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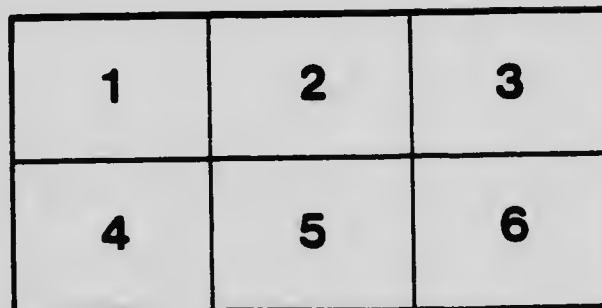
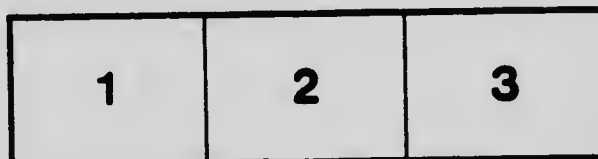
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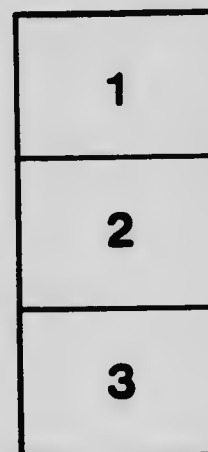
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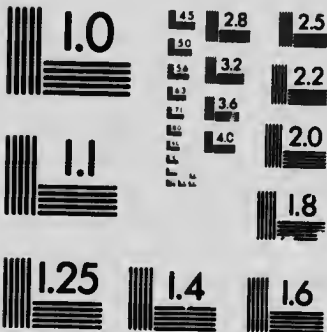
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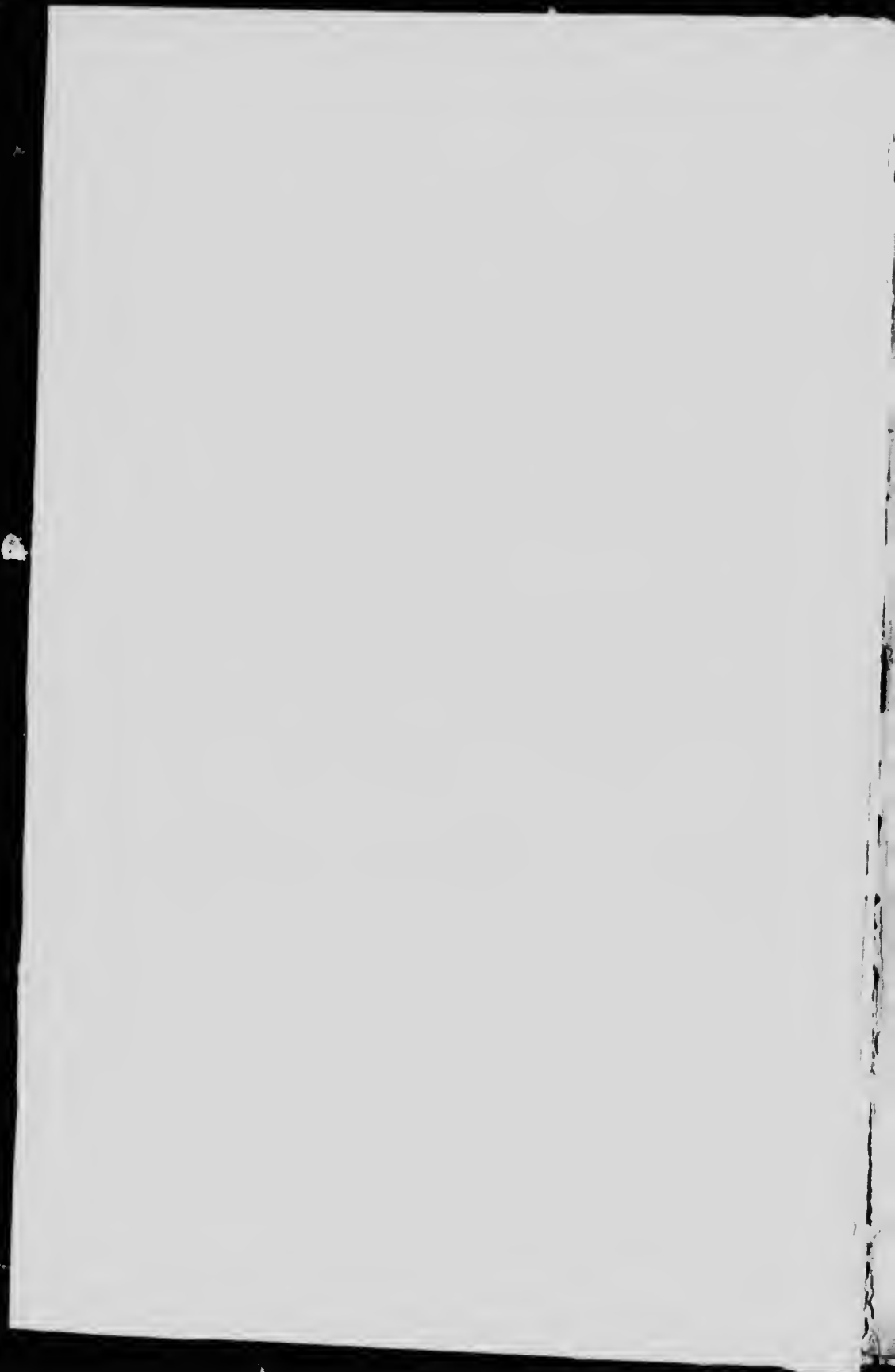
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THE LAW OF CONTRACTS

BY THE LATE
S. MARTIN LEAKE

Barrister-at-Law.

SIXTH EDITION

BY
A. E. RANDALL

Barrister-at-Law.

INCLUDING
NOTES ON THE CANADIAN LAW

BY
HON. MR. JUSTICE RUSSELL
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1912



P R E F A C E.

This book was published originally by the Author in 1867, the Second Edition appeared in 1878, and the Third Edition in 1892. The two editions which have immediately preceded the present, and which I prepared, appeared in 1902 and 1906, and the present edition has been prepared upon the same lines.

The provisions of the Marine Insurance Act, 1908, have been incorporated. I have omitted the judicial explanation of *Cooke v. Oxley* (1790), 3 T. R. 653, which appeared in former editions. For some time past I had conjectured that the true explanation of the case was that in 1790 the opinion prevailed that acceptance must be contemporaneous to the making of a valid contract in English law. Conjecture has now been changed to certainty from a chance perusal of *Kennedy v. Lee* (1817), 3 Mer. 441, in which case Lord Eldon, in dealing with contracts by correspondence, says: "I have always understood the law of the Court to be, with reference to this sort of contract, that if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if within a reasonable time of the acceptance being communicated, no variation

has been made by either party in the terms of the offer so made and accepted, *the acceptance must be taken to be simultaneous with the offer, and both together as constituting such an agreement as the Court will execute.*" I think the time has now arrived when *Cornfoot v. Fowke* (1840), 6 M. & W. 358, may be consigned to oblivion.

The precedence given to the Law Journal Reports in the text is in compliance with the expressed wishes of the publishers.

The Table of Cases, on the present occasion, has been prepared by my friend Mr. DIGBY KOE, of the Middle Temple. The task has been a particularly onerous one, as the references to contemporaneous reports usually quoted are given. I have had to render him some assistance in this respect, and my shortcomings had better be ascribed presumptively to my interference.

In consequence of representations which could not be ignored, I have attempted a new Index. Like the work itself, it is based upon the principles of the law, rather than upon the instances which illustrate the application of the principles in practice.

I have considered the cases reported in the Law Reports up to and including April, 1911.

A. E. RANDALL.

LINCOLN'S INN,
May, 1911.

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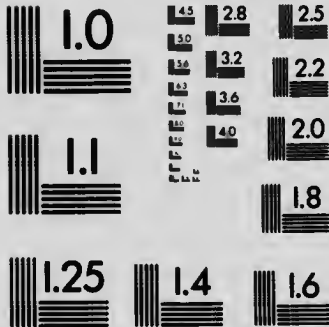
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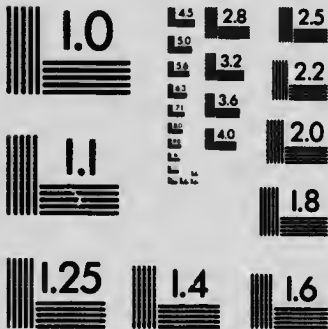
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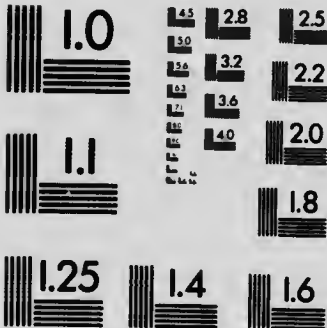
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THE LAW OF CONTRACTS.

PART I.

THE FORMATION OF CONTRACTS.

CHAPTER I.

SIMPLE CONTRACTS.

SECT. I.—SIMPLE CONTRACTS FORMED BY AGREEMENT.

§ 1. PRINCIPLES OF AGREEMENT.

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CONTRACTS in English law have been divided into three classes, distinguished by their modes of formation: namely, Simple Contracts, Contracts under Seal, and Contracts of Record (*a*). It is purposed to treat of the formation of contracts in this order; commencing with Simple Contracts, because the principles of formation of contracts of that class are of a less technical and more elementary character than those of contracts of the other classes.— Simple contracts may again be divided into two classes, according to the mode of formation: namely, simple contracts formed by

Simple contracts by agreement.

(*a*. 2 Blackst. Com. 465.

PART I. agreement; and simple contracts arising independently of agreement, or contracts implied in law.

Agreement. Agreement may be defined generally as consisting in two persons being of the same intention concerning the matter agreed upon. A *consensus ad idem* is a prime essential to the validity of a contract, and if one party has not agreed to all the terms there is no contract: thus where a guarantor *bonâ fide* made a material alteration in a bond of suretyship, whereby his co-sureties were discharged, he was himself discharged from all liability, as his contract was subject to the condition of proportional contribution (b); so where a person enters into a contract, which he can repudiate on the ground of fraud, for the sale of goods upon credit, if he cleets to affirm the contract, he cannot recover the contract price before the period of credit has expired (c); and where a bidder at a sale by auction of land, owing to a similarity of names, bid for lot 1 instead of lot 2, it was said that there was no contract (d). So too, in the case of the contract to pay value implied in law from the acceptance of the consideration, the express agreement of the parties may modify this liability (e), but unless so modified, the implication is matter of law, and consequently deemed part of the contract according to the maxim "*ignorantia juris neminem excusat*." The intention of a person can be ascertained by another only by means of outward expressions, as words and acts; and for the purpose of agreement there must be a communication of intention between them by means of such expressions. Accordingly, the law judges of the intention of a person by outward expressions only; and it judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them (f). Consequently an intention not expressed or not communicated, or withdrawn before communicated, or communicated only to a third person, is, in general, inoperative and immaterial to the question of agreement (g).

(b) *Ellismere Brewery Co. v. Cooper* (1895), 65 L. J. Q. B. 173; 1 Q. B. 75.

(c) *Ferguson v. Carrington* 1829, 7 L. J. O. S. K. B. 139; 9 B. & C. 59; *Strett v. Smith* (1834), 3 L. J. Ex. 257; 1 Cr. M. & R. 312.

(d) *Van Praagh v. Everidge* 1903, 72 L. J. C. 260; (1903) 1 Ch. 434.

(e) *Taylor v. Brewer* (1813), 1 M. & S. 290.

(f) *Blackburn, J., Smith v. Hughes* (1871), 10 L. J. Q. B. 227; L. R. 6 Q. B. 607.

(g) *Coe v. Troy* (1-22), 5 B. & Ald. 474; *Re East of England Bank* 1868, 38 L. J. C. 121; L. R. 4 Ch. 11.

The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions. In the case of written contracts, the subsequent acts or admissions of the parties cannot control the construction to be placed upon the words used (*h*); but may be given in evidence to explain what the parties intended to express by terms or phrases having no fixed meaning (*i*), or to show that a written contract has been discharged by a subsequent agreement (*k*). In the case of verbal contracts effect may sometimes be given to the maxim, "*non quod dictum, sed quod factum est inspicitur*" (*l*). The law also imputes presumptively a rightful intention to words and acts. And where a man does an act that may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongfully; according to the maxim, "*allegans suam turpitudinem non est audiendus*" (*m*).—The motive of a person in expressing an intention is in general immaterial to the question of agreement, and cannot be inquired into (*n*).

CH. I.
SECT. I.
Evidence of agreement.

Motive.

An agreement as the source of a legal contract imports that the one party shall be bound to some performance, which the latter shall have a legal right to enforce. And the intention of the one party as to the performance, expressed to, and accepted by the other, for the purpose of creating the right, constitutes a *promise*. Promissory expressions reserving to the promiser an option as to the performance do not create a contract: as in cases of employment upon the terms of such remuneration as the employer thinks right to give (*o*); or upon the terms of being remunerated by a testamentary provision (*p*); expressions of intention respecting settlements on marriage (*q*).

Agreement as source of contract.

Promises.

Representations made by a person to another require further to

Representation of fact.

(*h*) Eldon, L. C., *Iggulden v. May* (1804), 9 Ves. 325; Mansfield, Ch. J., *S. C.* (1807), 2 B. & P. N. R. 149; *Boehm v. Wood* (1820), 1 J. & W. 419; *Doe v. Webster* (1810), 9 L. J. Q. B. 373; 12 A. & E. 413.

(*i*) *Post*, p. 126.

(*k*) *Post*, p. 580.

(*l*) See *Croft v. Lumsden* (1858), 27 L. J. Q. B. 321; 6 H. L. C. 672; *Davenport v. R. G.* (1877), 47 L. J. P. C. 8; 3 Ap. Cas. 115.

(*m*) *Re Halliwell's Estate* (1886), 49 L. J. C. 428; 13 Ch. D. 636.

(*n*) Eldon, L. C., *Dowdell v. Mary* v.

Sandys Lady, (1801), 6 Ves. 114; *per cur.* *Vernon v. Keys* (1810), 12 East, 637; *S. C.* (1812), 1 Taunt, 188; *Williams v. Curwaine* (1833), 2 L. J. K. B. 101; 1 B. & Ad. 621.

(*o*) *Taylor v. Brewer* (1813), 1 M. & S. 290; *Roberts v. Smith* (1859), 28 L. J. Ex. 16; 4 H. & N. 315.

(*p*) *Osborn v. Gay's Hospital* (1726), 2 Str. 728; *Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; 8 Ap. Cas. 467.

(*q*) *Mansell v. Hodges* (1854), 4 H. L. C. 1039; *Jordan v. Mansy* (1854), 23 L. J. Ch. 865; 5 H. L. C. 185.

PART I. be distinguished. They may be representations of future acts, which, if intended to be binding, constitute promises strictly so called; and representations of matters of fact. "There is a clear difference between a representation of fact, and a representation that something will be done in the future. A representation that something will be done in the future cannot either be true or false at the moment it is made; and although you may call it a representation, if it is anything, it is a contract or promise" (r).—

Warranty of fact.

A representation of a matter of fact may be intended and expressed to bind the person making it to its truth, or rather for the consequences of it not being true; as in the case of a warranty of the soundness of a horse; or of the quality of goods; or of the seaworthiness of a ship; or of the genuineness of a picture. A representation or undertaking of this kind is commonly known as a *warranty*; and it is equivalent to a promise in producing a contract or legal obligation (s).—A representation of fact may also be made to another without a warranty of the truth, but with the intention of inducing him to act upon it; and if the latter in fact acts upon it and suffers loss by reason of it not being true, the party making the representation may become responsible in law for the consequences. The rules of law regulating contracts by agreement do not apply, and the party may incur legal responsibility for such representations without the formalities or requirements essential to the validity of that kind of contract (t). The rule as to representations of fact has been thus stated: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" (u). And "by the term 'wilfully' in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention

Liability for representation acted upon.

(r) Mellish, L. J., *Beattie v. Ebury* (Lord) (1872), 41 L. J. C. 808; L. R. 7 Ch. 804.

(s) See post, p. 265.

(t) Eldon, L. C., *Evans v. Bicknell* (1801), 6 Ves. 182; Grant, M. R., *Burrows v. Lock* (1805), 10 Ves. 475; Selborne, L. C., *Citizens' Bk. of Louisiana v. First National Bk. of New Orleans*

(1873), L. R. 6 H. L. 360; *Law v. Bouverie* (1891), 60 L. J. Ch. 594; (1891) 3 Ch. 82.

(u) *Pickard v. Sears* (1837), 6 A. & E. 469; *Cornish v. Abington* (1859), 28 L. J. Ex. 262; 4 H. & N. 549; *Bell v. Marsh* (1903), 72 L. J. C. 360; (1903) 1 Ch. 528; *Porter v. Moore*, (1904) 73 L. J. C. 729; (1904) 2 Ch. 367.

may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth (*x*). But "that doctrine does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do, in respect of which he may be sued, if it is put into a valid form, but not otherwise." In the latter case "there is no reason for the application of the rule, because the parties have only to enter into a contract, and then all difficulty is removed" (*y*).

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Again, the representation may be made, not only without any warranty, but also without any intention that it should be acted upon without further inquiry (*z*); that is to say, as a mere opinion given with the understanding that it should not be obligatory: as in the case of commendatory representations of the quality and value of goods made by the seller in offering them for sale, and which are made and accepted without any sense of responsibility attaching; according to the maxim of the civil law, "*simplex commendatio non obligat*" (*a*). And it is stated as "the rule to be derived from all the cases, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud" (*b*).

Representations not intended as binding.

It is further necessary, in order to create a legal obligation, that a simple contract should include in the matter agreed upon, besides a promise, what is called a *consideration* for the promise: which may be described generally as some matter accepted or agreed upon as a return or equivalent for the promise made. The fact of bargaining for and giving an equivalent for the promise serves to show that the parties act with deliberation, and with the intention that the transaction shall be binding; and for this pur-

Consideration.

x) *Freeman v. Cooke* (1848), 18 L. J. Ex. 114; 2 Ex. 651; *Currey, L. & N. B. Ry.* (1875), 44 L. J. C. P. 109; L. R. 10 C. P. 307; *Ston v. Lafone* 1887, 56 L. J. Q. B. 415; 19 Q. B. D. 68.
(*y*) *Cranworth, L. C., Jordan v. Money* 1859, 23 L. J. C. 868; 5 F. C. C. 185; *Selborne, L. C., Citizens' v. Louisiana v. First National Bk. of Orleans* 1873, L. R. 6 H. L. 500;

Selborne, L. C., Muddison v. Alderson (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 473.

(*z*) *Haycraft v. Cressy* 1801, 2 East, 92. See *post*, p. 236.

(*a*) *Chaudhry v. Lopus* 1603, Cro. Jac. 2; 2 Sm. L. C. 52.

(*b*) *Per cur. General v. Huth* 1845, 11 L. J. Ex. 366; 14 M. & W. 664. See Sale of Goods Act, 1893, sect. 14.

PART I.

Voluntary promises.

pose a nominal consideration stated in an agreement operates as an expression of intention and is presumptively sufficient. A promise merely *voluntary*, that is, made without a consideration, if it rests in agreement only, is not binding in law (c). Voluntary promises, which are thus incapable of becoming contracts by mere agreement, may be made legally binding by using the solemnities of a deed, which are prescribed for the same purpose as the consideration of an agreement, namely, that of securing a deliberate obligatory intention (d). Writing alone is not a sufficient solemnity to render a promise legally binding without a sufficient consideration to support it (e). Thus, with negotiable instruments, as bills of exchange and promissory notes, though by the custom of merchants a consideration is presumed to exist, in the absence of proof to the contrary, yet as regards parties between whom they are proved to pass without any consideration in fact, they are void of binding effect at law and in equity (f).

Executed and executory considerations.

The consideration of a promise may be *executed* or *executory*. An *executed* consideration is some act performed or some value given at the time of making the promise and in return for the promise then made: as where goods are delivered, or services rendered, upon credit, that is, upon a promise to pay for them at a future time: or where money is paid in advance for a promise given.—An *executory* consideration is a *promise* to do or give something in return for the promise then made: as upon an interchange of promises to marry: or upon an interchange of promises, on the one part to serve and on the other part to employ, in some work or business. The contract with an executory consideration thus comprises two promises, commonly described as *mutual promises*; the one promise forming the consideration for the other, and conversely. Consequently, contracts of this kind are binding on both parties, otherwise the consideration for one promises fails, and the contract is then described as being void for want of *mutuality*: as in agreements for services where there is a promise to serve on the one side, but no sufficient promise to employ on the other (g). The necessity of mutuality in contracts

Mutual promises.

(c) *Lamplugh v. Brathwait* (1615, Hob. 105; 1 Sm. L. C. 136; *Hulse v. Hulse* (1856), 25 L. J. C. P. 177; 17 C. B. 711; *Knight-Bruce, L. J., Kekewich v. Manning* (1851), 21 L. J. C. 581; 1 De G. M. & G. 176. Sale of Goods Act, 1893, sects. 1, 3, 8.

(d) *Sharrington v. Stratton* (1865),

Plowd. at p. 308.

(e) *Rann v. Hughes* (1778), 7 T. R. 350, n.; 4 Bro. P. C. 27.

(f) *Dobie v. Larkum* (1855), 10 Ex. 776; Bills of Exchange Act, 1882, sects. 3, 27, 28, 29, 30, 54, 55, 56.

(g) *Lees v. Whitcomb* (1828), 6 L. J. O. S. C. P. 213; 5 Bing. 34; *Sykes v.*

must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise" (*h*). Accordingly, where one party has received the benefit of the stipulations for which he contracted, or where the other party has performed all the obligations on his part, a defence based upon want of mutuality will not, in general, be a defence (*i*). Upon this principle a formal contract signed by one party only may amount to a mere offer until accepted by the other (*k*).

It appears from the nature of a consideration above described that the consideration must necessarily be something done or given, or promised to be done or given, contemporaneously with the making of the promise, in return for it; and that any matter done, given, or promised, before the making of the promise, cannot constitute a valid consideration. A promise made in respect of a past matter, though induced by the moral obligation of gratitude, or any other motive of compensation, is purely gratuitous and voluntary; and, therefore, is insufficient, unless made in an independently valid form, as by an instrument under seal (*l*). For example, where it was alleged that "in consideration that the plaintiff *had then* promised the defendant" to perform certain things, "the defendant *then* promised the plaintiff" to perform, etc.: the adverb of time was referred to the same period of time with both promises, which were in effect simultaneous and mutual, and therefore valid (*m*). But, "if a man disburse money about the affairs of another without request, and then the latter promise that, in consideration of the former having laid out the money for him, he will pay him 20*l.*, that is not a good consideration, being completely executed" (*n*). Upon this principle a promissory note given in remuneration of past services rendered gratuitously by the payee to the maker, cannot be enforced by the payee, if there be not other consideration (*o*). So it was held that a sum of

Past consideration.

Dixon (1833), 8 L. J. Q. B. 102; 9 A. & E. 693; *Westhead v. Spruson* (1861), 30 L. J. Ex. 265; 6 H. & N. 728.

(*h*) *Per cur.* *Arnold v. Mayor of Poole* (1842), 11 L. J. C. P. 97; 4 Man. & G. 896; *Hartley v. Cummings* (1817), 17 L. J. C. P. 14; 5 C. B. 247. See *Ex p. Waters* (1873), L. R. 8 Ch. 562; *G. v. N. Ry. v. Witham* (1873), 13 L. J. C. P. 1; L. R. 9 C. P. 16.

(*i*) *Fishmongers' Co. v. Robertson* (1843),

12 L. J. C. P. 185; 5 Man. & G. 131.

(*k*) *Dickinson v. Dodds* (1876), 45 L. J. C. 777; 2 Ch. D. 463.

(*l*) *Lamplugh v. Brathwaite* (1615), Hob. 105; 1 Sm. L. C. 136.

(*m*) *Thornton v. Jennings* (1810), 1 Man. & G. 166.

(*n*) *Tindal, C. J., Thornton v. Jennings* (1810), 1 Man. & G. 188.

(*o*) *Hulse v. Hulse* (1856), 25 L. J. C. P. 177; 15 C. B. 711.

PART I. money accepted as a gift would not support a promissory note subsequently given for the amount; though upon the question whether the money previously advanced was accepted as a gift or a loan, the note would be material evidence of the latter (*p*).— Upon the same principle a guarantee of past debts cannot be supported without a further consideration (*q*); but giving credit in future, or forbearing to sue the debtor for a certain time, or any other sufficient consideration will support a guarantee of debts past as well as future (*r*).

Simple contracts by agreement.

Form of simple contracts.

Express and implied contracts.

An agreement satisfying the above-mentioned conditions, that is to say, containing a promise made by the one party, for a valid consideration, and agreed to by the other party, creates at common law a contract by force of the mere agreement; and the contract so created is a *simple contract*. No special form is required by law for simple contracts: but contracts concerning certain matters are required by statute to be made with writing and signature or other prescribed formalities, or can only be enforced if evidence in writing signed be forthcoming. The words and acts of the parties, which are the evidence of their agreement, constitute in general the only *form* in which the contract appears. But the contract is an inference of law from the facts; therefore under the modern system of pleading introduced by the Judicature Acts the party relying upon a contract should not allege merely the existence of a contract, and state its effect, but should state whether the contract is verbal or in writing, or the result of a series of documents (*s*).

Contracts created by agreement are sometimes distinguished as *express* and *implied*, according to the manner in which the agreement is made. An *express* contract is proved by words, written or spoken, expressing an agreement of the parties; an *implied* contract is proved by circumstantial evidence of the agreement. Contracts may also be of a mixed character in respect of the mode of making them, that is to say, partly expressed in words and partly implied from acts and circumstances. The only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence, an implied contract

p *Hill v. Wilson* 1873, 12 L. J. C. 817; L. R. 8 Ch. 888.

q *Wood v. Benson* (1831), 1 L. J. Ex. 18; 2 Cr. & J. 91.

r *Oldershaw v. King* 1857, 27 L. J.

Ex. 120; 2 H. & N. 517; *Westhead v. Spruson* (1861), 30 L. J. Ex. 265; 6 H. & N. 728.

s Order XIX. rr. 4, 21. *Turgand v. Farrow* (1879), 48 L. J. Q. B. 703.

by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting must be the same" (1). An express contract necessarily supersedes and excludes all implication as to the matters expressed, according to the maxim, "*expressum facit cessare tacitum*" (2). It is necessary here to notice that the term "implied in law" is used to denote the class of simple contracts raised by law from facts and circumstances independent of agreement, and in which an agreement or promise, if implied at all, is an implication of law only, and has no existence in fact. Contracts implied in law are then contrasted with contracts arising from agreement. In contrasting express and implied agreements, as above, the term "implied" is used to describe an actual agreement which appears from circumstantial evidence and not in express terms (3).

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Contracts
implied in
law.

Agreements creating contracts may be expressed in writing, and in some instances are required by law to be expressed in writing. The contracts so created do not on that account constitute a distinct kind of contract, but are subject to the same general rules of law as other simple contracts. The fact of their being written, however, renders them subject also to the rules of evidence and to the rules of construction relating to written documents. These rules in their bearing upon written contracts as a class, including therein other contracts besides simple contracts, are treated in a separate chapter (4).

Contracts in
writing.

¹ Boke, B., *Metcalf v. Williams* (1859), 3 L. J. Q. S. K. B. 12; 1 B. & Ad. 425.

² *Roberts v. Butler* (1833), 2 L. J.

Ex. 268; 1 C. & M. 808; *Abbott v. Bates* (1875), 45 L. J. C. P. 117.

³ See *ante*, p. 2; and *post*, p. 12.

⁴ See *post*, p. 113.

§ 2 APPLICATION OF AGREEMENT TO CONTRACTS.

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Application
of agreement
to contracts.

Although simple contracts arising from agreement require in general no other formality than the facts in which the agreement appears; yet the application of agreement to the various contracts in which it may be employed follows certain general principles of a practical kind, which are useful for determining the question whether on any particular occasion a contract is created.

Offer and
acceptance
of terms.

An agreement must necessarily be made in the form, or what is equivalent to the form, of an offer of terms on the one side, and an assent to or acceptance of those terms on the other, communicated between the parties. No particular form of words is necessary to amount to an acceptance (*a*), which may be expressed symbolically as by the fall of the hammer upon a sale by auction (*b*).—

Orders for
goods.

The sending an order for goods to a merchant or tradesman is an offer to purchase; and the sending of the goods ordered is an acceptance of the offer, and creates a contract of sale (*c*). So a tender to supply goods to another at a certain price, may be accepted before the tender is withdrawn by an order for goods

Guarantees.

given in accordance with the tender (*d*).—A guarantee for payment of goods sold, or for advances made to a third party, or for the services of an agent or servant, is in general a mere offer until accepted by acting upon it according to the terms; the party guaranteed is not bound to act upon it, but upon supplying the

(a) *Webster v. Bee* (5 D. 7 Hare, 159). See *Sale of Goods Act*, 1893, s. 3.

(b) *Sale of Goods Act*, 1893, s. 58; *Payne v. Cave* (1789), 3 T. R. 118.

(c) *Cresswell, J., Harvey v. Johnston* (1848), 17 L. J. C. P. 298; 6 C. B. 301.

(d) *G. N. Ry. v. Witham* (1873), 43 L. J. C. P. 1; 1 L. R. 9 C. P. 16.

goods, or making the advances, or employing the agent as proposed. *h* accepts the offer and the guarantee attaches (*e*).—An open letter of credit in the common form, undertaking to honour bills of exchange to be drawn by the person to whom it is given, operates as a general offer of a contract, addressed or intended to be shown to all persons who may be willing to act upon it; which may be accepted by any such person making advances upon bills drawn in conformity with its terms and requirements (*f*); but subject to all conditions expressed in the letter as precedent to the drawing of the bills (*g*).—The publication of an advertisement offering a reward for information is a general offer to any person who is able to give the information asked; and the acceptance of it by giving such information creates a valid contract (*h*). So where a person performed the conditions contained in an advertisement, which offered a sum of money to users of a prophylactic, she was held entitled to recover the sum offered, as she contracted the disease mentioned in the advertisement (*i*). An advertisement of goods for sale by tender does not in general import a promise to sell to the person who makes the highest offer (*k*). And an advertisement of a sale by auction does not create a contract with a person attending that all the lots advertised shall be offered for sale (*l*). But an advertisement of a sale, knowingly made without any power or intention of carrying it out, may be ground for an action at the suit of a person who acts upon it and incurs expense in inspecting and valuing the property (*m*). A note upon a certificate of shares "without the production of this certificate, no transfer of shares mentioned therein can be registered," does not entitle a holder not named therein to damages, if the company allow a transfer to be registered without its production; for in this case, assuming that there is a contract, there was a party

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Letters of credit.

Advertisements.

h *Lysaght v. Walker* (1853), 5 Bl. N. S. 1; *Westhead v. Simons* 1861, 6 H. & N. 728; 30 L. J. Ex. 265.

i *R. Allen and Masterman v. Ash* (1867), 36 L. J. C. 222; L. R. 2 Q. B. 391; *Marshall v. Chartered Bank of India* (1869), 38 L. J. C. 363.

g *Union Bank of Canada v. Cole* (1877), 47 L. J. C. P. 100.

h *Williams v. Carwardine* (1833), 2 L. J. K. B. 161; 1 B. & Ad. 621; *Thatcher v. England* (1816), 15 L. J. C. P. 241; 3 C. B. 254; *Turner v. Walker* (1867), 36 L. J. Q. B. 112; L. R. 2

Q. B. 391; *Bent v. Wakefield Bank* (1878), 7 C. P. D. 1.

k *Allen v. Caribee Sunk Ball Co.* 1892, 62 L. J. Q. B. 257; 1893, 1 Q. B. 257.

l *Spence v. Harding* 1870, 39 L. J. C. P. 332; L. R. 5 C. P. 561.

m *Harris v. Nickerson* (1873), 42 L. J. Q. B. 171; L. R. 8 Q. B. 286.

n *Richardson v. Webster* 1873, 43 L. J. Q. B. 1; L. R. 9 Q. B. 31. See *McManus v. Bartlett* 1907, 76 L. J. K. B. 398; 1907, 2 K. B. 1.

PART I.

Railway
tables and
tickets.

named, namely, the shareholder, and the general rule is that none but parties to a contract may sue upon it (*n*).

Upon the principle of an advertisement, the time-tables published by a railway company may amount to an offer of a contract to all persons who apply as passengers, that the trains will run as therein advertised, but whether punctuality is, in fact, guaranteed must depend upon the facts of each particular case (*o*). The conditions contained in the time-tables may be incorporated by a reference upon the tickets or book of coupons delivered to passengers on payment of the fare for the carriage of themselves and their luggage (*p*); the tickets or printed notes delivered upon the receipt of goods for carriage (*q*); or upon the receipt of goods deposited for safe custody at railway parcel offices (*r*). Conditions may be so incorporated by being endorsed upon the ticket or receipt (*s*); or by a general reference, as in the case of a sale "subject to the conditions exhibited upon the premises" (*t*); but it is necessary, in order to bind the person accepting the ticket by the incorporated conditions, that the person offering the ticket has done all that is reasonably sufficient to give notice of the contents (*u*).

Compulsory
purchases of
land.

At different times the Legislature has given to railway companies and other bodies compulsory powers of purchasing land; these clauses are now contained in the Lands Clauses Consolidation Act, 1845, and are incorporated, sometimes with modifications, in the statute which creates or regulates the concern. The statutory notice to treat for the purchase of land served upon the owner does not create the relation of vendor and purchaser between

o, *Rainford v. James, Keith & Blackman Co.*, 1905, 71 L. J. C. 156; 1905 1 Ch. 296; *revd.* upon other grounds 1905, 74 L. J. C. 531; 1905, 2 Ch. 147. See *post*, p. 293.

p, *Denton v. G. N. Ry.*, 1856, 25 L. J. Q. B. 131; 5 E. & B. 860; *Le Blanche v. L. & N. H. Ry.*, 1876, 45 L. J. C. P. 521; 1 C. P. D. 285; *McCartan v. N. E. Ry.*, 1885, 54 L. J. Q. B. 111.

q, *Zoe v. S. F. Ry.*, 1869, 38 L. J. Q. B. 209; L. R. 1 Q. B. 339; *Barker v. S. E. Ry.*, 1879, 49 L. J. C. P. 107; 5 C. P. D. 1.

r, *Park, Newcastle & Berwick Ry. v. Crisp*, 1854, 23 L. J. C. P. 125; 11 C. B. 527. See the Railway and Canal Traffic Act, 1854; *Park v. N. Stafford-*

Shaw Ry., 1863, 32 L. J. Q. B. 211; 10 H. L. C. 473; *Lord v. Midland Ry.*, 1867, 36 L. J. C. P. 170; L. R. 2 C. P. 359; *Zoe v. S. E. Ry.*, 1869, 38 L. J. Q. B. 209; L. R. 1 Q. B. 339; *Lewis v. G. W. Ry.*, 1877, 3 Q. B. D. 195; 47 L. J. Q. B. 131.

s, *Van Pall v. S. E. Ry.*, 1862, 31 L. J. C. P. 241; 12 C. B. N. S. 75.

t, *Barker v. S. E. Ry.*, 1877, 46 L. J. C. P. 768; 2 C. P. D. 116; *Richardson, Spence & Co. v. Roehampton*, 1891, 63 L. J. Q. B. 283; 1891 A. C. 217; *Murriott v. Fennell Bros.*, 1909, 79 L. J. K. B. 111; 1909 2 K. B. 987.

u, *Harcis v. G. W. Ry.*, 1876, 45 L. J. Q. B. 728; 1 Q. B. D. 515.

v, *Watkins v. Ryall*, 1883, 52 L. J. Q. B. 121; 10 Q. B. D. 178.

the parties, for the promoters are, under certain circumstances, compellable to take other lands than those mentioned in the notice to treat; accordingly, if the service of the notice to treat be irregular and invalid, the owner cannot adopt the notice so as to make a contract (*x*). But after the price has been fixed, and the lands ascertained, there is a complete contract between the parties, with its resultant consequences (*y*). It is to be observed that the possession of compulsory powers does not exclude the right to contract exclusive of those powers with the ordinary consequences (*z*).

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A correspondence between two parties by letter may contain an agreement which will produce a contract as binding as if drawn up in articles and signed by the parties; but there must be found in the correspondence, taking the whole into consideration, a proposal of terms, met by such final acceptance as imports a consent of both parties. The Court in such cases regards not the form of the agreement but the substance; and the same construction must be put upon a letter, or a series of letters, as would be applied in the case of a formal instrument; the only difference is that a letter or a correspondence, being generally more loose and inaccurate in expression, creates a greater difficulty in arriving at the intended terms (*a*). Where a complete contract has been entered into in former letters, a subsequent correspondence between the parties cannot be used to contradict or vary the intention of the former contract, but may be used as evidence that the contract was not then concluded (*b*).

Contract by
letters.

As a general rule terms offered and representations made during the negotiation of a contract, which are not contained in the final agreement, are excluded from the contract (*c*). A person who

Preliminary
negotiations.

(*x*) *Adams v. London & Blackwall Ry.* (1850), 19 L. J. C. 557; 2 Mac. & G. 118; *Haynes v. Haynes* (1861), 30 L. J. C. 578; 1 Dr. & Sm. 426; *Shepherd v. Norwich* (1885), 51 L. J. C. 1050; 30 Ch. D. 553. See Lands Clauses Consolidation Act, 1845, ss. 93, 94. And see *Wilds. Woodwich Dist. Council* (1909), 78 L. J. C. 633; (1909) 2 Ch. 287; *Meyer v. Liverpool, St. Helen's & Lancs. Ry.* (1904), 73 L. J. K. B. 969, (1904) A. C. 161.
(*y*) *Harding v. Metrop. Ry.* 1872, 41 L. J. C. 371; L. R. 7 Ch. 154; *Re Pigott & G. W. Ry.* (1881), 50 L. J. C. 679; 18 Ch. D. 146; *Re Cury-Evers' Cont.* (1906), 75 L. J. C. 571; (1906) 2 Ch. 143.

(*z*) *Rangley v. Moulton Ry.* (1868), 37 L. J. C. 313; L. R. 3 Ch. 306; *Bygrave v. Metrop. Bd. of Wks.* (1886), 55 L. J. C. 602; 32 Ch. D. 117.

(*a*) *Hassay v. Hume Payne* 1879, 48 L. J. C. 846; 1 Ap. Ca. 311; *Moy v. Thomson* 1882, 51 L. J. C. 917; 20 Ch. D. 705.

(*b*) *Erle, J., Lewis v. Nicholson* (1852), 21 L. J. Q. B. 313; 18 Q. B. 503; *Bellamy v. Debenham* 1891, 60 L. J. C. 166; 1891 1 Ch. 412.

(*c*) *Wace v. Bickerton* (1850), 19 L. J. C. 254; 3 De G. & Sm. 751; *Watts v. Salter* (1850), 20 L. J. C. P. 43; 10 C. B. 177; *Inglis v. Buttery* (1878), 3 Ap. Ca. 552.

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had attended a sale by auction at which a house was put up for sale on certain conditions, but not sold, afterwards offered a price, which was accepted unconditionally; it was held that the conditions of the auction, not having been referred to, formed no part of the contract (*d*). Upon the negotiation for a sale of goods a sample was exhibited, but a contract was afterwards made in writing describing the goods by kind and quality without referring to the sample: it was held to form no part of the contract that the goods should agree with the sample (*e*). But representations made with the intention of inducing the other party to enter into the contract may become material, as giving ground for avoiding the contract or for an action of fraud, or may amount to a warranty (*f*).

Acceptance of offer.

An acceptance of the terms by the person to whom they are offered, communicated to the person making the offer, is necessary to complete the contract (*g*). The acceptance must include all the terms of the offer, which cannot be made in the terms that an acceptance will be assumed without communication (*h* : where a letter was sent offering to buy a horse, and stating that if the writer received no answer he would assume that his offer was accepted, to which no answer was returned: it was held that there was no contract and that the horse might be sold notwithstanding the offer (*i*). So where a letter was issued by a company to the shareholders stating that new shares were allotted and the certificates enclosed, with a receipt to be signed and returned, it was held that a shareholder who had taken no notice of the communication was not bound to accept the shares, and could not be charged as a shareholder (*k*). Upon the same principle, sending goods differing materially in quantity or description from those ordered is no acceptance (*l*): and where the shares in a company had been duly

(*d*) *Carby v. Watts* 1853, 22 L. J. C. 391.

(*e*) *Tye v. Eynon* 1813, 3 Camp. 162; *Meyer v. Eworth* (1814), 1 Camp.

22. Sale of Goods Act, 1893, ss. 13, 15.

(*f*) See *post*, p. 232.

(*g*) *Meynell v. Sotheby* 1855, 25 L. J. C. 257; affg. 1854, 3 Sm. & G. 101.

(*h*) *Harvey v. Facey* (1893), 62 L. J. P. C. 127, 1893, A. C. 552.

(*i*) *Fellhouse v. Bindley* (1862), 31 L. J. C. P. 204; 41 C. B. N. S. 869; affd. in Ex. Ch. 1863, 7 L. T. N. S. 835; 11 W. R. 429.

(*k*) *Somerville's case* 1871, 19 L. J. C. 431; L. R. 6 Ch. 265.

(*l*) Sale of Goods Act, 1893, s. 30; *Hart v. Mills* (1816), 15 L. J. Ex. 200; 15 M. & W. 85; *Cutlip v. Harrison* (1851), 20 L. J. Ex. 325; 6 Ex. 903; *Lory v. Green* 1859, 28 L. J. Q. B. 319; 1 E. & E. 969.

forfeited, it was held that a power vested in directors "to annul the forfeiture" could not be exercised *in invitum* (*m*).

CH. I.
SECT. I.

Conditional offer.

It sometimes happens that an offer is conditional. In these cases a bare acceptance carries with it tacitly an assent to the conditions. As where a lot was knocked down for less than the reserve price owing to a mistake of the auctioneer it was held that there was no sale (*n*). But in the case of written contracts, where it is sought to limit a general liability by words importing a condition it is essential that the party seeking to qualify his obligation should bring home to the other party the nature and extent of the condition (*o*); for words of exception always receive a strict interpretation (*p*). And where land was tendered for under the terms of a statute which entitled commissioners to raise the price, it was held that they could not exercise this right as against a party tendering, after his tender had been accepted (*q*). An offer may be conditional in the sense that the person making the offer reserves the right to fix the extent of his liability (*r*).

The acceptance must be absolute and unqualified, and must not leave any term open to future negotiation (*s*). In many cases an acceptance has been qualified by a statement "subject to the terms of a contract being arranged" by a solicitor or agent (*t*); or "subject to the preparation and approval of a formal contract" (*u*). The principle which governs these cases is plain. If there is a simple acceptance of an offer, accompanied by a statement that the acceptor desires that the agreement should be put into more formal terms in accordance with the offer and acceptance, the mere reference to the intention of putting the agreement into more formal terms will not prevent the Court from enforcing the final agreement which has been arrived at. But if the agreement is conditional on the acceptance of some further terms speci-

Conditional acceptance.

(*ac*) *Lackwarth's case* (1903), 72 L. J. C. 387; (1903) 1 Ch. 711.

(*n*) *McManus v. Fuchs* (1907), 76 L. J. K. B. 393; (1907) 2 K. B. 1.

(*o*) *Parker v. S. E. Ry.* (1877), 16 L. J. C. P. 768; 2 C. P. D. 116.

(*p*) *Richardson, Spence & Co. v. Rountree* (1894), 63 L. J. Q. B. 283; 1894 A. C. 217.

(*q*) See *Peart Life Assce. v. Johnson* (1909), 78 L. J. K. B. 777; 1909 A. C. 288.

(*r*) See *post*, p. 151.

(*s*) *Parson v. Spence* 1879, 49 L. J. P. C. 13; 5 Ap. Ca. 70.

(*t*) *Cope v. Albion* (1852), 22 L. J. Ex. 37; 8 Ex. 185. See *ante*, p. 3.

(*u*) *Lucas v. James* (1819), 18 L. J. C. 329; 7 Hare, 410; *Appleby v. Johnson* (1871), 43 L. J. C. P. 146; L. R. 9 C. P. 158.

(*v*) *Stanley v. Bowdswell* 1871, L. R. 10 C. P. 192; *Crossley v. Maycock* 1871, 43 L. J. C. 379; L. R. 18 Eq. 180.

(*w*) *Wain v. Bull* 1877, 17 L. J. C. 139; 7 Ch. D. 29.

PART I. fied, or to be specified by the party himself or his solicitor, then there is no final agreement" (x).

Acceptance
varying from
offer.

The acceptance must agree with the terms of the offer: if it proposes a material variation of the terms there is no agreement, or *consensus ad idem*, upon which a contract can be founded:—As an offer to purchase a house, with possession on the 25th July, and an acceptance of the offer with possession on the 1st August (y). An offer to buy a horse with a warranty of being quiet in harness, and an acceptance with warranty of being quiet in double harness (z). An offer to sell "good" barley, and an acceptance of the offer for "fine" barley, where it appeared that by the usage of the trade the expressions "good" and "fine" meant different qualities of barley (a). An order for goods is not executed by sending goods differing in quantity or description from those ordered (b). An offer to purchase the lease of a house and an acceptance of the terms for an underlease (c). But a variation in the language, which does not involve any difference in meaning, is a sufficient acceptance. Thus an offer for the insurance of a ship *at and from* a port was held to be completely accepted by a letter in the terms "In accordance with your written request you are hereby insured *from* the said port" (d).

Variance in
bought and
sold notes.

In the sale of goods through a broker it is the general practice for the broker to sign, and deliver to the buyer and seller, contract notes, stating the terms of the contract, which therefore must be identical except in the correlative words "bought" and "sold," and if these notes vary in any material term, there is no contract of sale and no property passes in the goods (e): as where the two sale notes varied in the description of the goods (f); or as to the method of payment, the one stating payment on delivery and the

(x) Jessel, M. R., *Crossley v. Maycock* (1871), 13 L. J. C. 379; L. R. 18 Eq. 180. See further examples: *Jones v. Daniel* 1894, 63 L. J. C. 502; 1894 2 Ch. 332; *North v. Percival* (1898), 67 L. J. C. 321; 1898 2 Ch. 128.

(y) *Routledge v. Grant* (1828), 6 L. J. O. S. C. P. 166; 1 Bing. 653.

(z) *Jordan v. Norton* 1838, 7 L. J. Ex. 282; 4 M. & W. 155.

(a) *Hutchinson v. Barker* 1839, 9 L. J. Ex. 21; 5 M. & W. 535.

(b) Sale of Goods Act, 1893, s. 30; *Hart v. Mills* (1846), 15 L. J. Ex. 210; 15 M. & W. 83; *Conliffe v. Harrison*

(1851), 20 L. J. Ex. 325; 6 Ex. 903; *Lery v. Green* (1859), 28 L. J. Q. B. 319; 1 Ell. & B. 969; *Jackson v. Rotay Cycle Co.* 1910, 80 L. J. K. B. 38; (1910) 2 K. B. 937.

(c) *Holland v. Egge* (1825), 2 Sim. & S. 191.

(d) *Colonial Insce. of N. Z. v. Adelaide Marine Insce.* (1886), 50 L. J. P. C. 19; 12 Ap. Ca. 128.

(e) *Grant v. Fletcher* (1826), 5 B. & C. 136.

(f) *Thornton v. Kempster* (1814), 5 Taunt. 786.

other payment by bill (*g*). But the variance in such cases may sometimes be reconciled by evidence of the mercantile meaning of the terms (*h*).

CH. I.
SECT. I.

Persons appointed directors, who have accepted the office and acted as such, are deemed to have contracted to take the shares necessary to qualify them for the post (*i*). In the case of other persons, a contract to take shares in a company is made in the ordinary course by an offer contained in a letter of application for the shares and an acceptance in a letter of allotment. The contract thus formed is afterwards executed by placing upon the register the name of the applicant, who then, and not by force of the mere contract, becomes a shareholder of the company, with the attendant rights and liabilities (*k*). If the allotment varies the terms of application, there is no contract to take the shares: as where it added a condition of forfeiture in default of payment on a certain day (*l*), or in default of signing the articles of association (*m*); or a condition that the shares were "not transferable" (*n*); or where the application was for paid-up shares, and the allotment was of shares upon which part payment only was credited (*o*).—If the application is made upon a condition, and the shares are allotted unconditionally, there is no contract: as an application upon condition of paying calls in goods (*p*); or that the applicant should have a building contract (*q*); or that the applicant should be appointed an officer of the company (*r*). But the application and allotment of shares may be absolute, although coupled with a collateral term as to payment or otherwise (*s*). As where the allotment contained a notice that interest would be charged upon payments due on the shares after a certain date (*t*). But the

Variance in application for and allotment of shares.

(*g*) *Gregson v. Ruck* (1843), 4 Q. B. 737.

(*h*) *Bold v. Rayner* (1836), 5 L. J. Ex. 172; 1 M. & W. 315; *Kempson v. Bayly* (1865), 31 L. J. Ex. 191; 3 H. & C. 763.

(*i*) *Paques' case* (1892), 51 L. J. C. 181, 1892) 2 Ch. 158; *Keworth's case* (1893), 62 L. J. C. 376; *Richardson's case* (1894), 63 L. J. C. 567; (1894), 2 Ch. 403.

(*k*) *Nicol's case* (1885), 29 Ch. D. 421; *Duff's Executors' case* (1886), 32 Ch. D. 301.

(*l*) *Jackson v. Tarpwood* (1869), 39 L. J. C. 11; L. R. 4 H. L. 305.

(*m*) *Oriental Ind. and Steam Co. v. Briggs* (1861), 31 L. J. C. 241; 4 D. G. F. & J. 191.

(*n*) *Chaplin v. Clarke* (1849), 1 Ex. 403.

(*o*) *Wynn's case* (1873), 43 L. J. C. 138; L. R. 8 Ch. 1002; *Boyle's case* (1871), 43 L. J. C. 531; L. R. 9 Ch. 392.

(*p*) *Shackelford's case* (1866), 35 L. J. C. 818; L. R. 1 Ch. 567; *Pellatt's case* (1867), 36 L. J. C. 613; L. R. 2 Ch. 527.

(*q*) *Simpson's case* (1869), 39 L. J. C. 121; L. R. 1 Ch. 184.

(*r*) *Roper's case*; *Harrison's case* (1868), L. R. 3 Ch. 633; *Re Mogridge* (1888), 57 L. J. C. 932.

(*s*) *Thomson's case* (1865), 31 L. J. C. 525; *Bradger's case* (1870), 39 L. J. C. 478; L. R. 5 Ch. 305.

(*t*) *Harris' case* (1872), 41 L. J. C. 621; L. R. 7 Ch. 587.

PART I.

Variance
between
prospectus
and articles.

allottee, though not bound to take the shares, may become liable by retaining them and acquiescing in the terms of the allotment (*u*). So where an application is made for shares in a proposed company according to a published prospectus, and shares are allotted by the company as afterwards constituted under a memorandum and articles of association which materially vary from the prospectus, whether in the objects of the company, or in the names of the directors, or in other material points, the allottee, not having notice of the variation, is not bound to accept the shares. But the allottee of shares in a company is *primâ facie* bound by the registered memorandum and articles of association, and if after having notice he delays taking proceedings to remove his name from the register, he may be liable as a shareholder to the creditors of the company (*x*).

Where the original offer is not accepted *simpliciter*, the person making the counter-proposal cannot subsequently make a binding contract by accepting the original terms (*y*).

Acceptance
by third
party.

An offer can be accepted only by the person to whom it is made and with whom it imports an intention to contract; it cannot be assigned to or accepted by another person, without the consent of the person making it. "In the simple case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A." (*z*). A person who receives an offer of employment by reason of his personal qualifications or circumstances must supervise the conduct of the business with which he is entrusted, and cannot delegate the employment to another, nor can the latter acquire any claim against the employer by the performance of the services without his knowledge and consent (*a*). In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order so as to bind the customer, who has not been made aware

(*u*) *Pyett's case* 1873, 42 L. J. C. 305; L. R. 15 Eq. 250. See *Kep. Sandys* 1889, 58 L. J. C. 504; 42 Ch. D. 98.

(*x*) *Dornes v. Ship* (1868), 37 L. J. C. 642; 14 R. 3 H. L. 343. See *Oakes v. Ingepord* 1867, 36 L. J. C. 949; L. R. 2 H. L. 325; *Langham v. East Wheat Mining Co.* (1868), 37 L. J. C. 253; *Wallace's case* 1883, 23 Ch. D. 413.

(*y*) *Hyle v. Wrench* (1840), 3 Beav. 334; *Thornburg v. Todd* (1842), 1 Y. &

C. Ch. 554; *Sheffield Canal Co. v. Sheffield & Rotherham Ry.* 1841, 3 Ry. Cas. 121. See *Wild v. Woolwich Barr, Canal* (1909), 78 L. J. C. 633; (1909) 2 Ch. 287.

(*z*) *Stuart, V. C., Mellor v. Surtees* (1851), 3 Sm. & G. 117; affirmed (1855), 25 L. J. C. 257.

(*a*) *Schauling v. Thomlinson* 1815, 6 Taunt. 147; *Hopkinson v. Smith* (1822), 1 Bing. 13; *Henderson v. Burnwell* 1827, 1 Y. & J. 387.

of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy (*b*). But where it appears that a person in entering into a contract was not influenced by the identity of the other contracting party, error in this particular is immaterial (*c*). Thus an offer made to any person who is in a position to receive and accept it, as an advertisement or an open letter of credit, may be accepted by any person who satisfies the conditions of the offer (*d*). Similarly the assignability of a contract may be made to depend upon the personality of one of the contracting parties (*e*). Upon the above principle if a person misrepresents his personality, there is no contract: as where a person ordered goods in the name of a firm, of which he falsely represented that he was a partner, and the goods were delivered to him in the name of the firm, it was held that he could not assert a contract of sale to himself for the purpose of claiming the property in the goods (*f*). And if a person applies for shares in the name of another, in whose name they are allotted and registered, the applicant is not chargeable as a shareholder, unless he intended to take the shares himself in the substituted name (*g*). So where a person was induced to execute orders for goods by reason of similarity of name and address of the person giving the order to that of another person, well known to the seller: it was held that there was in fact no contract of sale, and therefore no property passed, and that the seller might recover the goods from the trustee in bankruptcy or from a *bonâ fide* buyer without notice of the fraud (*h*). And where there is a fraudulent suppression of identity the contract may be disaffirmed (*i*).

Ch.
Ske.

Misrepresentation of personality.

An acceptance which is not communicated to the person making the offer will not bind him to a contract: unless the terms of the offer dispense with this condition (*k*). Upon this principle an

Communi-
cation of
acceptance.

b) *Boulton v. Jones* (1857), 27 L. J. Ex. 117; 2 H. & N. 561.

c) *Smith v. Winterdyt* (1878), 17 L. J. C. 715; 9 Ch. D. 223.

d) *Williams v. Carwardine* 1833, 2 L. J. K. B. 101; 4 B. & Ad. 621. And see ante, p. 11.

e) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), 72 L. J. K. B. 834; (1903) A. C. 414; *Kemp v. Baerwaldmann* 1906, 75 L. J. K. B. 873; (1906) 2 K. B. 604.

f) *Hardman v. Booth* (1863), 32 L. J.

Ex. 105; 1 H. & C. 803.

g) *Pugh's case* (1872), 11 L. J. C. 580; L. R. 13 Eq. 566; *Curatry's case* (1891), 60 L. J. C. 186; (1891) 1 Ch. 202.

h) *Carly v. Lindsay* (1877), 46 L. J. Q. B. 487; 3 Ap. Ca. 459; *Ex p. Barnett* (1876), 45 L. J. Bk. 120; 3 Ch. D. 123. See post, p. 328.

i) *Gordon v. Street* (1899), 69 L. J. Q. B. 45; (1899) 2 Q. B. 611.

k) *Ames v. Y. B.* 17 Ed. 1, 2, cited. *Bryden v. Metrop. Ry.* (1877), 2 Ap. Ca. 692; *Lysaght v. Walker* (1831), 5 Bl.

PART I.

Notice of
allotment of
shares.

application for shares in a company must be accepted by giving notice of the allotment to the applicant (*l*), or to his agent authorised to accept the notice (*m*). Registration of the applicant as shareholder alone is not sufficient; for it is not his duty to search the register (*n*). But an unstamped letter of allotment is sufficient notice, and may afterwards be replaced by a letter of allotment properly stamped (*o*). The allottee by subsequent acquiescence in the allotment may preclude himself from objecting to the want of notice (*p*): as by subsequently executing a transfer of the shares to another person (*q*). The applicant may dispense with notice by expressly agreeing to accept shares allotted, unless he receives notice of refusal to allot (*r*): or there may be a previous agreement by which the company are bound to allot such shares as are applied for, and the application then makes a complete contract to take the shares without further notice (*s*).

Delivery of
goods to
order.

But "when an offer is made to another party, and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound. If a man sent an offer abroad, saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer" (*t*).

Communi-
cation to
agent.

Communi-
cation by
post.

The acceptance of an offer of sale of land communicated to the agent for sale who made the order is sufficient, though the agent neglects to give notice of it to the vendor (*u*). In communicating by letter through the post-office, the general rule is that, as between the sender of a letter and the person to whom it is addressed,

N. S. 1; *Mozley v. Tinkler* (1835), 4 L. J. Ex. 84; 1 Cr. M. & R. 692; *Carlill v. Carbolic Smoke Ball Co.* (1892), 62 L. J. Q. B. 257; (1892) 1 Q. B. 256. (*l*) *Nicols' case* (1885), 29 Ch. D. 421; *Duff's Executor's case* (1886), 32 Ch. D. 301.

(*m*) *Hebb's case* (1867), 36 L. J. C. 748; L. R. 4 Eq. 9; *Robinson's case* (1869), L. R. 4 Ch. 322.

(*n*) *Pellatt's case* (1867), 36 L. J. C. 613; L. R. 2 Ch. 527; *Gunn's case* (1867), 37 L. J. C. 40; *Sahlgren's case* (1868), L. R. 3 Ch. 323.

(*o*) *Steel's case* (1879), 19 L. J. C. 176.

(*p*) *Levitt's case* (1867), L. R. 3 Ch. 36.

(*q*) *Crawley's case* (1869), L. R. 4 Ch. 322; see *Ward's case* (1870), L. R. 10 Eq. 659.

(*r*) *Blagden's case* (1864), 33 L. J. C. 574; 4 De G. J. & S. 447.

(*s*) *Adams' case* (1872), 41 L. J. C. 270; L. R. 13 Eq. 474; *Davies' case* (1872), 41 L. J. C. 659.

(*t*) *Ld. Blackburn, Brogden v. Metrop. Ry.* (1877), Ap. Ca. 691. See *Wancke v. Wingren* (1889), 58 L. J. Q. B. 519.

(*u*) *Wright v. Bigg* (1852), 15 Beav. 592.

the post-office is the agent of the sender; and the delivery of a letter to the post-office for transmission is no delivery to the person to whom it is addressed, until actually received by him (*x*). And being the agent of the sender there is no sufficient acceptance unless the letter accepting the offer is received; but where an acceptance through the post is expressly or impliedly authorized, if the letter accepting such offer is correctly addressed and posted, then all the conditions of acceptance are satisfied, and the contract becomes thereupon complete (*y*). And where the defendants wrote to the plaintiffs offering to sell wool, "receiving your answer in course of post," but the letter did not reach the plaintiffs within the time which the defendants anticipated, by reason of being misdirected, a binding contract was made by a written acceptance posted "in course of post" after the actual receipt of the offer (*z*). These principles have been applied to the case of an offer by letter to buy or sell goods, which is completely accepted by posting a letter of acceptance, notwithstanding the letter of acceptance is delayed in transmission through the post (*a*); and an application for shares in a company sent through the post, which is accepted so as to make a contract by notice of allotment posted to the address given by the applicant, though it never reaches the applicant (*b*).

Ch. I.
Sect. I.

Authority to
accept by
post.

Sale of goods
by post.

Allotment of
shares by
post.

Where the parties are separated, so as to render prompt personal communication impossible, the telegraph may be resorted to under the same circumstances, and with the same result, as would justify communication through the post (*c*). The sender of a message by telegraph through the post-office is not bound by errors in the transmission, for "the post-office authorities are only agents to transmit messages in the terms in which the senders deliver them," and are not general agents to bind the senders as principals (*d*). A person executing an order by telegraph, in which there happens to be a mistake, is also without any remedy against the telegraph

Communi-
cation by
telegraph.

x *Northam v. In Reas* (1859), 29 L. J. Q. B. 1; 2 E.R. & L. 271.

y *Harris' case* (1872), 11 L. J. C. 621; L. R. 7 Ch. 587; *Byrne v. Van Tienhoven* (1880), 49 L. J. C. P. 316; 5 C. P. D. 348; *Henthorn v. Fraser* (1892), 61 L. J. C. 373; (1892) 2 Ch. 27. See *Ex p. Jones* (1899), 69 L. J. C. 21; 1900) 1 Ch. 220.

z *Adams v. Lindsell* (1818), 1 B. & Ald. 681.

a *Dowdell v. Higgins* 1848, 1 H. L.

C. 381; *Adams v. Lindsell* 1818, 18 L. J. C. P. 310; 8 C. B. 225.

b *Harris' case* (1872), 11 L. J. C. 625; L. R. 7 Ch. 587; *Hauschild v. Ince*, v. *Grant* (1879), 48 L. J. Q. B. 577; 4 Ex. D. 216.

c *Sturgeson v. McLan* (1880), 49 L. J. Q. B. 701; 5 Q. B. D. 351; *Beane v. Moore* 1903, 73 L. J. C. 377; (1904) 1 Ch. 335.

d *Henkel v. Pope* (1870), 40 L. J. Ex. 15; L. R. 6 Ex. 7.

PART I.

company (*e*).—An offer by a "reply paid" telegram does not import, expressly or impliedly, that the sending of a telegraphic reply is a condition to the validity of the acceptance; it is presumptively only a request for a reply (*f*).

Continuance of offer.

The offer of a contract is made at the time when it is communicated: and it must continue open at the time of the acceptance.—

Offer limited to reasonable time.

An offer not otherwise limited must be accepted within a reasonable time (*g*). An application for shares must be accepted by an allotment within a reasonable time, dependent upon the prospectus and object of the company; and the applicant is not bound to accept shares allotted after such time has elapsed, though he has not formally withdrawn his application (*h*); but after notice of the allotment, if he does not effectively repudiate the shares immediately, he may become liable as shareholder of the company, if it be subsequently wound up (*i*). An offer to sell goods sent by letter in the usual course of business, without expressly requiring an answer by return of post, is accepted in time by a letter posted during business hours on the day of receiving the offer, though not the next post (*k*).—An offer expressed to continue for a fixed time may be legally retracted before the expiration of the time limit, unless previously accepted (*l*). An agreement to carry all the goods that should be presented for earriage at a certain rate during twelve months was construed as a continuing offer that might be accepted from time to time by delivering goods for earriage, but not otherwise binding either party (*m*). A tender to supply goods at certain prices during twelve months is a continuing offer, which if accepted by ordering goods under it, becomes a binding contract to supply those goods, although the party accepting the tender is under no liability to order goods (*n*). A guarantee for the payment of goods supplied

Offer limited to fixed time.

e *Playford v. United Kingdom Telegraph Co.* (1869), 38 L. J. Q. B. 249; L. R. 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.* (1877), 47 L. J. C. P. 1; 3 C. P. D. 1.

f *Hawkins, J., Read v. Anderson* (1882), 52 L. J. Q. B. 214; 10 Q. B. D. 104.

g *Powers v. Fowler* (1855), 4 E. & R. 519, n. (*a*); *Cranworth, L. C., Meen v. Surters* 1855, 25 L. J. C. 260.

h *Ramsgate Victoria Hotel Co. v. Montefiore* (1866), 35 L. J. Ex. 90; L. R.

1 Ex. 109; *Ex. p. Bailly* (1868), 37 L. J. C. 670; L. R. 3 Ch. 592.

i *Boulle's case* (1885), 51 L. J. C. 550.
k *Dunlop v. Higgins* (1848), 1 H. L. C. 381.

l See post, p. 23.

m *Burton v. G. N. Ry.* 1854), 23 L. J. Ex. 184; 9 Ex. 507.

n *G. N. Ry. v. Witham* (1873), 43 L. J. C. P. 1; L. R. 9 C. P. 16; *Reg. v. Denors* (1899), 69 L. J. P. C. 5; 1900 A. C. 103.

or of money advanced or of bills discounted for a third person, during a certain time is a continuing offer, which, if not withdrawn, may be accepted during the time by supplying the goods or otherwise acting upon it according to its terms (*o*).

Ch. I.
SECT. 1.

An offer may be revoked at any time by a communication of such intention to the other party before an acceptance is complete; and, with the exceptions before mentioned, an acceptance is, in general, not complete until it is in fact communicated to the person making the offer (*p*). At a sale by auction a bidder may retract his bidding before the hammer falls (*q*); and this though it be provided in the conditions of sale that no person shall retract his bidding (*r*). But it would seem that where the sale is without reserve, the property cannot be withdrawn from the sale after the first bid is made. An application for shares in a company may be withdrawn at any time before the letter of allotment is duly posted, and not afterwards (*t*).

Revocation
of offer.

An offer cannot be revoked after it has been accepted by the other party, and to be effective must be communicated to the other party; as in the case of a letter of revocation not delivered until after the offer contained in a former letter was accepted, though posted before the acceptance (*u*). Where the transaction is conducted by telegraphic communication, a telegram withdrawing an offer to sell despatched before, but not received until after, the despatch of the telegram announcing its acceptance by the buyer, is inoperative (*x*). If an offer is in fact revoked to the knowledge of the other party, whatever the source of his information may be, he cannot subsequently bind the party making the offer by an acceptance (*y*). If the person to whom property is offered for sale were to accept the offer without knowledge of a subsequent sale there might be two binding contracts against the vendor, raising a question of priority in equity as to the right to the specific property (*z*).

Notice of
revocation

(*o*) *Offord v. Davies* (1862), 31 L. J. 4, C. P. 319; 12 C. B. N. S. 748; *Marrell v. Carver* (1877), 47 L. J. C. 73; 7 Ch. D. 151.

(*p*) *See note*, p. 19.

(*q*) Sale of Goods Act, 1893, s. 58. *Payne v. Cave* (1789), 3 T. R. 148.

(*r*) See Sugden, V. & P. 14th ed. 11; Dart, V. & P. 7th ed. vol. i. p. 136.

(*s*) *Went v. Harrison* (1858), 28 L. J. Q. B. 18; 1 E. & E. 295.

(*t*) *Harris' case* (1877), 11 L. J. C. 625; 1 L. R. 7 Ch. 587.

(*u*) *Ryene v. Van Tinschen* (1880), 10 L. J. C. P. 316; 5 C. P. D. 311; *Henshaw v. Fraser*, 1892 61 L. J. C. 373; 1892 2 Ch. 27.

(*x*) *Stevenson v. McLean* (1880), 49 L. J. Q. B. 701; 5 Q. B. D. 351.

(*y*) *Dickinson v. Todd* (1876), 45 L. J. C. 777; 2 Ch. D. 463.

(*z*) *Fold v. Bolland* 1837, 1 Dru. &

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Revocation
of continuing
offer.

The offer of a contract may be revoked, though it expressly gives a fixed time for acceptance; the effect of such giving of time being merely to fix a limit beyond which the offer shall not continue (*a*). Thus where a written offer was made for purchasing a house, with the condition that a definite answer should be given within six weeks; it was held that the offer might be revoked at any time during the six weeks, and that an acceptance made after such revocation was inoperative (*b*). So where a written offer was made for the sale of a business, giving ten days for acceptance, and after some negotiations but within the ten days, the offer was withdrawn, the withdrawal was effective *c*. Upon this principle a continuing guarantee, offered for a certain time, of the current account of a debtor for goods sold, or for money advanced, or for bills discounted, which may be accepted by acting upon it from time to time, is revocable by notice given at any time during its continuance, except so far as it may have been previously acted upon (*d*).

Revocation
of continuing
guarantee.Variation of
offer.

As an offer may be wholly revoked, so it may be varied at any time before acceptance; and where negotiations ensue upon an offer for modification of its terms, the offer may be withdrawn at any time during the negotiations (*e*); but until withdrawn or varied, the original offer presumptively continues open for acceptance (*f*). So, a qualified acceptance is equivalent to a new offer, and may be withdrawn pending subsequent negotiations (*g*); but the person making the counter-proposal cannot subsequently make a binding contract by accepting the original offer (*h*).

Revocation
of acceptance.

Until an acceptance has been communicated to the party making the offer, it may be withdrawn or intercepted. Thus, the acceptor or indorser of a bill of exchange may cancel his signature at any

Wak. 37; *Pitt v. Shillcock* (1816), 6 Ha. 1; *Jackson v. Phillips* 1876, 15 L. J. C. 777; 2 Ch. D. 163; *Brown v. Horn* (1903), 73 L. J. C. 377; 1901 1 Ch. 505. See Leake, Property in Land, pp. 316-363.

Id. *Jackson v. Phillips* 1876, 15 L. J. C. 777; 2 Ch. D. 163.

(b) *Rothdale v. Great* 1828, 6 L. J. O. S. C. P. 166; 1 Bing. 653.

(c) *Ward v. Carter & Son* (1890), 59 L. J. C. 172; 14 Ch. D. 616.

(d) *Good v. Baines* 1862, 31 L. J.

C. P. 319; 12 C. B. N. S. 748. See *Re Coe* (1902), 71 L. J. C. 358; 1902 1 Ch. 733.

(e) *Thornbury v. Bell* 1812, 1 Y. & C. C. 563.

(f) *Stearns v. McLean* 1889, 19 L. J. Q. B. 701; 5 Q. B. D. 316.

(g) *Lucas v. Jones* 1819, 18 L. J. C. 329; 7 Hare, 110.

(h) *Hyde v. Wrench* 1840, 3 Brev. 331; *Sheffield Canal Co. v. Sheffield & Rotherham Ry.* (1811), 3 Ry. Cas. 121.

Thornbury v. Bell 1812, 1 Y. & C. C. 563.

time before delivery of the bill (*i*). Where a letter of acceptance has been posted, it is sufficient that the sender has done all in his power to recover the letter where that course is possible, and where the letter cannot be withdrawn by reason of the regulations of the post-office, the sender of the letter may annul its operation as an acceptance by any other means, if possible, before it is actually delivered (*k*). Where the letter accepting a proposed contract and the letter recalling the acceptance arrive at the same time it has been held that there is no contract (*l*); but this decision is apparently inconsistent with the cases which decide that a contract is complete from the moment the letter of acceptance is posted (*m*). But after the acceptance has been communicated to the party making the offer it cannot be revoked without his consent: as where the vendor of an estate accepted an offer to purchase by a letter sent by post, and in the course of the following day the estate was sold to another purchaser by an agent of the vendor in ignorance of the former sale; it was held that the second sale could be no revocation of the acceptance of the first (*n*).

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An offer of a contract is put an end to by a refusal of it; and it cannot afterwards be revived by a mere acceptance, without a renewed consent of the person who made it. "If an offer made is rejected the party making it is relieved from liability on that offer, and the party who has rejected the offer cannot afterwards at his own option convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the person who made the offer" (*o*).

Refusal of offer.

An offer which has not been accepted in the lifetime of the maker is necessarily terminated by his death; nor can the representatives of the deceased be made liable upon the unaccepted offer (*p*). Thus, a continuing guarantee, so far as it is a mere offer which may be acted upon, is revoked as to future action upon

Termination of offer by death.

i, Bills of Exchange Act, 1882, s. 21; *two v. Teed*, 1822, 5 B. & Ald. 770.

k, *Exp. Est.*, 1870, 43 L. J. 40; 19; L. R. 9 Ch. 27; Cockburn, C. J., *N. Lamb v. Pease*, 1850, 29 L. J. Q. B. 5; 2 E. & B. 271.

l, *Brammer v. Smith*, 1830, 9 Ct. Sess. 1st series 190.

m, *Hutcheon v. Fraser*, 1892, 61

L. J. C. 373; 1892, 2 Ch. 27.

n, *Batter v. Sanders*, 1840, 6 Har. 1.

o, *Ld. Langdale, Shapell Coal Co. v. Shapell & Rotherham Ry.*, 1841, 5 Ry. Cas. 132; *Hugh v. Wrench*, 1810, 3 Beav. 331.

p, *Mellish, L. J., De Linton v. Dalby*, 1876, 15 L. J. C. 777; 2 Ch. D. 475.

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it, by notice of the death of the guarantor (*r*). So an agency or authority to contract on behalf of a person is terminated by his death, and a contract purporting to be made under it, though without notice of the death, is not chargeable against his representatives (*s*).—An offer is also terminated by the death of the person to whom it was made without having accepted it; and in such case an acceptance by the representatives of the deceased would be inoperative, unless made upon a continuance or renewal of the offer to them; thus an offer of shares by a company to a shareholder, who dies before acceptance, cannot be accepted by the executor in his own name (*t*).—An offer relating to the property of a person is terminated by his bankruptcy, which transfers all his property to trustees (*u*).

Time of contract.

The time when a contract is made is of importance in considering the state of facts which the parties had in view. Thus where a contract was entered into respecting the sale of land, it was held that an allotment under an inclosure Act was not included in the subject-matter (*x*); and where land was tendered for under a statute, it was held that a statutory power to raise the price could not be exercised so as to bind the purchaser, subsequently to the date of the tender (*y*). But for purposes of title a contract is presumptively deemed to be made at the time of the acceptance which completes it, and not to relate back to the time of the offer (*z*). Accordingly, under an absolute contract of sale of goods the property therein passes to the buyer as from the acceptance; and therefore the buyer cannot maintain an action for any loss or injury to the goods happening before the acceptance (*a*). Until there is a binding contract of sale, the buyer has not any insurable interest in the goods sold, or in the profits of the expected contract (*b*).

r *Coulthart v. Clementson* (1879), 49 L. J. Q. B. 206; 5 Q. B. D. 42; *Re Sherry, London & County Bank v. Terry* (1884), 53 L. J. C. 404; 25 Ch. D. 692.

s *Blades v. Fry* (1829), 7 L. J. O. S. K. B. 211; 9 B. & C. 167; *Comptons v. Woodhouse* 1854, 24 L. J. C. P. 13; 15 C. B. 400.

t *Doll's Executors' case* (1886), 32 Ch. D. 301.

u *Meynell v. Surtees* (1855), 25 L. J. C. 257.

v *Fife v. Clayton* 1807, 1 Coop. t. Cott. 351.

w *Pearson v. Spence* 1880, 5 Ap. Ca. 70.

z See *Dickinson v. Dods* (1876), 45 L. J. C. 777; 2 Ch. D. 463.

a Sale of Goods Act, 1893, s. 18, rule 1; *Elthouse v. Bradley* (1862), 31 L. J. C. P. 204; 11 C. B. N. S. 869; affd. in Ex. Ch. (1863), 7 L. T. N. S. 835; 11 W. R. 429.

b *Seagrave v. Union Marine Co.* (1866), 35 L. J. C. P. 472; L. R. 1 C. P. 305.

At the common law, where the plaintiff pursued his remedy in an inferior court, he had to allege and prove that the whole cause of action arose within the jurisdiction of the inferior court (*e*). Now a contract is presumptively made at the place of acceptance. Thus where an order for work is given, it is accepted by doing the work at the place where the order was received (*d*); so where an order is given for goods, it is accepted by delivering the goods at the place ordered (*e*). In the case of a contract made by letter or telegram, the place of the contract is determined by the place whence the acceptance is despatched (*f*). An implied contract arising from an account stated, or admission of debt contained in a letter, arises at the place where the letter is received (*g*). A bill of exchange (or promissory note) is an incomplete and revocable document until it is issued, and therefore only becomes binding at the place of issue (*h*). In contracts within the Statute of Frauds (now replaced in part by sect. 4 of the Sale of Goods Act, 1892), the place of contract is taken to be where a written agreement or memorandum is signed, or where there is delivery and acceptance, or part payment (*i*).

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Place of
contract.

By the County Courts Act, 1888 (reproducing former enactments), an action may be commenced by leave of the judge or registrar "in the court in the district of which the cause of action or claim wholly or in part arose." The Lord Mayor's Court has a similar extended jurisdiction under the Mayor's Court Act, 1857. Under the above enactments the County Court and the Mayor's Court have jurisdiction, if any part of the cause of action arose within the jurisdiction; and for this purpose an offer is held to be part of the cause of action (*k*). The assignee of a debt has been held entitled to sue in the Mayor's Court upon an assignment made in the City of London, although the contract out of which the debt arose could not have been there sued on (*l*). The rule of the common law as to the whole cause of action still applies,

County
Courts.

Mayor's
Court.

(*e*) *Franch v. Bell* (1667, 1 Wms. Saund. 99, n. 3).

(*d*) *Norcross v. In Ross* (1859, 20 L. J. Q. B. 4; 2 Ell. & E. 271).

(*e*) *Taylor v. Jones* (1875, 15 L. J. C. P. 110; 1 C. P. D. 87).

(*f*) *Carson v. O'Connor* (1888, 57 L. J. Q. B. 401; 20 Q. B. D. 610; *Henthorn v. Fraser* (1892, 61 L. J. C. 373; 1892) 2 Ch. 27).

(*g*) *Taylor v. Nichols* (1876, 45 L. J. C. P. 155; 1 C. P. D. 242).

(*h*) Bills of Exchange Act, 1882, ss. 21, 84; *Car v. Trog* (1822, 1 B. & Ald. 471; *Chapman v. Cuttcell* (1865), 34 L. J. Ex. 186; 3 H. & C. 865).

(*i*) *Aris v. Orchard* (1860, 30 L. J. Ex. 21; 6 H. & N. 160; *Alderton v. Archer* (1881, 51 L. J. Q. B. 12; 14 Q. B. D. 1).

(*k*) *Grove v. Bush* (1873, 12 L. J. Ex. 151; L. R. 8 Ex. 208).

(*l*) *Read v. Brown* (1888, 58 L. J. Q. B. 120; 22 Q. B. D. 128).

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Supreme Court.

however, in proceedings against a garnishee by process of foreign attachment in the Mayor's Court (*m*).

By the Rules of the Supreme Court under the Judicature Acts, Order XI. r. 1, "Service out of the jurisdiction of a writ of summons may be allowed by the court or a judge whenever (amongst other cases) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction; unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." The test is whether the contract must be performed within the jurisdiction or whether the contracting party has an option to perform within or without the jurisdiction: it is only in the former event that the rule applies (*n*).

The place of contract is also material as *prima facie* denoting the law by which it is to be construed and regulated (*o*); and the law by which the capacity of the parties to contract, as dependent upon infancy or marriage, is determined (*p*).

§3. CONTRACTS WITH EXECUTED CONSIDERATIONS.

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Considerations executed and executory.

The consideration upon which a contract is made may be executed or executory. In the former case the consideration is

m *Mann of London v. Lee* (1867), 36 L. J. Ex. 225; L. R. 2 H. L. 239; *Cooke v. Gill* (1873), 42 L. J. C. P. 98; L. R. 8 C. P. 197.
(n) *Wanch v. Waggren* (1885), 58 L. J. Q. B. 519; *Cumber v. Leeband* (1898), 67 L. J. Q. B. 884; (1898) A. C. 524; *Dunst & Co. v. trans* 1901, 73 L. J. K. B. 907; 1901 2 K. B. 685.

o See *post*, p. 135.
p *Male v. Roberts* (1799), 3 Esp. 185; *Suttons v. De Barros* (1879), 49 L. J. P. D. 1; 5 P. D. 1; *Lee v. Abdy* (1886), 17 Q. B. 309; *Re Bozzelli* (1902), 71 L. J. Ch. 505; (1902) 1 Ch. 751. See *Re Slat* (1902), 71 L. J. C. 192; 1902) 1 Ch. 488.

executed by one party in return for the promise of the other, and nothing remains to be done but to perform the promise according to its terms. In the latter the consideration is a promise made by one party in return for the promise of the other; there are mutual promises which have to be performed on both sides, and the promise on one side may be dependent or conditional upon the performance on the other according to the construction of the terms (*q*). Contracts with executory considerations or mutual promises are framed in special terms expressing the intention of the parties respecting the subject-matter: as in leases, mortgages, charter-parties, policies of insurance, and the various matters which may be the subject of contract. The treatment of these subjects in detail is beyond the scope of the present work; but they are referred to throughout in explanation and illustration of principles. Contracts with executed considerations apply to equally various matters, but they depend to a great extent upon inferences of fact which are capable of being referred to certain common forms and general rules.

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A contract with an executed consideration appears either in the form of a request to perform the consideration, followed by the performing of the consideration according to the request; or in the form of an offer of the consideration, followed by accepting the consideration offered. In either case there is no contract until the consideration is executed, and so long as the consideration remains executory it is voluntary and may be withheld; it differs in this respect from a contract with executory considerations or mutual promises, in which the contract is complete upon the mere interchange of promises, and the consideration on either side, though executory, is obligatory (*r*). But the executed consideration is not a past consideration, in the sense of having been executed before the making of the promise, the execution of the consideration and the making of the promise being concurrent acts; and a promise afterwards made in respect of the same consideration, though in express terms, would be void as being made upon a past consideration (*s*). In the leading case upon executed considerations, the plaintiff alleged that the defendant, having committed a felony, requested the plaintiff to endeavour to obtain his pardon, where-

Contracts with executed considerations.

(*q*) See *ante*, p. 6; *post*, pp. 95, 466.

(*r*) *Ante*, p. 6.

(*s*) *Hopkins v. Logan* (1839), 8 L. J.

Ex. 218; 5 M. & W. 241; *Harris v. Carter* (1854), 23 L. J. Q. B. 295; 3 E. & B. 559. See *ante*, p. 7.

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upon the plaintiff did, by all the means he could, endeavour to obtain the pardon; and afterwards, in consideration of the premises, the defendant promised the plaintiff to pay him. The Court held that there was a valid contract founded upon a sufficient consideration, namely, the request of the plaintiff's services, and the rendering of the services in pursuance of the request; and the Court agreed "that a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*; but if that courtesy were moved by a suit or request of the party that gives the *assumpsit* it will bind" (t).

Consideration
executed
upon request.

Although an executed consideration will not support a promise unless the consideration was moved by a previous request, a previous request is implied in law, though non-existent in fact, from the acceptance of a consideration offered (u). The import of the principle thus stated seems to be that in all cases the consideration must be intended on both sides as not gratuitous or voluntary, but executed in respect of a promise express or implied (x). Upon the above principles, in the ordinary cases of goods sold and delivered, money lent, work and labour performed or services rendered, a promise to pay for the executed consideration is presumptively inferred either from a previous request to execute it, or from sufficient acceptance of it as executed (y). But the circumstances may be such that the consideration was executed without the understanding or expectation of payment: as the professional services of a barrister, which do not import any legal claim for remuneration (z). So, too, sums expended in the maintenance of adults by a parent, or by a person standing *in loco parentis* are regarded as gratuitous payments (a). It may also appear that the nature and amount of the consideration should be at the option of the party benefited: as in the case of services rendered upon the express terms of being paid so much as the employer shall please to give: or in the expectation of a legacy at his death (b).

(t) *Lamplugh v. Brathwait* (1615), Hobart, 105; 1 Smith, L. C. 136; *Osborn v. Rogers* 1670, 1 Wms. Saund. 356.

(u) Notes to *Lamplugh v. Brathwait* (1615), 1 Smith, L. C., 136.

(v) *Esher, M. R., Exp. Ford* (1885), 55 L. J. Q. B. 406; 16 Q. B. D. 307.

(w) Sale of Goods Act, 1893, ss. 8, 23; *Mills v. Blackall* 1847, 17 L. J. Q. B. 31; 11 Q. B. 358; *Coles v. Bateman* 1818, 17 L. J. C. P. 302; 6

C. B. 184; *Ex p. Brasseuse* 1901, 73 L. J. K. B. 763; (1901) 2 K. B. 327.

(x) *Kennedy v. Brown* 1863, 52 L. J. C. P. 137; 13 C. B. N. S. 677; *Re Le Brasseur and Oakley* 1896, 65 L. J. C. 763; (1896) 2 Ch. 487.

(y) *Re Cottrell* (1871), 41 L. J. C. 70; L. R. 12 Eq. 566; *Re Moulton* (1904), 94 L. T. 454. See *Re Rhoads* (1890), 59 L. J. C. 298; 41 Ch. D. 54.

(z) *Maddison v. Alderson* 1883, 52

A common form of executed consideration is the payment of money for another, either upon an express request, or under circumstances from which a request to pay and promise of repayment may be inferred. The payment under these circumstances creates a debt, which is technically described as a debt "for money paid by the plaintiff for the defendant at his request" (*e*). A request or authority (express or implied) to do any act (not being an act in itself illegal) which involves the person doing it in liability to pay money, or subjects him to any prejudice if he fails to pay it, presumptively imports a request to pay the money and a promise of indemnity (*d*). And it has been held that a payment under a guarantee which could not be enforced by reason of the Statute of Frauds, entitles the guarantor to be reimbursed (*e*). And where by the terms of a charter-party it was provided that the ship-owners should not be liable for loss caused by the master's negligence, and the charterers obtained the master's signature to bills of lading which did not incorporate this term of the charter-party, and the ship was lost by the negligence of the master, the owners were held to be entitled to recover from the charterers amounts which they were compelled to pay to the holders of the bills of lading (*f*).

CH. I.
SECT. I.
Money paid
upon request.

An auctioneer recovered, on the footing of indemnity, the auction duty which was at one time payable (*g*). So, too, an auctioneer employed to sell goods, which in fact were the property of a third person, who recovered the value against him, was held entitled to recover the amount from his employer as money paid (*h*). So, too, the employment of a broker to buy or sell imports a request to make all payments required by the rules, existing at the date of the order, of the market in which he is employed to act, so far as such rules are reasonable and not contrary to law (*i*); but a right of in-

Money paid
by agents.

L. J. Q. B. 737; 8 Ap. Ca. 467. And see *ante*, p. 3.

c) *O'Shaune v. Rogers* (1870), 1 Wms. Saund. 356.

d) *Shoekell v. Boscoe* 1836, 5 L. J. C. P. 193; 2 Bing. N. C. 634; *Dunlop v. Loring* 1875, 41 L. J. C. P. 197; L. R. 10 C. P. 126; *Reid v. Anderson* 1881, 53 L. J. Q. B. 532; 15 Q. B. D. 779; *Sheffield Corp. v. Barclay* (1905) 74 L. J. K. B. 717; 1905 A. C. 392.

e) *Alexander v. Lam* 1836, 5 L. J. Ex. 187; 1 M. & W. 511. See *post*, p. 203.

f) *Krieger & Co. v. Mool Teygon Ship Co.* 1907, 76 L. J. K. B. 985; 1907 A. C. 272.

g) *Brittain v. Lloyd* 1815, 15 L. J. Ex. 13; 14 M. & W. 762.

h) *Adams v. Jarvis* 1827, 5 L. J. O. S. C. P. 68; 4 Bing. 66.

i) *Taylor v. Stray* (1857), 26 L. J. C. P. 287; C. B. N. S. 175; *Smith v. Linds* (1858), 27 L. J. C. P. 335; 5 C. B. N. S. 587; *Perry v. Barnett* 1885, 54 L. J. Q. B. 466; 15 Q. B. D. 388; *Harley v. Edwards* 1887, 57 L. J. Q. B. 117; *Davis v. Howard* 1889, 59 L. J. Q. B. 133; 21 Q. B. D. 691.

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Money paid
under
indemnities.

A request to draw or accept an accommodation bill impliedly indemnifies the drawer or acceptor for the payment, and also for the costs of an action on the bill, if he is further requested to defend such action (*o*). So, a request to become bail imports an indemnity for the expenses of the bail; but in criminal cases not for the amount of the recognizance forfeited for non-appearance, such an indemnity being illegal (*p*). A request by a party interested in the result to bring or defend an action imports an indemnity against all costs and charges incurred, which may be recovered as a debt for money paid under the request (*q*). A request made to a person to detain, or deliver up, goods which are claimed by a third party imports an indemnity for the damages and costs recovered in an action brought by the claimant (*r*).

Consent to
execution of
consideration.

Consent to the execution of the consideration may be equivalent to a request or acceptance in importing a promise to pay for it. Where a surgeon, having attended a pauper, charged the overseer of the parish whose duty it was to provide the pauper with medical attendance, it was held that the knowledge of the overseer of the surgeon's attendance, without repudiating it, was equivalent

k) *Jackson v. Kewley* 1908, 77 L. J. K. B. 901; 1908, 2 K. B. 511.

l) *Humphreys v. Pratt* (1831), 5 Bligh, N. S. 151.

m) *Tophis v. Graue* 1839, 9 L. J. C. P. 180; 5 Bing. N. C. 636.

n) *Sedman v. Worthington* 1585, Cro. Eliz. 42.

o) *Bladen v. Charles* (1831), 9 L. J. O. S. C. P. 82; 7 Bing. 246; *Reynolds v. Dugh* 1840, 1 Man. & G. 753; *Garrard v. Cottrell* (1847), 10 Q. B. 679.

p) *Jones v. Orchard* 1855, 24 L. J. C. P. 229; 16 C. B. 614; *Consolidated Exploration & Finance Co. v. Musgrave* (1899), 69 L. J. C. 11; (1900) 1 Ch. 37.

q) *Burley v. Macaulay* (1819), 13 Q. B. 815. See *Garrard v. Cottrell* (1847), 10 Q. B. 679.

r) *Bells v. Gibbins* (1834), 4 L. J. K. B. 1; 2 A. & E. 57; *Dugdale v. Lovering* (1875), 44 L. J. C. P. 197; L. R. 10 C. P. 196.

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to an acceptance of his services and rendered him liable to pay for them (*s*). And where under like circumstances the overseer requested the surgeon to make out his bill to the parish, it was held that "the conduct of the overseer amounted to an acknowledgment on his part that the plaintiff had attended at his wish, and upon his responsibility" (*t*).

Upon this principle a husband may be charged with goods supplied to his wife without his authority, upon his afterwards sanctioning the use of them (*u*).—A father cannot be charged for goods supplied to a child without his express request or authority, his mere knowledge of the supply being insufficient for the purpose of fixing him with liability, there being no legal duty in a

Goods
supplied to
wife or child.

her at common law to maintain his child, or to pay a debt incurred by his child (*x*). Nor is there any obligation upon the mother chargeable except under the poor law to maintain her child out of her separate estate during coverture (*y*); nor during widowhood (*z*); but a wife may be authorised by her position to bind her husband to pay for necessities supplied to the children committed to her charge (*a*).

Upon the same principle no claim can be made for work done or services rendered to another without his request: though he involuntarily derives benefit from them (*b*). Thus where the captain of a ship, having contracted to take the command for a voyage at monthly wages, abandoned the command during the voyage, but afterwards assisted to navigate the ship; it was held that, though entitled to the monthly wages accrued due before the abandonment, he could not charge for the subsequent services because they were executed without the request or knowledge of the owner of the ship, and without his voluntary acceptance (*c*).

Consideration
executed
without
request.

Lamb v. Bence (1815), 4 M. & S. 275; *Payder v. Williams* (1833), 2 L. J. M. C. 105; 1 Cr. & M. 810.

(*t*) *Wing v. Mill* (1817), 1 B. & Ald. 104.

(*u*) *Montagu v. Benedict* (1825), 3 L. J. O. S. K. B. 91; 3 B. & C. 631; 2 Smith, L. C. 463.

(*x*) *Marshall v. Wright* (1840), 9 L. J. Ex. 158; 6 M. & W. 482; *Shelton v. Springett* (1851), 11 C. B. 452; *De Crespieny v. De Crespieny* 1853, 23 L. J. Ex. 27; 9 Ex. 192. A parent may be charged under the poor law

with the cost of relief of his children: see *Re Harrington* (1908), 78 L. J. Ch. 27; 1908, 2 Ch. 687.

(*y*) *Hodgens v. Hodgins* (1837), 4 Cl. & F. 323; Married Women's Property Act, 1882, s. 21.

(*z*) *Douglas v. Andrews* (1849), 19 L. J. C. 69; 12 Beav. 310.

(*a*) *Bazley v. Forder* (1868), 37 L. J. Q. B. 237; L. R. 3 Q. B. 559.

(*b*) *Ruabon S.S. Co. v. London Assur.* (1899), 69 L. J. Q. B. 86; (1900) A. C. 6.

(*c*) *Taylor v. Laird* (1856), 25 L. J. Ex. 320; 1 H. & N. 266.

PART I.

Building
upon the land
of another.

And upon this principle at common law no claim can be made for salvage services voluntarily rendered to property (*d*). But by general maritime law a reasonable remuneration is allowed by the Court to salvors of ships and goods from the perils of the sea, with a lien upon the property saved (*e*). In the case of work done and materials provided in building upon land of another, the inference as to the acceptance of the consideration drawn from retaining possession is different from that in the case of goods delivered and retained. The possession of the land necessarily involves possession of the buildings in their existing state, without allowing any option of rejecting them, and therefore without raising any inference of intention as to payment: there must be some positive request or some ratification proved in order to create a contract to pay the value (*f*); and if a person without the invitation or acquiescence of the landowner builds upon land he cannot claim any lien upon the land for the value of the work and materials (*g*). But if a person builds upon land with the knowledge of the landlord, and under circumstances which raise a promise that compensation will be made, the party making the expenditure can compel the landlord to fulfil the promise or expectation (*h*).

Consideration
executed
against the
will of
another.

Still less can any promise be presumed from a consideration performed against the will of the other party, though he may derive benefit from it (*i*). Where goods are detained adversely to the owner, and charges are incurred in the detention, no claim can be made against the owner in respect of such charges; as, where a shipwright detained a ship in his dock under a lien for repairs, it was held that he could not charge the shipowner with rent for the occupation of the dock (*k*).

Consideration
obtained by
wrong or
fraud.

A person cannot be heard to allege his own wrong or fraud (*l*). In the case of goods wrongfully or fraudulently obtained, the

(*d*) *Nicholson v. Chapman* (1793), 2 H. Bl. 254.

(*e*) *The Euell Grove* (1835), 3 Hagg. Adm. 209; *The Currier Dove* (1863), 2 Moo. P. C. N. S. 213; *Gas Float Whetton* No. 2 (1897), 66 L. J. P. 99; 1897 A. C. 337.

(*f*) *Sampter v. Hodges* 1898, 67 L. J. Q. B. 515; 1898, 1 Q. B. 673.

(*g*) *Clare Hall Master v. Harding* 1848, 17 L. J. C. 391; 5 Hare, 273;

Fry, J., Wallis v. Smith (1882), 21 Ch. D. 243.

(*h*) *Dunn v. Spence* (1802), 7 Ves. 231; *Burn v. Miller* (1813), 4 Taunt. 745; *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129.

(*i*) *Stokes v. Lewis* (1785), 1 T. R. 20.

(*k*) *Somes v. British Empire Shipping Co.* (1860), 30 L. J. Q. B. 229; 8 H. L. C. 338.

(*l*) *Darison v. Frankton* (1830), 8 L. J. K. B. 376; 1 B. & Ad. 112.

rightful owner may in general waive the wrong and bring an action for goods sold and delivered upon an implied promise to pay the value (*m*). Where a person had enticed away an apprentice and appropriated his services, it was held that the master of the apprentice might waive the wrong and claim the value of the services as if accepted under a contract to pay for them (*n*). But a party induced to enter into a contract by the fraud of the other party may elect to affirm the contract, but if he does so must give effect to all its terms, for a person is not permitted to approbate and reprobate (*o*).—Upon this principle a passenger, travelling by an excursion train by which no luggage was allowed, and taking luggage with him, was held liable to pay for the carriage, as having accepted the services of the railway in carrying it (*p*). So if a passenger by an ordinary train, by which only the usual personal luggage of passengers is carried free of charge, takes merchandise not answering that description, he may be charged for the carriage (*q*). If a passenger travels on a railway without paying his fare, the company may waive the wrong and sue for the ordinary fare as a debt (*r*); but they cannot claim as a debt the extra fare imposed by a by-law as a penalty (*s*).—But it is also open to the party wronged to disaffirm the contract, in which event he is entitled to be restored to his original position (*t*); or he may recover damages for the fraud treated as a substantive wrong (*u*).

Under the system of pleading in force prior to the Judicature Acts, where an executory contract had been completely performed on the one part, and there was left only a present money payment on the other, the plaintiff might state his claim in the general form of a debt founded upon the executed consideration: as a debt "for money payable for goods sold and delivered;" or "for work and labour done upon request," or "for money paid upon request,"

Debt implied upon execution of executory consideration.

(*m*) *Hill v. Perrott* (1810), 3 Taunt. 274; *Abbott v. Barry* (1820), 2 B. & B. 369; *Russell v. Bull* (1812), 10 M. & W. 352.

(*n*) *Lightly v. Clouston* (1808), 1 Taunt. 112; *Foster v. Stewart* (1814), 3 M. & S. 191.

(*o*) See *post*, p. 258.

(*p*) *Ramsay v. N. E. Ry.* 1863, 32 L. J. C. P. 241, 14 C. B. N. S. 611.

(*q*) *G. N. Ry. v. Shepherd* (1852), 21 L. J. Ex. 286; 8 Ex. 39; *Cahill v. L. & N. W. Ry.* 1861, 30 L. J. C. P. 289; 10 C. B. N. S. 154.

(*r*) *G. N. Ry. v. Winder* (1892), 61 L. J. Q. B. 608; 1892 2 Q. B. 595.

(*s*) *L. B. & S. C. Ry. v. Watson* (1879), 18 L. J. C. P. 316; 1 C. P. D. 118.

(*t*) See *post*, p. 260.

(*u*) See *post*, p. 261.

PART I.

er as the case might be, reserving the particular circumstances of the debt, if disputed, to be given in evidence (*x*).—The principle did not apply to contracts created by deed or by record, for which distinct forms of action were provided (*y*).

Part execution of consideration.

Where completion prevented by a party.

Upon the same principle a debt may arise upon a part executed consideration; as where the further execution of the consideration has been prevented by the default of one or other of the parties; or where it has been prevented by accident without default of either; or where it has been dispensed with by their mutual consent.—If after part execution of the consideration by one party, the completion is refused or prevented by the other, the former may insist upon his rights under the contract; but he is entitled, in some cases, to elect to treat the contract as rescinded, and to charge the other party with a present debt for the part executed consideration. As where, under a contract for the sale of goods upon credit, after delivery of some of the goods the buyer wrongfully refuses to receive more; the seller may treat the contract as rescinded and charge the buyer with a present debt for the goods actually delivered (*z*). So in the case of an author employed to write a book, if the employer wrongfully revokes the employment before completion, he may be charged with a present debt for the work then executed (*a*). And if a party is justified in his refusal to complete, as where a printer employed to print a work, after printing a part discovered that the rest was libellous, he is entitled to charge for the work executed (*c*).—There may, however, be a contract of employment in express terms, or by the usage of the employment, upon the condition that there is to be no payment in any event unless the work is completed (*d*). Estate and house agents usually carry on business upon the terms of payment only by commission upon the price or rent obtained, and their agency is revocable at any time before completion without compensation for work done under it upon these terms (*e*); but the agent completes his commission by finding a purchaser at the stipulated

(*x*) *Osborne v. Rogers* (1670), 1 Wms. Saund. 365, n. (4); *Borerley v. Lincoln Gas Light & Coke Co.* (1837), 7 L. J. Q. B. 113; 6 A. & E. 836.

(*y*) *Jefferson v. Morton* (1671), 2 Wms. Saund. 12 and notes; *Baber v. Harris* (1839), 8 L. J. Q. B. 153; 9 A. & E. 532; *Schlucker v. Mossy* (1825), 3 B. & C. 789.

(*z*) *Bartholomew v. Markwick* (1864),

33 L. J. C. P. 145; 15 C. B. N. S. 711.

(*a*) *Planché v. Colburn* (1831), 1 L. J. C. P. 7; 8 Bing. 14.

(*c*) *Clay v. Yates* (1856), 25 L. J. Ex. 237; 1 H. & N. 73.

(*d*) *Cutter v. Powell* (1795), 6 T. R. 320; 2 Smith, L. C. 1.

(*e*) *Simpson v. Lamb* (1856), 25 L. J. C. P. 113; 17 C. B. 603; *Green v. Mules* (1861), 30 L. J. C. P. 343.

price, and if his employer refuses or is unable to complete the sale, the agent is entitled to charge by the terms of his employment (*f*).—A shipbroker, according to the usage of the city of London, is paid by a commission upon the amount of freight procured by him, and not otherwise; and he has no claim for work done in negotiating a contract of freight which is not completed (*g*).

Ch. I.
Sect. II.

Upon the same principle, with contracts of employment for continuous services, at a salary or wages payable at fixed periods, as yearly, quarterly, or monthly, a wrongful dismissal during the currency of a period, entitles the person employed to claim for the services rendered during the broken interval up to the time of dismissal. The amount may be assessed as part of the damages in an action for the breach of contract by wrongful dismissal, or may be charged as a debt for the executed consideration; but after bringing an action for the wrongful dismissal, which is conclusive both as to the right of action and as to the amount of damages, the claim for the services cannot be charged as a debt (*h*). A domestic servant according to the usual terms of hiring is entitled to a month's wages as compensation for wrongful dismissal without notice, which may be recovered as damages in an action for the breach of contract; but it cannot be claimed as a debt for work done (*i*). Recovery as damages of a sum in lieu of notice puts an end to the contract for service (*k*).

Dismissal
from service.

A party who has made default in completion of a contract cannot in general claim for the part executed consideration as against a party who has not made default, who may be entitled to treat the contract as rescinded; but if in so doing, the latter voluntarily retains the benefit of the part executed consideration, he may render himself liable to pay for it. Upon a contract for the sale of goods, if part only of the goods contracted for be delivered, the buyer may refuse to accept that part only; but if he voluntarily retains the goods delivered, or part of them, after failure in delivery of the rest, he will be bound to pay the

Where a
party fails
to complete.

(*f*) *Prickett v. Badger* (1856), 26 L. J. C. P. 33; 1 C. B. N. S. 296; *Fisher v. Bennett* (1878), 48 L. J. Ex. 32.

(*g*) *Read v. Ross* 1830, 8 L. J. O. S. K. B. 111; 10 B. & C. 135.

(*h*) *Goodman v. Pocock* (1850), 19 L. J. Q. B. 410; 15 Q. B. 576; *Routledge v.*

Hobbs 1860, 29 L. J. M. C. 90; 2 E. & E. 519.

(*i*) *Fearnes v. Tisdal* (1847), 17 L. J. Ex. 18; 1 Ex. 295.

(*k*) *Barashy v. Taylor* 1867, 37 L. J. Q. B. 39. See *General Ball Posting Co. v. Atkinson* 1908, 78 L. J. C. 77; (1909) A. C. 118.

PART I.

Incomplete
services.Incomplete
building.

value (*l*). So if goods are delivered in excess of the contract, or together with other goods not within the contract, the buyer may in general reject or return the whole; but if he voluntarily retains them he will be bound to pay the value (*m*). So if goods are delivered not according to the contract the buyer may refuse to accept them, but if he retains them after discovering that they do not satisfy the contract, he becomes chargeable for their value (*n*).—But the circumstances may be such that there is no option of returning or rejecting the consideration executed, and therefore no promise can be inferred to pay for it. If a person engaged to serve for salary or wages payable at regular periods wrongfully leaves the service during the currency of a period, though he may recover the periodical sums then accrued due, he can make no charge for the services rendered during the broken interval up to the time of his leaving, which the employer has received without any intention of so paying for them and without the option of refusing them (*o*). So also if he commits any breach of duty or misconduct in the service which justifies his dismissal (*p*). But if he is wrongfully dismissed he may recover for such services in the manner already stated (*q*). A solicitor retained in a common law action impliedly contracts to carry his client's case through to its termination, and he has no claim for the costs of his past services if he discharges himself pending the proceedings, except where the client refuses to provide funds for disbursements, or requires the solicitor to commit an act of professional misconduct (*r*). But in Chancery actions a solicitor may send his bill in from time to time and demand payment during the progress of the suit (*s*).—In building contracts by which payment is to be made upon the completion of the work, if the builder fails to complete, or in other respects fails to satisfy the

(*l*) Sale of Goods Act, 1893, s. 30 (1); *Osculade v. Wetherell* (1829), 7 L. J. O. S. K. B. 261; 9 B. & C. 386; *Colvial Insee. of N. Z. v. Abblade Marine Insee.* 1886, 50 L. J. P. C. 12; 12 Ap. Ca. 128.

(*m*) Sale of Goods Act, 1893, s. 30 (2), (3); *Hart v. Mills* (1846), 15 L. J. Ex. 200; 15 M. & W. 85; *Loy v. Green* (1859), 28 L. J. Q. B. 319; 1 Ell. & E. 969.

(*n*) *Azémar v. Casella* (1867), 36 L. J. C. P. 263; L. R. 2 C. P. 677; *Wayne's Coal Co. v. Morewood* (1877), 46 L. J.

Q. B. 746.

(*o*) *Taylor v. Laird* (1856), 25 L. J. Ex. 329; 1 H. & N. 266.

(*p*) *Turner v. Robinson* (1833), 5 B. & Ad. 789; *Ridgway v. Hangerford Market Co.* (1835), 4 L. J. K. B. 157; 2 A. & E. 171; *Boston Fishing Co. v. Ansell* (1888), 39 Ch. D. 339.

(*q*) *Ante*, p. 37.

(*r*) *Underwood v. Lewis* (1894), 64 L. J. Q. B. 60; (1894) 2 Q. B. 306.

(*s*) *Re Hall & Barker* (1878), 9 Ch. D. 538; *Re Hudson* (1904), W. N. 52. See *Hobson v. Shearwood* (1845), 8 Beav. 486.

conditions of the contract, he cannot claim the contract price; and he can only charge for the value of the work actually done if there is some positive ratification by the owner of the incomplete or existing state of the building amounting to a dispensation with the further performance (*t*). So, where the contract is to supply a complete chattel for a lump sum, no claim can be made for any work done short of completion; but where payment is not made to depend on the completion of the chattel, the workman may require a payment based on *quantum valebat*, and if this is not complied with refuse to proceed with the work (*u*).

Cu. L.
Sect. 1.

Imperfect
chattel.

Where, after part execution of the consideration, the completion is prevented by some accident or event without default of either party, there is presumptively no claim for the part executed consideration; as where a person contracted to erect machinery on certain premises for a sum to be paid on completion of the whole, and in the course of the work the machinery and premises were destroyed by an accidental fire, it was held that no claim could be made for the work done before the fire (*x*). So, where the work is entire, and a party to the contract dies pending the completion of the work undertaken, there is no right of action on the original contract, but only on *quantum valebat* (*y*). But the contract may in terms provide for remuneration in the case of part execution, as where the master of a ship agreed "to attempt to tow" a disabled ship into port, and, after commencing the service, was compelled to cast her off in a more dangerous position than before, he was held entitled by the contract to remuneration for the attempted service (*z*).—The same principle applies to a charter-party or contract for the carriage of goods to a certain port; if the ship be wrecked in the course of the voyage and the master refuse to forward the goods, so that the shipper is compelled to take his goods at an intermediate place, he cannot be charged with a proportionate freight to that place (*a*): or, if the master abandon the

Completion
prevented
by accident.

Freight
pro rata
oneris.

(*t*) *Sumpter v. Hedges* (1898), 67 L. J. Q. B. 515; (1898) 1 Q. B. 673. See ante, p. 34.

(*u*) *Sinclair v. Byles* (1829), 7 L. J. O. S. K. B. 178; 9 B. & C. 92; *Roberts v. Harbeck* (1832), 3 B. & Ad. 401; Sale of Goods Act, 1902, s. 18, rule 2, s. 28.

(*x*) *Appleby v. Myers* (1867), 36 L. J. C. P. 331; L. R. 2 C. P. 651.

(*y*) *Werner v. Humphreys* (1841), 2 Man. & G. 853; *Crosthwaite v. Gardner* (1842), 21 L. J. Q. B. 256; 18 Q. B. 640.

(*z*) *The Benbow* (1878), 58 L. J. Adm. 21; 14 P. D. 3.

(*a*) *Cuth v. Brannings* (1797), 7 T. R. 381; *Hunter v. Prosser* 1898, 10 East. 378.

PART I.

Seaman's
wages for
incomplete
voyage.

Contract
rescinded
before
completion.

ship, and it be brought in by salvors (*b*). And, where the master was compelled to sell part of the cargo at an intermediate port for necessary repairs to the ship; it was held that he could not charge freight, though the goods sold for more there than if carried to the port of destination (*c*). So, where cargo has been sold because it became dangerous, or is so damaged as not to be worth forwarding (*d*). if the owner of the goods accept delivery at an intermediate place, he is not liable to pay the freight *pro rata itineris*, unless he dispenses with the further carriage of the goods (*e*). It was upon the same principle that seamen who did not complete the voyage, either owing to death or loss of the ship, forfeited their right to wages (*f*). The law has since been altered by statute (*g*).

Where, after part execution of the consideration, the contract is rescinded by mutual agreement, the claim for the part executed consideration must be referred to the agreement for rescission; and in the absence of any express stipulation, or implied understanding upon the matter, no claim can be made. Thus, where a contract of service at a salary payable quarterly was terminated by a tender of resignation on the one part accepted by the other, without mention of payment for the time elapsed since the last quarter, it was held that no claim could afterwards be made for the services rendered during that time (*h*). Where a father placed his son with a master as an apprentice upon trial for a month, which by agreement was extended to several months, when the father removed him and declined the apprenticeship, it was held that the master could make no charge for the past maintenance of the son during the continuance of the trial (*i*). But in a case of money lent under a special contract, which was afterwards rescinded by mutual agreement, it was held that the money still remained due; the rescission relating only to the further execution of the contract (*k*).—Upon this principle where one of the part-

(*b*) *The Kathleen* (1874), 43 L. J. Adm. 39; L. R. 4 A. & E. 269; *The Cito* (1871), 7 P. D. 5.

(*c*) *Hopper v. Burgess* (1876), 15 L. J. C. P. 377; 1 C. P. D. 137.

(*d*) *Flaxbaum v. Chapman* (1841), 13 L. J. Ex. 384; 13 M. & W. 230; *Acotus v. Burns* (1878), 47 L. J. Ex. 366; 3 Ex. D. 282; *Hill v. Wilson* (1879), 48 L. J. C. P. 761; 4 C. P. D. 329.

(*e*) *Cheesty v. Bar* (1808), 1 Taunt. 300; *Metcalf v. Britannia Ironworks*

(1877), 46 L. J. Q. B. 413; 2 Q. B. D. 423. See *The Tutoria* (1871), 11 L. J. Adm. 37; L. R. 4 P. C. 171.

(*f*) *Cutter v. Powell* (1775), 6 T. R. 320; 2 Smith, L. C. 1.

(*g*) Merchant Shipping Act, 1894, ss. 157, 158, 162, 169.

(*h*) *Lamburn v. Cynab* (1841), 10 L. J. C. P. 121; 2 Man. & G. 253.

(*i*) *Harrison v. Jann* (1862), 31 L. J. Ex. 248; 7 H. & N. 801.

(*k*) *Jamies v. Cotton* (1831), 9 L. J. O. S. C. P. 55; 7 Bing. 266.

ners has paid a premium upon becoming a member no claim can be made for a return of any part of the premium unless there is an agreement between the parties to that effect; but under the like circumstances the Court, in dissolving a partnership, administers relief upon equitable principles by directing a return of premium proportionate to the part failure of consideration (*l*); and where a partner may dissolve the partnership by notice at any time, he will not be allowed to do so without returning a proportionate part of the premium paid by the other party (*m*).

CH. I.
SECT. I.

The debt or promise implied upon an executed consideration, whether whole or in part executed, is measured in amount by its money value. This value is presumptively that put upon it by the parties, as in the case of a fixed charge for services or a fixed price for goods; but if there is no agreed value, it is assessed in an action by the Court or a jury at so much as the consideration was worth at the usual rate of remuneration. This value is commonly called a *quantum meruit* for work and services, and a *quantum valebat* for goods and materials, and was formerly so charged in pleading where no fixed price could be proved (*n*). Any proved imperfection or deficiency in the work or goods may be taken into consideration in estimating the value (*o*).

Implied
promise to
pay value
of executed
consideration.

l) Partnership Act, 1890, s. 40; *Lee v. Page* (1860), 30 L. J. C. 857; *Atwood v. Maudslayi* (1868), L. R. 3 Ch. 369; *Bellfield v. Bannister* (1891), 63 L. J. C. 104; (1891) 1 Ch. 521.

m) Partnership Act, 1890, s. 40; *Fatherstonhaugh v. Turner* (1859), 28 L. J. C. 812; 25 Beav. 382; *Rooke v. Nisbet* (1881), 50 L. J. C. 588.

n) 1 Chitty on Pleading, 6th ed. 311; *Webber v. Tivill*, 2 Wms. Saund. 6th ed. 121 c. n. (2). Sale of Goods Act, 1893, s. 8.

o) *Osborn v. Rogers* (1676), 1 Wms. Saund. 365, n. 4; *Potter v. Opie* (1671), 2 Wms. Saund. 712, n. (1); *Farnsworth v. Gervard* (1807), 1 Camp. 38.

CHAPTER I.

SIMPLE CONTRACTS.

SECT. II.—CONTRACTS IMPLIED IN LAW.

§ 1. DEBTS FOR MONEY PAID.

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Contracts
implied in
law.

Implied
promises.

Simple contracts arising independently of agreement, or contracts implied in law, include transactions affecting the two parties, other than an agreement between them, upon which the law operates by imposing a contract, that is, a liability on the one side and a correlative right on the other (*a*). The transactions which give rise to contracts of this kind, may be described generally as importing that some undue pecuniary inequality exists in the one party relatively to the other, which the law recognises as requiring compensation upon equitable principles (*b*); and the law not only imposes a debt, but further implies a promise to pay the debt; and the remedy for the implied promise thus created was assimilated in legal form to contracts founded on agreement which contained a promise in fact, namely, an action on the case on *assumpsit* (*c*). The promise here implied is, however, a fiction of law, and therefore requires to be distinguished from the im-

(*a*) See *ante*, p. 9.

(*b*) Maule J., *Lewis v. Campbell* (1842),

19 L. J. C. P. 130; 8 C. B. 545.

(*c*) *Slade's case* (1602), 4 Co. 92 b.

plied promises already mentioned, in which the promise is an implication or inference of fact, and which are termed implied promises merely to distinguish them from express promises or promises expressed in words (*d*). The distinction of promises in fact and promises in law, and of contracts arising from agreement and contracts implied in law independently of agreement, seems sufficiently clear in principle; but cases occur which are difficult to refer exclusively to either class, and which may, perhaps, be referred either to the one or to the other according to the different aspects in which the facts are regarded.

Contracts implied in law may be classed under the following heads (retaining the summary statements of the consideration which were in use under the common law system of pleading and by which they have hitherto been designated) (*e*): namely, debts for *money paid* by one party for the use of another: debts for *money received* by one party for the use of another: debts for money found to be due upon *accounts stated* between the parties. To which may be added by analogy debts due upon foreign judgments and other debts due under foreign law: such liabilities being recognised in the Courts of this country as simple contract debts.

A debt for money paid arises where a person has paid (*f*) money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect (*g*). Where there is an express request to pay the money, importation of a promise to repay the amount, or where such request can be inferred as a fact from the circumstances, the transaction then involves an actual agreement and produces a contract in the form of a consideration executed upon request. Where there is no request in fact, nor any actual agreement respecting the payment, but the circumstances alone raise the debt, the law implies a fictitious request to pay it; by means of which the plaintiff was enabled in pleading under the old system, to state his claim in the compendious form already referred to of "*money paid*" the

Debt for
money paid
for the use
of another.

(*d*) See *ante*, p. 8.

(*e*) See *Lagos v. Greenwich* (1909), 79

L. J. K. B. 85; (1910) 1 K. B. 41.

(*f*) *Morrell v. Jameson* 1818, 2 B. &

Ald. 51; *Adams v. Hanson* 1830, 8

L. J. O. S. C. P. 165; 6 Bing. 506.

(*g*) *Maule, J., Lewis v. Campbell* (1812),

19 L. J. C. P. 130; 8 C. B. 545.

PART I. plaintiff for the defendant at his request," instead of stating in detail the circumstances of the payment (*h*).

Payment under express contract.

Where there is an express contract between the parties, a debt cannot be charged against a person as an implied debt for money paid: for the liability is then chargeable only according to the contract, which excludes any implied debt independent of the contract. But an express contract may operate in its terms as a request in fact to pay the money, and a claim may then be supported, in point of form, as a debt for money paid according to the request (*i*).

Voluntary payment of the debt of another.

A voluntary payment of the debt of another, without request, and under no legal liability or compulsion, gives no claim for the money paid against the person whose debt is discharged (*k*). Accordingly, where a person has voluntarily paid the premiums necessary to keep up a policy of insurance, without having any request, contract, duty, or interest to do so, he can neither recover the amount paid against the owner who takes the benefit of it, nor claim any lien upon the policy for the money paid (*l*). The payment of a bill of exchange for honour *supra protest*, in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honour (*m*).

Payments in discharge of moral obligation.

A debt cannot be charged against a person for money paid on account of a mere moral obligation or duty on his part, which does not discharge him from a legal duty, unless paid at his express request (*n*).

Compulsory payment of debt of another.

Where a person has been compelled by legal process to pay, or being so compellable, has paid, money which another person was ultimately liable, at law or in equity, to pay, so that the latter has obtained the benefit of the payment by the discharge of his

J. Osborne v. Rogers (1670, 1 Wms. Saund. 357, n. 1); *per cur.* *Brittain v. Lloyd* (1845, 15 L. J. Ex. 43; 11 M. & W. 773).

(i) *Lubbock v. Tribe* (1838, 7 L. J. Ex. 158; 3 M. & W. 607; *Louis v. Campbell* (1819, 19 L. J. C. P. 130; 8 C. B. 541; *Phillips v. Muller* (1875, 44 L. J. C. P. 265; L. R. 10 C. P. 420).

(k) *Givens v. Hopley* (1818, 2 B. & Ald. 131; *Johnson v. Royal Mail Co.* (1867, 37 L. J. C. P. 18; L. R. 3 C. P. 43; *Shrooburny Earl v. Wivral Rys.* (1895, 64 L. J. C. 859; (1895) 2 Ch. 812; *Clinton's Claim* (1908, 77 L. J. C.

796; (1908) 2 Ch. 515. See *Exp. Off. Receiver, Re Hall* (1907), 76 L. J. K. B. 516; (1907) 1 K. B. 875.

(l) *Re Leslie* (1883, 52 L. J. C. 764; 23 Ch. D. 552; *Folenc v. Scottish Imperial Insur.* (1886), 56 L. J. C. 707; 34 Ch. D. 231; *Re Winchelsea's (Earl) Police Trusts* (1888, 39 Ch. D. 168; *Re Pearce's Trusts* (1908, 77 L. J. C. 784; (1908) 2 Ch. 492).

(m) Bills of Exchange Act, 1882, s. 68, sub-s. 2.

(n) *Winnall v. Adney* (1802, 3 Bos. & P. 47 and note.

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SECT. II

liability, the person having so paid may charge the person so discharged with a debt for the money paid for his use (*o*): as where an executor has been compelled to pay legacy duty, the charge of which falls upon the legatee (*p*); where a broker employed to buy shares has been compelled by the rules of the Stock Exchange or share market to pay the price, or difference upon a resale, or other charges that fall upon the buyer (*q*); where a lessor has been compelled to pay the costs of preparing a lease, which by the usual custom is prepared by the lessor's solicitor and paid for by the lessee (*r*); where one of two partners paid a several debt of his own with a promissory note drawn in the partnership name, which his partner being sued was compelled to pay (*s*); where a lessee, after assignment of a lease, is compelled to discharge liabilities under the lease, which are primarily incumbent upon the assignee in possession, he may charge the assignee with the amount as a debt for money paid for his use (*t*); but he cannot so claim against an underlessee, who is under no liability except to his own lessor under the sub-lease (*u*). As the husband of a deceased woman is bound by law to undertake the duty of burying his wife, he must refund to a person who, under circumstances of necessity, undertakes the charges of her funeral the money he may have paid (*x*). But the implied liability of the personal representative for the funeral expenses of a deceased person is limited to assets (*y*). By an extension of the same principle, where a purchaser of goods has been compelled to pay the value of goods to the owner upon his waiving a tort, he may recover from the person wrongfully obtaining the possession of the goods the amount of the compensation so paid (*z*).

Waiver of
tort.

Courts of equity did not entertain actions for a bare money claim, but where it could be shown that money of the lender had

Payment of
debt with
money of
another.

- (*o*) *Parment v. Ferrand* (1827), 5 L. J. O. S. K. B. 176; 6 B. & C. 439; *Hutton v. Lyre* (1815), 6 Taunt. 289; *Andrew v. St. Clare's Bd. of Wks.* (1898), 67 L. J. Q. B. 592; 1898 1 Q. B. 775.
(*p*) *Bab v. Payne* (1819), 18 L. J. Q. B. 273; 13 Q. B. 900.
(*q*) *Taylor v. Stray* (1857), 26 L. J. C. P. 287; 2 C. B. N. S. 175; *Smith v. Lindo* 1858, 27 L. J. C. P. 335; 5 C. B. N. S. 587; *Percy v. Barnett* (1885), 54 L. J. Q. B. 466; 15 Q. B. D. 388; *Harker v. Edwards* (1887), 57 L. J. Q. B. 147; *Davis v. Howard* (1889), 59 L. J. Q. B. 133; 24 Q. B. D. 691.
(*r*) *Grissell v. Robinson* (1836), 5 L. J.

- C. P. 313; 3 Bing. N. C. 10.
(*s*) *Cross v. Cheshire* (1851), 21 L. J. Ex. 3; 7 Ex. 43.
(*t*) *Monte v. Garrett* (1861), 11 L. J. Ex. 62; L. R. 7 Ex. 101.
(*u*) *Pontyfer v. Ford* (1884), 53 L. J. Q. B. 321; 12 Q. B. D. 152.
(*x*) *Beadshaw v. Beaud* (1861), 31 L. J. C. P. 273; 12 C. B. N. S. 344.
(*y*) *Rogers v. Price* (1829), 3 Y. & J. 28; *Brice v. Wilson* (1834), 3 L. J. K. B. 93; 3 Nev. & M. 512.
(*z*) *Loucheaux v. Kenny* (1779), 1 Dougl. 137; *Brown v. Hodgson* (1811), 4 Taunt. 189.

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been applied by the borrower in payment of an actual debt of another person, and a discharge by means of an adjustment of accounts is not sufficient to raise this equity, the lender was, to this extent, entitled to be considered as standing in the shoes of the original creditor who had been paid off; and this doctrine is now applicable in all courts (*a*). Accordingly, if a company raises money without any borrowing powers, or in excess of its borrowing powers, and applies it in discharge of debts and liabilities, the lender may, though he cannot charge the company with the loan, recover back so much of the money as has been applied in discharge of its legal liabilities, whether accruing before or after the advance (*b*). This principle is the basis of the securities called Lloyd's Bonds, which are bonds or debentures issued by railway companies to contractors and other creditors in acknowledgment of debts actually due, upon which they can raise money in payment; thereby placing the assignees or holders of the bonds in the position of creditors of the company to the amount of debts discharged with their money (*c*). This right of subrogation is only an implied right, and may consequently be excluded by the contract actually made (*d*).

Payment by
surety of the
debt of
principal.

A surety who has been compelled to pay the debt of the principal debtor may charge him with an implied debt or promise to pay the amount (*e*). Where the amount for which the surety is liable is ascertained he may take proceedings against the principal debtor to compel payment to the creditor (*f*). Owing to a technicality of the common law, if a surety took a bond of indemnity, he was limited to that security (*g*); but if he took any other security, it became a question of fact whether it was given in pursuance of an arrangement that the co-surety should be thereby discharged, or merely given by way of collateral security (*h*).—A drawer or

Drawer or
indorser of
bill.

(*a*) *Bannatyne v. McIver* (1905), 75 L. J. K. B. 120; (1906) 1 K. B. 103. See *Cracknell v. Janson* (1879), 11 Ch. D. 1; *Butler v. Roe* (1910), 79 L. J. C. 652; (1910) 2 Ch. 278.

(*b*) *Blackburn Building Soc. v. Capliff* (1882), 52 L. J. C. 92; 22 Ch. D. 61; *North Building Soc. v. Luce* (1889), 59 L. J. C. 3; 13 Ch. D. 158; *Wenlock v. Doe Co* (1887), 56 L. J. Q. B. 589; 19 Q. B. D. 155; *S. C.* (1888), 57 L. J. C. 216; 38 Ch. D. 531.

(*c*) *Re Cock and Finghat Rn.* (1869), 39

L. J. C. 277; L. R. 4 Ch. 748.

(*d*) *Re Bampton, Ltd.* (1910), 79 L. J. C. 247; 1910 1 Ch. 519.

(*e*) *Huntley v. Sanderson* (1833), 2 L. J. Ex. 201; 1 Cr. & M. 467. See *Toussaint v. Martineau* (1787), 2 T. R. at p. 105.

(*f*) *Ascherson v. Tredgare Dry Dock Co.* (1909), 78 L. J. C. 697; (1909) 2 Ch. 401.

(*g*) See 1 Wms. Saund. 362, n. *d*.

(*h*) *Dow v. Wallis* 1818, 17 L. J. Ex. 225; 2 Ex. 198.

indorser of a bill of exchange is in the position of surety, and if compelled to pay, may claim the amount from the acceptor whether he has paid the whole or a part (*i*). So where a guarantee is given for a bill without indorsement, as in the case of bill brokers giving to bankers a general guarantee of all bills discounted, if the guarantor is compelled to pay the bill he may recover the sum paid from the party primarily liable (*k*).—A party who has given a bill of exchange or promissory note for accommodation, that is, without consideration (*l*), or for a consideration or purpose which is satisfied or has failed, leaving the parties in the same position as upon an accommodation bill (*m*), if compelled to pay, may recover the amount as money paid for the party accommodated, but not where the payment is voluntary (*n*).

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Accommodation bill.

Where several persons are co-debtors for the same debt or liability, which as between themselves is payable in several shares, and one is compelled to pay the whole, or a part greater than his share, he is entitled to recover from each of the others a contribution, or proportion of the excess beyond his own share as a debt for money paid (*o*): as where one of several owners of land subject to a rent-charge is made to pay the whole, he has a right of contribution from the others (*p*). Contribution between co-owners of land subject to tithe rent-charge is given by statute (*q*). But if the payment be voluntary, there is no right of contribution, although there is community of interest, as in the case of partners, or tenants in common (*r*). Where several persons were under-lessees at distinct rents of separate parts of premises, the whole of which were held under one lease at an entire rent, and one was compelled under threat of distress to pay the whole rent to the superior landlord, it was held there was no right of contribution

Contribution between co-debtors.

(i) Bills of Exchange Act, 1882, s. 59 (2); *Turnbull v. Ferrand* 1827, 5 L. J. O. S. K. B. 176; 6 B. & C. 439; *Jones v. Broadhurst* 1850, 9 C. B. 173; *Woodward v. Pell* (1868), 38 L. J. Q. B. 30; L. R. 1 Q. B. 55.

(k) *Ex p. Bishop* 1880, 50 L. J. C. 18; 15 Ch. D. 400.

(l) Bills of Exchange Act, 1882, s. 28; *Driver v. Burton* 1852, 21 L. J. Q. B. 157; 17 Q. B. 980.

(m) *Hopner v. Trefry* (1817), 16 L. J. Ex. 233; 1 Ex. 17.

(n) *Reynolds v. Doyle* 1810, 1 Man. & G. 753; *Sleugh v. Shigh* 1850, 19 L. J. Ex. 345; 5 Ex. 511.

(o) *Edger v. Knapp* (1813), 5 Man. & G. 753; *Ramskill v. Edwards* 1885, 55 L. J. C. 81; 31 Ch. D. 100.

(p) *Christie v. Barker* 1881, 53 L. J. Q. B. 557.

(q) 5 & 6 Vict. c. 54, s. 16.

(r) *Re Webb* (1818), 8 Taunt. 113; *Lough v. Dickson* 1881, 51 L. J. Q. B. 18; 15 Q. B. D. 60.

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between the underlessees, there being no community of interest; the only remedy being against the lessor who was discharged by the payment (s).

Contribution
between
co-sureties.

Where several persons are co-sureties for the same debt, and one of them is called upon to pay more than his share, he has *primâ facie*, and subject to any special agreement between them, the right to contribution from the others proportionately to the amounts for which each is a surety (t). This right the surety could enforce against his co-sureties in an action for money paid (u). The fact of several persons being sureties for the same debt presumptively creates the relation of co-sureties with the right of contribution, though they are bound by different instruments and in different amounts and at different times, and unknown to one another; and the fact of suretyship may be proved by evidence extrinsic to the written instrument (x). Where several persons become parties to a bill of exchange for the purpose of securing a debt, their relation *inter se* as principal and sureties may be shown in order to displace or qualify their relative rights and liabilities apparent upon the face of the bill in order to claim contribution: as where one person draws and another indorses a bill of exchange for the accommodation of the acceptor (y); or where several persons indorse a bill successively as co-sureties of the same debt (z).—But the implied liabilities of co-sureties may be qualified by express contract (a). Where several persons being respectively sureties for different debts of the same debtor entered into a written agreement to supply funds for discharging all the debts in equal shares, it was held that the agreement applied only to the discharge of the debts; leaving them liable for contribution *inter se* in proportion to the original debts (b).

Death of
co-debtor or
co-surety.

Upon the death of one of several co-debtors or co-sureties, though the joint liability to the creditor may rest upon the survivors only, the liability to contribution is not increased beyond

(s) *Hunter v. Hunt* (1815), 14 L. J. C. P. 113; 1 C. B. 300; *Johnson v. Wild* 1890, 59 L. J. C. 322; 44 Ch. D. 146.

(t) *Dering v. Windchelsea Earl* (1787), 1 Cox. 318; 2 Wh. & T. L. C. 535.

(u) *Kemp v. Foden* (1844), 13 L. J. Ex. 137; 12 M. & W. 421.

(x) *Dering v. Windchelsea Earl* (1787), 1 Cox. 318; 2 Wh. & T. L. C. 113;

Whitney v. Barke 1871, L. R. 6 Ch. 342.

(y) *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350; 10 C. B. N. S. 561.

(z) *Macdonald v. Whitfield* (1883), 52 L. J. P. C. 70; 8 Ap. Ca. 733.

(a) *Pendlebury v. Walker* (1841), 4 Y. & C. Ex. 424; *Re Denton* (1904), 73 L. J. C. 465; (1904) 2 Ch. 178.

(b) *Accedickne v. Howard* (1875), 15 L. J. C. 622.

the original share; and an action for contribution may be brought against the executor of the deceased (*e*). But in the case of a continuing guarantee a surviving surety is liable for advances made after notice given of the death of a co-surety (*d*).—At law, no allowance was made for the inability of some to pay their shares, but by the rule of equity, which now prevails in all cases, if one of co-sureties becomes insolvent, the contribution of the others is increased proportionately, unless other provision is made by the instrument creating the suretyship, in which event, the contract prevails (*e*).

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Insolvency
of co-surety.

A surety has no monetary claim against a co-surety until he has paid more than his proportionate share of the principal debt, or more than his proportion of what the sureties can ever be called upon to pay; payment of his share, or of less than his share, gives him no claim unless it operates in discharge of the whole debt, or unless the whole debt is otherwise discharged, leaving no further liability on the sureties (*f*). Nor has a surety any claim to have a judicial declaration of indemnity before any liability has arisen which can give rise to an action (*g*). But where the liability of a surety is ascertained by judgment, or (in the case of a deceased surety) the allowance of the claim in an administration action, then before any payment there may be a judgment declaring the right to contribution, and ordering indemnity (*h*). In an action against a surety, a co-surety may be brought in by notice to defend and may avail himself of all defences of the surety, including those which the latter may have debarred himself from raising (*i*). The claim of a surety for contribution entitles him to a complete indemnity and carries interest, whether the right be express or implied (*k*).

Accrual of
claim.

There is no right of contribution at law between persons who are all liable for the same wrongful act, where the person seeking contribution must be presumed to have known that he was doing

Contribution
between joint
wrongdoers.

(*c*) *Butard v. Harris* (1853), 22 L. J. Q. B. 113; 2 E. & B. 287; *Ramskill v. Edwards* (1885), 55 L. J. C. 81; 31 Ch. D. 100.

(*d*) *Beckett v. Addyman* (1882), 51 L. J. Q. B. 597; 9 Q. B. D. 783.

(*e*) *Hitchman v. Stewart* (1855), 21 L. J. C. 690; 3 Drew. 274; *McKeown's case* (1877), 46 L. J. C. 819; 6 Ch. D. 447; *Lowe v. Dixon* (1885), 16 Q. B. D. 455.

(*f*) *Re Snowden* 1881, 50 L. J. C. 540; 17 Ch. D. 11.

(*g*) *Hughes-Hallett v. Indian Mahant, Gold Mines* (1883), 52 L. J. C. 418; 22 Ch. D. 561.

(*h*) *Walmersham v. Gullick* (1893), 62 L. J. C. 773; 1893, 2 Ch. 511.

(*i*) *Colburn v. Wallingford* 1881, 50 L. J. Q. B. 509.

(*k*) *Ex p. Bishop* 1880, 50 L. J. C. 48; 15 Ch. D. 400.

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an unlawful act; they are severally liable though they may be sued jointly; and if one is compelled to pay the whole amount of damages, he cannot, under the circumstances mentioned, recover contribution or indemnity from the others (*l*). And one defendant cannot sue another for a contribution to the costs of an action to which both are liable (*m*). In cases of breach of trust there may be contribution, according to the circumstances, between those co-trustees who have concurred in it (*n*). And by the Directors' Liability Act, 1890, s. 5, a director who has become liable to make any payment for untrue statements in a prospectus under that Act is entitled to contribution "as in cases of contract" from any other person who would have been liable to make the same payment.

Contribution between co-insurers.

Where several insurers insure the same risk to the same person, they are presumptively entitled to contribution *pro rata* to satisfy the loss against which they have all insured; so that if one insurer pays the whole loss, he stands in the place of the assured to claim contribution from the other insurers (*o*). It is immaterial to the right of contribution that the insurances are not all in the same name if they are all in the same interest; but no contribution arises between insurers who insure the same risk to several persons independently and without any relation between them upon which to found such claim (*p*). Nor is there any right of contribution between insurers of different subjects against the same risk, where payment upon one does not diminish the loss on the other; as in the case of insurances upon a ship and the freight (*q*).

Subrogation of insurer to assured.

Insurance is a contract of indemnity only; consequently an insurer of property, upon payment of the amount due under his contract, is subrogated to the assured, that is, is considered in equity as standing in his place, and may pursue his remedies against a person primarily liable for the loss (*r*). As in the case

l *Myers v. Newell* (1790), 8 T. R. 186; *1 Smith, L. C.* 383; *Burton v. Rhodes* (1896), 68 L. J. Q. B. 545; (1899) 2 Q. B. 846.

m *Dewsbury v. Moberg* (1881), 50 L. J. C. 777; 18 Ch. D. 236. See *Stanton v. Burton* (1889), 58 L. J. Q. B. 183; 22 Q. B. D. 529.

n *Rahon v. Hughes* (1886), 55 L. J. C. 472; 31 Ch. D. 320; *Challenger v. Chambers* (1896), 65 L. J. C. 343; (1896) 1 Ch. 685; *Robinson v. Harkin* (1896), 65 L. J. C. 773; (1896) 2 Ch. 415.

Marine Insurance Act, 1906, s. 67 2, s. 89; *Norby v. Rod* (1763), 1 W. Bl. 416; *Davis v. Gilbert*, Park, Insur., 421.

p *North British & Mercantile Insur. v. London, Liverpool & Globe Insur.* (1877), 16 L. J. C. 537; 54 Ch. D. 569.

q *See Insur. v. Hadden* (1881), 53 L. J. Q. B. 252; 13 Q. B. D. 706.

r Marine Insurance Act, 1906, s. 79; *Phœnix Assur. v. Spanner* (1907), 74 L. J. K. B. 792; (1905) 2 K. B. 775.

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of an insurance against fire of premises where the loss is caused by the wilful or negligent act of a third party (*s*); or of an insurance upon goods lost at sea where the shipowner is liable (*t*); or of an insurance of cargo which is lost by jettison for which there is a claim for general average (*u*); in all these cases the insurer having paid the assured the total amount of the loss may recover from the party liable as money paid for his use, the amount so paid. The insurer has no better remedy than the assured, and if the latter can make no claim neither can the former: as where the ship insured was lost by a collision at sea with another ship of the same owner, it was held that the underwriter, who had paid for a total loss, had no claim, because the insured could have no action against himself (*x*). So where property insured against fire was wilfully burnt by the life of the assured, it was held that the insurer had no remedy against the wife (*y*).

General average in maritime law is the contribution from the several owners of a ship and cargo to the loss of a portion which is sacrificed in time of danger for the safety of the whole, as in the case of cargo jettisoned. The person upon whom the sacrifice falls is entitled to call upon the others whose property is saved for a general average contribution, adjusted according to value, which he may recover in an action at common law for money paid (*z*). But a person who is guilty of, or responsible for, a wrongful act leading to the loss, will lose his right to contribution unless expressly reserved by contract (*a*). And it is said, that the principle of general average, in maritime law, applies to all other cases of voluntary sacrifice properly made for the common benefit (*b*). An extraordinary expenditure incurred in saving the whole is as much a sacrifice as if goods or money's worth were thrown away (*c*). Goods, such as specie, which on account of their in-

General
Average.

(*s*) *Mason v. Sainsbury* (1782, 3 Dougl. 61; *Commercial Union Assn. v. Lister* (1874), 43 L. J. C. 601; L. R. 9 Ch. 183.

(*t*) *Dufourcel v. Bishop* (1887, 56 L. J. Q. B. 497; 18 Q. B. 373.

(*u*) *Trickinson v. Jachow* 1868, 37 L. J. C. P. 321; L. R. 3 C. P. 639.

(*x*) *Simpson v. Thomson* (1877), 3 Ap. Ca. 279.

(*y*) *Midland Insur. v. South* 1881, 50 L. J. Q. B. 329; 6 Q. B. D. 561.

(*z*) *Birkley v. Presgrave* (1801), 1 East, 220. See *The Lætrun* 1902, 71 L. J.

P. 108, 1902, P. 256.

(*a*) *Strang, Steel & Co. v. Scott & Co.* 1889, 59 L. J. P. C. 1; 11 Ap. Ca. 601; *The Curran Post* 1890, 59 L. J. P. 71; 15 P. D. 203.

(*b*) 1 J. Blackburn, *Anderson v. Ocean S. S. Co.* 1884, 51 L. J. Q. B. 192; 10 Ap. Ca. 111.

(*c*) Blackburn, J., *Kemp v. Holliday* 1865, 31 L. J. Q. B. 242; 6 B. & S. 719; *Worshields, Curley & Co. v. Stevens & Sons* (1908), 77 L. J. K. B. 985; 1908 A. C. 431.

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trinsic value have been removed from a ship on approach of danger for their own safety and not for the common safety of all, do not contribute to the general average (*d*). The shipowner has a lien for the general average upon the whole cargo; and it is his duty to enforce it by having an adjustment made of the contribution and collecting the amount, or taking reasonable security for it before delivering the goods to the consignees (*e*).

Payment
under
restraint of
goods.

Where a person has been compelled to pay the debt of another by a legal restraint of his goods for the debt, he may recover the amount as a debt for money paid (*f*): the shipowner is bound to deliver the cargo on payment of freight only, and where the ship and cargo are hypothecated by the master for necessary repairs of the ship, the cargo owner may recover from the shipowner all sums paid to obtain a release of the cargo (*g*). Where the mortgagee of a ship on taking possession was compelled to discharge a maritime lien for wages of crew due by a former possessor, he was held entitled to recover the amount from the latter as money paid for his use (*h*).

Distress of
goods for
rent or
liabilities of
another.

Upon this principle, where an under-tenant pays the rent due to the superior landlord under a distress or threatened distress upon his goods, he may recover the amount from his immediate landlord as a debt for money paid to his use; or he may treat the payment as made by the authority of the latter and deduct the amount from the rent due or accruing due to him (*i*). And the tenant may in like manner recover from his landlord payments made in respect of charges upon the land against which the landlord is bound to protect the tenant; as a charge of repairing a bridge *ratione tenuræ* (*k*); or a charge under a local drainage Act (*l*). Some taxes charged upon land by statutory provision —

(*d*) *Royal Mail Steam Packet Co. v. English Bl. of Rio* (1887), 57 L. J. Q. B. 31; 19 Q. B. D. 362. See further as to general average, Abbott, Shipping, pp. 751 *et seq.*; Carver, Carriage by Sea, pp. 172 *et seq.*

(*e*) *Cranks & Co. v. Allan* (1879), 49 L. J. Q. B. 201; 5 Q. B. D. 38; *Huth & Co. v. Lamport* (1886), 55 L. J. Q. B. 239; 16 Q. B. D. 735; *Strang, Steel & Co. v. Scott & Co.* (1889), 59 L. J. P. C. 1; 14 App. Cas. 601.

(*f*) *Edmonds v. Wallingford* (1885), 51 L. J. Q. B. 305; 14 Q. B. D. 811;

The Orchis (1889), 59 L. J. Adm. 31; 15 P. D. 38.

(*g*) *Benson v. Duncan* (1819), 18 L. J. Ex. 169; 3 Ex. 644.

(*h*) *Johnson v. Royal Mail Steam Packet Co.* (1867), 37 L. J. C. P. 33; L. R. 3 C. P. 38. See *The Orchis* (1889), 59 L. J. Adm. 31; 15 P. D. 38.

(*i*) *Jones v. Morris* (1849), 18 L. J. Ex. 477; 3 Ex. 742. See Law of Distress Amendment Act, 1908.

(*k*) *Baker v. Givenshill* (1812), 11 L. J. Q. B. 161; 3 Q. B. 148.

(*l*) *Davieson v. Linton* (1822), 5 B. & Ald. 521.

as the income tax when paid by the tenant, must be deducted from the next payment of rent; if not so deducted, the sum paid is, so far as respects the amount of tax, a voluntary payment, and cannot be recovered from the landlord by action, except by special agreement (*m*). Where the owner of goods leaves them upon the premises of another at his request and for his benefit, as in the case of a carriage left with a carriage-builder in the way of his trade, and they are there distrained for rent, which the owner is obliged to pay to recover his goods, he can claim the amount as money paid for the use of the tenant (*n*).

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Distrain of
goods on
premises of
another.

It has been stated as a doubtful question whether an implied debt for money paid may arise from transactions which are equivalent to the payment of money: as where goods are taken in execution for debt, or are taken in distress for rent and sold to pay the sum due. It would appear, however, that the implication should be made, there being no distinction for this purpose between money paid by the produce of goods sold, and money paid to prevent a sale (*o*). But where the plaintiff has only given security for money, as a bill, bond, or covenant, he cannot generally charge the defendant for money paid to his use until the security has been paid (*p*).

Transactions
equivalent
to money
payment.

m, *Lamb v. Brewster* 1879, 48 L. J. Q. B. 421; 1 Q. B. 607; *Wace v. Warren* 1895, 72 L. T. 628; 13 W. R. 490.

n, *Leell v. Partidge* 1799, 8 T. R. 308. See Law of Distress Amendment Act 1908.

o, *Relph v. Rice* 1816, 16 L. J.

Ex. 157, 15 M. & W. 411. See *Vaughan v. Marshall* 1821, 5 M. & W. 175; *Pattison v. Belford* 1856, 26 L. J. Ex. 115, 1 H. & N. 543.

p, *Taylor v. Hoagins* 1802, 3 East, 169; *Meredith v. Jamison* 1818, 2 B. & Ald. 51; *Pence v. Butcher* 1829, 8 L. J. O. S. K. B. 217; 10 B. & C. 329.

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Debts for money received to the use of another.

Where a defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt a receipt by the defendant for the use of the plaintiff, an action for money had and received may be maintained (a). The action was maintainable in a few cases in respect of money claims usually enforced in a court of equity (b). The debt implied was technically charged in pleading at common law as payable "for money received by the defendant for the use of the plaintiff." The advantages of this technical form of claim were that the pleadings were general in form (c). This general mode of pleading is now subject to the rules of the Judicature Act, which require that "every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies" (d). —A contract of insurance is a contract of indemnity only (e); accordingly the insurer, upon payment of the loss, may maintain an action for money had and received to recover from the assured

Money received by assured for insurer.

(a) *A. L. Smith, L. J., Phillips v. London School Bd.* (1898), 67 L. J. Q. B. 874; (1898) 2 Q. B. 453.

(b) *Fraser v. Penderbury* 1861, 31 L. J. C. P. 1. See post, p. 75.

(c) *Chandler v. Flett* (1671), 2 Wms. Saund. 393, n. (2); *Owen v. Challis* (1848), 17 L. J. C. P. 266; 6 C. B. 115.

(d) See *Lagos v. Graunwaldt* (1909), 79 L. J. K. B. 85; 1910 1 K. B. 41.

(e) *Ante*, p. 50.

any sums the latter may have received in excess of the loss from the party liable (*f*). This right of the insurer is a right of subrogation: it exists where no money passes, and the rights of the parties are ascertained as a result of taking an account between them at a notional completion (*g*). But the insurer has no claim to moneys which are in the nature of a gift to the assured, as moneys appropriated under a treaty to indemnify against war losses so far as they were not insured (*h*). An underwriter on a ship has no claim to money received by the shipowner from an insurance upon the freight, because the subjects of the insurances are distinct, and the payment upon loss of freight does not diminish the loss on the ship (*i*). Contracts arising from agreement may also result in a receiving of money to the use of another; as in the case of an agent in the course of his agency receiving money to be accounted for to his principal (*k*).

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Where a person has been wrongfully or fraudulently deprived of the possession of money, he has a remedy by action for the specific wrong or fraud, or he may in general waive the wrong, and claim the sum received by the wrongdoer as a debt.—Subject to the rule regarding the suspension of the remedy until a felon has been prosecuted (*l*), money feloniously stolen may be claimed as a debt from the thief; the owner being entitled “either to bring trover or trespass for taking the particular coin, or to waive the tort and sue for money had and received” (*m*). The remedy is only suspended where the action is brought by the person directly injured by the felonious act against the criminal himself (*n*); and the objection cannot be taken by pleading, or upon the evidence at the trial, but only by an application to the Court to stay the pro-

Money
obtained by
wrong or
fraud.

Money
feloniously
stolen.

(*f*) *Castellain v. Preston* (1883), 52 L. J. Q. B. 366; 11 Q. B. D. 380; *Dufourcet v. Bishop* (1886), 56 L. J. Q. B. 497; 18 Q. B. D. 373; *West of England Fire Insur. v. Isaacs* (1896), 66 L. J. Q. B. 36; (1897) 1 Q. B. 226.

(*g*) *White v. Dobson* (1814), 14 Sim. 273; *Darrell v. Tibbatts* (1880), 50 L. J. Q. B. 33; 5 Q. B. D. 560.

(*h*) *Burnand v. Rodocanachi* (1882), 51 L. J. Q. B. 548; 7 Ap. Cl. 333.

(*i*) *Sea Insur. v. Hadden* (1884), 53 L. J. Q. B. 252; 13 Q. B. D. 706.

(*k*) See *post*, p. 72.

(*l*) *Wibraham v. Snow* (1670), 2 Wms.

Saund. 100, n. s.; *Coe v. Parton* (1810), 17 Ves. 329; *Ex p. Ball* (1879), 48 L. J. Bk. 57; 10 Ch. D. 667.

(*m*) Parke, B., *Neate v. Harding* (1851), 20 L. J. Ex. 250; 6 Ex. 351; and see *Chaurar v. Bayliss* (1862), 31 Beav. 351; 31 L. J. C. 757; *Flower v. Sadler* (1882), 10 Q. B. D. 572.

(*n*) *White v. Spettigue* (1845), 14 L. J. Ex. 99; 13 M. & W. 603; *Osborn v. Gillett* (1873), 42 L. J. Ex. 53; L. R. 8 Ex. 88; *Ex p. Ball* (1879), 48 L. J. B. 57; 10 Ch. D. 667; *Appleby v. Franklin* (1885), 55 L. J. Q. B. 129; 17 Q. B. D. 93.

PART I.

Money
obtained
by false
pretences.

Under a
fraudulent
contract.

Money
obtained
wrongfully
from a third
party.

Wrongfully
taking fees
of office.

ceedings (*o*).—Where a person has been induced to pay money by false pretences, he may recover it back in an action for money received to his use (*p*). If he paid the money knowing the pretence to be false, the receiver cannot be convicted of the crime of obtaining money under false pretences; and it is said to be doubtful whether the money could be recovered back in a civil action (*q*).—Where a person has paid money under a contract which he was induced to make by fraud, he may in general avoid the contract and recover the money as a debt for money received to his use; but whilst the contract remains upon he cannot so claim the money (*r*).

Upon like principles where a person has wrongfully obtained the money of another from a third party, knowing at the time to whom it belongs, the rightful owner may recover it as a debt for money received to his use (*s*): as where a person has obtained payment of another person's debts, by fraudulently representing to the debtors that he had authority to collect them (*t*); or has knowingly received partnership money in payment of the private debt to him of one of the partners (*u*). Technically, rents received under an adverse title could not be recovered in an action for money had and received, but only as mesne profits, unless the collector purported to act as agent of the true owner (*x*). Where a person has wrongfully taken the fees of an office of which another person is the rightful holder, the latter may recover the amount as money received to his use (*y*). But he cannot in right of his office recover gratuities given to the person actually performing the duties of the office (*z*). And it seems that a mere claimant to the office, not duly invested, cannot recover the fees in this form (*a*).

^o *Wells v. Abrahams* (1872), 41 L. J. Q. B. 306; L. R. 7 Q. B. 554; *Roupe v. D'Arippe* (1883), 10 Q. B. D. 112; *Appleby v. Franklin* (1887), 55 L. J. Q. B. 129; 17 Q. B. D. 93.

^p *Martin v. Morgan* (1819), 1 Br. & R. 289; *Holt v. Ely* (1853), 1 E. & Bl. 795.

^q *Bramwell, B., Reg. v. Mills* (1837), 26 L. J. M. C. 80; *Dears. & B. C. C.* 208.

^r See *post*, p. 260.

^s *Letlwood v. Williams* (1815), 6 Taunt. 277; *Litt v. Martin* (1856), 18 C. B. 314.

^t *Anchev v. Hawley* (1857), 26 L. J. Ex. 323.

^u *Kendal v. Wood* (1871), 39 L. J. Ex. 167; L. R. 6 Ex. 213.

^v *Clarence v. Marshall* (1834), 3 L. J. Ex. 142; 2 Cr. & M. 495; *Hickman v. Upsall* (1877), 46 L. J. C. 215; 4 Ch. D. 144.

^w *Spey v. Emperor* (1810), 10 L. J. Ex. 50; 6 M. & W. 639; *Multon v. Roberts* (1857), 26 L. J. Ex. 380; 2 H. & N. 432.

^x *Boyer v. Indsworth* (1796), 6 T. R. 681.

^y See *Powell v. Melbank* (1772), 1 T. R. 399, n. 6P; (1773, 3 Wils. 355.

A person who has received in payment for a valuable consideration money which has been wrongfully obtained, may retain it against the party defrauded, unless the recipient has notice of the wrong (*b*). If received by a person merely as agent or bailee for safe keeping, he may be charged with it so long as it remains in his hands; or if he has paid it away after having notice of the claim (*c*). Money paid to a banker is received upon a contract of loan, and the banker is liable only to the customer from whom he received the money *bonâ fide* as his own unless the true owner can identify the money in the banker's hands, and it is free from any claim of the banker against his customer (*d*).

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SECT. II.

Following money wrongfully obtained and paid away.

Where a person has wrongfully converted goods into money, the owner may waive the wrong and recover the proceeds in an action for money received to his use (*e*). The true owner has recovered in an action for money had and received, the proceeds of bills of exchange or other securities wrongfully converted into money (*f*); of stock sold under a forged power of attorney (*g*); and of goods seized and sold under a writ of execution in the belief that they were the property of the execution debtor (*h*). — Where the goods of a bankrupt have been assigned after an act of bankruptcy, or by way of fraudulent preference, the trustee in bankruptcy may treat the transaction as void and recover the goods or their value; or, if the goods have been sold, he may claim the proceeds as money received to his use (*i*). So if the goods of a bankrupt have been seized and sold in execution, after notice of an act of bankruptcy (*k*). Upon the same principle, if coal has been wrongfully severed and sold by the owner of an adjoining mine, the owner of the coal may claim the proceeds as money received to his use; but by waiving the wrong he is

Money obtained by wrongful conversion of goods.

Proceeds of realty wrongfully severed.

b) *Calland v. Loyd* 1810, 9 L. J. Ex. 56; 6 M. & W. 26; *East v. Green* (1862), 31 L. J. Ex. 159; 7 H. & N. 881; *Thomson v. Clydesdale Bank* 1893, 62 L. J. P. C. 91; (1893) A. C. 282.

c) *Atter v. Buckhouse* 1838, 7 L. J. Ex. 234; 3 M. & W. 633.

d) *Calland v. Loyd* 1810, 9 L. J. Ex. 46; 6 M. & W. 26; *Gray v. Johnston* (1868), L. R. 3 H. L. 1.

e) *Hunter v. Prinsop* 1808, 16 East, 378.

f) *Buchanan v. Findlay* 1829, 7 L. J. O. S. K. B. 314; 9 B. & C. 738.

g) *Stue v. Marsh* 1827, 7 L. J. O. S.

K. B. 201; 6 B. & C. 551; *Marsh v. Keaton* 1831, 2 Cl. & F. 250.

h) *Oughton v. Seppings* 1830, 8 L. J. O. S. K. B. 394; 1 B. & Ad. 241.

i) Bankruptcy Act, 1883, ss. 47, 48;

Mack v. Feldman (1870), 39 L. J. Q. B. 101; L. R. 5 Q. B. 275; *Heddon v. Nevill* (1870), 39 L. J. C. P. 245; L. R. 5 C. P. 478; *Smith v. Baker* (1873), 42 L. J. C. P. 155; L. R. 8 C. P. 350.

k) Bankruptcy Act, 1883, s. 45; Bankruptcy Act, 1890, s. 11. See *Lucas v. Dicker* (1880), 40 L. J. C. P. 130; 6 Q. B. D. 84; *Butler v. Wearne* (1885), 17 Q. B. D. 182.

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bound to allow a deduction from the price for the actual costs of raising the coal (*l*). Where fixtures have been wrongfully severed and sold, the owner may recover the proceeds as money received for his use (*m*).

Waiver of the wrong.

If the owner of property which has been wrongfully sold accepts payment of the proceeds of the sale, or any part thereof, from the seller, he waives all right to treat the wrongful act as an independent cause of action against the seller according to the maxim: *quod semel placuit in electionibus amplius displicere non potest*, and he cannot afterwards bring an action for damages (*n*); nor, after recovering the proceeds of the sale, can he claim for the value of the goods in excess of that amount (*o*).—A mere demand of the proceeds of sale which is refused does not waive the wrong; and the owner upon the refusal may bring an action for damages or for the specific recovery of the goods (*p*). But the acceptance of the proceeds of a wrongful sale or conversion has not the effect of a precedent consent, so as to preclude the owner from insisting upon the tortious character of the act (*q*).

Following goods wrongfully obtained.

Property in goods may be followed and claimed from a receiver, though he received possession without notice of a defect of title; and if the goods have been converted by him the rightful owner may claim the proceeds as money received to his use (*r*). Upon the same principle, where an agent paid in a postal order belonging to his principal to his own banker, who credited the agent's account with the proceeds, it was held that the principal might recover the proceeds from the banker (*s*); and where a bill of exchange or cheque, payable to order has been stolen, and endorsed with a forged indorsement to a person who presents it and receives payment, the rightful owner may recover the money, as received to his use, from the recipient unless he be a banker collecting a crossed cheque for a customer (*t*). Exception is made

Sale in market overt.

l *Powell v. Ross* (1837), 8 L. J. Q. B. 17; 7 A. & E. 426; *Jegan v. Vernon* (1871), 40 L. J. C. 389; L. R. 6 Ch. 742; *Trotter v. Macken* (1880), 49 L. J. C. 256; 13 Ch. D. 574.

m *Dalton v. Whitem* (1842), 12 L. J. Q. B. 55; 3 Q. B. 961; *Baileu v. Heath* (1898), 67 L. J. C. 529; 1898) 2 Ch. 301.
n *Brewer v. Sparrow* (1827), 6 L. J. O. S. K. B. 1; 7 B. & C. 510; *Lythgoe v. Vernon* (1860), 29 L. J. Ex. 164; 5 H. & N. 180.

o *Smith v. Baker* (1873), 42 L. J. C. P. 155; L. R. 8 C. P. 350.

p *Valpy v. Sanders* (1848), 17 L. J. C. P. 249; 5 C. B. 886.

q *Hunter v. Princep* (1808), 10 East, 378; *Morsh v. Keating* (1834), 2 Cl. & F. 250; *Rice v. Reed* (1899), 69 L. J. Q. B. 33; (1900) 1 Q. B. 51.

r *Glyn v. Baker* (1811), 13 East, 509; *Bacius v. London & S. W. Bk.* (1859), 69 L. J. Q. B. 164; (1900) 1 Q. B. 270.

s *Fine Art Soc. v. Union Bank of London* (1886), 55 L. J. Q. B. 70; 17 Q. B. D. 705.

t *Arnold v. Cheque Bank* (1876), 45

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SECT. II.

of the sale of goods in market overt in the usual course of trade, which at common law gives a good title to a buyer who takes them *bonâ fide* and without notice of any defect (*u*). By the Larceny Act, 1861, s. 100, and Sale of Goods Act, 1893, s. 24, the property in stolen goods sold in market overt is restored to the original owner upon conviction of the thief; but the restored title dates only from the time of the conviction, and does not entitle the owner to charge intermediate purchasers (*x*). Sect. 100 of the Larceny Act, 1861, provides that a restitution order shall not be made "where a valuable security shall have been paid or discharged by some person or body corporate, liable to the payment thereof, or being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of." This exception, in the case of a bond, is an answer to a civil action (*y*). In the case of an overdue bill of exchange, or promissory note, the person who takes it cannot acquire or give a better title than that which the person from whom he took it had (*z*). A banker's cheque payable on demand is not considered as overdue until after a reasonable time for presentment has elapsed, which depends upon the circumstances of the case as giving cause for suspicion and inquiry; and when the rightful owner of a cheque has lost it or has been wrongfully deprived of it, his right to recover the cheque or its proceeds from the holder depends upon whether the latter took it before or after such reasonable time had elapsed (*a*).

Negotiable
instruments.

Money wrongfully obtained by means of unlawful compulsion or extortion of any kind may be recovered back as a debt for money received: as money extorted by *duress* of the person, that is to say, by imprisonment, or threats of imprisonment or of

Money
obtained by
compulsion.Duress of
the person.

L. J. C. P. 562; 1 C. P. D. 578; *Bobbett v. Pickett* (1876), 45 L. J. Ex. 555; 1 Ex. D. 368; *Patent Gun Cotton Co. v. Wilson* (1880), 44 L. J. C. P. 713; Bills of Exchange Act, 1882, s. 82; Bills of Exchange (Crossed Cheques) Act, 1906.
(*u*) See *Hargreave v. Spink* (1891), 61 L. J. Q. B. 318; (1892), 1 Q. B. 25; Sale of Goods Act, 1893, s. 22.
(*x*) *Harwood v. Smith* (1788), 2 T. R. 750; *Scutty v. Sykes* (1850), 19

L. J. Q. B. 447; 15 Q. B. 506; *Walker v. Matthews* (1881), 51 L. J. Q. B. 213; 8 Q. B. D. 109.
(*y*) *Chichester v. Hill* (1882), 52 L. J. Q. B. 160.
(*z*) Bills of Exchange Act, 1883, s. 36.
(*a*) Bills of Exchange Act, 1883, ss. 36-37, 73; *London & County Bank v. Groom* (1881), 51 L. J. Q. B. 224; 8 Q. B. D. 288.

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Duress of property.

personal injury. Where a person was arrested under a writ of *copias* to hold to bail directed against another person, and was obliged to pay the sum indorsed upon the writ in order to obtain his release: it was held that he might recover it back from the sheriff as money received to his use, although it had been paid into court and paid out to the execution creditor (*b*). Money extorted by duress of goods or other property, that is by withholding the possession of property wrongfully taken or detained, or by threatening injury to property, may be recovered back: as where goods are detained under an unfounded or excessive claim of lien, which is paid to redeem them (*c*).—Where the solicitor of a mortgagee threatened to sell the mortgaged property unless the mortgagor would pay certain charges in excess of what was properly due, the mortgagor having paid the sum demanded in order to prevent the sale, was held entitled to recover back the excess (*d*). And where a mortgagee refused to execute a transfer of his mortgage unless allowed for costs a sum to which he was not entitled, and the transferee by the direction of the mortgagor paid those costs under protest, the mortgagor was held entitled to recover from the mortgagee the amount so paid (*e*). So where a solicitor, acting for the mortgagee, detains the deeds from the mortgagor upon a claim of lien for charges against the mortgagee, for which the mortgagor is not liable upon paying off a mortgage, the amount so paid may be recovered in an action for money had and received (*f*). The lien of a solicitor extends only to his taxable costs, charges and expenses, and not to advances on loan or for other purposes: and by taking a security for his general costs and charges, he presumptively abandons his lien (*g*).—But money paid in compromise of a *bonâ fide* claim of right to detain the goods, and not merely to release them from unlawful detention, cannot be recovered back: it is then paid under a valid contract for a good consideration (*h*), and a person is not entitled to avoid

(*b*) *De Mesnil v. Daken* 1867, 37 L. J. Q. B. 42; L. R. 3 Q. B. 18.

(*c*) *Astley v. Reynolds* 1765, 2 Strange, 915; *Pratt v. Wyard* (1833), 3 L. J. N. S. K. B. 7; 5 B. & Ad. 808; *Somes v. British Empire Shipping Co.* (1860), 30 L. J. Q. B. 229; 8 H. L. C. 338. See *Gibbender Naf v. Platon* (1890), 59 L. J. Q. B. 371; 25 Q. B. D. 13.

(*d*) *Clare v. Phillips* (1844), 7 Man. & G. 586.

(*e*) *Fraser v. Penlthony* 1861, 31

L. J. C. P. 1.

(*f*) *Wakefield v. Newban* 1844, 13 L. J. Q. B. 258; 6 Q. B. 276; *Re Llewellyn* (1891), 60 L. J. C. 732; (1891) 3 Ch. 145.

(*g*) *Re Taylor & Co.* (1891), 60 L. J. C. 525; (1891) 1 Ch. 590; *Re Douglas, Norman & Co.* (1897), 67 L. J. C. 85; (1898) 1 Ch. 199; *Re Morris* (1907), 77 L. J. K. B. 265; (1908) 1 K. B. 473.

(*h*) *Atlee v. Backhouse* (1838), 7 L. J. Ex. 234; 3 M. & W. 633.

a contract upon the ground that he was induced to enter into the contract by duress of property; duress of the person being alone a sufficient compulsion in law to give the right of avoiding a contract induced by it (*i*).

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Where parties stood in certain personal relations, the Court of Chancery presumed, and this presumption must be made now in all branches of the judicature, the exercise of the moral duress of undue influence, which entitled the person affected by its presumed exercise to recall any gift or benefit (*k*); as in the case of a gift from a child to his parent, or from a ward to his guardian (*l*); a gift from a patient to his medical adviser (*m*); a gift to a spiritual adviser or director (*n*); a gift from a client to his legal adviser (*o*). The relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another (*p*).—But the party so influenced can only obtain relief upon the terms of restoring the other party to his original position (*q*); and if the relation between the parties changes, and the possibility of influence ceases to exist, the right to recall the gift or benefit may be extinguished on the ground of confirmation (*r*).—The Court may take away from third persons the benefit which they have derived from the undue influence of others (*s*).

Property
obtained by
undue
influence.

Money obtained by compulsion of legal process cannot, in the absence of fraud, be recovered back in an action between the same parties (*t*). The principle applies where payment has been made pending the proceedings, and although the process has never

Compulsion
of legal
process.

(*g*) *Skate v. Brule* (1840), 9 L. J. Q. B. 233; 11 A. & E. 983.

(*k*) *Huguenin v. Basely* (1807), 11 Ves. 289; 1 Wh. & T. L. C. 247. See *Houers v. Bishop* (1909), 78 L. J. K. B. 796; (1909) 2 K. B. 390.

(*l*) *Archer v. Hudson* (1844), 7 Beav. 551; affd. (1846), 15 L. J. C. 211; *Savery v. King* (1856), 25 L. J. C. 482; 5 H. L. C. 627.

(*m*) *Allen v. Davis* (1850), 20 L. J. C. 44; 4 De G. & Sm. 133; *Bilney v. Southey* (1852), 21 L. J. C. 472; ^o Hare, 534.

(*n*) *Huguenin v. Basely* (1807), 14 Ves. 289; 1 Wh. & T. L. C. 247; *Morley v. Loughnan* (1893), 62 L. J. C. 515; (1893) 1 Ch. 736.

(*o*) *Brown v. Kennedy* (1861), 33 L. J. C. 312; 4 De G. J. & S. 217; *Morgan*

v. Muatt (1877), 6 Ch. D. 638.

(*p*) *Dent v. Bennett* (1839), 8 L. J. C. 125; 1 M. & Cr. 239; *Tate v. Willetson* (1866), L. R. 2 Ch. 55.

(*q*) *Savery v. King* 1856, 25 L. J. C. 482; 5 H. L. C. 627. And see *post*, p. 260.

(*r*) *Alford v. Skinner* (1887), 56 L. J. C. 1052; 36 Ch. D. 115.

(*s*) *Huguenin v. Basely* (1807), 14 Ves. 289; 1 Wh. & T. L. C. 247; *Savery v. King* 1856, 25 L. J. C. 482; 5 H. L. C. 627; *Liles v. Terry* (1895), 65 L. J. C. 31; (1895) 2 Q. B. 679; *Wells v. Bickeron* (1902), 71 L. J. C. 609; (1902) A. C. 271.

(*t*) *Marriot v. Hampton* (1797), 7 T. R. 269; 2 Smith, L. C. 409; *Ward v. Willis* (1900), 69 L. J. Q. B. 123; (1900) 1 Q. B. 675.

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terminated in a final order or judgment (*u*). Money paid in an action without defending it, or after a defence which has failed, cannot be claimed back in a new action against the former plaintiff upon the discovery of new evidence (*x*). And money levied by execution under a judgment cannot be recovered back in an action for money received, though the judgment may have been signed or the execution issued irregularly or for an excessive amount; the remedy for the abuse of legal process being by application to the summary jurisdiction of the Court to set aside or amend the proceedings; under which the money wrongfully levied may be recovered back by order of the Court or by action (*y*). But if the wrongful compulsion be not justified by the process as it stands, an action may be maintained to recover back the money paid under it, because the validity of the process is not questioned in such action, but only the execution of it: as where goods were taken under a writ of execution which were not the goods of the execution debtor (*z*); or where a person was taken under a writ of *capias* which was directed against another person (*a*).

Distress.

Upon the same principle money obtained under a distress of goods cannot be claimed back as a debt for money received; the proper remedy for a distress being an action of replevin, or of trespass for taking the goods (*b*). But the tender of a sufficient sum to satisfy the distress, made before the impounding of the goods distrained (which places the goods *in custodia legis*), renders further detention of the goods wrongful; and if such tender be refused and an excessive sum be demanded and paid for the release of the goods, it may be recovered back as money received (*c*).

Money
extorted for
performance
of legal duty.

Excessive fees or unjustified payments extorted under colour of an office may be recovered back: as by a justice of the peace for granting a publican's licence (*d*); by a sheriff for executing

(*u*) *Moore v. Fulham Vestry* (1895), 61 L. J. Q. B. 226; (1895) 1 Q. B. 399.
(*x*) *Marriot v. Hampton* (1797) 7 T. R. 269; 2 Smith, L. C. 409.

(*y*) *De Cadeval (Duke) v. Collins* (1836), 5 L. J. K. B. 171; 4 A. & E. 858; *De Medina v. Grove* (1816), 15 L. J. Q. B. 287; 10 Q. B. 152; *Hugler v. Allen* (1866), 36 L. J. Ex. 17; 1 L. R. 2 Ex. 15. See *Hughes v. Justin* (1891), 63 L. J. Q. B. 417; (1891) 1 Q. B. 607.

(*z*) *Oughton v. Suppans* (1830), 8 L. J. O. S. K. B. 394; 1 B. & Ad. 211.

(*a*) *De Mesnil v. Dakin* 1867, 37 L. J. Q. B. 12; 1 L. R. 3 Q. B. 18.

(*b*) *Gulliver v. Cosens* (1815), 14 L. J. C. P. 215; 1 C. B. 788; *Glynn v. Thomas* 1856, 25 L. J. Ex. 125; 11 Ex. 870.

(*c*) *Full v. Whitaker* (1871), 41 L. J. Q. B. 78; 1 L. R. 7 Q. B. 120; *Green v. Duckett* (1883), 52 L. J. Q. B. 435; 11 Q. B. D. 275.

(*d*) *Morvan v. Palmer* (1824), 2 L. J. O. S. K. B. 115; 2 B. & C. 729.

process (e); by a parish clerk for making extracts from the register (f); by the steward of a manor for admission to copyholds (g). Upon the same principle a person recovered harbour dues demanded upon articles exempted from charge, and paid in ignorance of the exemption (h). At the common law, unless the contract provides for the amount to be paid for the carriage of goods, a common carrier is bound to carry goods for a reasonable reward, and the owner of the goods being willing to pay what is justly due, but obliged to pay an excessive amount, may recover back the excess as money received to his use (i). Charges made by a railway company in excess of the regular rate for the carriage of passengers or goods may be recovered back in an action for money received; railway companies being under statutory obligation to charge all persons equally and after the same rate under the same circumstances (k). The Railway and Canal Traffic Act, 1854, prohibits railway and canal companies from giving any "undue and unreasonable preference" in traffic; but the jurisdiction created for such cases (which is now transferred to the Railway Commissioners appointed under the Railway and Canal Traffic Act, 1888) is exclusive of the ordinary courts; and no action will lie for charges made in violation of the Act and paid under protest, before an adjudication has been made by the Commissioners (l). A claim for merely excessive charges is not within this jurisdiction, and must be made in the ordinary courts of law (m). Upon the same principle a candidate at a parliamentary election recovered moneys paid to the returning officer in excess of the sum allowed by statute (n).

CH. I.
SECT. II.

Excessive
charge by
carrier.

Money paid voluntarily, that is to say, without compulsion or extortion or undue influence, and with a knowledge of all the facts, cannot be recovered, although paid without any considera-

Money paid
voluntarily.

e) *Dow v. Parsons* 1819, 2 B. & Ald. 504, 2.

f) *Stech v. Williams* (1853), 22 L. J. Ex. 225; 8 Ex. 625.

g) *Totherne v. Gardner* (1856), 25 L. J. Q. B. 201; 5 E. & B. 913.

h) *Hooper v. Ender Corp.* (1887), 56 L. J. Q. B. 456.

i) *Ashdale v. Wainwright* 1842, 11 L. J. Q. B. 79; 2 Q. B. 837.

k) *G. W. Ry. v. Sutton* 1868, 38 L. J. Ex. 177; L. R. 4 H. L. 226; L. & N. W. Ry. v. *Evershed* 1878, 18

L. J. Q. B. 22; 3 Ap. Cas. 1029; *Stow v. Midland Ry.* (1901), 73 L. J. K. B. 392; (1904) 1 K. B. 669.

l) *Rhymney Ry. v. Rhymney Iron Co.* 1890, 59 L. J. Q. B. 414; 25 Q. B. D. 116.

m) *G. W. Ry. v. Ry. Commrs.* 1881, 7 Q. B. D. 182; *Ry. v. Ry. Commrs.* (1889), 58 L. J. Q. B. 233; 22 Q. B. D. 642.

n) *Morton v. Tuckerson* 1891, 62 L. J. Q. B. 400; 1893 2 Q. B. 121.

PART I.

Money paid
for illegal
considera-
tion.

tion; as a payment made by way of a gift (*o*); or a payment in discharge of a debt contracted during infancy (*p*), or in respect of a claim which might have been resisted as being founded upon an illegal consideration (*q*). And it is immaterial for this purpose whether the payment is made upon a mere demand or in an action (*r*). Accordingly it was held that where a purchaser under a contract of sale paid the deposit, knowing that there was no sufficient contract to satisfy the Statute of Frauds, he could not afterwards claim a return of the deposit merely upon that ground (*s*). Property or income tax must be deducted from the next payment or instalment; if not then deducted the payment is voluntary and cannot be recovered (*t*). But the payment of a bill of exchange by the acceptor is not such a voluntary payment as precludes him from disputing the consideration of the bill and recovering back the amount from the payee (*u*).—In the case of payments under an illegal executory contract or for an illegal purpose, which are voluntary by reason of the illegality, so long as the contract remains executory the payment may be recovered (*x*). Where, however, the payee has performed the stipulations on his part (either wholly or in part), the payment cannot be recovered back (*y*). To this rule are the well-known exceptions of payments by person oppressed, or the victims of undue influence, or payments under a contract made in contravention of a statute. In all these cases the *delictum* is not par, and the person making the payment may recover (*z*).

Money paid
under mistake
of fact.

Money paid under mistake or ignorance of fact may be recovered back, where the supposed state of fact is such as to create a liability to pay the money, which in reality is not due (*a*): as money paid

(*o*) *Howes v. Bishop* 1909, 78 L. J. K. B. 796; (1909) 2 K. B. 390.

(*p*) *Valentini v. Canali* (1889), 59 L. J. Q. B. 74; 24 Q. B. D. 165.

(*q*) *Wilson v. Ray* (1839), 8 L. J. Q. B. 224; 10 A. & E. 82.

(*r*) *Wilson v. Ray* (1839), 8 L. J. Q. B. 224; 10 A. & E. 82.

(*s*) *Thomas v. Brown* (1876), 45 L. J. Q. B. 811; 1 Q. B. D. 714.

(*t*) *Lamb v. Brewster* (1879), 48 L. J. Q. B. 421; 4 Q. B. D. 607; *Warren v. Warren* (1895), 72 L. T. 628; 43 W. R. 490.

(*u*) *Kendal v. Wood* (1871), 39 L. J. Ex. 167; L. R. 6 Ex. 213.

(*x*) *Tappenden* *Randall* (1801), 2 Bos. & P. 467; *rt v. Walsh* (1810), 3 Taunt. 277.

(*y*) *Paterson v. Scott* (1832), 2 L. J. C. P. 13; 9 T. R. 320; *Hermann v. Jenchner* (1885), 51 L. J. Q. B. 340; 15 Q. B. D. 561; *Kearley v. Thomson* (1890), 59 L. J. Q. B. 288; 24 Q. B. D. 742. The last case was not referred to in *Consolidated Exploration Co. v. Musgrave* (1899), 69 L. J. C. 11; (1900) 1 Ch. 37. And see *post*, Pt. III., Chap. IV.

(*z*) *Lottery v. Bourdieu* (1780), 2 Dougl. 168; *Kearley v. Thomson* (1890), 59 L. J. Q. B. 288; 24 Q. B. D. 742. See *post*, Pt. III., Chap. IV.

(*a*) *Kelly v. Solari* (1811), 11 L. J.

for goods sold under a mistake in the weight or measurement of the goods or in the calculation of the price (*b*); money paid upon an erroneous statement of account, without notice of the error (*c*); fees paid to a director for services rendered during a period when his office was vacated (*d*). Where a sheriff had paid over the proceeds of an execution to the judgment creditor, in ignorance of a prior act of bankruptcy of the debtor, and was afterwards compelled to pay the same sum to the trustee in bankruptcy, he was held entitled to recover it back from the judgment creditor (*e*).

Upon this principle, where a tenant had paid rent to the agent of his landlord, in ignorance that his landlord's estate had determined, he was held entitled to recover back the rent so paid in an action for money had and received (*f*). Where a tenant had paid a claim for tithe rent-charge including by mistake the charge upon land not in his occupation, it was held that he might recover back the sum, not chargeable, though the tithe owner had then lost his remedy against the real occupier by lapse of time (*g*). — A payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore as regards the motive of the party is voluntary, cannot be recovered back. Where a person having a second charge upon property paid off a prior charge, in the belief that the security was valid, which it afterwards appeared not to be; it was held that the payment, having been made voluntarily and under no supposed obligation, could not be recovered back (*h*). And a voluntary gift made under a mistake, but under no supposed liability, and not induced by fraud, cannot be recovered; as where a banker paid a customer's cheque to the bearer under a mistake as to the state of his account (*i*). It would be otherwise in the case of fraud; as where

Ch. I.
Sect. II.

Rent paid
under mistake
of title.

Mistake not
affecting legal
liability.

Ex. 19; 9 M. & W. 54. See *Re Hoare* (1904), 74 L. J. C. 25; (1905) 1 Ch. 76.

(*b*) *Cox v. Prentice* (1815), 3 M. & S. 311; *Newall v. Tindalson* (1871), L. R. 6 C. P. 105.

(*c*) *Dods v. Lloyd* (1818), 17 L. J. Q. B. 247; 12 Q. B. 531; *Townsend v. Crowley* (1860), 29 L. J. C. P. 300; 8 C. B. N. S. 177.

(*d*) *Re Boddan Co.* (1903), 73 L. J. C. 198; 1904 1 Ch. 276.

(*e*) *Stoddish v. Ross* (1819), 19 L. J. Ex. 185; 3 Ex. 527.

(*f*) *Barber v. Brown* (1856), 26 L. J.

C. P. 41; 1 C. B. N. S. 121. See *Hickson v. Upsall* (1877), 16 L. J. C. 245; 4 Ch. D. 144.

(*g*) *Durant v. Keeble, Chumers* (1880), 50 L. J. Ex. 30; 6 Q. B. D. 231.

(*h*) *Aiken v. Short* (1856), 25 L. J. Ex. 321; 1 H. & N. 210.

(*i*) *Chambers v. Miller* (1862), 32 L. J. C. P. 30; 13 C. B. N. S. 125; *Pollard v. Bank of England* (1871), 40 L. J. Q. B. 233; L. R. 6 Q. B. 623. See *Imperial Bank of Canada v. Bank of Hamilton* (1903), 72 L. J. P. C. 1; 1903 A. C. 49.

PART I

Payment
with means
of knowledge.

the bearer presented the draft knowing the drawer to be insolvent, and the banker paid it for the honour of the drawer (*k*).

Where money is recoverable upon the footing that the payment was made under a mistake or in ignorance of a fact, it is in general immaterial that the party making the payment had the means of knowledge but did not avail himself of it; or that the payment was made in forgetfulness of a material fact which had extinguished the liability, as where the directors of an insurance office paid a life policy in forgetfulness of the fact that it had lapsed by default of payment of the annual premium (*l*). But "if the money is intentionally paid without reference to the truth or falsity of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it." The liability to repay money paid by mistake arises in such cases upon payment, but where the party receiving the money is ignorant of the mistake under which the claim arises, it is necessary to give him notice of the mistake, and to demand the money before bringing an action to recover it; because without such notice and demand he is under no duty to repay it (*n*).

Notice of
mistake to
party
charged.

Mistake of
law.

Money paid voluntarily and with knowledge of all the facts and circumstances cannot be recovered back merely upon the ground that it was paid under a mistake of law, or in ignorance of the law as to the liability (*o*). Where a person insured a ship and cargo without having any interest, and in ignorance of the legal effect of such want of interest in avoiding the policy, it was held that he could not recover back the premium paid (*p*). And where an underwriter paid the loss upon a policy, knowing that it had been obtained by concealment of a fact material to the risk, but in ignorance of the legal effect of such concealment, it was held that he could not recover back the money (*q*). Where a fund has been distributed amongst the persons supposed to be entitled, with full

(k) *Martin v. Morgan* (1819), 1 Br. & B. 289.

(l) *Kelly v. Solari* (1841), 11 L. J. Ex. 10; 9 M. & W. 54; *Bell v. Gardner*, (1812), 11 L. J. C. P. 195; 1 Moll. & G. 11; *Townsend v. Goodry* (1860), 29 L. J. C. P. 300; 8 C. B. N. S. 477.

(m) *Parker, R. Kelly v. Solari* (1841), 11 L. J. Ex. 10; 9 M. & W. 54.

(n) *Fremantle v. Jeffries* (1869), 38 L. J.

Ex. 116; 1 L. R. 4 Ex. 181; *Baker v. Conner & Co.*, 1909, 79 L. J. K. B. 313; 1910 1 K. B. 56.

(o) *Brushner v. Darnes* (1813), 5 Taunt. 113.

(p) *Larry v. Boardman* 1780, 2 Dougl. 168.

(q) *Bell v. Lushley* 1801, 2 East, 169.

knowledge of all the circumstances, one of them cannot recover back money from another on the ground of a mistake as to their rights in the distribution (*r*). Where the purchaser of an estate accepts the title, and the contract is completed by conveyance, he cannot be relieved from his purchase and recover his purchase-money in respect of a defect which appeared on the abstract of title (*s*).

Ch. I.
SECT. II.

Money paid into court or to a receiver or officer of the court in mistake of law is not the subject of an action; but the Court will order it to be repaid or distributed according to law as soon as the mistake is discovered (*t*). A trustee in bankruptcy was ordered to repay money which he had claimed from an execution creditor, who had paid it in ignorance of his right to retain it (*u*). And where money paid into a bankruptcy under a mistake in law had been distributed amongst the creditors, the Court ordered it to be repaid out of any other funds applicable to dividends (*x*).

Mistake of
the court.

Money paid for a consideration which fails may be recovered back: as the price of goods sold which the seller fails to deliver, wholly or partially (*y*). If the buyer of goods sold with an implied condition as to title and warranty as to possession, which is presumptively the case, is deprived of them at the suit of the true owner, he may recover the price from the seller (*z*). Where a person bought goods through a broker and paid him the price, and through default of the broker in executing the commission the buyer had no remedy upon the contract of sale, it was held that he might recover back the price from the broker upon the failure of the consideration (*a*). So money paid as the price of shares sold, of which the buyer fails to get registration through default of the seller (*b*). And money paid as a deposit upon application for shares in a projected company, which is after-

Money paid
for considera-
tion which
fails.

(*r*) *Rogers v. Ingham* (1876), 3 Ch. D. 351.

(*s*) *Soper v. Arnold* (1887), 37 L. J. C. 115; 37 Ch. D. 96; affd. (1889), 59 L. J. C. 211; 11 Ap. Ch. 429.

(*t*) *Re Brown* (1886), 55 L. J. C. 556; 32 Ch. D. 597; *Ex p. Rhoades* (1890), 68 L. J. Q. B. 801; 1899 2 Q. B. 317. See *Re Opera Co.* (1891), 60 L. J. C. 161, 839; (1891) 2 Ch. 151; (1891) 3 Ch. 260.

(*u*) *Ex p. Atkinson* (1873), 43 L. J. B. 107; 1 L. R. 9 Ch. 609.

(*x*) *Ex p. Scotts* (1850), 30 L. J. Q. B. 71; 16 Q. B. D. 30.

(*y*) *Giles v. Edwards* (1797), 7 L. R. 181; *Foran v. Chadborn* (1819), 19 L. J. C. P. 1; 8 C. R. 1.

(*z*) Sale of Goods Act, 1893, s. 12; *Eichholz v. Baweston* (1861), 31 L. J. C. P. 105; 17 C. B. N. S. 708.

(*a*) *Re J. A. Morgan* (1865), 34 L. J. P. 14; 11 C. 709.

(*b*) *W. v. B. v. Thind* (1845), 11 L. J. Q. B. 16; 7 C. B. 27.

PART I.

Deposit on
sale of land.

wards abandoned, may be recovered back from the promoters or directors who received the money (c).

Upon the same principle a deposit paid under a contract for the purchase of land, in which the vendor makes default and thereby entitles the purchaser to rescind, may be recovered back as received upon a consideration which has failed: as where the vendor fails to make a good title (d); or where a premium was paid for a lease which the lessor was unable to grant (e); or where the vendor of a lease failed to procure the landlord's consent to an assignment as required by the lease (f); or where the vendor insisted upon the purchaser signing a formal contract with unusual and unreasonable terms (g). Also if the contract is mutually abandoned or is incapable of completion the purchaser is presumptively entitled to a return of the deposit (h).—The claim to a return of the deposit may be excluded by the express terms of the contract declaring it to be forfeited in the event which puts an end to the contract (i). And the fact of the payment of money "as a deposit" impliedly means that it is a security for completion by the purchaser; which is forfeited if he repudiates the contract, but which goes towards payment of the purchase-money if the contract is completed (k).—If there is a valid subsisting contract of sale the purchaser may claim as damages, in an action for a breach by the vendor, his expenses incurred about the purchase, besides the deposit with interest; but if there is no valid contract, or the contract is rescinded by the parties, he can only claim a return of the deposit as money received upon a consideration which fails (l).—Upon completion of the contract by execution of the deed of conveyance the deposit is accounted for as part payment of the purchase-money (m). And after accepting the conveyance by which the

(c) *Ashpittel v. Sercombe* (1850), 19 L. J. Ex. 82; 5 Ex. 147; *Johnson v. Gushell* (1857), 27 L. J. C. P. 122; 3 C. B. N. S. 569. See *Spurgeon v. Booth* (1909), 78 L. J. P. C. 164; (1909) A. C. 576.

(d) *Wilde v. Fort* (1812), 1 Taunt. 331.

(e) *Wright v. Cuth* (1849), 19 L. J. C. P. 60; 8 C. B. 150.

(f) *Lloyd v. Crisp* (1813), 5 Taunt. 219; *Wright v. Newton* (1835), 2 Cr. M. & R. 124.

(g) *Manser v. Wisker* (1871), 10 L. J. C. P. 94; L. R. 6 C. P. 120.

(h) *Gushell v. Archer* (1835), 4 L. J. K. B. 78; 2 A. & E. 500.

(i) *Hinton v. Sparkes* (1867), 37 L. J.

C. P. 81; L. R. 3 C. P. 161; *Lea v. Whitaker* (1872), L. R. 8 C. P. 70; *Evans v. Daniel* (1875), L. R. 10 C. P. 538.

(k) *Dupree v. Bodborough* (1863), 33 L. J. C. 124; 4 Giff. 479; *Essex v. Barrett* (1875), 41 L. J. Bk. 138; L. R. 10 Ch. 572; *Howe v. Smith* (1884), 53 L. J. C. 1055; 27 Ch. D. 89; *Soper v. Arnold* (1889), 59 L. J. C. 214; 14 Ap. Ca. 42; *Smith v. Butler* (1900), 69 L. J. Q. B. 521; (1900) 1 Q. B. 691.

(l) *Gushell v. Archer* 1835, 4 L. J. K. B. 78; 2 A. & E. 500. See *post*, pp. 261, 787.

(m) *Ockenden v. Healy* 1858, 27 L. J. Q. B. 361; E. B. & E. 185; *Howe v.*

vendor completes the contract, no claim can be made for a return of purchase-money upon the ground of failure of consideration, by reason of defects in the title or in the subject of conveyance or otherwise; the remedy against the vendor, if any, being upon the covenants of the deed (*n*): unless a remedy remains under some provision of the contract of sale which extends beyond the completion: as an express provision for compensation for any errors in the title or description (*o*). In cases of fraud the Court will reopen the whole transaction and grant relief at any time notwithstanding the execution of the conveyance (*p*).

Upon the same principle, money paid in the purchase or discharge of bills or securities which are delivered as valid, but which are in fact forged or void, may be recovered back, though the defect may be unknown to both parties: as a document purporting to be a foreign bond, which was not recognized as such by the foreign State (*q*); an unstamped bill of exchange sold as a foreign bill which was in fact an inland bill (*r*); a forged Bank of England note (*s*); forged bills of exchange, whether sold with or without indorsement (*t*). But a payment made to a *bonâ fide* holder of a forged bill cannot be recovered back if the party making the payment has accepted the bill or has so conducted himself as to lead the holder to believe that he considered the signature to be genuine (*u*); or does not assert his right to repayment until after such an interval of time has elapsed that the position of the holder has been altered (*x*). A person who pays a bill for the honour of the supposed indorser, upon discovering the indorsement to be a forgery, may recover back the money if he give notice of the forgery in time to preserve the remedies over against prior

Forged and
void bills and
securities.

Smith 1884), 53 L. J. C. 1055; 27 Ch. D. 89.

(*n*) *Early v. Garrett* 1829, 8 L. J. O. S. K. B. 76; 9 B. & C. 928; *Chas. v. Lamb* 1875, 44 L. J. C. P. 177; L. R. 10 C. P. 334; *Hart v. Clowse* 1880, 5 C. P. D. 376; *Clayton v. Leach* (1889), 41 Ch. D. 103.

(*o*) *Box v. Helsham* (1865), 36 L. J. Ex. 29; L. R. 2 Ex. 72; *R. Turner and Skelton* 1879, 49 L. J. C. 114; 13 Ch. D. 130; *Palmer v. Johnson* (1881), 53 L. J. Q. B. 348; 13 Q. B. D. 351. See *Debenham v. Southey* (1901), 70 L. J. C. 525; (1901) 2 Ch. 98.

(*p*) *Early v. Garrett* (1829), 8 L. J. O. S. K. B. 76; 9 B. & C. 928; *Hart v. Swaine* 1877, 47 L. J. C. 5; 7 Ch. D.

12; *Jolyff v. Baker* 1883, 52 L. J. Q. B. 609; 11 Q. B. D. 255.

(*q*) *Young v. Cole* 1837, 6 L. J. C. P. 201; 3 Bing. N. C. 724.

(*r*) *Gumprecht v. Bartlett* (1853), 23 L. J. Q. B. 65; 2 E. & B. 849.

(*s*) *Leeds Bank v. Walker* 1883, 52 L. J. Q. B. 590; 11 Q. B. D. 84.

(*t*) *Jones v. Ryde* (1811), 5 Taunt. 488; *Gurney v. Womersley* 1851, 21 L. J. Q. B. 46; 4 E. & B. 133.

(*u*) Bills of Exchange Act, 1882, ss. 23, 53; *Pace v. Neale* (1762), 3 Burr. 1351.

(*v*) *London and River Plate Bank v. Bank of Liverpool* 1895, 65 L. J. Q. B. 80; 1896 1 Q. B. 7.

PART I.
Dishonoured
bills.

parties (*y*).—The transfer of a bill without indorsement imports no guarantee of payment, and the buyer receives the consideration bargained for in the credit of the bill; therefore the money paid for it is not recoverable merely by reason of its dishonour (*z*). But bank notes and bankers' cheques are exceptional to this rule, in that they pass for money upon the credit of the bearer; and if dishonoured the money may be recovered back as paid upon a consideration which fails, subject to presenting them for payment in due time, and giving due notice of dishonour (*a*).

Subsequent
failure of
considera-
tion.

Money paid for an executed consideration, if it was in fact the consideration bargained for, cannot be recovered back merely upon the ground that it proved to be of no value (*b*): as money paid for the use of a supposed patent, which, after being used for some years, was discovered to be invalid (*c*).—So where the consideration fails by the fault of the party himself the money paid for it cannot be recovered back; as the price of an annuity, of which the buyer neglected to register the memorial required by the statute (*d*): or the price of shares in a company bought on the Stock Exchange of which the buyer neglected to obtain registration (*e*). And where in a contract in writing it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, each is taken to agree to do all that is necessary to be done on his part for effectuating the object of the contract (*f*).—Upon this principle freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is "the uniform though perhaps anomalous rule that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea; and cannot be recovered back after, if paid before the goods are lost

Freight paid
in advance.

(*y*) *Wilkinson v. Johnson* (1824), 3 L. J. O. S. K. B. 58; 3 B. & C. 428. See Bills of Exchange Act, 1882, s. 68, sub-s. 3.

(*z*) Byles on Bills, 16th ed. 188. See *Misa v. Currie* (1876), 45 L. J. Ex. 852; 1 Ap. Ca. 554.

(*a*) *Rogers v. Langford* (1833), 1 Cr. & M. 637; *Tommins v. Gibbins* (1852), 21 L. J. Q. B. 403; 18 Q. B. 722. See Bills of Exchange Act, 1882, s. 74.

(*b*) *Lowest v. Heath* (1846), 15 L. J. Ex. 297; 15 M. & W. 486.

(*c*) *Taylor v. Hare* (1805), 1 B. & P. N. R. 260; *Begbie v. Phosphate Manure Co.* (1876), 1 Q. B. D. 679; affg. (1875), 44 L. J. Q. B. 233. See *Laure v. Pusee* (1856), 26 L. J. Q. B. 25; 6 E. & B. 930. (*d*) *Stratton v. Rastall* (1788), 2 T. R. 366.

(*e*) *Strong v. Russell* (1860), 29 L. J. Q. B. 115; 1 E. & E. 888, 916; *London Founders' Assn. v. Clarke* (1888), 57 L. J. Q. B. 291; 20 Q. B. D. 576.

(*f*) *Sprague v. Booth* (1909), 78 L. J. P. C. 164; 1909 A. C. 576.

by perils of the sea" (*g*). But advance freight stipulated to be paid "if required" cannot be claimed after the goods are lost (*h*).

CH. I.
SECT. II.

Money paid for a consideration which fails partially cannot be recovered back. A purchaser, having taken possession of the land sold, cannot recover back the purchase-money, though the vendor fails to make a title, because he has received some consideration for it in the possession of the land (*i*); and under a contract for a lease, the lessee having taken possession cannot recover back the premium paid, though the lessor fails to grant the lease (*k*): the remedy in such cases being by action for the breach of contract, or by suit for rescission. In the case of an annuity, if any one of the securities given therefor be set aside there is a total and not a partial failure of the consideration (*l*). Where goods were delivered under a contract of sale by description and the price was paid, and the buyer used a greater portion than necessary for a trial of the quality and sold another portion, it was held that he could not afterwards repudiate the goods as not answering the description, and claim a return of the price (*m*). So upon a sale of a specific chattel with a warranty of quality, a mere breach of the warranty does not entitle the buyer to return the chattel and recover back the price as upon a total failure of consideration: the remedy is by action upon the warranty. But he may be entitled to do so by express stipulation: and he may do so if the warranty be fraudulent (*n*). In an action for the price the buyer may claim a reduction by reason of the breach of warranty: or he may pay the price and maintain a separate action upon the warranty (*o*).

Partial
failure of con-
sideration.

If the consideration is severable and apportionable to the money paid, a part failure of the consideration may give the right to recover back a proportionate part of the price: as where goods are sold and paid for by weight, and the goods delivered do not amount to the weight invoiced and paid for, the excess of money paid may

Apportion-
ment of
considera-
tion.

(*g*). Brett, J., *Allison v. Bristol Marine Insur.* (1876), 1 Ap. Ca. 226; *Byrie v. Schiller* (1871), 10 L. J. Ex. 177; L. R. 6 Ex. 319.

(*h*). *Smith v. Pymon* (1891), 60 L. J. Q. B. 621, (1891) 1 Q. B. 712.

(*i*). *Blackburn v. Smith* (1848), 48 L. J. Ex. 487; 2 Ex. 783.

(*j*). *Hunt v. Silk* (1804), 5 Post, 449.

(*k*). *Huggins v. Coates* (1843), 13 L. J. Q. B. 161; 5 Q. B. 432.

(*m*). *Harner v. Groves* 1855, 21 L. J. C. P. 53; 15 C. B. 667.

(*n*). Sale of Goods Act, 1893, s. 53; *Street v. Blay* (1831), 2 B. & Ad. 456; *Gompertz v. Barton* 1832, 2 L. J. Ex. 82; 1 Cr. & M. 207; *Hegworth v. Hutchinsan*, 1867, 36 L. J. Q. B. 270; L. R. 2 Q. B. 447.

(*o*). Sale of Goods Act, 1893, s. 53; *Innis v. Hodges* (1871), 40 L. J. Q. B. 276; L. R. 6 Q. B. 687.

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be recovered back (*p*). A premium paid on a policy of insurance on which no risk has attached, and therefore paid for a consideration which has failed, may be recovered back; but if the risk has once attached, there is no apportionment of the premium by reason of the risk ceasing before the expiration of the policy (*q*). A premium paid upon a contract of apprenticeship is not apportionable upon the death of the master or of the apprentice during the apprenticeship (*r*); nor upon a failure of the apprenticeship by the default of the apprentice (*s*); but in the case of articled clerks to solicitors, there are conflicting decisions whether the Court may apportion the premium and order the return of a part, in exercise of its summary jurisdiction over the solicitor as an officer of the Court (*t*). Upon a dissolution of partnership the Court may apportion a premium paid upon admission, and order repayment of a part (*u*).

Money received by agent from principal.

Money received by an agent from his principal under instructions for its application, upon termination of the agency before the money is applied, whether by countermand of the principal (*x*), or by repudiation by the agent of his agency (*y*), may be recovered back as money received to the use of the principal. But so long as the agency subsists the claim of the principal for non-compliance with instructions rests upon the express terms of the agency; and the money is held under the instructions and not simply to the use of the principal (*z*). If the agent misappropriate the money by paying it away to a third party who receives it *bonâ fide* and for value and without notice of the misappropriation, the principal cannot follow the money and recover it from the latter (*a*).

(*p*) *Devaux v. Canella* (1819, 19 L. J. C. P. 71; 8 C. B. 640).

(*q*) *Mansfield, C. J., Thorne v. Fletcher* (1777, 2 Cowp. 666; *Osou v. Bruce* (1810), 12 East, 225; *Bradford v. Symonds* (1881), 50 L. J. Q. B. 582; 7 Q. B. D. 156. See *Atkinson v. Gyllon* (1852), 2 De G. M. & G. 670; affg. 21 L. J. C. 818.

(*r*) *Whincup v. Hughes* (1870), 10 L. J. C. P. 101; L. R. 6 C. P. 78; *Ferns v. Carr* (1885), 54 L. J. C. 179; 28 Ch. D. 409.

(*s*) *Levynd v. Beval* (1891), 60 L. J. Q. B. 373; (1891) 1 Q. B. 431.

(*t*) *R. Thompson* (1818, 1 Ex. 864; *Hirst v. Tibou* (1850, 19 L. J. C. 441;

2 Mac. & G. 131; *Ferns v. Carr* (1885), 54 L. J. D. 478; 28 Ch. D. 409.

(*u*) *Partnership Act*, 1890, s. 40; *Atwood v. Maule* (1868), L. R. 3 Ch. 369; *Belfield v. Bowm* (1894, 63 L. J. C. 104; (1894) 1 Ch. 521.

(*v*) *Bate v. Cartwright* (1819, 7 Pri. 510; *Hasteloe v. Jackson* (1828, 6 L. J. O. S. K. B. 318; 8 B. & C. 221.

(*w*) *Fletcher v. Marshall* (1846, 15 M. & W. 755.

(*z*) *Perry v. Roberts* (1835, 4 L. J. K. B. 139; 3 A. & E. 118; *Ehrensperger v. Anderson* (1848), 18 L. J. Ex. 132; 3 Ex. 148.

(*a*) See *ante*, p. 57.

Money received by an agent from a third party for a principal may be claimed by the principal as money received to his use, if there be a subsisting agency, general or special, to receive the money on his account (*b*). If there be no subsisting agency for that purpose, the money cannot be claimed by the person for whom it is paid, until the agent has acknowledged to him that he holds it on his account and to his use (*c*): as in the case of money paid to a banker or agent for payment over to creditors (*d*): or of money paid to a banker to meet acceptances of bills (*e*). And if such acknowledgment is made upon condition, an action for money received will not lie until the condition is satisfied (*f*). At the common law interest could not be recovered by a principal from his agent in an action for money had and received: but since the Judicature Act, 1873, interest may be so recovered where a court of equity would have fixed the agent with interest at the suit of the principal (*g*).—A claim for money received cannot in general be made upon a sub-agent who receives it only on account of the agent, without any privity or relation to the principal to whose use it is paid (*h*). Money voluntarily paid to an agent for payment over to a principal can be recovered back from the agent upon any such ground as mistake or failure of consideration, only so long as it remains in his possession: and not after he has paid it over or accounted for it to the principal according to his instructions *bonâ fide* and without notice of any claim or demand upon it (*i*): if the agent be acting for a foreign principal, crediting him in an open account is equivalent to payment over, but in other cases it will not operate as a discharge (*k*). The above rule does not apply to where the agent, acting for undisclosed principals, ostensibly contracts on

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Money received by agent for a principal.

Money received by sub-agent.

(*b*). *De Bernales v. Fuller* 1810, 13 East, 590, n.; *Lilly v. Hays* 1836, 6 L. J. K. B. 5; 5 A. & E. 518. See *McCarthy v. Galvin* (1839), 8 L. J. Q. B. 158; 9 A. & E. 607.

(*c*). *Wallace v. Everett* 1811, 14 East, 582; *Wallace v. Hurd* 1830, 1 Cr. & J. 83; *Henderson v. Rothschild* 1887, 56 L. J. C. 471, 36 Ch. D. 459.

(*d*). *Williams v. Everett* (1811), 14 East, 582.

(*e*). *Moore v. Bashell* 1857, 27 L. J. Ex. 3; *Hill v. Rogers* (1868), 38 L. J. C. 538; 1 L. R. 8 Eq. 290.

(*f*). *Baron v. Husband* 1833, 4 B. & Ad. 612; *Malcolm v. Scott* (1850), 5 Ex. 601; S. C. in Ch. 1850, 20 L. J. C.

17; 3 Mac. & G. 29; *Hudson v. Bilton* 1856, 26 L. J. Q. B. 27; 6 E. & B. 565.

(*g*). *Harsant v. Bilton* 1887, 56 L. J. Q. B. 512.

(*h*). *New Zealand Land Co. v. Watson* 1881, 50 L. J. Q. B. 433; 7 Q. B. D. 374; *Skinner & Co. v. Wagonin, Eddlees & Co.* 1882, 1 Cal. & Ell. 12. See *Exp. v. Eddlees & Co.* 1884, 51 L. J. Q. B. 108; 5 Q. B. D. 262.

(*i*). *Shand v. Grant* 1863, 15 C. B. N. S. 324; *Taylor v. Metrop. Ry.* (1906), 75 L. J. K. B. 735; 1906 2 K. B. 55.

(*k*). *Car v. Peintice* (1815), 3 M. & S. 314; *Holland v. Russell* (1863), 32 L. J. Q. B. 297; 4 B. & S. 14.

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his own account (*l*). And in the case of the solicitor of a vendor receiving the deposit under a contract of sale, the payment is equivalent to immediate payment to the vendor, and no action will lie to recover it back from the solicitor, whether he has paid it over or not (*m*).—But money obtained by an agent by wrong or fraud may be recovered back from him, although he has paid it over or accounted for it: as in the case of a bailiff obtaining payment by levying an execution upon the goods of a wrong person (*n*); or money received with notice of an available act of bankruptcy to which the title of the trustee in bankruptcy related back (*o*); or a solicitor obtaining payment of costs for his client by a wrongful detainer of deeds (*p*). The principal may also be liable to repay the money wrongfully or fraudulently obtained, if implicated in the wrong or fraud (*q*).—Money of a principal wrongfully or fraudulently obtained from the agent, or paid away by the agent in mistake, may be recovered back in an action for money received, at the suit either of the principal or of the agent (*r*).

Money
received by
stakeholder.

A stakeholder is an agent with whom money is deposited to abide an event which by agreement shall decide the ownership, as where money is deposited with a stakeholder as subscriptions to the stakes of a race. The person claiming the stakes as winner is bound to show that he is entitled to them in accordance with the terms of the agreement, and if this has become impossible from any cause, each subscriber may recover back his own stake, as upon a failure of consideration (*s*). An action will not lie against the stakeholder to recover the stakes until he has notice of the event, by which the money becomes held by him to the use of the winner (*t*). An auctioneer receiving a deposit from a purchaser is in the position of a stakeholder: he holds the money

l *Dicks v. Lloyd* (1848), 17 L. J. Q. B. 247; 12 Q. B. 531; *Novall v. Tomlinson* 1871, L. R. 6 C. P. 405.

m *Ellis v. Giddon* (1893), 62 L. J. Q. B. 232; 1893, 1 Q. B. 350.

n *Saunders v. Dorris* (1808), 1 Taunt. 359.

o *Ex p. Edwards* (1881), 13 Q. B. D. 747.

p *Smith v. Sleep* (1844), 12 M. & W. 585; *Oates v. Hudson* (1851), 20 L. J. Ex. 281; 6 Ex. 346.

q See *Barwick v. English Joint Stock Bk.* 1867, 36 L. J. Ex. 147; L. R. 2 Ex. 259; *Swire v. Francis* (1877), 47

L. J. P. C. 18; 3 Ap. Ca. 106; *Chaplen v. Brunswick Building Soc.* 1881, 50 L. J. Q. B. 372; 6 Q. B. D. 696.

r *Holt v. Ely* (1853), 1 E. & B. 795; *Colonial Bank v. Exchange Bank of Yarmouth* (N. S. 1885), 55 L. J. P. C. 14; 11 Ap. Ca. 81.

s *Marugat v. Bradwick* (1837), 6 L. J. Ex. 113; 2 M. & W. 369; *Doss v. Wolfe* (1869), L. R. 2 P. C. 280; *Sadler v. Smith* (1869), 39 L. J. Q. B. 17; L. R. 5 Q. B. 40.

t *Wilkinson v. Girdlestone* (1839), 9 A. & E. 536.

for payment to the vendor if the contract is completed, and to the purchaser if the contract goes off; and the terms upon which it is held can only be varied by the joint agreement of the contracting parties (*u*). If the deposit from the purchaser upon the sale of an estate is paid to the solicitor of the vendor, he holds it as agent of the vendor, unless it is paid to him upon the express terms of holding it as stakeholder to abide the event of the sale (*x*).

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A trustee who had received trust money was considered as absolute owner at law, and was accountable only in equity by enforcing execution of the trust. No action for money had and received could be maintained against him in a court of common law, although he had money in his hands, which, under the terms of the trust, he was liable to pay over to the beneficiary, but which he still held in the character of trustee only. If, however, it appeared that the character of the relation between the parties had changed, and the trustee had ceased to hold it as a trustee, properly so called, the plaintiff might maintain an action at law for money had and received, founded upon an appropriation to his use, or admission of liability and the liability thence arising (*y*). A person receiving money under a statutory liability to pay it over to another, without any discretion as to its application, is not in the position of a mere trustee, and a common law action lay for money had and received at the suit of the party entitled; as the churchwardens of district churches appointed by the statute to receive the rents of the seats and pay the salaries of the minister and clerk (*z*). - An executor or administrator is in the position of a trustee for the purpose of administering the estate of the deceased, and therefore the legacies or distributive shares payable out of the estate are not common law debts (*a*). But an executor might be made liable in an action for money had and received upon his personal admission of liability to the legatee (*b*).

Money
received by
trustee.

Money
received by
executor.

The implied debt for money received for the use of another may Transactions
equivalent

u *Gray v. Guthridge* 1828, 6 L. J. O. S. K. B. 154; 1 Man. & R. 651; *Harington v. Hoggart* 1830, 9 L. J. O. S. K. B. 11; 1 P. & Ad. 577.

y *Ellis v. Gaulton* 1893, 62 L. J. Q. B. 232; 1893, 1 Q. B. 350.

z *Per cur. Parker v. Price* 1817, 16 L. J. Ex. 192; 16 M. & W. 451; *per cur. Edwards v. Loundes* (1852), 22 L. J. Q. B. 107; 1 E. & B. 81.

(c) *Edwards v. Loundes* (1852), 22 L. J.

Q. B. 107; 1 E. & B. 81; *Nichols v. Davis* (1868), 38 L. J. C. P. 127; L. R. 4 C. P. 80; *Lloyd v. Burrap* 1868, 38 L. J. Ex. 25; L. R. 4 Ex. 63.

a *Dicks v. Stuart* (1791), 5 T. R. 690; *Jones v. Turner* 1827, 6 L. J. O. S. K. B. 71; 7 B. & C. 542.

b *Hart v. Moore* 1835, 4 L. J. Ex. 275; 2 Cr. & M. 700. See *Harding v. Harding* 1886, 55 L. J. Q. B. 462; 17 Q. B. D. 112.

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to receipt
of money.

arise from receiving that which, for the purpose in question, is received as equivalent to money (*c*): as foreign money (*d*): sums admitted in account as received (*e*): sums entered as received in an account rendered by an agent to his principal (*f*): a banker's cheque or a bank note received as money (*g*).—But proceeds of a bill of exchange, before it is due, cannot be charged as money had or received, and though it has been pledged to a banker, and value received in account; but if entrusted to the defendant, to be discounted, he may be charged with the proceeds in this form of action (*h*). Goods or stock or securities for money cannot be charged as money received, unless in fact sold or exchanged and converted into money (*i*).

§ 3. DEBTS IMPLIED UPON ACCOUNTS STATED.

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Account
stated.

Upon an admission of money being due and payable a promise to pay the amount is implied in law; which, under the old system of pleading, was technically charged as a distinct debt "for money found to be due from the defendant to the plaintiff on an account then and there stated between them" (*a*) "An account

(*c*). See *ante*, p. 53.

(*d*) *Ehrenspurger v. Anderson* (1818), 18 L. J. Ex. 132; 3 Ex. 118.

(*e*) *Standish v. Ross* (1819), 19 L. J. Ex. 185; 3 Ex. 527.

(*f*) *Skyrving v. Greenwood* (1825), 1 B. & C. 281; *Shaw v. Pictou* (1825), 4 L. J. O. S. K. B. 29; 1 B. & C. 715. See

Banc v. Bolland (1832), 1 Cr. & M. 130.

(*g*) *Rough v. May* (1836), 5 L. J. K. B.

186; 1 A. & E. 954; *Wilkinson v. Gide-roy* (1839), 9 A. & E. 536; *Timmons v. Gibbins* (1852), 21 L. J. Q. B. 403; 18 Q. B. 722.

(*h*) *Atkins v. Owen* (1837), 6 L. J. K. B. 267; 4 A. & E. 819; *Palmer v. Jernam* (1837), 2 M. & W. 282.

See *ante*, p. 53.

(*i*) *Parke, B., Lubbock v. Triche* (1838), 7 L. J. Ex. 158; 3 M. & W. 66.

stated is nothing more than the admission of a balance due from one party to another; and that balance being due, there is a debt. The statement of the account, and admission of the balance, implies a promise in law to pay it" (b).

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"In order to constitute an account stated there must be a statement of some certain amount of money being due" (c). There must be at least one item for which a certain sum is admitted, and there may be several items; and the statement of the account raises an implied debt as to each item contained in it severally (d). An admission by a person of his liability, but not fixing a certain amount (e); or merely that he had received a sum of money at an anterior date, but not that it was a subsisting debt to the plaintiffs (f); or an offer to pay a smaller sum of money in answer to a claim for a larger sum (g); or the statement of a debt subject to arbitration as to amount and liability (h), is not sufficiently certain to support an action on an account stated.—An objection to some only of numerous items will be treated as an admission of the accuracy of the rest of the account (i). So an account stated has been established where the debtor paid money on account with a promise to pay the remainder (k); and where the debtor referred the creditor to his agent for payment of the account (l). The payment of interest on a specified debt operates as an account stated of the debt, as being presumptively unpaid (m).

Certainty of
liability and
amount.

Admission of
liability.

An account stated may consist of one item or of the sum of several items without any cross demand; or it may consist of a balance struck of cross demands. Of these in their order. If there be no cross demands, an account stated produces only a

Validity of
debt in
support of
account
stated.

(b) *Abinger v. C. B., Irving v. Veitch* (1837), 7 L. J. Ex. 25; 3 M. & W. 90.

(c) *Parke, B., Hughes v. Thorpe* (1839), 9 L. J. Ex. 109; 5 M. & W. 656.

(d) *H-gluare v. Primrose* (1816), 5 M. & S. 65; *Lane v. Hill* (1852), 21 L. J. Q. B. 318; 18 Q. B. 252.

(e) *Burgh v. Legge* (1839), 8 L. J. Ex. 258; 5 M. & W. 418; *Hughes v. Thorpe* (1839), 9 L. J. Ex. 109; 5 M. & W. 656.

(f) *Tucker v. Barrow* (1828), 6 L. J. Q. S. K. B. 121; 7 B. & C. 623.

(g) *Wayman v. Hilliard* (1830), 9 L. J. O. S. C. P. 30; 7 Bing. 101.

(h) *Baker v. Hoard* (1851), 20 L. J. Ex. 444; 5 Ex. 959.

(i) *Porter v. Cooper* (1834), 3 L. J. Ex. 330; 1 Cr. M. & R. 387; *Chisman v. Court* (1841), 10 L. J. C. P. 124; 2 Man. & G. 307.

(k) *Procock v. Harris* (1808), 10 East, 104.

(l) *Porter v. Cooper* (1831), 3 L. J. Ex. 330; 1 Cr. M. & R. 387.

(m) *Pardon v. Pardon* (1842), 12 L. J. Ex. 3; 10 M. & W. 562; *Perry v. Stob* (1845), 15 L. J. Q. B. 10; 8 Q. B. 115.

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Consideration
of debt.Debt not
enforceable
by statute.Debts barred
by Statute of
Limitations.

prima facie liability; which may be rebutted by disputing the debts charged in the account: as by showing that the debt charged was incurred under a mistake (*n*); or that it was a future or contingent debt not yet due, as an I. O. U. given as a deposit upon an incomplete contract of sale (*o*). But an account stated by two jointly is not avoided by showing that one of them contracted only as surety for the other (*p*). A trustee in bankruptcy may challenge a settled account on grounds not open to the bankrupt (*q*).—So, it may be shown that a debt stated in the account was void for want of consideration, or that the consideration failed or was illegal; as a promise to pay the value of a cheque lost by the plaintiffs under circumstances which freed the defendant from further liability (*r*); or to remunerate a barrister for professional services (*s*). Conversely, unless there be a balance struck of cross demands, the receipt of the amount shown upon an account stated, but which is less than the amount actually due, is no answer to an action for the balance, there being no consideration for foregoing the balance (*t*). The effect of an account stated may also be avoided by showing that it is in respect of costs due to a solicitor who has not complied with the statutory requirement of delivering a signed bill (*u*), or that the debt was claimed under a contract, which was then executory, and upon which no action could be maintained by reason of the Statute of Frauds, but not where there was an admission of liability after the plaintiff had performed his part of the contract (*x*).—An account stated or admission of a debt barred by the Statute of Limitations must be stated in the form required by the Statute of Frauds Amendment Act, 1828, s. 1, which enacts that no acknowledgment or promise is sufficient to take a debt out of the statute unless made in writing signed by the party chargeable (*y*).—An account stated in writing does not, as such, re-

(n) *Gough v. Findon* (1851), 21 L. J. Ex. 58; 7 Ex. 48.

(o) *Wilson v. Wilson* (1854), 23 L. J. C. P. 137; 14 C. B. 616; *Leone v. Elliott* (1861), 30 L. J. Ex. 350; 6 H. & N. 656.

(p) *Buck v. Harst* (1866), L. R. 1 C. P. 297.

(q) *Ex p. Chatterton* (1907), 76 L. J. K. B. 644; (1907) 2 K. B. 23.

(r) *Lubbock v. Tribe* (1837), 7 L. J. Ex. 158; 3 M. & W. 607.

(s) *Kennedy v. Brown* (1863), 32 L. J.

C. P. 137; 13 C. B. N. S. 677.

(t) *Brooks v. Bockett* (1817), 16 L. J. Q. B. 178; 9 Q. B. 847. See *Turner v. Willis* (1905), 74 L. J. K. B. 365; (1905) 1 K. B. 468.

(u) *Smith v. Page* 1846, 15 M. & W. 683; *Prigg v. Attwood* (1856), 25 L. J. Q. B. 408; 6 E. & B. 691.

(x) *Falmouth v. Thomas* 1832, 2 L. J. Ex. 57; 1 Cr. & M. 89; *Cocking v. Ward* (1845), 15 L. J. C. P. 245; 1 C. B. 858.

(y) *James v. Ryper* 1838, 7 L. J. Ex. 216; 4 M. & W. 32; *Clack v. Alexander*

quire a stamp, though it may be evidence of an antecedent agreement (z). And it is no answer to a claim upon an account stated that the debt accrued due under a written agreement which could not have been put in evidence for want of a stamp if the consideration is executed, leaving only the debt unpaid (a). But if the document relied upon as an account stated requires a stamp, as in the case of a bill of exchange or a promissory note, it must be duly stamped in order to be admissible (b).

CH. I.
SECT. II.

Debt under
unstamped
agreement.

An account may be stated of an equitable debt, thereby making it *primâ facie* recoverable as a legal claim. Thus a trustee by admitting that he has money in his hands to be paid over to the plaintiff as beneficiary, or by settling accounts on that footing, is liable for the sum so admitted to be due in a common law action for money due on account stated (c). So where upon a dissolution of partnership the partners account together and strike a balance, it may be recovered in an action upon such account (d).

Account
stated of
equitable
debts.

An account stated of a present debt implies a promise to pay *in presenti*, and will not support a promise to pay at a future date, without a new consideration (e). An account may be stated of a debt payable at a future time, or at a particular place, or upon some condition; and there is then no liability until the time has elapsed or other condition has been fulfilled (f). Thus a bill of exchange is evidence of an account stated between immediate parties, which is not absolute until the bill is due, and which is subject by law to the conditions of due presentment and notice of dishonour (g).

Account
stated of
future debts.

An account stated of items on both sides, importing an agreement to set off the items on one side against the items on the other, and to leave the balance only due, is equivalent to payment

Account
stated of
cross
demands.

1844), 13 L. J. Ex. 133; 8 Scott, N. R. 147.

(z) *Beeching v. Westbrook* (1811), 10 L. J. Ex. 464; 8 M. & W. 411.

(a) *Re Tiptonmouth Shipping Assoc.* (1872), 41 L. J. C. 679; L. R. 14 Eq. 118.

(b) *Green v. Davies* (1825), 3 L. J. O. S. K. B. 185; 4 B. & C. 235; *Jones v. Ryder* (1838), 7 L. J. Ex. 216; 4 M. & W. 32.

(c) *Roper v. Holland* (1835), 1 L. J.

K. B. 156; 3 A. & E. 99; *Howard v. Boardhill* (1853), 23 L. J. Q. B. 23.

(d) *Foster v. Allanson* (1788), 2 T. R. 179; *Wray v. Midstone* (1839), 9 L. J. Ex. 39; 5 M. & W. 21.

(e) *Hopkins v. Logan* (1839), 8 L. J. Ex. 218; 5 M. & W. 211.

(f) *Whitley v. Williams* (1836), 5 L. J. Ex. 237; 1 M. & W. 533.

(g) *Burke v. Legge* (1839), 8 L. J. Ex. 258; 5 M. & W. 418; *Fryer v. Roe* (1852), 12 C. B. 137.

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of the debts to the extent of the set-off; and the discharge of the cross demands is a sufficient consideration to support the debt for the balance (*h*). A mere open account, without striking the balance and agreeing to set off the cross items, has no such effect in payment; and it leaves the items open to dispute (*i*); and of this character is a banker's pass book (*k*).

Reopening of account.

An account of cross items as above, leaving only the balance due, cannot be disputed merely upon the ground that some of the items taken as paid were not recoverable in an action: as a debt payable under a contract unenforceable by reason of not satisfying statutory requirements (*l*); or a debt barred by the Statute of Limitations (*m*); or a debt due to a solicitor for costs in respect of which no signed bill has been delivered (*n*). But if any of the items are such that, though actually paid over, they might be recovered back upon a failure of consideration, or as paid under a mistake of fact, or under fraud or illegality or other sufficient ground, the account may then be reopened as to such items (*o*).—In cases calling for the intervention of a court of equity, the Court has a general jurisdiction to open settled accounts, in whole or in part, upon the ground of substantial error, but as a general rule it will only give leave to surcharge and falsify, unless by reason of the relation between the parties, or of other special circumstances, it would be inequitable for the accounting party to have the benefit of the more lenient order *p*. An account stated or a settled account has generally no effect as regards omissions from the account (*q*).

Form of account stated.

An account stated may be in writing, or by oral statement. An oral statement is admissible in evidence, though there is no statement in writing of the same debt, and though the debt arises

(*h*) *Callender v. Howard* (1850), 19 L. J. C. P. 312; 10 C. B. 290.

(*i*) *Williams v. Griffiths* (1835), 1 L. J. Ex. 129; 2 Cr. M. & R. 15; *Cotton v. Partidge* (1812), 11 L. J. C. P. 161; 4 Man. & G. 271.

(*k*) *Commercial Bank of Scotland v. Rhoad* 1830, 3 Macq. H. L. 613; *Kepetipalla Rubber Estates v. Nat. Bank of India* 1909, 78 L. J. K. B. 961; 1909, 2 K. B. 1010. See *Skyring v. Greenwood* 1825, 1 B. & C. 181.

(*l*) *Lowcock v. Pickles* (1865), 33 L. J. Q. B. 65; 1 B. & S. 197.

(*m*) *Ashby v. James* (1813), 12 L. J.

Ex. 295; 11 M. & W. 542.

(*n*) *Turner v. Wallis* 1905, 74 L. J. K. B. 365; (1895), 1 K. B. 468.

(*o*) *Rose v. Searcy* (1835), 1 L. J. C. P. 275; 2 Bing. N. C. 115.

(*p*) *Colman v. Mellers* 1850, 2 Mac. & G. 309; *Williamson v. Barbour* 1877, 50 L. J. C. 117; 9 Ch. D. 529; *Gothroy v. Kneibly* 1878, 48 L. J. C. 15, 5 Ch. D. 517; *Re Bayley-Washington & Cohen's Cont.* (1909), 78 L. J. C. 351; (1909) 1 Ch. 618.

(*q*) *Johnson v. Carter* (1794), 2 Bro. C. C. 311, n; *Dods v. Lloyd* (1848), 17 L. J. Q. B. 217; 12 Q. B. 531.

out of a written agreement (*r*).—An account stated or admission of a debt contained in a deed under seal, from which a promise to pay can be implied, constitutes a covenant or contract under seal, and not a simple contract debt (*s*); and if the debt was originally a simple contract debt, it would in general become merged in the superior security (*t*). The ascertainment of the amount due under a deed does not of itself create a new simple contract debt upon an account stated (*u*); but if forming part of an account containing other items besides that due under the deed, a new contract may be implied to pay the balance of the account, upon the principle above stated of the cross items operating in payment (*x*).

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SECT. II.
Account
stated in
deed.

A bill of exchange or promissory note is evidence of an account stated between immediate parties (*y*). And the account so stated is of a debt according to the tenor of the instrument (*z*). An indorsement in blank, which makes the instrument payable to bearer, does not carry with it an account stated with the bearer as such (*a*). Such instruments are not admissible evidence of an account stated unless properly stamped (*b*).—An I O U is evidence of an account stated by the person signing with the person to whom it is addressed *c*, and if it is not addressed, then presumptively with the person producing it (*d*). It is no evidence of the nature of the debt (*e*). It may be rebutted by showing that there was in fact no debt to found the admission, as an I O U given by way of deposit on an executory contract of sale (*f*).

Bill of
Exchange.

An account stated as a cause of action must be made to the plaintiff himself or to his agent (*g*). But an administrator may

The parties
to an account
stated.

(*r*) *Singleton v. Barrett* (1832, 1 L. J. Ex. 134; 2 Cr. & J. 368; *Nichall v. Holt* (1840), 9 L. J. Ex. 293; 6 M. & W. 662.

(*s*) *Saltoun v. Houston* (1824), 2 L. J. O. S. C. P. 93; 1 Bing. 433; *Courtney v. Taylor* (1843), 12 L. J. C. P. 330; 6 Man. & G. 851.

(*t*) See post, p. 651.

(*u*) *Middleitch v. Ellis* (1848), 17 L. J. Ex. 365; 2 Ex. 623.

(*x*) *Foster v. Allanson* (1788), 2 T. R. 479.

(*y*) *Perry v. Stale* (1845), 15 L. J. Q. B. 10; 8 Q. B. 115.

(*z*) *Burgh v. Legge* (1839), 8 L. J. Ex. 258; 5 M. & W. 418; *Tiger v. Roe* (1852), 12 C. B. 437.

(*a*) *Burmeister v. Hogarth* (1813), 12 L. J. Ex. 178; 11 M. & W. 97.

(*b*) *Green v. Davies* (1825), 3 L. J. O. S. K. B. 185; 4 B. & C. 235; *Jones v. Ryder* (1838), 7 L. J. Ex. 46; 4 M. & W. 32. See *Smart v. Nokes* (1844), 13 L. J. C. P. 79; 6 Man. & G. 911.

(*c*) *Buck v. Hurst* (1866), L. R. 1 C. P. 297.

(*d*) *Douglas v. Holme* (1840), 10 L. J. Q. B. 43; 12 A. & E. 641.

(*e*) *Foxmayer v. Atcock* (1847), 16 M. & W. 449.

(*f*) *Wilson v. Wilson* (1854), 23 L. J. C. P. 137; 14 C. B. 616; *Lemere v. Elliott* (1866), 30 L. J. Ex. 350; 6 H. & N. 656.

(*g*) *Tarbock v. Bispham* (1836), 6 L. J. Ex. 49; 2 M. & W. 2; *Bates v. Townley* (1848), 19 L. J. Ex. 399; 2 Ex. 152; *Grundy v. Townsend* (1888), 36 W. R. 531.

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rely upon an admission of debt made in favour of the deceased's estate before obtaining the letters of administration (*h*).—The admission must be made by the defendant himself or his agent (*i*).—The account stated must be made by the defendant to the plaintiff in the same relative rights in which the debt is charged (*k*).

§ 4. DEBTS IMPLIED FROM JUDGMENTS OF INFERIOR AND FOREIGN COURTS AND ON FOREIGN STATUTE.

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Judgment debts.

Courts of record.

Judgment of inferior court.

The judgment of a Court of competent jurisdiction, adjudicating a certain sum of money to be due from one person to another, implies a debt; and the judgment may be enforced not only by execution of the ordinary process of the Court, but also by an action of debt upon the judgment (*a*). Debts created by judgments of a court of record are contracts of record, and are, therefore, treated hereafter as contracts of that class (*b*). But it is not every order of a court awarding a sum of money to be paid that is equivalent in law to a judgment (*c*).

An action of debt lay at common law upon a judgment of an inferior court (*d*); but not upon a judgment of the statutory

(*h*) *Re Trigonmouth Shipping Ass.* (1872), 11 L. J. C. 679; L. R. 11 Eq. 118.

(*i*) *Chisman v. Count* (1841), 10 L. J. C. P. 124; 2 Man. & G. 307; *Bates v. Townley* (1848), 19 L. J. Ex. 399; 2 Ex. 152; *Brettel v. Williams* (1819), 19 L. J. Ex. 125; 4 Ex. 623.

(*k*) *Barker v. Bist* (1812), 11 L. J. Ex. 375; 10 M. & W. 61; *Pitch v. Lyon* (1816), 15 L. J. Q. B. 393; 8 Q. B. 147.

(*a*) *Hodgson v. Barker* (1858), 28 L. J. Q. B. 61; E. B. & E. 584.

(*b*) See *post*, p. 105.

(*c*) *Carpenter v. Thornton* (1819), 3 B. & Ald. 522; *Westmoreland Slate Co. v. Feilden* (1891), 60 L. J. C. 680; (1891) 3 Ch. 15.

(*d*) *Williams v. Jones* (1845), 14 L. J. Ex. 115; 13 M. & W. 628.

County Courts established by the County Courts Acts, because such an action would have been inconsistent with the remedies on the judgment provided by those Acts (*e*), and it is now expressly provided by s. 151 of the County Courts Act, 1888, that no action shall be brought upon a judgment of the statutory County Courts.

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By the Judgments Act, 1838, s. 22, a judgment, or order for the payment of money, of any inferior court of record may be removed into a superior court by order of a judge of that court; and thereupon such judgment or order shall be of the same effect, and all proceedings may be taken thereupon, as if such judgment or order had been originally recovered or made in the superior court. The statute gives power to remove the judgment for the purpose of execution only; it gives no jurisdiction to the superior court to inquire into the merits or into the regularity of the proceedings in the court below (*f*). It does not apply to judgments of the statutory County Courts (*g*). These, however, by the County Courts Act, 1888, s. 151, may be removed, in the cases therein provided, into the High Court for the purpose of execution. By the Inferior Courts Judgment Extension Act, 1882, ss. 4, 5, a certificate of a judgment of any inferior court of England, Scotland or Ireland may be registered in a County Court for execution within the jurisdiction of the court in the same manner as if the judgment had been obtained in the court in which the certificate shall be so registered.

Removal of
judgment of
inferior
court.

Upon the same principle, where the judgment of a foreign court in a civil action has adjudicated the payment of a certain sum, a debt is implied in law which may be enforced by action in the courts of this country (*h*); and the judgment, not being matter of record in this country, is merely evidence of a simple contract debt (*i*).—The judgments of the Irish, Scotch, and colonial courts are considered as foreign judgments for this purpose, and raise an implied simple

Foreign
judgments.

Irish,
Scotch and
colonial
judgments.

(*e*) *Berkley v. Edderlin* (1853), 22 L. J. Q. B. 281; 1 E. & B. 805; *Auston v. Mills* (1853), 23 L. J. Ex. 40; 9 Ex. 288.

(*f*) *Williams v. Ireland* (1876), 1 C. P. D. 227; and see the Borough and Local Courts of Record Act, 1872, s. 6; *Paine v. Slater* (1883), 12 L. J. Q. B. 282; 11 Q. B. D. 120.

(*g*) *Morston v. Holt* (1855), 21 L. J. Ex. 169; 10 Ex. 707.

(*h*) *Grant v. Easton* (1881), 53 L. J. Q. B. 68; 13 Q. B. D. 302; *Huntington v. Attrill* (1892), 62 L. J. P. C. 41; (1893) A. C. 150.

(*i*) *Dupieix v. De Borja* (1705), 2 Vern. 540; *Walkerv. Watts* 1778, 1 Dougl. 1. See *Grant v. Easton* 1883, 53 L. J. Q. B. 68; 13 Q. B. D. 302.

PART I.
Judgments
Extension
Acts.

contract debt (*k*) for the sum adjudged to be due, upon which an action may be maintained in the English courts (*l*).—By the Judgments Extension Act, 1868, s. 1, a certificate of a judgment in any of the superior courts in Ireland and in Scotland for any debt, damages or costs may be registered in England, and “shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid, in the court in which it is so registered” (*m*). And the Act gives a corresponding effect to a certificate of a judgment of the superior courts of England when registered in Ireland or Scotland. Under the Supreme Court of Judicature Act, 1879, ss. 4, 6, judgments are now registered in the Central Office of the Supreme Court.

The judgment must be final and for a certain sum.

A judgment, as ground for an action of debt, must be final and must award a certain sum to be unconditionally due. An action will not lie upon a judgment ordering the defendant to pay a certain sum, first deducting thereout the defendant's costs, before taxation of the costs; because until then there is no final judgment for a certain amount (*n*). So, no action can be brought upon a judgment with a stay of execution, until the time for staying the execution has elapsed (*o*). But the pendency of an appeal is in general no bar to an action on a final judgment, though it may afford ground for an application to stay the proceedings (*p*).

Pendency of appeal.

Judgments in equity.

For the above reason judgments for payment of money in proceedings in equity which remain subject to the control of the court, will not in general support an action of debt; as a decree in a suit for specific performance for payment of the purchase-money upon conveyance of the estate (*q*). “But where the Chancery suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that an individual must pay it, the circumstances by which the court arrives at that conclusion do not affect

(*k*) *Phillpott v. Adams* (1862), 31 L. J. Ex. 421; 7 H. & N. 888.

(*l*) *Harris v. Saunders* (1825), 3 L. J. O. S. K. B. 239; 4 B. & C. 411; *Douglas v. Forrest* (1828), 6 L. J. O. S. C. P. 157; 4 Bing. 686; *Russell v. Smyth* (1842), 11 L. J. Ex. 308; 9 M. & W. 810.

(*m*) See *Re Dundee Ry. Co.* (1888), 58

L. J. C. 5; *Fontaine's case* (1889), 41 Ch. D. 118.

(*n*) *Satler v. Robins* (1808), 1 Camp. 253.

(*o*) *Hall v. Odler* (1809), 11 East, 118.

(*p*) *Scott v. Pilkington* (1862), 31 L. J. Q. B. 81; 2 B. & S. 11.

(*q*) *Carpenter v. Thornton* (1819), 3 B. & Ald. 522.

the right of suing in a court of law which grows out of the legal duty to pay" (*r*): as in the case of a decree for the payment of a balance due upon a final settlement of a partnership account (*s*): or of a trust and executorship account (*t*).

CR. I.
SECT. II.

For the same reason no action will lie upon interlocutory or collateral orders pending an action, the jurisdiction remaining in the court which made them; as an interlocutory order for the payment of costs (*u*). And this principle was applied to an interim judgment for costs made by the Scotch Court of Session pending an appeal (*x*). No action will lie upon an order of the Divorce Court to pay alimony *pendente lite*, because the court can rescind or alter it at any time (*y*).—But an action will lie upon a final judgment or final order for the payment of costs (*z*): as a judgment of the House of Lords dismissing an appeal and ordering the appellant to pay the costs (*a*); a final order of the Privy Council to pay costs (*b*); a decree of the Court of Session in Scotland to pay costs (*c*).

Interlocutory
orders.

Final orders
for costs.

The final judgment of a court of competent jurisdiction is conclusive between the parties upon the matters adjudicated upon; consequently in an action upon a judgment no defence can be raised which was open to the party in the original suit (*d*). Nor can the defendant take advantage of any error in the proceedings which might be corrected in the court which gave the judgment (*e*). But in an action upon a judgment of an inferior court the plaintiff himself must allege and prove that the cause of action was within the jurisdiction of the inferior court (*f*).

Effect of
judgment in
estoppel.

Upon the same principle the judgment of a foreign or colonial court is conclusive between the parties in an action or other legal

Foreign
judgment.

(*r*) *Per cur.* *Henderson v. Henderson* (1844), 13 L. J. Q. B. 274; 6 Q. B. 297.

(*s*) *Henley v. Soper* (1828), 6 L. J. O. S. K. B. 210; 8 B. & C. 16.

(*t*) *Henderson v. Henderson* (1841), 13 L. J. Q. B. 274; 6 Q. B. 297.

(*u*) *Emerson v. Lushley* (1793), 2 H. Bl. 248; *Sheehy v. Professional Life Ass.* (1857), 26 L. J. C. P. 301; 3 C. B. N. S. 211.

(*x*) *Patrick v. Shedden* (1853), 22 L. J. Q. B. 283; 2 E. & B. 14.

(*y*) *Bailey v. Bailey* (1884), 53 L. J. Q. B. 583; 13 Q. B. D. 855.

(*z*) *Ex p. Alexander* (1891), 61 L. J. Q. B. 377; (1892) 1 Q. B. 216.

(*a*) *Marbella Iron Ore Co. v. Allen* (1878), 47 L. J. C. P. 601.

(*b*) *Hutchinson v. Gillespie* (1856), 25 L. J. Ex. 103; 11 Ex. 798.

(*c*) *Russell v. Smyth* (1842), 11 L. J. Ex. 308; 9 M. & W. 810.

(*d*) *Jewsbury v. Mummery* (1872), 42 L. J. C. P. 22; L. R. 8 C. P. 56. See *Huntington v. Attrill* (1892), 62 L. J. P. C. 44; (1893) A. C. 150.

(*e*) *Dick v. Tolhausen* (1858), 4 H. & N. 695.

(*f*) *Read v. Pope* (1834), 1 Cr. M. & R. 302; *Williams v. Jones* (1845), 14 L. J. Ex. 145; 13 M. & W. 628.

PART 1. proceedings between them in the courts of this country; provided it is final and conclusive between the same parties in the foreign court (*g*). And in an action upon such judgment the defendant cannot plead any defence to the merits which could have been pleaded in the original action (*h*); as that the evidence was defective or insufficient (*i*); or that fresh evidence had been discovered (*k*); or that it was founded upon a contract which was induced by fraud (*l*); or a set-off (*m*); or a discharge in bankruptcy, which he might have pleaded in the foreign or colonial court (*n*). It is not open to the defendant in an action upon a foreign judgment, to show that the foreign court decided erroneously in applying or in not applying the law of a foreign country, or that the court was misinformed or not informed as to the law of a foreign country; foreign law being a matter of fact to be decided by the court upon the evidence produced by the parties themselves (*o*).

Foreign law.

Grounds of avoidance of foreign judgment.

Jurisdiction.

A foreign judgment is presumed to be within the jurisdiction of the foreign court as regards the parties and the matter of adjudication, without allegation or proof to that effect, as required with the judgments of inferior courts (*p*). But a foreign judgment may be avoided by showing a want of jurisdiction; as that the defendant was a foreigner to the court, not resident within or otherwise amenable to the jurisdiction (*q*). A foreigner who appears voluntarily in an action and takes the chance of a judgment in his favour cannot afterwards object to the jurisdiction; if property has been seized by the foreign court, and the owner appears merely for the purpose of defending it, his appearance is deemed not to be voluntary (*r*). A foreign judgment may also be avoided by show-

(*g*) *Ricardo v. Garcias* (1845), 12 Cl. & F. 368; *Nourse v. Freeman* 1889, 59 L. J. C. 337; 15 Ap. Ca. 1.

(*h*) *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 281; 16 Q. B. 717; *Keble v. Marshall* (1856), 26 L. J. C. P. 19; 1 C. B. N. S. 211; *Fauquelin v. Bouard* (1864), 33 L. J. C. P. 78; 15 C. B. N. S. 311.

(*i*) *Henderson v. Henderson* (1811), 13 L. J. Q. B. 274; 6 Q. B. 288.

(*k*) *Le Caze Brasar v. Rutkbour*, 30 L. J. Ex. 238; 6 H. & N. 301.

(*l*) *Bank of Australasia v. Nias* 1851, 20 L. J. Q. B. 281; 16 Q. B. 717.

(*m*) *Henderson v. Henderson* 1811, 13 L. J. Q. B. 271; 6 Q. B. 288.

(*n*) *Ellis v. Moloney* (1871), 10 L. J. C. P. 109; L. R. 6 C. P. 228.

(*o*) *Castrique v. Ourie* (1870), 39 L. J. C. P. 350; L. R. 4 H. L. 414; *Gulard v. Gray* (1870), 40 L. J. Q. B. 62; L. R. 6 Q. B. 139; *Re Tenfort* 1888, 57 L. J. C. 135; 36 Ch. D. 600; *Huntington v. Attrill* 1892, 62 L. J. P. C. 41; 1893) A. C. 150. See the Foreign Law Ascertainment Act, 1861; and the Foreign Jurisdiction Act, 1890.

(*p*) *Robertson v. Stenith* (1811), 5 Q. B. 941; *Barber v. Lamb* (1860), 29 L. J. C. P. 231; 8 C. B. N. S. 95. See *ante*, p. 85, n. (1).

(*q*) *Schibsig v. Westenholz* (1870), 40 L. J. Q. B. 73; L. R. 6 Q. B. 155; *Emmanuel v. Sganou* (1907), 77 L. J. K. B. 180; 1908, 1 K. B. 302.

(*r*) *Foncel v. Barrett* (1885), 55 L. J. Q. B. 39.

ing want of jurisdiction in the matter adjudicated (*s*); as in the case of a French court pronouncing an English contract to be cancelled, it was held that the judgment had no effect beyond French courts, and did not bar an action upon the contract in this country (*t*).—A foreign judgment may also be avoided by showing that the proceedings were contrary to the general principles of justice recognised by all other courts: as that the defendant was not summoned, and had no notice of the proceedings and had not appeared, nor had any opportunity of being heard (*u*): or that the court was constituted of persons interested in the suit who decided in their own favour (*x*): or that the court, according to a law peculiar to that country, refused to recognise a title to property previously acquired by the law of another country (*y*). Where the foreign court has jurisdiction over the parties and the subject matter, and substantial justice has been done, irregularity in the procedure will not invalidate the judgment (*z*). Where a foreign court has adjudicated *in rem* the judgment will bind all persons interested in the property whether parties to the proceedings or not (*a*).—A foreign judgment may also be avoided by showing that it was obtained by the fraud of the party who seeks to enforce it; and the fraud may be proved by the same evidence which successfully imposed upon the foreign court (*b*). But the defendant is estopped from pleading that the original cause of action was obtained by fraud of the plaintiff, because he ought to have raised that defence in the foreign court (*c*).—A foreign judgment is also impeachable for error apparent upon the face of it, that is to say, such error as shows upon the face of the judgment itself, without any extrinsic evidence, that the judge had come to an erroneous conclusion either

CH. I.
SECT. II.

Disregard of
justice.

Fraud.

Error
apparent
upon the
judgment.

Bank of Australasia v. Nias (1851), 20 L. J. Q. B. 284; 16 Q. B. 717.

(*t*) *Novelli v. Rossi* (1831), 9 L. J. O. S. K. B. 307; 2 B. & Ad. 757; explained in *Castro v. Lurie* (1870), 39 L. J. C. P. 338; L. R. 4 H. L. 433.

(*u*) *Buchanan v. Rucker* (1808), 9 East, 192; *Ferguson v. Mahon* (1839), 9 L. J. Q. B. 146; 11 A. & E. 179; *Roussillon v. Roussillon* (1880), 49 L. J. C. 338; 14 Ch. D. 351.

(*x*) *Pice v. Dechurst* (1837), 6 L. J. Ch. 226; 8 Sim. 279; on appeal (1838), 8 L. J. Ch. 57; 1 M. & Cr. 76.

(*y*) *Simpson v. Fogo* (1863), 32 L. J. C. 249; 1 H. & M. 195.

(*z*) *Pemberton v. Hughes* (1899), 68

L. J. C. 281; (1899) 1 Ch. 781.

(*a*) *Castro v. Lurie* (1870), 39 L. J. C. P. 350; L. R. 4 H. L. 414; *Liverpool Marine Credit Co. v. Hunter* (1868), 37 L. J. C. 386; L. R. 3 Ch. 470; "*Minna Craig*" Co. v. *Chartered Mercantile Bank* (1897), 66 L. J. Q. B. 339; (1897) 1 Q. B. 460; *Re Maunsell, Son & Field* (1900), 69 L. J. C. 317; (1900) 1 Ch. 602.

(*b*) *Ochsenheim v. Papelier* (1873), 42 L. J. C. 861; L. R. 8 Ch. 695; *Aboulloff v. Oppenheimer* (1882), 52 L. J. Q. B. 1; 10 Q. B. D. 295; *Vadala v. Laurex* (1890), 25 Q. B. D. 310.

(*c*) *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; 16 Q. B. 717.

PART I.

of law or fact; and for this purpose reasons appended to the judgment as forming the grounds of decision may be taken as part of the judgment itself, and are examinable (*d*). So, though a foreign judgment is presumed to be correct according to the law of the court, yet if it clearly appear or be admitted by the parties to be erroneous according to that law, it may be impeached for such error in the courts of this country (*e*).

Debt on
foreign
statute.

Debts founded on foreign or colonial statutes seem, like debts created by foreign judgments, to be in the nature of simple contracts; as a debt for calls upon shares in a company constituted under a colonial statute (*f*). An action does not lie in this country to enforce a liability in the nature of a tax or rate imposed by a foreign legislature upon property situate abroad (*g*).

(*d*) *Reimers v. Drue* (1857), 26 L. J. C. 196; 23 Beav. 145; *Simpson v. Fogo* (1863), 32 L. J. C. 249; 1 H. & M. 195.
(*e*) *Meyer v. Rolli* (1876), 45 L. J. C. 741; 1 C. P. D. 358; *Huntington v.*

Atwell (1892), 62 L. J. P. C. 14; (1893) A. C. 150.

(*f*) *Welland Ry. v. Blake* (1861), 30 L. J. Ex. 161; 6 H. & N. 410.

(*g*) *Sydney Council v. Bull* (1908), 78 L. J. K. B. 15; (1909) 1 K. B. 7.

CANADIAN NOTES.

Privity of Contract.

In *Sims vs. Dennison*, 28 U. C. Q. B., 323, the defendant, being the treasurer of a Turf Club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the Club was indebted to him for advances which he had previously made. It was held that the plaintiff could not sue defendant for money had and received, there being no privity between them and defendant being accountable only to the Club.

In *Standing vs. London Gas Company*, 21 U. C. R., 209, one Taylor contracted with the defendant, a corporation, to construct certain work for them and on the same day the plaintiff agreed with Taylor to do a portion of the work for nine hundred dollars, subject to the same conditions which bound Taylor with the defendant, one of which was that twenty per cent. of the price should be retained until three months after completion of the work and then paid upon the certificate of the manager that it had been performed to his satisfaction. Taylor on the same day by letter authorised defendants to pay the plaintiff for his work up to the amount of Taylor's contract with him and defendant, in answer, agreed to this provided the plaintiff should carry out his contract with Taylor and perform his work to the satisfaction of the manager on whose certificate alone any money should be paid. Defendant paid the plaintiff all but the twenty per cent. as the work progressed, but the manager refused to certify, complaining that it was improperly performed. It was proved, however, that he had verbally agreed to pay the men who had worked under the plaintiff one hundred dollars if they would discharge the Company. It was held, reversing the judgment of the court below, that the plaintiff had no right of action against the defendant because there was no contract between them.

The case of the *Great Western Railway Company vs. The Preston and Berlin Railway Co.*, 17 U. C. R., 477, on which the trial judge had based his opinion, was distinguished.

Action En Garantie Simple.

In *Royal Electric Company vs. Leonard*, 23 S. C. R., 298, the appellants, who had a contract with the City of Three Rivers

to supply and set up a complete electric plant, sub-let to the respondent the part of their engagement which related to the steam engine and boilers. The original contract with the City of Three Rivers embraced conditions of which the defendant had no knowledge, and included the supply of other and totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the work, having sued the city for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondent. It was held, affirming the judgment of the courts below, that there was no legal *connexité* existing between the contract of the defendant and that of the plaintiff with the City of Three Rivers upon which the principal demand was based, and, therefore, the action *en garantie simple* was properly dismissed.

General Offer makes Contract with Party Accepting.

In *Bank of Montreal vs. Thomas*, 16 O. R., 503, on the maturity of a bill of exchange, the drawers thereof, thinking the acceptor would be unable to meet it, telegraphed him if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of plaintiff bank who, on the faith of it, discounted a sight bill drawn by the acceptor on the drawers, with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so redrawn. It was held that the telegram having been sent for the purpose of inducing persons to advance money on it and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendant, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced. It was also held that no time being mentioned in the telegram an authority to draw at sight would be implied.

Acceptance by Letter, when Complete.

In *McGunn vs. Anger*, 31 S. C. R., 186, an offer was made by letter dated and mailed at Quebec, defendant's acceptance being by letter dated and mailed at Toronto. It was held that, in the Province of Quebec as in the rest of Canada, in negotia-

tions carried on by correspondence it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but it is complete on the mailing of such letter in the general post-office.

Notification of Acceptance Necessary.

In *Western Assurance Co. vs. Temple*, 31 S. C. R. 373, a condition in a policy of insurance provided that the policy would be avoided if the assured should have or obtain other assurance whether valid or not on the property. The assured applied for other insurance, but before he was notified of the acceptance of his application the premises were destroyed by fire. It was held that there was no breach of the condition.

Mode of Acceptance Prescribed.

In *Carr vs. Canadian Northern R'Y*, 17 Man. 178, a written offer to sell lands on certain terms accompanied by an intimation that if the purchaser takes possession the vendor will treat that act as an acceptance of the offer and the subsequent taking of possession without further communication with the vendor together constitute a binding contract of purchase and sale of land which is taken out of the Statute of Frauds by the act of taking possession, such act being in itself a part performance of the contract as well as an essential in the making of it.

Contract by Correspondence, where Made.

In the *Craigellachie Distillery Co. vs. Bigelow*, 37 N. S. R., 482, Eager & Co., who did business at Halifax, Nova Scotia, acted as agents for the plaintiff company whose head office was at Glasgow, Scotland, but they had no power to accept orders or make sales, the scope and extent of their agency being limited to receiving orders and transmitting them to plaintiff whose officers alone had power to decide whether they would accept the orders and forward the goods or not. In the course of this business Eager & Co. received orders from the defendant for a quantity of whiskey, and the orders having been transmitted to plaintiff, the whiskey was committed to a carrier at Glasgow to be forwarded to defendants at Halifax and Truro in the province of Nova Scotia. In an action brought by plaintiff against

defendant on his acceptances for the price of the whiskey, defendant sought to escape liability on the ground of illegality, pleading that the plaintiff carried on business in Halifax without a license and that the liquors were sold and shipped by plaintiff knowing they were to be disposed of in contravention of the Liquor License Act of Nova Scotia and of the Canada Temperance Act. It was held that the contract sued on was made in Glasgow and not in Halifax and plaintiff was, therefore, entitled to recover.

It was held further that in the absence of statutory enactment to the contrary the law requires actual knowledge on the part of the vendor of the illegal purpose on the part of the vendee and, assuming that the plaintiff's secretary, who was at one time in the province, acquired some knowledge of the law then in force, this fact did not raise a presumption that he or plaintiff knew at the time the orders were received or delivery was made that such law still existed or that defendant intended to dispose of the goods illegally.

See Supreme Court report, affirming, 37 S. C. R., 55.

In *National Cash Register Co. vs. Lovett*, 39 N. S. R., 540, plaintiff's agent sold goods at North Sydney, Cape Breton, under a contract in writing, one of the terms of which was that the title of the goods was not to pass until after payment in full of the price, and another that the order was subject to the approval of the plaintiff. Plaintiffs were a Company carrying on business at Dayton, Ohio, but the goods were shipped from a factory in Hamilton, Ontario. It was held that the contract was made out of the jurisdiction either at Dayton, Ohio, when it was accepted and agreed to by plaintiff, or at Hamilton, Ontario, when the goods were shipped, and that it was, therefore, not affected by the provincial statute of Nova Scotia, the Bills of Sale Act.

Consensus Requisite to Ratification.

On October 30th, 1886, an order in council was passed which recited the execution and assignment of an original contract, the execution of the work by Woodburn after it expired and the recommendation of the Secretary of State that a formal contract should be entered into extending the original contract to December 1st, 1887, and then authorised the Secretary of State to enter

into such formal contract with Woodburn, but subject to the condition that the government should waive all claims for damages by reason of non-execution or imperfect execution of the work and that Woodburn should waive all claims to damages because of execution of binding work by other parties up to the date of said extension. Woodburn refused to accept the extension on such terms.

It was held that Woodburn could not rely on the Order in Council as a ratification of a contract formed by a letter of the Queen's Printer, that the element of consensus entered as much into the ratification of the contract as into the contract itself and Woodburn could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

Contract Concluded.

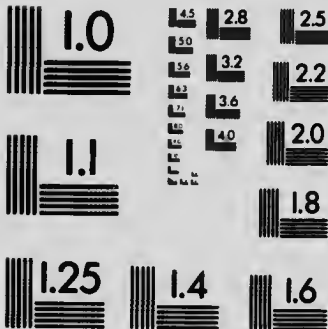
In *Heckla vs. Cunnard*, 37 N. S. R., 891, plaintiffs, through their agent H., and defendants negotiated for the chartering by plaintiffs to defendants of the steamer T., then at Chatham, N.B. Defendants desired to have the steamer delivered to them at North Sydney, but, after some negotiations, on the 9th of October, offered to take delivery at Chatham and use the vessel for three months if navigation remained open. Plaintiffs declined to take the risk of navigation remaining open and, on October 15th, plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day plaintiff's agent replied, "Have closed in accordance with your telegram to-day and arranged delivery North Sydney." On the following day defendants replied: "Telegram received closing T. Try to get her delivered North Sydney end October." It was held, dismissing defendants' appeal, that defendants, by their telegram of October 15th, in view of previous correspondence, disclosed an intention to authorise a contract according to what had already been embodied in writing, and that the reply to that telegram conveyed all that was required to embody the terms of the charter. Also held that defendants, whose position was changed on the 22nd, could not, by continuing the correspondence, and raising other questions, escape the effect of the mutual terms previously agreed upon.

In *Anglo Newfoundland Fish Co. vs. Smith*, 35 N. S. R., 267, plaintiffs offered to buy a quantity of fish from defendant at a



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price of 25 cents per quintal above the Halifax price, provided the fish were so cleansed or prepared for market as to leave little if any blood or black spot. Defendants replied guaranteeing to furnish the quantity of fish required at the price specified and prepared as required by plaintiffs: "with one exception, that it is impossible for us to take all black skin from the nape of the fish." Plaintiffs in reply stated that the condition which the defendants wished to except was the most important requisite, that it was done in the case of all fish caught and cured in Iceland and other places mentioned and that for this one reason fish from those countries sold at a fair price when fish not so prepared could not be sold at all. Defendants failed to make any immediate reply to this letter and plaintiffs wrote again asking whether defendants had decided to supply the cargo in the condition plaintiffs would like to have it as per their previous letter. Defendants thereupon wrote: "We will furnish any quantity of fish that you want, suitable for any market, at the price you offer." They added: "I will do my best in regard to removing the black skin as you stated in your previous letter. To this letter plaintiffs replied, stating that they would take a cargo of 2,500 quintals according to previous arrangement as to quality and price.

The judgment of Townshend, J., that notwithstanding the words "I will do my best," there was a complete contract upon which plaintiffs were entitled to recover was affirmed by an equal division of the court. In the judgment of Graham, E.J., concurred in by Ritchie, J., he examines the authorities fully, and concludes that there was no contract such as the plaintiffs contended for, and that plaintiffs could not now argue that the defendants had not "done their best," as that was not the contract on which they had declared, and what was more important, the plaintiffs had not accepted the offer of such a contract.

In *Marshall vs. Jamison*, 42 U. C. Q. B., 115, the plaintiff, through his agent at Seaforth, early in September offered defendant ninety-four cents a bushel for his wheat f.o.b. at Trenton, where defendant lived, at station on the same line of railway as Seaforth. This was not then accepted, and on the 9th of September defendant offered to take that price, but plaintiff did not then want the wheat. On the 11th of September plaintiff telegraphed defendant, "Will take your wheat at ninety-four

cents. Answer." On the same day defendant answered, " Will accept your offer ninety-four. Send directions about shipping." It was held that the words " Send directions about shipping " did not qualify the previous unconditional acceptance. It was also held that under such a contract it was the duty of the buyer to provide the cars.

In *Ballaenyne vs. Watson*, 30 U. C. C. P., 529, the plaintiff on August 30th telegraphed to the defendant: " Quote price for August cheese and number of boxes," to which defendant replied, " Six cents." The plaintiff telegraphed, " Your offer of August cheese at six cents accepted." On September 8th defendant wrote to plaintiff, " When will you inspect and ship. We will ship at Lucknow and Wingham about 700 August. Will expect you to inspect and ship in usual time, say middle of month." On the 11th September, plaintiff replied that he would ship next week, which ended on September 20th. On September 15th plaintiff again wrote asking defendant, " When will it be convenient for you to ship your August cheese, and at what stations? Please let me know at once as we would not want to ship later than Monday or Tuesday of next week." On September 18th defendant replied that he had already informed him of the stations " and we were expecting to ship this week." On the 19th plaintiff wrote requesting delivery at the places named on Wednesday, which would be the 24th.

It was held that it was not essential that each of these letters and telegrams should refer in terms to the preceding one, but the connection might be made out even from the subject-matter of the correspondence, so long as it appeared that it all related to the same contract and that a valid contract was established for the sale of 700 boxes of cheese at 6 cents per pound. The Court was assisted by parol evidence and construed the letters and telegrams in the light of surrounding circumstances.

In *European and N. A. R. Co. vs. McLeod*, 3 Pugsley (N.B.), 3, the plaintiff company was about being organized, and defendant was asked to take stock in it and subscribed his name to a paper prepared for that purpose agreeing to take ten shares. It was held that this was an offer made by the Company on the one side and accepted by the defendant on the other and that a complete contract was formed which made him liable as a stockholder

to assessments and that it was not necessary that certain shares designated by numbers should be assigned to defendant to make him liable.

In *Murphy vs. Thompson*, 28 U. C. C. P., 233, the defendant at Toronto wrote plaintiff at Mountforest: "Our Mr. Peters advises me that you have a car or two of hogs. Please state by telegraph quantity and lowest price average and upwards." On the 19th, Peters telegraphed plaintiff, from Hurriston, "Name lowest price for one or two cars hogs, give average," to which plaintiff immediately replied, "Will take seven ten here, average two hundred." Peters telegraphed in reply, "Will accept your offer seven ten, \$7.10, order cars coming to-day."

It was held that this was a complete contract sufficient to satisfy the Statute of Frauds, for the words "order cars" merely referred to the utmost number of cars, namely, two, mentioned in the first telegram, and did not mean "provided you order the cars." There being two sizes of cars, one double the capacity of the other, it was held that it would be a good contract for at least two cars of the smaller dimensions, capable of being extended by parol evidence to cars of the larger size.

In *Thorne et al vs. Barwick et al*, 16 U. C. C. P., 369, the plaintiffs on September 5th wrote to defendants asking their price for a certain specified quantity of leather. On the 7th of September the defendants replied through their manager, acknowledging receipt of the plaintiffs' letter and adding, "We are now selling our leather for twenty-two cents each at the tannery. Trusting to receive your order, I remain, etc." On September 13th, plaintiff wrote as follows, "I am in receipt," etc., reciting the offer, "In reply, etc., I will take four hundred sides number one overweight, though I am paying you one cent more than what I have just purchased at. I will send over Mr. P. to look out what will be most suitable for my trade." On September 15th one of the defendants telegraphed plaintiff, "Wednesday next will be most convenient to attend Mr. P. at tannery."

It was held that the whole correspondence taken together constituted a binding contract between the parties and, *semble*, that the letter and telegram of 13th and 15th of September would of themselves have established a binding contract.

In *Bruce vs. Toulton*, 4 O. A. R., 144, in reply to an offer by the defendant for the sale of certain wheat, the plaintiffs telegraphed, "Will take your five cars at eighty-five cents per bushel." to which the defendant replied by postal card, 25th of July, "Send instructions for the shipment of the five cars spring." On the 26th the plaintiff mailed a postal card with instructions, but this was never received by the defendants. A shipping note mailed on the 27th however reached the defendant on Monday, the 29th, but he had sold the wheat on the 27th. It was held that the postal card sent on the 25th amounted to an absolute acceptance and not merely a conditional acceptance should the defendant be satisfied with the instructions he might receive as to the mode of shipment.

In *Dalrymple vs. Scott*, 19 O. A. R., 477, to a written offer to sell some flour on certain terms, a telegram was sent, "Letter received, offer accepted. Writing." No letter was written, but it was held that there was a completed contract.

In *Bundy vs. Johnson*, 6 U. C. C. P., 221, plaintiff telegraphed to defendant at Lockport, "A party wants to buy wheat on 'Graee Greenwood.' What is your price?" Defendant answered by telegraph, "I will sell for two dollars per bushel." Plaintiff replied, "I will take wheat on Graee Greenwood at your offer two dollars per bushel." The telegrams were held to constitute a valid contract between the parties.

In *McGoldrick vs. Eastern Express Company*, 1 Pugsley (N.B.), 138, the plaintiff applied to the agent of an express company in Fredericton to forward a case of furs to Halifax to be sent to London, stating that he wished to have them insured. The agent said he could not get marine insurance in Fredericton, but that if the plaintiff would write to S, the agent of the Company at St. John, he had no doubt he would do it as he had done so for others. On the following day the agent of the Company at Fredericton received the furs from the plaintiff and signed a receipt stating that they were to be forwarded and delivered to the nearest connecting express, nothing being stated about insurance in the receipt. The furs were sent to S. at St. John, and were by him forwarded to Nova Scotia and there taken charge of by another Company who shipped them to London and they were

lost. At the time the plaintiff delivered the invoice of the furs to the agent at Fredericton he also delivered him a letter addressed to S. in which the plaintiff stated that he wished S. to insure \$600 on the furs and to forward them to Halifax immediately as he wished to have them in London at a particular time. S. did not insure. In an action against the Company for neglecting to insure it was held that the contract was complete when the agent in Fredericton received the furs and gave the receipt, which contained the terms of the contract and that the letter to S. was only a request to insure and formed no part of the contract for the transmission of the furs.

In *Andrews vs. Calori*, 38 S. C. R., 588, the correspondence between the parties was held to satisfy the Statute of Frauds and the words, "So soon as title is evidenced to our satisfaction," contained in the solicitor's letter accepting the condition as to terms of payment, did not import any new term into the agreement. The words referred to were held to be different from those which constituted a new term in the case of *Hussey vs. Horne-Payne*, 8 C. B., 670, in which the words were, "subject to the title being approved by our solicitor," though it was pointed out as to this latter case that it had in effect been overruled in *Hack vs. London Provident Association*, 23 C. B., 112.

In *Webb vs. Sharma*, 34 U. C. Q. B., 410, Webb, one of the plaintiffs, saw defendant at his cheese factory at Stratford and talked of the price of cheese. On leaving he said that any correspondence would be through C. Subsequently plaintiffs authorized C. to buy cheese from the defendant and, on August 20th, at 4 p.m., C. telegraphed defendant, "Name lowest price for your cheese, stating the number of boxes." This was received on the 21st, and, on the evening of that day, defendant telegraphed C., "Will sell two hundred and fifty cheeses ten and a half cents," which C. received at 9.25 a.m. on the 22nd, and immediately answered by telegraph, "I accept your offer. When will you box? Answer." This was received at the Stratford office 10 a.m., and by defendant on the same date. On the evening of the 21st, defendant had left the telegram to be sent to C. on receipt at telegraph office of C.'s answer to defendant's telegram naming the price. It read, "I have sold in Stratford. Did not get your answer in time." It was held that the telegrams shewed a complete contract.

In *Sumner vs. Thomson et al*, 31 N. S., 481, plaintiff wrote to defendant as follows, after certain negotiations by telephone: "I confirm sale to you by telephone of 10,000 bushels Island black oats at 24 cents per bushel f.o.b. cars at Pietou or 28 cents delivered at Elmsdale whichever way you may prefer to order them forward, etc." Defendants replied: "Yours of 7th to hand and we now complete purchase and will forward; the bags go to you at once for the oats when we hope to be able to instruct you as to where to ship the same." It was agreed at the trial to be the usage of trade, if oats were to be delivered at a certain point on the railway at a certain price with an option to the buyer to direct delivery at points either this side or beyond the place of delivery, that the freight should be either added or deducted as the case might be. It was held that the defendants were bound and that as soon as one of the parties acted on one of the alternatives and the other, without objecting, adopted it, the option was at an end and all the terms complete.

In *Harty vs. Gooderham et al*, 31 U. C. Q. B., 18, the plaintiff, by telegraph, asked defendants their prices for high wines and whiskey. Defendants wrote specifying the prices for quantities not less than a car load and requesting an order. Plaintiff telegraphed, "Send three car loads high wines." Defendants refused to deliver at the price first named, answering that the price had advanced, but it was held that there was a complete contract. It was admitted that the order was reasonable in point of quantity and, although that seems immaterial, that the defendants had the goods on hand.

Contract not Concluded.

The case last referred to was distinguished from *Johnson vs. Rogers*, 30 O. R. 150, in which the defendants, dealers in flour, wrote to the plaintiffs who were bakers that they wished to secure their patronage as customers, but it was hardly prudent for them to push the sale of flour just now as prices were sure to advance at least fifty cents a barrel within a few days. "Nevertheless, we are going to do it just to save you money and secure your patronage. We quote you R. O. B. or F. O. B. your station, Hungarian \$5.40 and Strong Baker's \$5.00, car lots only. We would suggest your using the wire to order as prices are so

rapidly advancing that they may be beyond reach before a letter would reach us."

Plaintiffs replied next day, being the morning on which they received the letter, "We will take two ears "Hungarian" at your offer of yesterday." Defendants refused to deliver, flour having advanced, and it was held by the Divisional Court, Armour, C. J., Falconbridge and Street, J.J., that there was no contract. Defendant's letter was only a quotation of prices.

Harvey vs. Facey, 1893 A. C., 552, was quoted as a strong authority against the plaintiffs, as to which see article in Canada Law Journal, Vol. 45, p. 617.

In *Larkin vs. Gardner*, 27 O. R., 125, a land agent was employed to effect a sale of land, but without authority to sell at the price for which defendant agreed to purchase. The purchaser signed a form of agreement which was taken by the agent to the plaintiff and signed by him, but, before the purchaser was notified thereof, he gave notice to the agent withdrawing his offer. It was held that he could do so as the instrument, although in form an agreement, was in substance a mere offer.

In *Fulton Bros. vs. Upper Canada Furniture Co.*, 9 O. A. R., 211, the plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants, in a subsequent letter, assumed that this was to be American inspection and the plaintiffs answered, "We do not know anything about American inspection, but will submit to any reasonable inspection. No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection. It was held, reversing the judgment of the Common Pleas Division, that there had not been shewn a clear accession on both sides to one and the same set of terms, and that a concluded agreement had not been made out between the parties.

In *Williston vs. Larson*, 19 S. C. R., 673, the defendant signed a document by which he agreed to sell certain property to the plaintiff for \$42,500 and plaintiff signed an agreement to purchase the same. The document signed by plaintiff stated that the property was to be purchased subject to the encum-

branches thereon. With this exception the documents were the same in substance and each contained at the end this clause: "Terms, deeds and so on to be arranged by the first of May next." On the day that these papers were signed the defendant, on the request of plaintiff's solicitor to have the terms of the sale put in writing, added to the one signed by him the following: "Terms \$500 cash this day, \$500 on the delivery of the deed of the Parker property, \$800 with interest every three months until the \$6,500 are paid when the deed of the entire property will be executed." The property mentioned in these documents was with other property of the defendant mortgaged for \$36,000. Plaintiff paid two sums of \$500 each and demanded a deed of the Parker property which was refused.

It was held that there was no completed agreement between the parties; the agreement only provided for payment of \$6,500, leaving the greater part of the purchase money unprovided for. If the plaintiff was to assume the mortgage, it was necessary to provide for the release of defendant's other property and for matters in relation to the leasehold property. Strong, J., said that it was an agreement for the sale of an equity of redemption only, and, as questions would arise in future as to release of defendant's other property from the mortgage and his indemnity from personal liability to the mortgagee, there was no completed agreement that could be enforced.

In *McIntosh vs. Brill*, 20 U. C. C. P., 426, plaintiff telegraphed to defendant in answer to enquiry about the price and quantity of butter on hand that he had a hundred kegs at twenty cents and defendant replied that he would take it if good. Plaintiff did not state in return that it was good, or offer to guarantee it. As, but two days after, he again telegraphed to come and see the butter or send \$1,500, to which defendant answered "You could try and see him the following week. After the several days plaintiff enquired whether defendant intended taking the butter or not. In an action by the plaintiff against the defendant it was held that there was no binding contract between the parties.

In *Willing vs. Currie*, 36 U. C. Q. B., 46, defendant telegraphed plaintiff, "Can you ship three ears Treadwell wheat this month at one-twenty? Reply." On the same day the plaintiff an-

swered, " Will accept your offer three cars Treadwell one dollar twenty." On the 25th defendant enclosed a shipping bill to plaintiff, asking him to ship the wheat as soon as possible. This bill was a printed form in use in the Grand Trunk Railway filled up for the three cars, addressing them to the Royal Canadian Bank, Montreal. On the next day, hearing that the Railway Company had been inserting the words " At the owner's risk of delay " in their shipping bills, the defendant telegraphed plaintiff that he could not take the wheat if the plaintiff allowed these words to be put in. The agent of the railway insisted on the insertion of the words. It was held that the two telegrams of the 24th and the letter of the 25th did not form a binding contract, that the terms of the shipping note were to be considered as part of the bargain and that the plaintiff, therefore, could not recover for goods bargained and sold, having forwarded the wheat and drawn upon the defendant with a bill of lading attached.

In *Sumner vs. Colc*, 30 S. C. R., 379, plaintiff, a grain merchant in Truro, telegraphed defendant, a grain merchant in Toronto, " Quote bottom. prices twenty to twenty-five cars thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." Defendant replied next day, " White oats thirty-two half, Truro, bags two cents bushel extra." Plaintiff wired same day, " How much less can you do mixed oats for. Might work white at thirty-two but not any more. Answer." Defendant replied, " Mixed oats scarce, but odd cars obtainable half cent less. Exporters bidding twenty-three for white. Highest freight Truro freight two half over Halifax. Offer white thirty-two bulk, thirty-four in half bushel bags Truro." Next day plaintiff wired, " I confirm purchase twenty thousand bushels oats white at thirty-two, mixed at thirty-one half, bagged even four bushels in my bags. Confirm. May yet order five cars more in bulk," and he confirmed it also by letter. Defendant answered by telegram at once, " Cannot confirm bagged. Am asked half cent for bagging. Bags extra." Plaintiff replied, " All right. Book order; will have to pay for bagging." Defendant wired, same day, " Too late to-day, made too many sales already, will try confirm to-morrow." On receipt of this plaintiff wrote urging action, and next day wired, " Will you confirm oats, completed sale receipt first telegram yesterday.

"Expect you to ship." Defendant answered next day, "Market advanced two cents here since yesterday noon. Had outs under offer expecting your order till noon yesterday. When you accepted bugged parties demanded half cent for bugging. They sold before your second wire yesterday. This is why I could not confirm, etc."

It was held by the Supreme Court of Canada, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties as they did not come to an understanding in respect to some of the material terms.

In *McIntyre vs. Hood*, 9 S. C. R., 556, the appellant wrote the respondent as follows: "A. McIntyre agrees to take \$35,000 for property known as 'McMicken Block' terms one-third cash, balance in one year at eight per cent. per annum, open until Saturday 28th, noon." On the same day Hood accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McMicken's Block, being the property on Main Street, etc., for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstracts submitted by your solicitor to N. F. Hagel, Esq., 32 Donaldson Block, as soon as possible that I may get conveyance and give mortgage." It was held that there was no binding unconditional acceptance of the offer of sale.

Ritchie, J., dissented, considering that the contract was completely formed; that the parties intended that the sale should be an immediate sale to take effect from the time of making of the payment of cash one-third, that when this was paid the vendee was to have a title to the property and possession given to him and, as regards the latter part of the acceptance asking for papers and abstracts, it was nothing more than that he might have the title investigated in the usual way by his own solicitors; that he might get the conveyance and give his mortgage.

In *St. James vs. Corporation of St. Gabriel*, Contlee's Dig., 377, the corporation of St. Gabriel on February 1st, 1880, called for tenders for water works for the village according to plan and specification. St. James & Co. tendered to do the several works of supplying and laying water-pipe in the village according to plan and specification for \$37,600.99. The specification

had no prohibition against transferring the contract. The tender of St. James & Co. was the lowest but one, that of D. & Co. By a memorandum of agreement made 5th of March, 1880, between (St. James & Co., doing business together under the name of) St. James & Co., and T., St. James & Co. transferred all their interest under the tender for \$500 to T. when the contract should be awarded by by-law being passed. D. & Co. availed themselves of certain irregularities to withdraw their tender. The St. Gabriel Council decided to make some changes in the plans and specifications and resolved that the specification as made by the engineer of the corporation with the correction as amended by the Council be accepted and that St. James be allowed two days to consider the specification and if he should accept that he should attend on the 15th of July at 3 p.m., to sign the contract. The new specification contained a clause that the contractor will not be permitted to sub-let any portion of the work except for delivery of materials without the consent of the municipal council. On the 15th of July, St. James & Co. went to the office of the respondent's notary to sign the contract. At the same time T. presented himself and claimed the right to sign the contract as transferee, producing and communicating to the mayor the document by which St. James & Co. had transferred all their interest in the contract to him. In the result the Council determined not to give the contract to St. James & Co., but sent for the next lowest tenderer to whom they made an offer on the terms and conditions proposed to St. James & Co., at the meeting 12th of July, and this offer being accepted it was resolved to give them the contract.

An action was brought by St. James in his own name as the only person interested in the tender of St. James & Co., for breach of the contract between himself and the respondent and of the resolutions of 12th of July, 1880, and it was held by the Superior Court at Quebec, whose decision was affirmed by the Supreme Court of Canada, that the evidence shewed no individual tender by St. James but one by St. James & Co., as constituting the firm of St. James & Co., and further that under the circumstances there never had been any completed contract between the parties; that the provision against assigning the contract was a material stipulation which had been violated by the assignment to C. and that the Council had been justified in refusing to accept the tender.

In *Carter vs. Bingham*, 32 U. C. Q. B., 615, after some enquiries and conversations, plaintiff telegraphed defendant, "Will take fifteen to twenty bales good new hops at twenty cents cash." Defendant replied by telegram, "Your offer accepted. Have booked your order for fifteen bales new hops for delivery when picked." It was held that the acceptance was not simple but was qualified by leaving out the word "good" and also as to the time of delivery.

In *Kinghorne vs. Montreal Telegraph Co.*, 18 U. C. Q. B., 60, plaintiff, living at Kingston, received from Craik, at Oswego, a telegram, "Will give you eighty cents for rye," and on the next day he took to defendant's office the reply, "Do accept your offer. Ship to-morrow fifteen or twenty hundred." In an action for not transmitting the telegram, it was held that there could be no damages recovered because the telegram if sent would not have made a complete contract.

In *McFarren vs. Johnson*, 10 O. R., 161, plaintiff offered to give defendant fifteen hundred dollars for a certain lot of land containing a fifty feet frontage. Defendant replied that he would take seventeen hundred and fifty dollars for the fifty feet or fifteen hundred dollars for thirty-five feet of the fifty feet. Before receiving any answer, defendant telegraphed to plaintiff, "Coming Monday to accept fifteen hundred dollars. Waiting immediate reply." Plaintiff telegraphed back, "Come at once." It was held that the telegrams did not constitute any contract such as plaintiff alleged for the sale of the fifty feet for fifteen hundred dollars, for it was ambiguous to which proposal of fifteen hundred dollars the defendant's telegram referred, and, moreover, that the words "Coming to accept" did not show an actual acceptance but were merely an expression of an intention to do something in the future.

It would seem that the acceptance clearly applied to the offer of the thirty-five feet for fifteen hundred dollars, and Proudfoot, J., seems to hold that it would be so, but, as plaintiff said it was not, he concluded that the parties had never arrived at the same mind on the subject. The judgment is really based on the proposition that the words "Coming to accept" did not indicate an absolute acceptance.

Terms too Uncertain or Ambiguous.

In *Kerr and Begg vs. Cotton*, 2 B. C. R., 246, it was held that where a contract provided for the manufacture according to specifications of an article equal in every respect to a sample produced and no sample was produced as agreed upon, the contract was void for uncertainty and no action could be brought for the breach of it by either party.

In *Montreal Gas Co. vs. Vasey*, 1900 A. C., 595, a written promise by the appellants that, if satisfied with the respondent as a customer, they would favourably consider any application by him to renew a subsisting contract on its expiration, was held not to impose a legal obligation to grant the renewal.

In *Bell vs. Northwood*, 3 Man., 514, the agreement for the sale of certain shares of stock was perfect as to amount and terms except for the proviso that a note for five thousand dollars to be given in part payment was "to be secured by a portion of the stock." This was held too indefinite for specific enforcement.

In *McLaughlin vs. Whiteside*, 7 Grant's, Ch., 573, the terms of agreement were as contained in a letter by the intending purchaser: "We will give you for your mill privilege in Laxton with all the improvements, etc., four thousand dollars." In reality the premises mentioned comprised two mill privileges, but the vendor insisted that only one was embraced in the agreement. It was held that the expression "your mill privilege in Laxton" was too uncertain to admit of the agreement being enforced and that there had been a plain misunderstanding between the parties.

In *Foster vs. Russell*, 12 O. R., 136, an agreement was in the following form: "In consideration of you advancing us the sum of \$3,000 we agree to give you collateral security and to pay you interest at the rate of eight per cent." No kind of security was specified in the agreement, of which, therefore, because of its uncertainty, specific performance was refused.

Contract Notwithstanding Apparent Uncertainty.

In *O'Donnell vs. Hugbill et al.*, 11 U. C. Q. B., 441, an agreement to saw logs and deliver lumber at another's mill, as soon

as the parties so agreeing were able to do so, was held not void for uncertainty.

In *Sylvester vs. Murray*, 26 O. R. 599, the purchasers of a farm signed a contract in which they said, "We agree to take your farm and pay you \$9,000, and, if we get along fairly well, we will give you the other \$5,000 as soon as we are able." The price of \$9,500 had been mentioned in the negotiations for the sale. It was held that the provision as to the \$500 was a conditional promise on which a recovery might be had on proof that the purchasers were of ability to pay, which the evidence failed to shew. In the judgment of Boyd, Ch., it is mentioned that the text books are silent on the subject of such contracts.

In *re Ross*, 29 Grant's, Ch., 385, where money was lent to be repaid when the borrower was able, it was held that his ability might be shewn by a slight amount of evidence such as was open to public observation of a flourishing condition of his affairs, and it was not necessary to shew that the borrower was in a position to discharge the debt without inconvenience.

In *Leadyard vs. McLean*, 10 Grant's, Ch., 139, the owner of land had made a demise of fifty acres for the purpose of boring for oil and contemporaneously executed an agreement by which he agreed to convey at any time a roadway from any wells the lessee might dig or bore to a certain road and, also, sufficient land for the working of such well or wells, the lessee agreeing to pay one hundred dollars for the first well and fifty dollars per acre for the land necessary for working such wells or said roadway and fifty dollars for any oil wells he should work after the first one, etc. It was held that this agreement was not too uncertain to be executed.

No Consensus ad idem.

In *Omnium Securities vs. Richardson*, 7 O. R., 182, defendant wrote plaintiff's agent, "I have considered the matter of our conversation and offer you \$800 for the property." The agent replied, "I have your favour offering \$800 for the property. I have concluded to accept your offer." The evidence shewed that, at the prior conversation referred to in defendant's letter,

defendant was seeking to buy the property on terms of five or seven years' credit. It was held that as the acceptance by plaintiff was as of a cash offer there was no contract, the parties differing in their understanding of it.

Agreement to Enter into a Formal Contract.

In *Anglo-Canadian Man. Co. vs. Gordon*, 19 Man., 201, it was held that there was no binding contract where the writing signed appeared to be only an agreement to enter into a formal contract for the purchase of land to be prepared in the future, although it set forth the terms agreed on as the basis of such formal contract. In this case the terms of the agreement in question are thus stated in the judgment: "It recites that the party of the second part is anxious to purchase from the parties of the first part 320 acres as soon as the parties of the first part shall be in a position to enter into a binding agreement for the sale to the party of the second part and the parties of the second part have agreed that they will when in a position to do so enter into such formal agreement for sale."

Contracts Inferred from Conduct, etc., and Implied Contracts.

In *Waterhouse vs. Morrow*, Courtlee's Digest, 323, Morrow gave Waterhouse an order by letter for mill machinery to be put in complete operation to his satisfaction in a building to be provided by him. All the machinery with the exception of a slab saw was supplied and the mill was put in operation in the summer of 1872. Morrow found fault with the machinery and, after alterations and repairs made by Waterhouse in 1873, Morrow put additional machinery in the mill and worked it until 1875, when it was destroyed by fire. Morrow had insured the whole machinery including that supplied by Waterhouse, for \$7,700, the additional machinery put in by himself being valued at \$2,500, and received the benefit of the insurance to the full amount of the loss. The contract price was \$4,250 with freight and expenses, making in all \$4,790. Some payments were made, but Morrow refusing to pay a balance of \$1,900, Waterhouse brought an action in assumpsit adding the common counts. At the close of the plaintiff's case, a non-suit was moved for on the ground that it was a condition precedent to Morrow's liability that the work should be done to his satisfaction and plaintiff's evidence shewed

that defendant never was satisfied, but was always complaining. This being overruled, Morrow undertook to shew that the machinery was not as represented, but defective and in many parts had to be repaired and that he had already paid what it was worth. Evidence was given on this issue and Waterhouse endeavoured to shew that any defect in the working of the mill was attributable to the shifting of the foundation erected by Morrow and to the want of skill of the men employed by him. The trial Judge left it to the jury to say whether the machinery was reasonably fit and proper for the purpose for which it was intended and, if not, directed them that Morrow was only bound to pay as much as it was worth. The jury returned a verdict for Waterhouse for \$1,850, having deducted \$200 for defects and \$80 for machinery not supplied. A new trial was granted by the Supreme Court of New Brunswick on the ground that the trial Judge should have directed the jury that the length of time that the defendants used the machinery, the complaints he made about it from time to time and all the circumstances connected with it should have been left to the jury with a direction to them to consider whether, from the defendant's dealing with it, they could infer a new implied contract on his part to keep the machinery and pay what it was worth, though less than the contract price. On appeal it was held that in suing upon this contract it was not necessary for the plaintiffs to have averred as a condition precedent to their right to recover that the work, besides having been skilfully, properly, sufficiently and in a workmanlike manner executed, was completed to the satisfaction of the defendant. In cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract, although the party could not recover the remuneration stipulated for in the contract because he had not done that which was to be the consideration of it, still, if the other party has derived any benefit from the work done, as it would be unjust to allow him to retain that without paying for it, the law implies a promise upon his part to pay such a remuneration as the benefit conferred upon him is reasonably worth. The jury in this case having decided upon the evidence that the defendant had derived a greater benefit from the work done than was compensated by the amount already paid, the plaintiffs were entitled to retain the benefit of the work.

In *re Estate of Martha Slaugenhite*, 38 N. S. R., 47, the plaintiff was induced to give up her employment at which she was earning her living and go and live with her mother, in consequence of her mother's promise to leave her all her property at her death. It was shewn by the evidence that, during three years at least, plaintiff's services were understood not to be gratuitous. The mother having failed to make provision as agreed, plaintiff was held entitled to recover on a quantum meruit for her services during the time stated. It was also held that the plaintiff who was divorced and not living with her husband, must be assumed to be emancipated and not a minor.

In *re Estate of Ainslie*, 41 N. S., 527, claimant came from the United States at the request of testatrix and remained with her for a considerable period of time previous to her death, performing services of an onerous character. There was no relationship between the parties. It was held that the case was the ordinary one of a request and services performed for which claimant was entitled to recover on a quantum meruit and that the burden was on the executor of deceased of establishing a sufficient answer. It was held also that the mere fact that claimant expected the property of testatrix to be left to her and that under the terms of the will she was given a share of the residue in the absence of any understanding or agreement that she was to be remunerated in that way, was no bar to her recovery; and also that the omission of claimant to mention her claim in the course of an ordinary conversation with the executor did not constitute a satisfaction of the debt but would merely go to her credibility as a witness.

In *O'Connor vs. The Halifax Electric Tramway Co.*, 38 N. S. R., 212, the defendant company had placed a number of special or extra cars on a portion of their line for the purpose of carrying a large number of persons who had assembled for the purpose of reviewing a regatta. It was arranged that the cars in question should run from a point in the suburbs near a point where the regatta was held to a point in the centre of the city and discharge their passengers there, returning for others. Those passengers who desired it were given transfers which entitled them to be carried on other cars to their destination in other parts of the city. The point at which the special cars were stationed was passed at stated intervals by other cars carrying on

the regular service to and from Quinpool Road. Plaintiff, who had been attending the regatta, entered a car known as a trailer, attached to another car which bore a sign at each end with the words "Quinpool Road," expecting to be carried to a point on the line near his residence, but was informed on reaching the central point that the car in which he was went no further and that he would have to transfer.

It was held that outside of the cars performing the regular service there was no obligation on the part of the company to carry plaintiff through to his destination in any one particular car and that the only contract on the part of the company was to carry passengers in the usual mode and method of running its trams, and that, under the circumstances existing at the time, it was plaintiff's duty to have protected himself by making enquiry as to the destination of the car. Russell, J., dissenting, held that a passenger boarding a car marked "Quinpool Road," had a right to assume that it was a Quinpool Road car, and that there was an offer on the part of the Company when they invited plaintiff to enter this car, provided he paid his fare or presented his ticket, to carry him on that car to any point on the route usually travelled by the Quinpool Road car.

This decision was affirmed by the Supreme Court of Canada, but with an unanswered dissenting opinion of Idington, J., 37 S. C. R., 523.

BRINGTON, J., said:—Then where do we find the necessary evidence beyond the ticket to show the contract? The obvious answer is, in the invitation by the company to ride and the acceptance thereof by the passengers.

How is the invitation extended? It is universally found to exist, in street railway traffic, in the shape of some word or words or sign to indicate the destination or the particular part of the line a car is proposed to run over. * * * The interpretation of the term "Quinpool Road" is not in the slightest doubt in this case. It was as plain in its meaning to those daily accustomed to its use as if a long contract had been written out signifying that the car on which it was inscribed was intended to run and should run along the belt line from the starting point at which a passenger entered, till it returned there and to pass Quinpool Road in its journey.

In *Regina vs. Archibald*, 2 Pugsley & Burbidge (N.B.), 250, it did not appear on the evidence by whose authority a child was taken to the parties supporting it, but when the latter rendered his account to the Overseers of the Poor for sixteen years' support, they did not deny their liability or raise any objection whatever but paid four dollars on account of the demand and in the course of the trial before a Justice of the Peace one of the overseers expressly admitted their liability on the whole sum. This was held sufficient evidence from which a contract might be implied.

In *St. Clair vs. Ottawa I. & S. Mfg. Co.*, 27 U. C. C. P., 410, the proprietors of a newspaper, seeing defendant's advertisement in another newspaper asked if they might insert it in their paper to which the reply was, "Yes, in the meantime send terms. Must be low." The advertisement appeared in the newspaper for a time with an alteration made by defendant's agent and plaintiff claimed at the rate of ten cents per line. There was no contract to pay at that rate, but plaintiff said that in answer to defendant's telegram he wrote that their charge was ten cents a line and a notice to that effect also appeared in the paper. It was held that plaintiff could not recover at that rate and what was considered fair remuneration was allowed.

In *Wilson et al. vs. Mason*, 38, U. C. Q. B., 14, the purchasers had bought two distillery plants, part of which was fixed to the distillery building. In order to obtain possession of this it was found necessary to incur expense in removing the part so affixed. Plaintiffs were held entitled to recover the amount so expended as money paid.

No Contract Implied Where Express Contract Made.

In *Auger vs. Thompson*, 3 O. A. R., 19, defendant gave a note of a third party to plaintiff, in exchange for a buggy. The note was not paid at maturity, whereupon plaintiff sued the defendant on the common counts for the price, alleging that defendant had induced him to take the note by fraudulent representations. It was held that the plaintiff could not recover for, there being an express contract to take the note for the buggy, no agreement to pay money could be implied by reason of the

alleged fraud. Per Moss, C.J.A.: "The decision of *Selway vs. Fogg*, 5 M. & W., 86, is precisely in point. In the language of Lord Abinger a party cannot be bound by an implied contract when he has made a specific contract which is avoided by fraud. The appellant's contract was to give Kinsey's note in exchange for the buggy. If that contract were brought about by fraud it might have been wholly repudiated by the plaintiff, but no agreement to pay the price can be raised by implication of law. The case of *Sheriff vs. McCoy*, 27 U. C. R., 597, upon which reliance was placed in the Court below, seems to us to be distinctly in favour of the defendant. The action was for goods sold and the defendant pleaded that, at the time of the sale, the plaintiff agreed to and did receive in payment two promissory notes made by a third person. This plea the plaintiff sought to meet by alleging that he was induced to receive the note by fraudulent representations. The Court of Queen's Bench decided that the action could not be maintained. Mr. Justice Wilson lays down what we have no doubt is the correct rule. He says, at p. 602. 'The plaintiff is attempting to make a contract for the sale of goods when no such contract was ever made in fact or in law and when the defendant never promised to pay cash. He is not without a remedy for he may sue for the fraud in an action on the case or in trover for the goods he parted with.' This language is entirely applicable to the present case."

Implied Quantum Meruit where Express Contract Rescinded.

In *Thompson vs. Smith*, 21 U. C. C. P., 1, the defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered the oil but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented and requested defendant to return the oil, which defendant promised but failed to do within a reasonable time. Before the four months had expired, plaintiff sued for goods sold and delivered. It was held that the original contract had been rescinded and that the plaintiff might sue upon the new contract arising out of the retention of the oil by the defendant.

No Promise Implied.

In *Timmins vs. Surples*, 26 U. C. C. P., 49, plaintiff's goods being about to be sold under distress for rent, plaintiff and

defendant agreed that if defendant would go to the sale and purchase the goods, the plaintiff would repay him the price, when defendant was to give him the goods. The purchase was made accordingly, but defendant refused on tender to deliver the goods. It was held that there was no contract on which defendant could be held liable for damages and that plaintiff's remedy was in an action for deceit or a proceeding in equity to have defendant declared a trustee.

In *McLaughlin vs. Brouse*, 11 U. C. Q. B., 609, a bill of sale of timber contained a proviso making the same void in case the defendant should pay to the plaintiff £300 and interest on a day named, but if default be made in payment of said sum in part or in whole, then it shall remain and be in full force and virtue. It was held that this deed did not sufficiently import a promise to pay to warrant an action of debt.

Implied Parol Agreement Substituted for Specialty.

In *Ross vs. Tail*, 11, T. 7 Wm. 4th, Out. Digest, vol. 1, col. 1281, it was held that where an agreement under seal for the completion of certain work had been entered into by one of two plaintiffs and the other, who was not mentioned in it, signed and sealed it also, and afterwards assisted in the work and was recognized and paid by the defendant for whose benefit the work was done as a joint contractor with the plaintiff mentioned in the instrument, the action of assumpsit was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal.

Promise Dependent on Another's Volition.

In *Croasdaile vs. Hall*, 3 B. C. R., 384, plaintiff had performed services for a mining company for over three years when the following resolution was passed: "Resolved and carried unanimously that Mr. H. E. Croasdaile (the plaintiff), be requested to accompany Messrs. H. M. N. to England and assist them in negotiating the sale of the mine, and that he be paid for his expenses seventy dollars by each of the aforesaid thirteen interests and such further sum as Mr. W. H. shall consider right upon the sale of the mine in consideration of his services to the partner-

ship. Plaintiff proceeded to England accordingly and in the result a sale of the mines was effected. W. H. declined to allow the plaintiff anything and the defendants refused to pay him anything for his services either before or consequent on the resolution. It was held that the resolution affected the subsequent service only and that it contained no contract on which the plaintiff could recover anything. Its acceptance constituted an agreement to abide by the decision of W. H. to the exclusion of any right of action for subsequent services upon a quantum meruit and the verdict for \$4,350 was set aside.

Unilateral Contract, (so-called).

In *Brantford & Lake Erie Ry. Co. vs. Hoffman*, 19 S. C. R., 336, H. tendered for construction of a railway pursuant to advertisement and his offer was conditionally accepted. At the same time he executed a bond reciting the fact of the tender, conditioned, within four days, to provide two acceptable sureties and deposit five per cent. of the amount of his tender in the Bank of Montreal and also to execute all necessary arrangements for the commencement and completion of the work by specified dates and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action on the bond it was held, affirming the judgment appealed from, of the Appeal Court of Ontario, that the agreement made by the bond was unilateral, that the Railway Company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts and, as no such agreement was entered into, H. was not liable on the bond.

Contract with Crown, Imperfect.

In *Humphreys vs. The Queen*, 20 S. C. R. 591, it was held that an action would not lie against the Crown for breach of contract for carrying mails for nine months at the rate of \$10,000 a year, made by parol with the Postmaster-General and accepted by the contractor by letter, notwithstanding it was partly performed as, if a permanent contract, being for a larger sum than a thousand dollars it could not be made without the authority of an Order in Council and if temporary it was revokable at the will of the Postmaster-General.

Sale of Property Bought under Agreement Relates Back to Agreement.

In the case of *Tupper vs. Annand*, 16 S. C. R., 718, the former, being in Newfoundland, discovered a mine of pyrites and proposed to the latter that they should buy it on speculation. Annand agreed and advanced money towards Tupper's expenses in going to Newfoundland to secure the title. Tupper made the second journey and obtained an agreement of purchase for a limited time which lapsed, owing to the failure to effect a sale within the time. It was renewed, however, some two or three times, Annand continuing to advance money for expenses. Finally Tupper effected a sale at a profit, keeping the matter of the sale secret from Annand. It was held that the sale related back as between Tupper and Annand to the date of the first agreement and the latter could recover his share of the profit.

CHAPTER II.

CONTRACTS UNDER SEAL AND SPECIALTIES.

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CONTRACTS under seal are formed by a deed sealed and delivered. They involve agreement inasmuch as the parties by executing the deed agree to the matter contained in it; but they derive their legal effect from the formality of the deed which is used to witness the agreement, and not, like simple contracts, from the mere fact of agreement (*a*). In general it is optional with the parties to put agreements into the form of a deed under seal. But agreements as to some matters and for some purposes are required by law to be made by deed; and a voluntary or gratuitous promise, that is, one made without a consideration, is void of legal effect unless made by deed (*b*).

CH. II.

Contracts
under seal.

"A deed is a writing or instrument written upon paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed."—"A deed cannot be written upon wood, leather, cloth or the like, but only upon parchment or paper, for the writing upon

(a) See *ante*, p. 3.(b) See *ante*, p. 6, and *post*, p. 99.

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Signing.

them can be least vitiated, altered, or corrupted" (c). The contents of a deed may be written or printed, in ink or in pencil (d). —Signing a deed, though usual, is no part of the formality at common law (e); but it is made necessary in some cases by statutes, and sometimes by the special terms of the authority or power under which the deed is executed. The Statute of Frauds, which requires certain contracts to be made in writing and signed, does not apply to contracts under seal, and therefore does not require such contracts to be signed in addition to the ordinary formalities of the deed (f). —Sealing is sufficiently performed if a seal or other instrument be impressed on the deed with intention of sealing it, although no impression be left (g); and upon proof of the signature of a deed bearing a seal and purporting to be sealed by the parting signing, the fact of sealing may be presumed (h). But in the absence of a seal, or other evidence of sealing, there is no presumption that an instrument purporting to be a deed has been sealed (i). One seal will serve for several persons, if it appears to have been intended and used as the seal of each (j). And it is no objection that there are two seals appearing for the same party; as where the deed was executed by two agents acting for one principal, each of whom signed his name opposite a different seal on behalf of the principal (k).

Delivery.

To operate as a deed a document must be delivered as a deed (l). Delivery may be made by giving possession of the deed to the other party, or by authorising the other party to take possession. A deed proved to have been signed and sealed by the one party, and appearing in the possession of the other party, is presumed to have been duly delivered (m). Delivery may also be made by giving possession of the deed to a stranger for the use and benefit of the

(c) Co. Lit. 35 b; 171 b; Shepp. Touch. by Preston, p. 50.

(d) *Schneider v. Norris* (1814), 2 M. & S. 286; *Geary v. Physic* (1826), 4 L. J. O. S. K. B. 147; 5 B. & C. 231; *Glynn v. Margeban* (1893), 62 L. J. Q. B. 466; (1893) A. C. 351.

(e) Shepp. Touch. by Preston, p. 56; *Ex p. Hodgkinson* (1815), 19 Ves. 296; *Taunt v. Pepler* (1820), 6 Madd. 166.

(f) *Acclue v. Whisson* (1842), 12 L. J. C. P. 58; 4 Man. & G. 801; *Cherry v. Henning* (1819), 1 L. J. Ex. 61; 4 Ex. 636.

(g) *Re Southlands* (1871), L. R. 3 C. P. 411. See *Reg. v. St. Paul's* (1815), 14 L. J. M. C. 109; 7 Q. B. 232.

(h) *Grether v. Neale* (1792), 1 Peake, 146; *Talbot v. Hodson* (1816), 7 Taunt. 251; *Re Muir's Estate* (1873), 12 L. J. C. 882.

(i) *National Provincial Bank v. Jackson* (1886), 33 Ch. D. 1; *Re Smith* (1892), 67 L. T. 64.

(j) *Ball v. Dunsterville* (1791), 4 T. R. 313.

(k) *Laurie v. Lees* (1881), 51 L. J. C. 209; 7 Ap. Ca. 19.

(l) *Chauter v. Johnson* (1845), 14 L. J. Ex. 289; 14 M. & W. 408; *Mowett v. Castle Steel & Iron Co.* (1858), 34 Ch. D. 58.

(m) *Hall v. Bainbridge* (1848), 71 L. J. Q. B. 317; 12 Q. L. 699.

other party, the intention being sufficiently expressed; a delivery to a stranger with it any explanation of intention would be insufficient (*n*). Delivery may also be effected by a mere declaration thereof, though the party retains the deed in his own possession, or the possession is retained by his solicitor or agent, without communication to the other party (*o*). Where a policy of insurance, purporting to be signed, sealed and delivered in the presence of a witness by the directors of an insurance company, was left in the company's office to be sent for by the assured, according to the usual practice; it was held to be a valid policy and binding upon the company, though they cancelled it whilst it remained in their possession (*p*). An acknowledgment by the party whose deed it is, that it is valid and operative is sufficient evidence of delivery (*q*).—The execution and delivery of a deed may be attested by a witness, who signs a formal statement appended to the deed to the effect that it was signed, sealed, and delivered in his presence. Attestation is in some cases made necessary by statute, or by the special authority under which the deed is executed (*r*). A party to the transaction cannot be an attesting witness (*s*).

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Attestation.

A deed takes effect from the delivery, and it is presumed to have been delivered on the day on which it is dated; but it may be alleged and proved, according to the fact, that it was delivered on a different day (*t*), and the date of its execution also governs the interpretation of expressions of time which are not otherwise correctly or definitely fixed (*u*). A deed cannot be executed in part only; any exception or qualification appended to the deed either contradicts the execution to that extent, or must be rejected as repugnant to the contents (*x*). But where parties to a deed

Deed takes effect from delivery.

(*n*) Co. Lit. 36 a; Shepp. Touch. by Preston, 57, 58; *Doc v. Knight* (1826), 4 L. J. O. S. K. B. 161; 5 B. & C. 671.

(*o*) *Doc v. Knight* (1826), 4 L. J. O. S. K. B. 161; 5 B. & C. 671; *Exton v. Scott* (1833), 6 Sim. 31; *Hall v. Palmer* (1844), 13 L. J. C. 352; 3 Hare, 532; *Re Dodds* (1891), 60 L. J. Q. B. 599.

(*p*) *Arnos v. Wickham* (1867), 36 L. J. C. P. 313; L. R. 2 H. L. 296.

(*q*) *Hall v. Bunsterville* (1791), 4 T. R. 313; *Hobson v. Vesott* (1829), 7 L. J. O. S. C. P. 145; 5 Bing. 368; *Tupper v. Faulkes* (1863), 30 L. J. C. P. 211; 9 C. B. N. S. 797.

(*r*) See *Wright v. Barlow* (1815), 3 M. & S. 612; *Freshfield v. Reed* (1842), 11

L. J. Ex. 193; 9 M. & W. 101; *Turben v. Phillips* (1883), 23 Ch. 7, 14.

(*s*) *Seal v. Cluridge* (1881), 50 L. J. Q. B. 316; 7 Q. B. D. 516; *Re Percott* (1891), 60 L. J. Q. B. 567; (1891) 2 Q. B. 151.

(*t*) *Hall v. Guzenore* (1804), 4 East, 477; *Doc v. Robson* (1812), 15 East, 32; *Steel v. Mair* (1825), 4 B. & C. 272; *Jaynes v. Hughes* (1854), 21 L. J. Ex. 115; 10 Ex. 430.

(*u*) *Hall v. Guzenore* (1804), 4 East, 477; *Doc v. Day* (1809), 10 East, 427; *Stykes v. Wardle* (1825), 4 L. J. O. S. K. B. 81; 4 B. & C. 908.

(*x*) *Wilkinson v. Anglo-Californian Gold Mining Co.* (1852), 21 L. J. Q. B. 327;

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Delivery as
escrow.Escrow takes
effect from
delivery.Execution of
deed in
blank.

contemplate that it shall be executed by all the persons named therein, it is not binding upon an executing party if the condition as to execution be not complied with (*y*).—The delivery of a deed may be made upon a condition, so that the delivery is not complete and the deed not binding until the condition is satisfied; and it is then called an *escrow* (*z*). The condition may be expressly declared, or it may sufficiently appear from the circumstances attending the delivery (*a*). Delivery as an escrow may be made whilst the party retains the deed in his own possession, or upon delivery of the possession to a third party, or to the solicitor of the other party to the deed (*b*); or even, it would seem, upon delivery of the possession to the other party himself (*c*). After a deed has been delivered as an escrow, the fact of possession of it by the other party is presumptive evidence that the condition has been satisfied, and that the delivery is complete (*d*).—Upon performance of the condition an escrow becomes effective as a deed from the date of the original delivery; so that if a bond be delivered as an escrow, and before performance of the condition the obligor and obligee die, yet on the performance of the condition it becomes an effective bond and charges the assets of the deceased obligor; and so, if a woman before marriage delivered a bond upon condition and afterwards married, whereby formerly she lost her capacity to contract, and after marriage the condition was performed, the bond was valid and took effect from the original delivery (*e*).

A deed delivered with a material part of the contents left in blank or omitted is necessarily void; and it cannot be completed by subsequently filling in the blank, without a re-delivery or what is equivalent to it (*f*); as a debenture under the seal of a company issued with a blank for the name of the payee (*g*); or a

18 Q. B. 728; *Exchange Bk. v. Blithen* (1885), 54 L. J. P. C. 27; 10 Ap. Ca. 293.

(*y*) *Woodcock v. Monckton* (1841), 1 Coll. 273; *Peto v. Peto* (1849), 16 Sim. 590. See *Latch v. Wedlake* (1810), 9 L. J. Q. B. 201; 11 A. & E. 959.

(*z*) Co. Lit. 36 a; *Shepp. Touch.* by Preston, p. 58; *Millership v. Brooks* (1860), 29 L. J. Ex. 369; 5 H. & N. 797; *Kidner v. Keith* (1863), 15 C. B. N. S. 35.

(*a*) *Johnson v. Baker* (1821), 1 B. & Ald. 410; *Bowker v. Burdett* (1843), 12 L. J. Ex. 329; 11 M. & W. 128; *Gudgen v. Bisset* (1856), 26 L. J. Q. B. 36; 6 E. & B. 986.

(*b*) *Watkins v. Nash* (1875), 44 L. J.

C. 505; L. R. 20 Eq. 262.

(*c*) *London Property Co. v. Saffield* (1897), 66 L. J. C. 790; (1897) 2 Ch. 608.

(*d*) *Hare v. Horton* (1833), 3 L. J. K. B. 41; 7 B. & Ad. 715.

(*e*) *Perryman's case* (1599), 5 Co. 84 a; *Frost v. Walshe* (1617), J. Bridgm. 49; *Graham v. Graham* (1791), 1 Ves. J. 272.

(*f*) *Hudson v. Revett* (1829), 7 L. J. O. S. C. P. 145; 5 Bing. 372; *Hibblewhite v. M'Morine* (1810), 9 L. J. Ex. 217; 6 M. & W. 200; *Powell v. London & Provincial Bk.* (1893), 62 L. J. C. 795; (1893) 2 Ch. 555.

(*g*) *Enthoven v. Hoyle* (1553), 24 J. J. C. P. 100; 13 C. B. 373.

deed of composition under sect. 192 of the Bankruptcy Act, 1861, expressed to be made with the creditors named in a schedule, to which no schedule was annexed until after execution (*h*).—But if the blanks are immaterial to its operation the deed may be partially effective; as where the blank affects one of several parties only, the deed may be operative as to the others (*i*). A composition deed signed by a creditor with a blank for the amount of his debt, was held to operate as a valid release for the amount of debt due upon the account taken between him and the debtor (*k*). An assignment to trustees for the benefit of the creditors named in the schedule, to which no schedule was annexed, was held to operate effectually as a conveyance to the trustees (*l*).

A transfer of shares, if transferable by deed only, by a deed executed in blank as to the name of the transferee, or the number and description of the shares, is void of effect in conveying the legal title to the shares; nor can it be made effective by filling up the blanks without a re-delivery, or without an authority to do so under seal (*m*); and the practice of the Stock Exchange to deliver transfers of shares with a blank for the name of the purchaser, to be filled up by the purchasing broker, is not allowed to prevail against the rule of law (*n*).—But a transferee who fills up the blanks with his own name and procures registration as shareholder becomes liable as such to the company and their creditors (*o*); and a transfer of shares in blank may give an equitable title to registration, according to the terms of the agreement to transfer them, subject to prior equities (*p*).—If the shares be transferable without a deed, a transfer in blank will impliedly authorise the transferee to fill in the blanks for the purpose intended (*q*). And in such case it is immaterial as regards the authority and operation of the

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Transfer of shares in blank.

(*h*) *Sellin v. Price* (1866), 36 L. J. Ex. 93; L. R. 2 Ex. 189. See *Wood v. Stuck* (1867), 37 L. J. Q. B. 130; L. R. 3 Q. B. 379.

(*i*) *De v. Bingham* (1821), 4 B. & Ald. 672.

(*k*) *Harby v. Wall* (1817), 1 B. & Ald. 103; *Fazakerley v. McKnight* (1856), 26 L. J. Q. B. 30; 6 E. & B. 795.

(*l*) *West v. Steward* (1815), 14 M. & W. 47.

(*m*) *Hobbs v. Morine* (1840), 9 L. J. Ex. 217; 6 M. & W. 200; *Powell v. London & Provincial Bank* (1893), 62 L. J. C. 795; (1893) 2 Ch. 555. See *Swan v. North British Australasian Co.*

(1863), 32 L. J. Ex. 273; 2 H. & C. 175.

(*n*) *Taylor v. Great Indian Peninsula Ry.* (1859), 28 L. J. C. 709; 4 De G. & J. 599.

(*o*) *Re Barnard's Banking Co.* (1867), 37 L. J. C. 81; L. R. 3 Ch. 105; *Re Manchester and Oldham Bank* (1885), 51 L. J. C. 926.

(*p*) *Société Générale de Paris v. Walker* (1885), 55 L. J. Q. B. 169; 11 Ap. Ca. 20; *Colonial Bank v. Cady* (1890), 60 L. J. C. 4.1; 15 Ap. Ca. 267; *Ireland v. Hart* (1902), 71 L. J. C. 276; (1902) 1 Ch. 522.

(*q*) *Ex p. Sargent* (1874), 43 L. J. C. 425; L. R. 17 Eq. 273.

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instrument of transfer, that it is made and sealed in the form of a deed (*r*).—The instrument, though duly filled in, gives only an equitable title to the shares, until completed by registration under it (*s*).

Acceptance of contract under seal.

A deed is operative and binding from the time of delivery, even if the other party then had no notice of it, unless the other party express his dissent, upon a presumption of acceptance founded on the principle that a person will accept that which is for his benefit (*t*). And in conveyances of property this presumption of acceptance is extended to such as contain onerous charges of covenants or liabilities (*u*); and "a man may be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assent to it and take a benefit under it" (*x*).—A party may disclaim the benefit of a deed; and such disclaimer may be made by deed, or by any words or acts that sufficiently show an intention to disclaim (*y*).

Disclaimer.

Deed executed by one party only.

Hence a party to a deed may sue upon a covenant contained in it without having executed it himself, and without any other evidence of acceptance (*z*); as a mortgagee suing a mortgagor without having executed the mortgage deed (*a*). And a corporation or company may sue upon a covenant in a deed without executing it, although a special form of execution be required by statute to bind themselves (*b*).—But the party so claiming as covenantor must accept the covenant, subject to all the conditions and provisos expressed or implied in the deed, whether he has bound himself by executing it or not; and it may be a condition precedent that the deed shall be executed by both parties (*c*). In a deed containing covenants on both sides, the party who has

(*r*) *Ortigosa v. Brown* (1877), 47 L. J. C. 168.

(*s*) *Colonial Bank v. Hepworth* (1887), 56 L. J. C. 1089; 36 C. D. 36; *Colonial Bank v. Cady* (1890), 60 L. J. C. 131; 15 Ap. Ca. 267.

(*t*) *Fletcher v. Fletcher* (1844), 13 L. J. C. 352; 3 Hare, 532; *Nixon v. Wickham* (1867), 36 L. J. C. P. 313; L. R. 2 H. L. 296.

(*u*) Co. Lit. 231 a; *Siggers v. Evans* (1855), 24 L. J. Q. B. 305; 5 E. & B. 367.

(*x*) *Per cur. Webb v. Spicer* (1819), 19 L. J. Q. B. 34; 13 Q. B. 893. See *Richardson v. Jenkins* (1853), 22 L. J. C. 874; 1 Drew. 477.

(*y*) See *Begbie v. Crook* (1835), 4 L. J. C. P. 308; 2 Bing. N. C. 70; *Stacey v. Elph* (1833), 2 L. J. C. 50; 1 M. & K. 198; *Re Birchall* (1889), 10 Ch. D. 436.

(*z*) *Petrie v. Bury* (1824), 3 L. J. O. S. K. B. 29; 3 B. & C. 353; *Rose v. Poulton* (1831), 1 L. J. K. B. 5; 2 B. & Ad. 822.

(*a*) *Morgan v. Pike* (1852), 23 L. J. C. P. 64; 14 C. B. 473.

(*b*) *British Empire Mutual Life Assoc. v. Brown* (1852), 22 L. J. C. P. 51; 12 C. B. 723.

(*c*) See *Johnson v. Baker* (1821), 4 B. & Ald. 440; *Macdonald v. Law Union Fire & Life Insur.* (1874), 43 L. J. Q. B. 131; L. R. 9 Q. B. 328.

executed the deed may be sued by the party who has not executed (*d*). But in such case the mutual covenants may be so dependent on one another, either from their nature or by construction of their terms, as to render the covenants on the one side conditional upon the validity, or the performance, of the covenants on the other side; and then the covenants on the one side are not absolutely binding until the fulfilment of the condition by the execution of the deed, or the performance of the covenants on the other side (*e*). Thus, "with respect to leases by indenture the covenants which depend on the interest in the lease and are made because the covenantor has that interest, such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute, not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate. Unless there be a term, a covenant to repair *during the term* is void. But with respect to collateral covenants not depending on the interest in the land, it is otherwise, and they are obligatory" (*f*).

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Dependent covenants.

All deeds are either indentures or deeds poll. An indenture is a deed made between two or more parties; and it is so called because it was formerly the practice to make an original copy of the deed for each of the parties on the same parchment, and then to separate them by an indented division, so that on subsequently comparing the parts they might be identified by the fitting of the indented edges (*g*). The practice of indenting has been unnecessary since Real Property Act, 1845, s. 5, which enacted "that a deed executed after the 1st of October, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented." In the case of a material variance in the contents of the two parts of an indenture there is no valid contract (*h*); but a mere clerical mistake may be read as corrected by the context (*i*).—Leases are usually made by indentures of lease and counterpart; the lessor executes the lease, which conveys the

Form:

Indenture.

Lease and counterpart.

(*d*) *Morgan v. Pike* (1853), 23 L. J. C. P. 64; 14 C. B. 473.

(*e*) *Cabell v. Faghuau* (1670), 1 Wms. Saund. 461, n. (1); *Pordage v. Cole* (1670), 1 Wms. Saund. 548, and notes.

(*f*) *Per cur. Pitman v. Woodbury* (1848), 3 Ex. 11; *Sneatman v. Ambler* (1852), 22 L. J. Ex. 81; 8 Ex. 72; *How v. Greek* (1864), 34 L. J. Ex. 4; 3 H. &

C. 391; *Toler v. Slater* (1867), 37 L. J. Q. B. 23; L. R. 3 Q. B. 42.

(*g*) Co. Lit. 143 b, 229 a; *Shepp. Touch. by Preston*, 50.

(*h*) *Wynne's case* (1873), 43 L. J. C. 138; L. R. 8 Ch. 1002.

(*i*) *Burchell v. Clark* (1876), 46 L. J. C. P. 115; 2 C. P. D. 88. See *post*, Pt. I., Chap. VI., Sect. I.

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interest in the land, and delivers it to the lessee, whose property it becomes; the counterpart is executed by the lessee and delivered to the lessor, and is the security to him for the covenants and conditions and powers of re-entry (*k*). In cases of discrepancy between the lease and counterpart the lease is the governing document, but the lessor may prove the contents of the lease by the counterpart, or, if the lessee refuses to produce the lease, by parol evidence (*l*).

Deed poll.

A deed poll is a deed made by one party only; and it is so called because the edge is polled without indenting (*m*). In a contract by deed poll, the promisee does not appear formally as a party to the deed, but is identified only by name or designation in the body of the deed; he is entitled to take the benefit of the deed, but subject to the conditions and provisos therein expressed (*n*).

Covenant.

The terms *indenture*, *deed* or *writing obligatory* import in general a deed under seal (*o*). The Act of a railway company requiring that transfers of shares should be made by *writing* under the *hands and seals* of the parties was held to intend an instrument, with all the incidents of a deed (*p*). Under articles of a company permitting the transfer of shares to be made by an "instrument in writing" a deed is not necessary (*q*).—A promise contained in a deed is specially called a *covenant*, also a *special contract* or contract by *specialty*. "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" (*r*).

Bond.

A bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money. It is sometimes called an *obligation* in a special sense of the word; and the parties are called respectively the *obligor* and the *obligee* (*s*).—

(*k*) *Hall v. Ball* (1841), 10 L. J. C. P. 285; 3 Man. & G. 212; *Knight v. Williams* (1900), 70 L. J. C. 92; (1901) 1 Ch. 256.

(*l*) *Hughes v. Clark* (1851), 10 C. B. 905; *Houghton v. Kewney* (1856), 25 L. J. C. P. 218; 18 C. B. 235; *Burchell v. Clark* (1876), 46 L. J. C. P. 116; 2 C. P. D. 88. See Co. Lit. 229 a.

(*m*) Co. Lit. 229 a; Shepp. Touch. by Preston, 50.

(*n*) *Sunderland Marine Insce. v. Kewney* (1851), 20 L. J. Q. B. 417; 16 Q. B. 925; *Macdonald v. Law Union Insce.* (1873), 43 L. J. Q. B. 131; L. R. 9 Q. B. 328.

(*o*) See *Cabell v. Vaughan* (1670), 1 Wms. Saund. 461, n. 1).

(*p*) *Hibbleschite v. M'Farlane* (1840), 9 L. J. Ex. 217; 6 M. & W. 200.

(*q*) *Ex p. Sargent* (1871), 43 L. J. C. 425; L. R. 17 Eq. 273.

(*r*) See *Wolveridge v. Stevard* (1833), 3 L. J. Ex. 360; 1 Cr. & M. 644; *Easterby v. Sampson* (1830), 6 Bing. 644; *Holland v. Holland* (1869), 38 L. J. C. 398; L. R. 4 Ch. 449; *Jackson v. N. E. Ry.* (1877), 47 L. J. C. 303; 7 Ch. D. 573.

(*s*) *Parry v. Farrest* (1670), 2 Wms. Saund. 138; *Sainger v. Margriddle* (1710), 11 Mod. 218.

A bond containing such acknowledgment simply is called a *single bond*; but a bond may be liable to be defeated upon the performance of a certain act, otherwise to remain in full force; if the instrument which defeats the force or operation of the bond be contained in a separate document it is termed a *defeasance*, if in the same document it is termed a *condition* (*t*). The debt acknowledged by the bond is invariably fixed at a larger sum than the equivalent of the condition, for the purpose of securing its performance, and is called the *penal sum* or *penalty*.—*Common money bonds* are bonds with the condition to pay a sum of money with interest at a certain day, on payment of which at the day the bond is to be void, otherwise it is to be forfeited. In such bonds the penalty acknowledged to be due is generally fixed at double the sum secured. The condition may be adapted to secure any other matter: as the performance of the covenants in a deed, the faithful discharge of an office, or the rendering of accounts, upon satisfaction of which the bond is declared to be void; such bonds are called bonds with *special conditions*.—By the common law the whole penalty became forfeited and was recoverable upon breach of the condition, according to the literal construction of the bond. But the Court of Chancery, under its general jurisdiction, gave relief against the forfeiture at law upon payment of the amount really due, or of the damages actually arising from the breach of the condition (*u*); and courts of law were invested with a statutory power of granting relief.

At the common law the entire penalty stated in the condition of a common money bond was forfeited by non-payment of the money *ad diem* according to the condition, but by s. 12 of the statute 4 Anne, c. 16, payment before the action of the principal and interest due, though not made according to the condition or defeasance, was pleadable in bar of such action as effectually as if the money had been paid at the day and place according to the condition. The same statute (sect. 13) enabled the court to stay proceedings in an action upon any such bond with a penalty upon payment of all the principal money and interest due on such bond together with costs (*x*). Since the Common Law Procedure Act, 1852, and now by the Rules of the Supreme Court made

CH. II.

Single bond.

Bond with condition.

Common money bond

Special condition.

Relief against penalty.

Relief under 4 Anne, c. 16.

Payment *post diem*.

Payment into court.

(*t*) *Forrell v. Forrest* (1670), 2 Wms. Saund. 138. See *Gerard v. Clavess* (1892), 61 L. J. Q. B. 487; (1892) 2 Q. B. 11.

(*u*) *Stoman v. Walter* (1784), 1 Bro. C. C. 418; 2 Wh. & T. L. C. 237.

(*x*) *Forrell v. Forrest* (1670), 2 Wms. Saund. 138.

PART I.

Relief under
8 & 9 Will. 3,
c. 11.

under the provisions of the Judicature Acts, payment into court (*y*) or a set-off (*z*) may be pleaded in all actions.

Bonds with *special conditions* are subject to the statute 8 & 9 Will. 3, c. 11, which applies "in all actions on any bond, or on any penal sum, for non-performance of any covenants or agreements in any deed or writing contained." This statute restricts the amount recoverable at law to the damages for the breaches of the conditions or agreements which the plaintiff shall assign and prove; and it allows the judgment for the penalty to remain only as a security against further breaches (*a*).—A bond conditioned for payment of a sum by instalments, during the currency of the instalments, is within this statute, and not within the above statute of Anne (*b*). A bond conditioned for payment of a sum on a certain day and interest in the meantime on certain days, after the lapse of the day for payment of the principal becomes a bond within the statute of Anne; and it is not necessary to assign breaches of the condition under the statute of Will. 3 (*c*).

Effect of
bond with
condition.

Specific
performance
of condition.

Hence a bond with condition binds the obligor to the performance of the condition with the same effect as a covenant in similar terms: no action can be maintained upon the bond until a breach of the condition, and no more can be recovered than the damages sustained by the breach (*d*); but the amount of damages is presumptively limited to the amount of the penalty (*e*). In an action on the bond, a plea of the Statute of Limitation is available only against a specific breach; and a new breach gives a new cause of action (*f*).—Bonds with special conditions are also construed and applied in equity according to the expressed intention of the parties, either as giving to the obligor the option of forfeiting the penalty instead of performing the condition, or as intended to secure the performance; and in the latter event it will be specifically enforced, although the relief given may be of greater value than the penalty of the bond (*g*).

(*y*) R. S. C. 1883, O. XIX. r. 3. See post, p. 648.

(*z*) *Birks v. Trippet* (1667), 1 Wms. Saund. 46, n. (*u*); R. S. C. 1883, O. XXII. r. 1. See post, p. 735.

(*a*) *Gainsford v. Griffith* (1668), 1 Wms. Saund. 67. See *Tatler v. Caralampi* (1888), 21 Q. B. D. 414.

(*b*) *Preston v. Dania* (1872), 42 L. J. Ex. 33; L. R. 8 Ex. 19.

(*c*) *Smith v. Bond* (1833), 2 L. J. C. P. 269; 10 Bing. 125.

(*d*) Co. Lit. 206 a; *Milbourn v. Ewart* (1793), 5 T. R. 381; *Palmer v. Locke* (1880), 50 L. J. C. 113; 15 Ch. D. 294.

(*e*) *Beanscombe v. Seabrough* (1814), 13 L. J. Q. B. 247; 6 Q. B. 15. See post, p. 798.

(*f*) *Tuckey v. Hawkins* (1847), 16 L. J. C. P. 201; 4 C. B. 655; *Blair v. Ormond* (1851), 20 L. J. Q. B. 444; 17 Q. B. 423.

(*g*) *Rolfe v. Pierson* (1772), 2 Bro. P. C. 436; *Jenlaine v. Agate* (1829), 3 Sim. 129; *Lagan v. Wuenholt* (1832), 1

Contracts made by deed under seal do not require a consideration to give validity to the promise in the same sense as simple contracts by agreement. With the latter the consideration is made a necessary condition, as proof of the intention that the promise shall be binding, and to avoid giving effect to promissory expressions which are not so intended. With contracts under seal, a deliberate intention to make a binding promise is presumed from the formalities required in the execution of a deed. Hence a voluntary promise, that is, one that is gratuitous or without consideration, may be made binding in the form of a covenant by a deed under seal; though such a promise cannot be made binding in the form of a simple contract (*h*). Equity follows the law in this respect, and allows a voluntary covenant full legal effect. But the courts in administering equity, though they cannot set aside or restrict the legal operation of a contract merely upon the ground that it is voluntary, yet refuse to apply the auxiliary remedies of specific performance or injunction, or any other purely equitable remedies; also by the rules of equity in the administering of assets, voluntary bonds and covenants were postponed to all debts founded upon valuable consideration; and the same rule applied in bankruptcy until abolished by the Bankruptcy Act, 1869, s. 32 (repealed and re-enacted by the Bankruptcy Act, 1883, s. 40), which provides that, save certain excepted debts, "all debts provable in the bankruptcy shall be paid *pari passu*;" and this rule is now applied in the administration of the estates of deceased persons by force of sect. 10 of the Judicature Act, 1873 *k*. Although the existence of a consideration is not essential in a contract under seal, yet if a consideration in fact exists, it must be lawful. If the consideration is unlawful the contract is void; and the illegality of the consideration may be alleged and proved even in contradiction to the written terms of the deed (*l*).

Ch. II.

Consideration in contracts under seal.

Voluntary covenants.

Effect in equity.

Illegal consideration.

At common law a creditor could not levy execution against the real estate of his debtor during his life, or after his decease. The statute of Westminster 2, by the writ of *elegit*, first subjected

Remedies against real estate.

Cl. & F. 611; *Howard v. Woodward* (1865), 31 L. J. C. 47; *London & Yorkshire Bk. v. Pitt* (1887), 56 L. J. C. 987. (*h*) *Skarington v. Stratton* (1565), Plowden, at p. 308. (*i*) *Jefferys v. Jefferys* (1811), Cr. & Ph. 138; *Walrond v. Walrond* (1858), 28

L. J. C. 97; *Johns*, 18; *Re Lucan* (1890), 60 L. J. C. 10; 45 Ch. D. 470. (*k*) *Ex p. Pottinger* (1878), 47 L. J. B. 43; 8 Ch. D. 621. See *post*, p. 438. (*l*) *Collins v. Blantyre* (1767), 2 Wils. 311; 1 Smith, L. C. 355. See *post*, p. 515.

PART I.

Contracts
binding heirs.

the land of a debtor to execution upon a judgment against him. This statute only permitted a moiety of the debtor's land to be seized, but by sect. 11 of the Judgments Act, 1837, the remedy of the creditor was extended to the entirety of his debtor's interest (*m*). Contracts under seal in which the obligor or covenantor was expressed to be bound or to covenant on behalf of him only, could not be enforced at the common law against him or devisee of the obligor or covenantor, but only against the personal representative in respect of personal estate, with a priority over debts by simple contract: if, however, a person by a deed under seal bound himself "and his heirs," or covenanted for himself "and his heirs," his heir became chargeable for the debt or covenant to the full value of all the land which the ancestor left to descend to his heir; and which were, therefore, called *assets by descent* (*n*). By the Statute of Frauds (29 Car. 2, c. 3), s. 10, which extended execution against equitable estates generally, trust or equitable estates of inheritance were declared to be assets by descent, and the heir was made chargeable with the obligation of his ancestors by reason of such assets as fully as if the estate at law had descended to him in like manner as the trust. And by sect. 12, estates *pur autre vie* were made chargeable in the hands of the heir, if they came to him by special occupancy, as assets by descent, as in the case of lands in fee simple.

Statute of
Fraudulent
Devises.

The creditor by specialty had no remedy against a devisee of the land, until the passing of the statute 3 W. & M. c. 14 (known as the Statute of Fraudulent Devises). This statute empowered the creditor to sue the heir and devisee of his deceased debtor jointly in respect of bonds and specialties binding the heirs. An exception was made of devises or dispositions by will for the payment of debts. This statute was repealed by the statute 11 Geo. 4 & 1 Will. 4, c. 47, and re-enacted in similar terms; but with an extended operation to covenants as well as debts, to which the former Act was restricted (*o*); and if there were not an heir-at-law, enabling the creditor to sue the devisee solely (*p*).—At common law the heir was not liable, if he had *bona fide* alienated the lands descended before the commencement of the action

Plea of *viens*
per descent.

(*m*) *Underhill v. Devereux* (1670), 2 Wms. Saund. 197. And see *post*, p. 108.

(*n*) *Harbert's case* (1584), 3 Co. 12 a; *Crossing v. Honour* (1683), 1 Vern. 180; Co. Lit. 209 a, 383 b, 386 a. See notes

(*t*) *Jefferson v. Morton* (1670), 2 Wms.

Saund. 12; Conveyancing and Law of Property Act, 1881, s. 59.

(*o*) See notes to *Jefferson v. Morton* (1670), 2 Wms. Saund. 30.

(*p*) *Hunting v. Sheldrake* (1841), 11 L. J. Ex. 77; 9 M. & W. 256.

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against him; he might then plead *riens per descent*, that is to say, that he had not any lands of the ancestor at the time of suing out the writ. But by the above statutes both the heir and devisees were made answerable to the value of lands aliened (that is, conveyed away) before the action was brought (*q*).—The creditor may follow the real estate or the proceeds in the case of the bankruptcy of the heir or devisee, or it seems in case of a voluntary alienation by them without consideration (*r*). The creditor may proceed against the heir or devisee notwithstanding there may be personal assets unadministered; for the rule that the personality is the primary fund for the payment of debts applies only in equity in distributing the charge of debts between the real and personal representatives, entitling the heir or devisee who has been compelled to pay the specialty debts to be reimbursed out of the personal estate, as against the next of kin or the residuary legatee; and the court will marshal the assets in order to apportion the debts to the respective funds (*s*).—Real estate might be made available for the payment of debts of a deceased person by means of a trust for payment of debts or a charge of debts (*t*). In these cases intricate questions arose whether the executor could convey the legal estate, but the law applicable to this subject has now become unimportant, except in the cases of title to land, by reason of Part I. of the Transfer of Land Act, 1897 (*u*). Notwithstanding provisions for payment of debts out of realty, the personal estate remained primarily liable unless exonerated (*x*).

Exoneration of real assets by the personality.

Provisions for payment of debts out of realty.

The general liability of the real assets to satisfy the debts of a deceased person was imposed by the Administration of Estates Act, 1883, sometimes known as Sir John Romilly's Act, but the Act gave priority to creditors by specialty in which the heirs were bound over creditors by simple contract or by specialty in which the heirs were not bound (*y*); but this priority, as well as the general priority of specialty debts in the administration of assets at law and in equity, was taken away by the Administration of Estates Act, 1869 (more generally known as Hinde Palmer's Act).

Real estate as assets for debts.

(*q*) See notes to *Jefferson v. Morton* (1670), 2 Wms. Saund. 25. And see *Re Illidge* (1884), 53 L. J. C. 991; 27 Ch. D. 478.

(*r*) *Ex p. Morton* (1800), 5 Ves. 199.

(*s*) See *Ancaster (Duke) v. Mayer* (1785), 1 Bro. C. C. 454; 1 Wh. & T. L. C. 1;

Aldrich v. Cooper (1802), 8 Ves. 382; 1 Wh. & T. L. C. 35.

(*t*) Leake, Property in Land, p. 192.

(*u*) Leake, Property in Land, p. 197.

(*x*) Leake, Property in Land, p. 193.

(*y*) Leake, Property in Land, p. 191.

PART I.

The last change was effected by sect. 10 of the Judicature Act, 1875, which introduced the rules of bankruptcy as to the respective rights of secured and unsecured creditors, and as to the proving and valuation of debts and liabilities in the case of insolvent estates. This, in effect, gives priority to claims for rates and wages, but all other debts provable, including voluntary debts, are now payable *pari passu* (z).

Land primarily liable to mortgage debts and charges.

A series of statutes known as the Real Estates Charges Acts, 1854, 1867, 1877, have thrown upon the heir or devisee the burden of discharging all liabilities to which the land is specifically liable at the death of the deceased owner, in exoneration of the personal or other real estate of the deceased, unless he shall have by will or deed signified an intention to the contrary (a).

Limitation of action upon contract under seal.

Contracts under seal have a further superiority over simple contracts in respect of the period of limitation for actions. Where the cause of action arises upon a contract under seal, the period of limitation is in general twenty years; where it arises out of a simple contract, the period in general is six years (b).—Some other doctrines peculiar to contracts under seal may here be mentioned: a contract under seal, being attended with superior remedies, operates in law in merger of a simple contract on the same matter: that is to say, if a bond or covenant under seal be given to secure a simple contract debt, the simple contract is merged in the contract under seal and is thereby extinguished, according to a general rule of law that a party, by acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security (c).—The doctrine of estoppel applies to the recitals and statements made by a party to a deed under seal: they are held conclusive against the party, and he is estopped from denying their truth, in any legal proceedings taken upon the deed between the same parties in the same right, or those claiming through them (d). The estoppel does not extend to proceedings by a

Merger.

Estoppel by deed.

(z) *Re Heywood* (1897), 67 L. J. C. 25; (1897) 2 Ch. 593; *Re Whitaker* (1900), 70 L. J. C. 6; (1901) 1 Ch. 9.

(a) *Leake, Property in Land*, p. 209.

(b) See *post*, Pt. IV., Chap. XI.

(c) See *post*, Pt. IV., Chap. IX.

(d) *Botman v. Taylor* (1834), 4 L. J. K. B. 58; 2 A. & E. 278; *Cuthbertson v.*

Irring (1860), 29 L. J. Ex. 485; 6 H. & N. 135; *General Finance, Mortgage & Discount Co. v. Liberator Permanent By. Soc.* (1878) 10 Ch. D. 15. See *Doe v. Oliver* (1830), 8 L. J. O. S. K. B. 137; 5 Man. & R. 202; 2 Sm. L. C. 708; *Rimmer v. Webster* (1902), 71 L. J. O. 561; (1902) 2 Ch. 163.

party in a different right (e); nor to proceedings by persons not parties nor claiming through parties to the deed (f); nor to proceedings for purposes collateral to the deed, though for such purposes the contents of the deed may be evidence (g). A trustee in bankruptcy may insist that a creditor shall justify his claim against the estate, and is not bound by recitals admitting the liability of the bankrupt to the creditor, although the bankrupt himself would be estopped (h). The effect of a deed in estoppel is also restricted to such recitals and statements as are intended to be agreed upon as true against one or other of the parties; and this intention is to be gathered from the construction of the deed (i). By the rule of the common law a contract under seal could not be varied or discharged by a simple agreement not under seal; as expressed in the maxim, "*nunquamque dissolvi eo ligamine quo ligatum est.*" But such an agreement might be effectual in equity to restrict or oppose the legal operation of the deed, and to this extent is now valid in all courts (k).

Ch. II.

Deed cannot be varied by simple agreement.

Debts created by statute take their form and incidents from the provisions of the particular statute upon which they are founded: as debts for penalties imposed by penal statutes and made due and payable to an informer or to a party grieved (l); debts for tolls payable under statutes (m); debts for money received under statutory authority for payment over to others (n). "Where an Act of Parliament creates a duty or obligation to pay money, the money may be recovered by action, unless some provision to the contrary is contained in the Act" (o). "And where an Act creates an obligation, and enforces the performance in a specified manner, it is a general rule that performance cannot be enforced in any other manner" (p). But whether the Act in giving a special remedy

Debts created by statute.

Remedies.

(e) *Motter v. Brown* (1863), 32 L. J. Ex. 138; 1 H. & C. 686.

(f) *Heath v. Credlock* (1874), 43 L. J. C. 169; L. R. 10 Ch. 22; *Cracknell v. Janson* (1879), 11 Ch. D. 1.

(g) *Carpenter v. Butler* (1810), 10 L. J. Ex. 393; 8 M. & W. 209; *Ex p. Morgan* (1876), 45 L. J. Bk. 36; 2 Ch. D. 72.

(h) *Ex p. Chatterton* (1907), 76 L. J. K. B. 614; (1907) 2 K. B. 23.

(i) *Stronghill v. Buck* (1850), 19 L. J. Q. B. 209; 14 Q. B. 781.

(k) *Kaye v. Waghorne* (1809), 1 Taunt. 428; *Nash v. Armstrong* (1831), 30 L. J. C. P. 286; 10 C. B. N. S. 259; *Steeds v.*

Steels (1889), 58 L. J. Q. B. 302; 22 Q. B. D. 537.

(l) *Girdlestone v. Brighton Aquarium* (1879), 48 L. J. Ex. 373; 4 Ex. D. 107.

(m) *Shepherd v. Hills* (1855), 25 L. J. Ex. 6; 11 Ex. 55.

(n) *Udall v. Buryup* (1868), 38 L. J. Ex. 25; L. R. 4 Ex. 63.

(o) *Shepherd v. H's* (1855), 25 L. J. Ex. 6; 11 Ex. 55; *Richardson v. Wallis* (1873), 42 L. J. Ex. 68; L. R. 8 Ex. 69.

(p) *Doc v. Bridges* (1831), 9 L. J. O. S. K. B. 113; 1 B. & Ad. 859; *Pittmore v. Oswaldtwistle Council* (1898), 67 L. J. Q. B. 635; (1898) A. C. 387.

PART I.

Specialty
debt.Debts for
calls.

excludes the remedy by action, is a question of construction depending upon the terms and general purpose of the Act (*g*). And where a statute creates a duty and appoints a remedy which is not co-extensive in point of time with the duty, and the duty remains to be performed after the remedy provided by the statute has expired, an action at law will arise on the cesser of the statutory remedy (*r*). A statutory obligation to pay money is in general a debt by specialty within the Civil Procedure Act, 1833, s. 3, which prescribes twenty years as the limit within which actions of debt upon any specialty must be brought (*s*). This rule was applied in an action by a railway company against a shareholder for calls, under the Companies Clauses Act, 1845, s. 26 (*t*). But an action for a penalty under a by-law of a chartered company is within the Limitation Act, 1623, as is also an action given to a local authority to obtain contribution out of a county fund, and must be brought within six years (*u*). The Companies (Consolidation) Act, 1908, s. 14, provides that all money payable by any member to the company under the memorandum or articles of association of the company, is in England and Ireland a debt "in the nature of a specialty debt." There is no debt due until a call is made (*x*). The liability of a contributory for calls in the winding up of a company under sect. 125 of the same Act, creates a debt in England or Ireland "of the nature of a specialty" (*y*). Accordingly the heir of a contributory is bound in respect of real estate descended (*z*).

(*g*) *London School Board v. Wright* (1884), 53 L. J. Q. B. 266; 12 Q. B. D. 578; *Bentley v. Manchester Ry.* (1891), 60 L. J. C. 611; 1891 3 Ch. 222. See *Begg v. Parry* (1851), 20 L. J. C. P. 99; 10 C. B. 531.

(*r*) *Pulford v. Devonish* (1903), 73 L. J. C. 35; (1903) 2 Ch. 625.

(*s*) *Jones v. Pope* (1667), 1 Wms. Saund. 55; *Shepherd v. Hills* (1855), 25 L. J. Ex. 6; 11 Ex. 55.

(*t*) *Cork & Brandon Ry. v. Goode* (1853), 22 L. J. C. P. 198; 13 C. B. 826.

(*u*) *Tobacco Pipe Makers' Co. v. Loder* (1851), 20 L. J. Q. B. 414; 9 Q. B. 765; *Salford (Corp.) v. Lancashire C. C.* (1890), 59 L. J. Q. B. 576.

(*x*) *Whittaker v. Kershaw* (1890), 60 L. J. C. 9; 45 Ch. D. 320.

(*y*) *Re Muggelidge* (1870), 39 L. J. C. 620; L. R. 10 Eq. 443.

(*z*) *Buck v. Robson* (1870), 39 L. J. C. 821; L. R. 10 Eq. 629.

CANADIAN NOTES.

What Constitutes a Sealed Instrument.

In *Whittier vs. McLellan*, 13 U. C. Q. B., 618, Robinson, C.J., said that notwithstanding the nisi prius decision in *Clement vs. Ganhouse*, 5 Esp., 81, the Court felt bound to treat as a document under seal a letter subscribed formally in the presence of witness with the seal set opposite to the signature in the usual manner. He could not say that it was indispensable to the creation of a specialty that, besides sealing, the party should expressly affirm that he sealed it. It was held also that an averment of a promise to deliver a conveyance included the averment of a promise to execute it.

Contract Complete on Delivery.

In *Providence Savings Life Assurance Society vs. Mowat*, 32 S. C. R., 147, it was held that a contract of life assurance is complete on delivery of the policy to the assured and on payment of the first premium. Where the insured, being able to read, has had ample opportunity to examine the policy and, not being misled by the Company as to its terms nor induced not to read it, has neglected to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

It should not be inferred from this head-note that there is no contract until the premium has been paid. The case relates to a contract made where the policy issued was not in accordance with the application.

Sealed Instrument Irrevocable.

In *The Waterhouse Engine Works Co. vs. Pratt*, 30 O. R., 538, it was held that a contract sealed and delivered by one party which was subject to the approval of the other party could not be revoked by the former before the latter had had a reasonable time within which to signify his assent. The case is thus stated in the head-note, but MacMahon, J., who tried the cause with a jury said that, after examining the authorities referred to by counsel, he was confirmed in the view that the contract being sealed and delivered by the defendant, although subject to the approval of the plaintiff Company, could not be revoked by him as in the case of an ordinary offer made which could be revoked

before acceptance, citing the leading case of *Xenos vs. Wickham*, L. R., 2 H. L., 296.

Negotiations Merged in Deed.

In *Carroll vs. The Provincial Natural Gas, etc., Co.*, 26 S. C. R., 181, plaintiff by his contract agreed to sell to the Erie Gas Company all his gas plant, leases and franchises, the Company agreeing to reserve gas enough to supply the plant now operated or to be operated by them on said property. Subsequently a deed was executed and delivered to the Company transferring all the leases and property specified in the agreement and containing no reservation in favour of plaintiff such as was contained in the agreement. The Erie Company, a few years later, assigned the property to the defendant Company who immediately cut off from the works of the plaintiff the supply of gas. It was held that the rights of the parties must be determined by the deed and not by the precedent agreement and that, as the deed contained no reservation in favour of plaintiff, his action for an injunction could not be sustained.

Per Strong, J.: "In case of an agreement to sell land reserving the timber to the vendor, and then a conveyance and execution of the agreement containing no reservation, could it be doubted that the grantee would be entitled to the timber? To say that the whole property as described in the deed completing the purchase, did not pass would be equivalent to saying that if by an executory contract it is agreed to sell a lot of land of one hundred acres, reserving one acre to the vendor, a conveyance purporting to convey the whole hundred acres would leave the reservation of the contract intact. That the parties in the present case were dealing not with the property in the land itself but with what may be called a dismemberment of the right of property, can surely make no difference. To recognize the retention by the vendors of any such right would be to permit them to derogate from their own grant, for upon its face the deed is inconsistent and incompatible with the reservation claimed."

Deed Conclusive as to Parties to Contract.

In *Armstrong vs. Anderson et al*, 4 U. C. Q. B., 113, the plaintiff contracted by deed with another party to cut for him certain lumber for which the latter covenanted to pay. Supposing

a third party to have a joint interest in the lumber he sued both on an implied assumpsit. It was held that he was concluded by the deed as to the parties liable on the contract and could not sue the two parties jointly.

Signatories Individually Bound unless a Corporation.

In *Cullen vs. Nickerson*, 10 U. C. C. P., 549, a contract was made between "the trustees of the Wesleyan Methodist Parsonage" and plaintiff. The trustees were defendant and three others, and it was held that where the parties to the deed, described not by their own names and personal descriptions, but as a collective body not shown to be corporate, had signed and sealed the deed with their own names and seals they were individually bound.

CHAPTER III.

CONTRACTS OF RECORD.

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CONTRACTS of record comprised Judgments, Recognizances, and Statutes merchant and staple (*a*).—A record is a memorial or entry of the acts and proceedings of a court of record. The enrolment or entry in the roll of the court is essential to constitute the record and to give it special efficacy (*b*); and the court has power at all times to inspect its own records (*c*). A record is conclusive of its contents, and admits no averment or proof to the contrary. If an alleged record be denied, the fact is tried by the mere production and inspection of the court roll, from which it appears whether it is the record alleged, and what are the contents (*d*).

The judgment entered in a court of record, when final, is entered upon the roll of the court containing the record of the action. A judgment that the plaintiff shall recover against the defendant a sum of money as debt, or damages, or costs of suit, creates a debt; which is therefore a debt or contract of record. So a judgment for the defendant, that he shall recover a sum of money for his costs of defence, creates a debt of record (*e*). Judgment debt.

(*a*) 2 Blackst. Com. 464.
 (*b*) *Glynn v. Thorpe* (1853) 12 B. & Ald. p. 82, *post*, p. 686.
 (*c*) *Craven v. Smith* (1868), 38 L. J. Ex. Q. B. 61; E. B. & E. 884. See *ante*, p. 82.
 (*d*) Co. Lit. 117 b; 260 a. See *ante*, p. 82, *post*, p. 686.
 (*e*) *Hodsoll v. Baxter* (1858), 28 L. J. Q. B. 61; E. B. & E. 884. See *ante*, p. 82.

PART I.

ments of courts not of record, and judgments of foreign and colonial courts, have been already treated as creating simple contract debts (f).

Judgment
by consent.Warrant of
attorney.*Cognovit
actionem.*Judge's
order.

A judgment, being a simple mode of securing a debt attended with easy proof and convenient remedies, may be used for this purpose by agreement without previous litigation; also after the commencement of an action, the parties may come to an agreement as to the entry of judgment, and the terms on which it is to be enforced.—A *warrant of attorney* is an instrument in writing, usually under seal, giving authority to enter judgment against the party executing it without process; and it may be made subject to a *defeasance* containing the terms and conditions upon which the judgment may be entered and execution issued (g). A *cognovit actionem* is an instrument in writing, confessing the cause of action in a pending suit, and authorising the plaintiff to enter judgment; it may also be made subject to terms and conditions controlling its application. Also a judge's order may be made by consent, authorising the plaintiff to enter judgment against the defendant in an action, forthwith or at a future time, and subject to terms of defeasance or condition.—The judgment entered by consent under these instruments is attended with the regular incidents of a judgment as if entered *in invitum*; but the terms of the defeasance or condition control the execution according to the intention of the parties: and the courts exercise an equitable jurisdiction to apply the judgment and execution accordingly (h). These instruments are not within the statute 8 & 9 Will. 3, c. 11, which requires the plaintiff in an action on any penal sum to assign breaches (i).—The Debtors Act, 1869, requires as a condition to the validity of a warrant of attorney or *cognovit actionem* that its nature and effect shall be explained, prior to its execution, to the party executing by a solicitor who is to attest it; and that it should be filed within twenty-one days; further that any defeasance or condition must be written on the same paper or parchment before filing. By the same statute a judge's order by

(f) See *ante*, p. 82.

(g) *Kinnersley v. Mussen* (1813), 5 Taunt. 264; *Clarke v. Figs* (1817), 2 Stark. 234. See Chitty's Practice and Forms; and *post*, p. 684.

(h) *Wentworth v. Bullen* (1829), 9 L. J. O. S. K. B. 33; 9 B. & C. 840; *Char-*

lington v. Laing (1826), 8 L. J. O. S. C. P. 50; 6 Bing. 242.

(i) *Kinnersley v. Mussen* (1813), 5 Taunt. 264; *Shaw v. Worcester (Marq.)* (1830), 8 L. J. O. S. C. P. 98; 6 Bing. 385. See *ante*, p. 98.

consent to enter up judgment must be filed within twenty-one days from the making of the order, or the judgment and any execution thereon will be void against creditors.

CR. III.

A judgment for payment of a certain sum of money may be treated as a distinct debt or claim upon which a new action may be brought (*k*). But an action cannot be maintained in a statutory County Court founded upon a judgment in the High Court, nor an action in the High Court upon a judgment in the statutory County Court (*l*).—In exercising the discretion conferred by the statute 43 Geo. 3, c. 46, s. 4, the court would deprive a successful plaintiff of his costs of action brought upon a judgment, instead of enforcing it by execution (*m*): unless he joined in one action, other causes of action besides the judgment (*n*). The statute applied only to actions brought upon judgments recovered by the plaintiff, and not to judgments for costs recovered by a defendant (*o*). The costs seem now to be subject to the larger discretion given to the court by Ord. LXV. r. 1, and the Judicature Act, 1890 (*p*).

Action on judgment.

Costs of action.

A judgment is enforced in the ordinary course of procedure by execution; and judgments of inferior courts may be removed into the High Court for the purpose of execution (*q*). Execution cannot issue after six years from the judgment without leave of the court (*r*). Where judgment has been obtained against a firm an action may be brought upon the judgment against a member of the firm; though Ord. XLII. r. 10, enables execution to be issued against him (*s*).

Execution.

By the common law a judgment creditor may have execution, by the writ of *fieri facias* (usually called a *fi. fa.*), of all the goods and chattels of the judgment debtor: including chattels real and

By writ of *fieri facias*.

(*k*) *Bennett v. Neale* (1814), 14 East, 343.

(*l*) County Courts Act, 1888, ss. 63, 151.

(*m*) *Hannur v. White* (1844), 13 L. J. Ex. 110; 12 M. & W. 519.

(*n*) *Jackson v. Everett* (1861), 31 L. J. Q. B. 59; 1 B. & S. 857.

(*o*) See *Seldon v. Wilde* (1910), 79 L. J. K. B. 621; [1910] 2 K. B. 9.

(*p*) *Ld. Blackburn, Garnett v. Bradley* (1878), 48 L. J. Ex. 186; 3 Ap. Ca. 914; *Harris v. Petherick* (1879), 48

L. J. Q. B. 521; 4 Q. B. D. 611; *Forster v. Farquhar* (1893), 62 L. J. Q. B. 296; (1893) 1 Q. B. 564; *Sprange v. Lee* (1908), 77 L. J. C. 274; (1908) 1 Ch. 421.

(*q*) *Hannur v. White* (1844), 13 L. J. Ex. 110; 12 M. & W. 519. See *ante*, p. 83.

(*r*) Order XLII. rr. 22, 23; see *Fellows v. Thornton* (1884), 53 L. J. Q. B. 279; 14 Q. B. D. 335.

(*s*) *Clark v. Cullen* (1882), 9 Q. B. D. 355.

PART I.

Writ of
elegit.

estates for years in land (*t*). But at common law no execution could be had of the land or real estate of the judgment debtor, beyond taking the present profits until satisfaction of the debt under the writ of *levari facias*. Execution against the possession of the land was first given in the statute of Westminster 2 by the writ of *elegit*, which originally required the sheriff to deliver to the judgment creditor, besides the goods and chattels, *one-half* of the land of the debtor, to hold to him and his assigns until the debt should be levied upon a reasonable valuation (*u*). The Statute of Frauds, s. 10, extended the writ to lands held in trust for the judgment debtor, and by the Judgments Act, 1837, s. 11, the writ of *elegit* was extended to "all such lands, including lands of copyhold or customary tenure, as the person against whom execution is issued, or any person in trust for him shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall have any disposing power for his own benefit." By the Bankruptcy Act, 1883, s. 146, it is enacted that a writ of *elegit* shall not extend to goods, and *levari facias* has been abolished in civil proceedings.

Execution
against real
assets.

Upon the death of a judgment debtor his real assets may be charged in execution to the same extent by taking proceedings to revive the judgment against the heir and tenants of the lands; but the heir is then charged as tenant of the lands only and not as heir: he is not liable to an action on the judgment as he is on a contract under seal of the ancestor in which he is expressly named (*x*).

Judgment
as a charge
upon land.

The judgment operated as a lien or charge upon land at law, and related back to the first day of the term in which it was signed (*y*). It was found in practice that purchasers of land might be defrauded by judgment debts of which they had no notice being charged upon the land, and various statutes have been passed, which, without affecting the right of the judgment creditor as against his debtor, have made provision for publicity.

(*t*) See notes to *Whartley v. Lane* (1669), 1 Wms. Saund. 256; *Underhill v. Devereux* (1670), 2 Wms. Saund. 197; *Johnson v. Pickering* (1907), 77 L. J. K. B. 13; (1908) 1 K. B. 1. See *Birstall Candle Co. v. Daniels* (1908), 77 L. J. K. B. 390; (1908) 2 K. B. 254.

(*u*) *Underhill v. Devereux* (1670), 2 Wms. Saund. 197, n. (1).

(*x*) See *ante*, p. 100; *Jeffreson v. Morton* (1670), 2 Wms. Saund. 12, n. (4).

(*y*) See *Jeffreson v. Morton* (1670), 2 Wms. Saund. 47, n. (5).

The Judgments Act, 1837, s. 13, followed the earlier practice under the statute 4 & 5 W. & M. c. 20 of requiring the judgment to be registered, and by subsequent statutes periodically re-registered, in order to charge the land as against purchasers for value (z). The next change was to require the judgment creditor to be diligent in pursuing his remedies, and by the Judgments Act, 1864, the law affecting freehold, copyhold, and leasehold estates was assimilated to that affecting purely personal estates, and it is enacted by sect. 1, that "no judgment, statute, or recognizance, to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, statute or recognizance." And by sect. 4, "every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance shall be entitled to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land" in manner therein provided. By the Lands Charges Registration and Searches Act, 1888, ss. 5 and 6, "every writ or order affecting land"—which includes incorporeal hereditaments—"issued or made by any court for the purpose of enforcing a judgment, statute or recognizance, and any order appointing a receiver or sequestrator of land" must be registered or re-registered as provided by the Act or else it will "be void as against a purchaser for value of the land," unless the writ or order is issued or made in an original proceeding registered as a *lis pendens*; and by the Lands Charges Act, 1900, these provisions are extended to executions obtained on behalf of the Crown.

Ch. III

Registration
of judgment
and writ.

Prior to the Judicature Act, 1873, if the interest of the debtor in the land could not be taken in execution under process issuing out of the common law courts, the Court of Chancery granted relief (commonly called equitable execution) by way of sale of the debtor's interest in the land, or by the appointment of a receiver. This jurisdiction can now be exercised by all branches of the High Court (a); but any order obtained must be registered

Equitable
execution.

(z) See *Fuller v. Redman* (1859), 29 L. J. C. 324; 26 Beav. 600. Lands Charges Act, 1900, Schedule.

(a) *Smith v. Coxell* (1880), 50 L. J. Q. B. 38; 6 Q. B. D. 75; *Holmes v. Millage* (1893), 62 L. J. Q. B. 380; (1893) 1 Q. B. 551.

PART I.

Priority of
judgment
debt.

under the Lands Charges Registration and Searches Act, 1888, to affect a purchaser for value.

A judgment creditor at common law had an absolute priority in the administration of the legal assets of the deceased debtor, which the legal personal representative was bound to recognise, being presumed in law to have notice of it as matter of record (*b*). By the Law of Property Amendment Act, 1860, s. 3, it was enacted that no judgments, unless registered under the Acts in force for that purpose, "shall have any preference against heirs, executors, or administrators in their administration of their ancestor's, testator's or intestate's estates." But this provision has been repealed by the Lands Charges Act, 1900, and the old law, apparently, restored.—An executor or administrator necessarily has notice of a judgment recovered against him, and was formerly bound to give priority to those amongst creditors of equal degree who recovered judgments against him (*c*), according to the dates of their judgments (*d*). This priority is apparently taken away by the Judicature Act, 1875, s. 10, in providing that in the administration of assets the same rules shall prevail "as to the respective rights of secured and unsecured creditors" as in bankruptcy (*e*).

Judgment
against
executor.

Effect of
judgment in
merger of
debt.

The judgment of a court of record merges or extinguishes the cause of action on which it is founded. "If there be a breach of contract or wrong done or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result; hence the legal maxim, '*transit in rem judicatum*,' the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher" (*f*).

Effect of
judgment in
estoppel.

Hence also the judgment operates in estoppel, that is, is conclusive between the parties upon the matter adjudicated;

(*b*) *Fuller v. Redman* (1859), 29 L. J. C. 321; 26 Beav. 500.

(*c*) *Jennings v. Rigby* (1863), 33 L. J. C. 149; 33 Beav. 198.

(*d*) *Freeland v. Johnson* (1851), 23 L. J. C. 637, 2 M. & Giff. 301.

(*e*) See *Re Whitaker* (1900), 70 L. J. C. 6; (1901) 1 Ch. 9.

(*f*) *Per cur. King v. Howe* (1811), 14 L. J. Ex. 29; 13 M. & W. 504. See *post*, p. 681.

Ca. III.

which thereby becomes *res judicata*, and cannot be again litigated between the same parties; nor can a party bring an action to set aside a judgment upon grounds which reopen the matter adjudicated (*g*). In an action on a judgment the defendant cannot plead any matter of defence which he might have pleaded in the original action (*h*); as a discharge in bankruptcy or by a deed of composition (*i*). He cannot plead the pendency of an appeal, though he may apply to stay proceedings upon that ground (*k*). Nor can he plead any matter which forms a ground of error in the judgment, but he must resort to a writ of error (*l*); nor can he plead the pendency of a writ of error (*m*), for the record can be amended or set aside only by the court which made it, or by a court of error upon sufficient grounds, and upon regular proceedings being taken for that purpose (*n*). But in proceedings in bankruptcy against the judgment debtor the consideration for a judgment debt may be inquired into, because the interests of the other creditors are concerned (*o*); and if the proof of the consideration is rejected the judgment debt cannot be afterwards enforced (*p*). Upon the same principle a judgment recovered against the plaintiff upon the merits of the case is conclusive and operates in *estoppel* to preclude him from bringing another action for the same cause (*q*). But where one of several plaintiffs died pending the action, judgment against the others was held to be no *estoppel* against the executor of the deceased (*r*).

Judgment
against
plaintiff.

A recognizance at common law is an obligation in the form of an acknowledgment of a debt, made before a judge or other officer having authority for that purpose, and enrolled in a court of record. The debt is acknowledged to be due to the Crown, or to

Recogni-
zance.

(*g*) *Duchess of Kingston's case* (1776), 2 Smi. L. C. 713; *Tiercean v. Lawrence* (1705), 1 Salk. 276; 2 Smi. L. C. 742. See post, Pt. IV., Chap. IX.

(*h*) *Jewsbury v. Munnery* (1872), 42 L. J. C. P. 22; L. R. 8 C. P. 56.

(*i*) *Todd v. Marfield* (1826), 6 B. & C. 105; *Ellis v. McHenry* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 228.

(*k*) *Scott v. Pilkington* (1862), 31 L. J. Q. B. 81; 2 B. & S. 11.

(*l*) *Dick v. Tolhausen* (1858), 4 H. & N. 695.

(*m*) *Doe v. Wright* (1839), 10 A. & E. 763; *Riddle v. Grantham Canal* (1847), 16 L. J. Ex. 129; 16 M. & W. 882.

(*n*) See *Blakamore's case* (1610), 9 Co. 156 a; *Hayward v. Ribbins* (1803), 4

East, 310; *De Medina v. Grove* (1846), 15 L. J. Q. B. 287; 10 Q. B. 152.

(*o*) *Ex p. Bamber* (1881), 51 L. J. C. 300; 17 Ch. D. 480; *Ex p. Anderson* (1885), 54 L. J. Q. B. 383; 14 Q. B. D. 606.

(*p*) *Brandon v. McHenry* (1891), 60 L. J. Q. B. 448; (1891) 1 Q. B. 538; *Re Deechurst* (1891), 60 L. J. Q. B. 411.

(*q*) *Per cur. Fought v. Winch* (1819), 2 B. & Ald. 668; *per cur. Freeman v. Cooke* (1848), 18 L. J. Ex. 114; 2 Ex. 654; *Hunter v. Stewart* (1861), 31 L. J. C. 346; 4 De G. F. & J. 168; *For v. "Star" Newspaper Co.* (1899), 69 L. J. Q. B. 117; (1900) A. C. 19.

(*r*) *Arnison v. Smith* (1889), 58 L. J. C. 335; 40 Ch. D. 567.

PART I.

an officer, or to the plaintiff in an action, as . . . is conditional to secure various objects, as to appear at the assizes, to keep the peace, to become bail, to act as receiver in an action. A recognizance is not made under seal; it is proved by the record, and may be put in suit by writ of *scire facias* upon the record or by an action of debt (*s*). A recognizance formerly operated as an immediate charge upon all the lands of the party from the time of enrolment on record; but the law has since been modified in favour of purchasers for value whose title can only be displaced by a registered process in execution (*t*). A recognizance enrolled takes precedence in the administration of assets after judgment debts, but before contracts under seal (*u*); and money due under it is a debt of record until the recognizance is vacated, as money due from a receiver under recognizance to account (*x*).

Statute
merchant
and statute
staple.

Statutes merchant, statutes staple, and recognizances in the nature of a statute staple were acknowledgments of debt made in writing before officers appointed for that purpose, and enrolled of record (*y*). These securities were abolished by the Statute Law Revision Act, 1863.

(*s*) 2 Black. Comm. 311; Bacon, Abr. tit. "Execution" (B); *Underhill v. Devereux* (1670), 2 Wms. Saund. 197, n.

(*t*) See *ante*, p. 109.

(*u*) *Williams' Executors*, 767.

(*x*) *Seagram v. Tuck* (1881), 50 L. J. C. 572; 18 Ch. D. 296.

(*y*) Bacon, Abr. tit. "Execution" (B); *Underhill v. Devereux* (1670), 2 Wms. Saund. 197, n.

CHAPTER IV.

CONTRACTS IN WRITING.

SECT. I.—AGREEMENTS MADE IN WRITING.

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CONTRACTS in writing are not a distinct class of contract at common law, writing being applicable to all contracts. Contracts under seal are necessarily expressed in writing in the form of a deed. Contracts of record are entered in writing upon the rolls of a court of record. Simple contracts may be made in writing; but whether they are so or not, they are described by the general term *parol* contracts, importing only that they are made by mere agreement and not by deed under seal or by record. The term *parol* applied to evidence is generally used to mean *oral*, as distinguished from *written* evidence; but with reference to written documents, it is often used to include all evidence extrinsic to the writing (*a*). In pleading a contract or agreement under the present practice it should be stated whether it is in writing, or by *parol*, or partly in writing and partly by *parol*, and what are the writings, and the words or effect thereof (*b*); and the defence of want of written evidence to satisfy the Statute of Frauds cannot be raised by demurrer but must be pleaded (*c*).

By the statute law some contracts are required to be made by deed or in writing, and with registration or other formalities;

(a) *Per cur.* *Rann v. Hughes* (1778), 1 Bro. P. C. 27; 7 T. R. 350 (*a*); *Alinger, C. B.*, *Beckham v. Brooks* (1841), 11 L. J. Ex. 201; 9 M. & W. 92.

(b) *Per cur.* *Turquand v. Farm* (1879), 48 L. J. Q. B. 703. See Order XIX. rr. 4, 20, 21. And see *Dupont v. Mays* (1869), 1 Wms. Saund. 293, n. (2).

(c) *Cutland v. King* (1877), 46 L. J. C. 381; 5 Ch. D. 669.

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and other contracts, though they may be made by parol, can be enforced only by written evidence, or if there be corroboration. Of these, the most important is the Statute of Frauds, which is treated in detail in a subsequent chapter. The other statutes, so far as they affect or illustrate the principles of the law of contracts, are referred to in treating of the matters to which they relate.

Contracts in writing by agreement of the parties.

Where it is intended that the terms of an agreement shall be put into a formal written contract, the question sometimes arises whether there is an agreement which is binding before the intended formal contract is made, or whether until then the matter rests merely in negotiation. "I again protest against its being supposed, because people wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (*d*). The like question may arise with written terms that are intended to be afterwards put into the form of a deed, namely, whether there is a binding agreement to execute such deed, or merely a negotiation respecting the terms of the deed (*e*). The following cases explain the nature of the question and the grounds of decision:—

Agreement before reduction into writing.

Where the vendor and purchaser of an estate agreed upon the terms, which were written down and signed by the vendor, who subjoined a letter to his solicitor instructing him to prepare a proper agreement; it was held that there was a complete agreement binding the vendor notwithstanding the intention to have a more formal instrument (*f*). So where "heads of agreement" contained the expression "subject to approval of conditions and form of agreement by purchaser's solicitor," it was held that the "heads of agreement" were a complete contract (*g*). Where land was offered in lots upon certain printed conditions, adding that "the purchaser will be required to sign a contract embody-

(*d*) *Cranworth, L. C., Ridgway v. Wharton* (1857), 27 L. J. C. 46; 6 H. L. C. 238. And see *per* Lord Wensleydale, in *S. C.*

(*e*) *Jones v. Victoria Graving Dock* (1877), 46 L. J. Q. B. 219; 2 Q. B. D. 314.

(*f*) *Faulk v. Freeman* (1801), 9 Ves. 351; *Bolton Partners v. Lambert* (1889), 58 L. J. C. 425; 41 Ch. D. 295.

(*g*) *North v. Percival* (1898), 67 L. J. C. 321; (1898) 2 Ch. 128.

ing the foregoing conditions"; a purchaser having made an offer for some lots at a certain price, which was accepted; it was held that there was a complete agreement to sign the contract referred to, and to complete the purchase (*h*). Where a correspondence took place between two brokers agreeing upon a sale of goods, with the expression "contract in due course," it was held that the sale was complete, though a contract was subsequently tendered differing in its terms (*i*). So where a tender for building was accepted, with notice given that the contract would be ready for signature in a few days, it was held that there was a binding agreement upon acceptance of the tender (*k*). So an agreement for withdrawal from a partnership was construed as an executory agreement to be carried out upon the usual terms (*l*).—On the other hand, where an offer is accepted only with reference to a written contract intended to contain the terms, the parties are not bound until such contract is signed (*m*): as where a proposed purchaser paid a deposit and took a receipt for part payment of the purchase-money, which stated, "the terms to be expressed in an agreement to be signed as soon as prepared" (*n*); where an offer for the sale of an estate was accepted, "subject to the terms of a contract being arranged" (*o*); where an offer or acceptance of a lease is made "subject to the preparation and approval of a formal contract," or with a reference to a solicitor or agent to arrange the terms (*p*).

Ch. IV.
SECT. I.

Agreement conditional upon reduction into writing.

Upon the contract being reduced into writing, the previous negotiation, whether it resulted in a binding agreement or not, is presumptively merged in the writing, which thenceforth becomes the exclusive evidence of the terms; and if there is any discrepancy between the previous negotiation or agreement and the final writing, the latter must prevail (*q*). And though the final writing cannot be admitted in evidence for want of a stamp, the

Effect of reduction into writing.

h. Rossiter v. Miller (1878), 48 L. J. C. 10; 3 Ap. Ca. 1121.

i. Heyworth v. Knight (1864), 33 L. J. C. P. 298; 17 C. B. N. S. 298.

k. Lewis v. Brass (1878), 2 Q. B. D. 667.

l. Gray v. Smith (1889), 59 L. J. C. 115; 13 Ch. D. 208.

m. Kingston-upon-Hull v. Pitch (1851), 21 L. J. Ex. 23; 10 Ex. 610; *Chinnock v. Elphinstone* (1865), 1 De G. J. & S. 638; *Cressley v. Maycock* (1874), 43

L. J. C. 379; 14 R. 18 Eq. 181; *Jones v. Daniel* (1891), 63 L. J. C. 562; 1891 2 Ch. 332.

n. Wood v. Mudgeley (1854), 23 L. J. C. 553; 5 De G. M. & G. 41.

o. Harvey v. Barnard's Inn (1881), 50 L. J. C. 750; *Hawkesworth v. Chaffey* (1886), 55 L. J. C. 325.

p. Winn v. Bull (1877), 47 L. J. C. 139; 7 Ch. D. 29.

q. See post, p. 119.

PART I.

rior agreement is not revived (*r*). But where some only of the terms of a contract are carried into execution by a deed or final written contract, the remaining terms which are executory may continue in force; as in the case of a contract of sale of land with clauses for compensation for any error in the particulars of sale, which may entitle the purchaser to compensation for errors discovered after he has accepted a conveyance of the property (*s*); for several contracts may be contained in one writing, whether it be authenticated by signature only (*t*), or be by deed (*u*).

Contracts contained in several writings.

Conversely a contract may be contained in several writings, as in a correspondence by letters; and if the writings are sufficiently connected together by internal references, the contract, though requiring several writings to express all the terms, is nevertheless complete in a written form; extrinsic evidence of the circumstances being required only to apply the references and identify the writings referred to (*x*). And if one only of the connected writings bears the proper agreement stamp, the other writings are admissible (*y*). But if the writings are not sufficiently connected by their contents as parts of one agreement, the contract is not found complete in the writings, and is then not a contract in writing (*z*).—Where a letter contained a reference to “the instructions” sent by the lessor to a solicitor to prepare a formal agreement, it was held that the provisions of the Statute of Frauds were sufficiently complied with; parol evidence being given only to identify the instructions referred to (*a*). So an agreement by letter for a lease for a certain term of years “at the rent and terms agreed upon” was held to be a contract in writing, upon evidence of the written report of a surveyor containing the

(*r*) *Knight v. Barber* (1846), 16 L. J. Ex. 18; 16 M. & W. 66.

(*s*) *Palmer v. Johnson* 1884, 53 L. J. Q. B. 345; 13 Q. B. D. 351. See *Leggott v. Barrett* (1880), 15 Ch. D. 306.

(*t*) *Powell v. Edwards* (1810), 12 East, 6; *Rods v. Dormer* (1832), 4 B. & Ad. 77; *Watling v. Horwood* (1847), 12 Jur. 48.

(*u*) *Doe v. Bingham* 1821, 4 B. & Ald. 672; *Collins v. Prosser* (1823), 1 L. J. O. S. K. B. 682; 1 B. & C. 682; *Harrison v. Sumner* (1836), 35 L. J. C. P. 264; L. R. 1 C. P. 518.

(*x*) *Lewis v. Nicholson* (1852), 21 L. J. Q. B. 311; 18 Q. B. 503; *Oliver v. Hunting* 1890, 59 L. J. C. 255; 44 Ch. D. 205. Cp. *Whitbread v. Smith* (1854), 23 L. J. C. 611; 3 De G. M. & G. 727.

(*y*) *Pate v. Dickin* (1834), 4 L. J. Ex. 28; 1 Cr. M. & R. 422; *Taylor v. Parry* (1840), 9 L. J. C. P. 298; 1 Man. & G. 601.

(*z*) *Brown v. Langley* (1842), 12 L. J. C. P. 62; 1 Man. & G. 466.

(*a*) *Ridgway v. Wharton* (1857), 27 L. J. C. 46; 6 H. L. C. 238.

terms referred to (b). So an agreement for a lease of premises "as per plan agreed upon," together with the plan, made a contract in writing (c). A receipt in writing for the deposit on a "purchase of land" or on "property purchased" is a sufficient reference to a written agreement or purchase to connect the writings in order to show a complete contract in writing within the Statute of Frauds (d). A letter demanding payment of the "balance of purchase-money" was held a sufficient reference to a receipt for part of the purchase-money, in order to read the two documents together as shewing a contract in writing (e). A letter guaranteeing the payment of "the promissory note" was held to connect the note with the letter sufficiently to make a guarantee in writing to satisfy the Statute of Frauds (f).—Familiar instances of contracts incorporating several written documents are afforded by policies of insurance which are issued upon terms contained in the application form (g); and by railway tickets and consignment notes referring to notices containing the terms and conditions of carriage (h); and by bills of lading upon conditions "as per charter party," which incorporate the charter party so far as it is applicable to the bill of lading and consistent with its terms (i).—In such cases as are above cited the document referred to is presumptively incorporated into the written contract in its entirety and the two documents are construed together; if a party claims to be bound only by certain parts of the document, to be distinguished by parol evidence, as, for example, such parts only as were read over to him, the contract is not wholly in writing (k).

Where an agreement is made with reference to a writing or writings which do not contain all the terms, and parol evidence is necessary to connect and incorporate the terms in writing with the

Contracts partly in writing.

(b) *Baumann v. James* (1868), L. R. 3 Ch. 508.

(c) *Holmes v. Horsfall* (1829), 1 Russ. & M. 116.

(d) *Long v. Millar* (1875), 48 L. J. C. P. 596; 4 C. P. D. 450; *Shardlow v. Cutlerill* (1882), 51 L. J. C. 353; 20 Ch. D. 90.

(e) *Studds v. Watson* (1885), 54 L. J. C. 626; 28 Ch. D. 305.

(f) *Shortrede v. Clark* (1834), 3 L. J. K. B. 125; 1 A. & E. 57.

(g) *Worsley v. Wood* (1796), 6 T. R. 710; *Anderson v. Fitzgerald* (1853), 4 H. L. C. 484; *Home Insce. Co. of New*

York v. Victoria-Montreal Fire Insce. (1906), 76 L. J. P. C. 1; (1907) A. C. 59.

(h) See ante, p. 12.

(i) *Guthrie v. Trechman* (1885), 54 L. J. Q. B. 515; 15 Q. B. D. 154; *Servino v. Campbell* (1890), 60 L. J. Q. B. 303; (1891) 1 Q. B. 283; *Manchester Trust Co. v. Furness* (1895), 64 L. J. Q. B. 766; (1895) 2 Q. B. 539; *The Northumbria* (1906), 75 L. J. P. 101; (1906) P. 292.

(k) *Brodie v. St. Paul* (1791), 1 Ves. jun. 326; *Clinton v. Cooke* (1802), 1 Sch. & L. 35.

PART I.

Writing
accepted by
parol.

rest of the agreement, the contract is not in writing; it will not satisfy the Statute of Frauds or any other statute requiring a contract to be made in writing, or to be proved by written evidence; nor is the writing an agreement or memorandum of agreement requiring a stamp (*l*).—A statutory requirement of a "contract in writing" involves signature by the parties, one of whom may, however, be an agent (*m*). But a written proposal of terms, accepted with a parol exception, addition or variation, is not a contract in writing: as a printed prospectus of a school, accepted with a parol variation of the terms of payment (*n*); an order for goods in writing and invoice sent, making no mention of the time of payment, but with a prior verbal agreement for terms of credit (*o*); a contract with a railway company to carry goods between two termini, and evidenced by a written ticket to an intermediate place, and verbally for the rest of the distance (*p*). A letter asking for a loan, upon which the money was lent, was held not to constitute a debt payable by virtue of a written instrument, for which interest could be claimed under the Civil Procedure Act, 1833 (*q*). At a sale by auction according to printed catalogue and conditions of sale, where a lot is knocked down to a bidder, there is a valid contract, provided it is not required to be in writing; but there is no contract in writing until signing the conditions of sale; consequently in the former case the oral statements of the auctioneer made at the time of the sale may form part of the contract; in the latter they are excluded by the written contract (*r*).

(*l*) *Brown v. Langley* (1842), 12 L. J. C. P. 62; 4 Man. & G. 561; *Clay v. Crofts* (1851), 20 L. J. Ex. 361.

(*m*) *Poolley v. Driver* (1877), 46 L. J. C. 466; 5 Ch. D. 458; *Menzies' case* (1890), 59 L. J. C. 73; 43 Ch. D. 118; *Elsner's and McArthur's case* (1895), 65 L. J. C. 76; (1895) 2 Ch. 759.

(*n*) *Clay v. Crofts* (1851), 20 L. J. Ex. 361.

(*o*) *Lockett v. Nicklin* (1848), 2 Ex. 93.

(*p*) *Malpas v. L. & S. W. Ry.* (1866), 35 L. J. C. P. 166; 1 L. R. 1 C. P. 336.

(*q*) *Taylor v. Holt* (1864), 34 L. J. Ex. 1; 3 H. & C. 452.

(*r*) *Cloues v. Higginson* (1813), 1 V. & B. 524; *Shelton v. Livins* (1832), 1 L. J. Ex. 139; 2 Cr. & J. 411; *Eden v. Blake* (1845), 14 L. J. Ex. 194; 13 M. & W. 614.

CHAPTER IV.

CONTRACTS IN WRITING.

SECT. II.—ADMISSION OF EXTRINSIC EVIDENCE.

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It is a general rule of law that contracts in writing cannot be varied by extrinsic evidence of the intention of the parties. The rule applies equally, whether the parties have agreed that the terms expressed in the writing shall represent their contract, or whether the contract be reduced to writing under the requirements of a statute; and whether it be contained in several writings or in a single formal deed or writing; and whether it be a contract under seal, or a simple contract (a). Where a contract is made partly in writing and partly by parol the rule is not applicable, and all the circumstances may be proved and considered in order to ascertain the terms of the agreement and the construction and

Contract in writing cannot be varied by extrinsic evidence.

(a) *Mores v. Ansell* (1771), 3 Wils. 275; *Harris v. Rickell* (1859), 28 L. J. Ex. 197; 4 II. & N. 1; *Inglis v. Buttery* (1878), 3 Ap. Ca. 552; *G. W. Ry. v. Fisher* (1905), 74 L. J. C. 241; (1905) 1 Ch. 316.

PART I.

Sale of goods
by written
contract.

Sale by
auction.

Extra work
under written
contract.

effect of the writing, and even to vary the contents of the writing (b).

Accordingly upon a sale of goods described in a written contract, evidence that a sample was exhibited at the time of the sale is not admissible for the purpose of showing either that the seller was entitled to deliver goods according to the sample, though not answering to the description; or that the buyer was entitled to refuse goods answering the description, because not corresponding to the sample (c). And if goods are described in a written contract of sale as of a certain kind and quality, the contract is executed by delivering goods answering to the description in the contract, and it cannot be shown by evidence that the best, or any other quality or description, was contemplated (d).—So, if a sale by auction is followed by a written contract, the writing cannot be explained, or added to, or varied by parol evidence of what passed at the sale; and if a contract is signed referring to the particulars and conditions of sale, evidence is not admissible to show that the auctioneer at the time of the sale made oral statements in explanation, or in alteration of the particulars or conditions (e): as a statement that the timber on the estate sold was to be taken at a separate valuation (f); or that the timber growing on the estate sold comprised a certain quantity (g).—Upon the same principle where a claim is made for extra work beyond that contracted for in a written contract, the question whether the work was extra can be decided only by reference to the written contract, which must therefore be produced in support of the claim (h). If the contract stipulates for a written order for extra work, no claim can be made under the contract without such order (i); unless there is an independent promise to pay, which may be inferred from the conduct of the parties (k).

(b) *Bolton (Lord) v. Tomlin* (1836), 6 L. J. K. B. 45; 5 A. & E. 856; *Stones v. Dowler* (1860), 29 L. J. Ex. 122.

(c) *The v. Fynnmore* (1813), 3 Camp. 462; *Meyer v. Ewerth* (1814), 4 Camp. 22. See Sale of Goods Act, 1893, s. 15, sub-s. 1.

(d) *Smith v. Jefferys* (1846), 15 L. J. Ex. 325; 15 M. & W. 561; *Harnor v. Groves* (1855), 24 L. J. C. P. 53; 15 C. B. 667; Sale of Goods Act, 1893, ss. 13, 14.

(e) *Gunnis v. Erhart* (1789), 1 H. Bl. 289; *Skelton v. Livers* (1832), 1 L. J. Ex. 139; 2 Cr. & J. 411.

(f) *Cloues v. Higginson* (1813), 1 V. & B. 524.

(g) *Powell v. Edmonds* (1810), 12 East, 6.

(h) *Buxton v. Cornish* (1844), 13 L. J. Ex. 91; 12 M. & W. 426; *Ingdis v. Buttery* (1878), 3 Ap. Ca. 552.

(i) *Morgan v. Burnie* (1833), 9 Bing. 672; *Milner v. Field* (1850), 20 L. J. Ex. 68; 5 Ex. 829; *Wadsworth v. Smith* (1871), 40 L. J. Q. B. 118; L. R. 6 Q. B. 332.

(k) *Burn v. Miller* (1813), 4 Taunt. 745; *Edie v. Kingsford* (1854), 23 L. J. C. P. 123; 14 C. B. 759.

Bills of exchange, promissory notes and negotiable instruments carry certain defined liabilities, clear of all qualifications except such as are expressed upon the face of the instrument; so that a party to a bill is estopped as against a *bonâ fide* holder for value, from denying the contracts appearing on the bill to which he has put his name (*l*). A contemporaneous agreement, if in writing, concerning a bill or note may bind the parties to the agreement to terms which control their rights and liabilities upon the instrument as between themselves; as a written agreement between drawer and acceptor to renew the bill from time to time (*m*). But a contemporaneous written agreement does not affect persons who are not themselves parties to the agreement, even if they take the bill with notice (*n*). Agreements of this kind, controlling the operation of bills and notes, must be wholly in writing, requiring no oral link to connect the bill or note with the agreement (*o*); for by a rule of law an oral agreement, though it may be binding in itself, cannot control the operation of a bill or note, even between the parties to such agreement (*p*); but if supported by an independent consideration, an oral agreement might be an equitable defence in an action for not paying according to the tenor (*q*).—A collateral agreement not incorporating the bill as part of one and the same contract, is not a defence to an action on the bill, but the ground for a cross action; and whether the agreement incorporates and controls the bill, or is merely collateral, is a question depending upon the construction of the terms of the agreement (*r*). Every presumption is made in favour of the validity of a written instrument, and accordingly it is always presumed that a valid consideration for a bill or note exists; but evidence is always admissible to rebut a presumption, and it may be shown that there was in fact no consideration, or that the consideration has failed; and

CH. IV.
SECT. II.

Application
of rule to
bills of
exchange.

Collateral
agreement.

Evidence to
rebut con-
sideration.

(*l*) *Abrey v. Cruz* (1869), 39 L. J. C. P. 9; L. R. 5 C. P. 37; *Hill v. Wilson* (1873), 42 L. J. C. 817; L. R. 8 Ch. 888; *New London Credit Synd. v. Neale* (1898), 67 L. J. Q. B. 825; (1898) 2 Q. B. 487; Bills of Exchange Act, 1882, ss. 54, 55, 56.

(*m*) *Bowerbank v. Monteiro* (1813), 4 Taunt. 844; *Maillard v. Page* (1870), 39 L. J. Ex. 239; L. R. 5 Ex. 312.

(*n*) *Salmon v. Webb* (1852), 3 H. L. C. 182.

(*o*) *Brown v. Langley* (1842), 12 L. J.

C. P. 62; 4 Man. & G. 466.

(*p*) *Woodbridge v. Spooner* (1819), 3 B. & Ald. 233; *Abrey v. Cruz* (1869), 39 L. J. C. P. 9; L. R. 5 C. P. 37; *New London Credit Synd. v. Neale* (1898), 67 L. J. Q. B. 825; (1898) 2 Q. B. 487.

(*q*) *Cockburn, C. J., Flight v. Gray* (1857), 27 L. J. C. P. 13; 3 C. B. N. S. 320; Willes, J., *Abrey v. Cruz* (1869), 39 L. J. C. P. 9; L. R. 5 P. C. 37.

(*r*) *Salmon v. Webb* (1852), 3 H. L. C. 510; *Maillard v. Page* (1870), 39 L. J. Ex. 239; L. R. 5 Ex. 312.

PART I.

Implied
terms and
incidents of
written
contract.

although evidence is not admissible to contradict the consideration so far as it is expressed, it is admissible to show the failure of the consideration stated (*s*).

The incidents which are impliedly contained in a written contract, whether by construction of the terms or by implication of law, are as much within the general rule as if expressed in written terms in the instrument, and cannot be varied or contradicted by extrinsic evidence (*t*). A written contract for the sale of goods expressing no time for payment or delivery, and therefore importing by construction of law a sale for ready money, does not admit of evidence of credit given, except under a general usage of trade (*u*). So a written contract expressing no time for the delivery of the goods by the seller, or for the removal by the buyer, imports a reasonable time, and parol evidence to the contrary is not admissible (*x*). A written lease or agreement for a lease at a stated rent, making no mention of ground rent, or land tax, or other taxes, which impliedly fall upon the landlord, does not admit of parol evidence to show that it was intended that the tenant should pay them, and that the rent should be clear of all charges (*y*). A written contract for an indefinite hiring at weekly wages, which imports in law a weekly hiring determinable at a week's notice, excludes parol evidence of agreement at the time of signing the contract that the hiring should be for a year (*z*).

Application
of the rule
in equity.

As a general rule, parol evidence in variance of a written contract is not admissible in equity under circumstances in which it would not be admissible at law (*a*).—But where courts of equity grant extraordinary remedies as in enforcing contracts by specific performance, evidence of the extrinsic circumstances may be given to oppose the exercise of this jurisdiction (*b*).

(*s*) *Ridout v. Bristow* (1830), 9 L. J. O. S. Ex. 18; 1 Cr. & J. 231; *Richards v. Thomas* (1831), 1 Cr. M. & R. 772; *Abbott v. Hendricks* (1840), 10 L. J. C. P. 51; 1 Man. & G. 791.

(*t*) *Heyworth v. Knight* (1861), 33 L. J. C. P. 298; 17 C. B. N. S. 298; *Blackburn, J., Burgess v. Wickham* (1863), 33 L. J. Q. B. 28; 3 B. & S. 669.

(*u*) *Ford v. Yates* (1841), 10 L. J. C. P. 117; 2 Man. & G. 549. See Sale of Goods Act, 1893, s. 28.

(*x*) *Greaves v. Ashlin* 1813, 3 Camp.

426. See Sale of Goods Act, 1893, s. 29.

(*y*) *Preston v. Merceau* (1779), 2 W. Bl. 1249; *Rich v. Jackson* (1791), 4 Bro. C. C. 514; 6 Ves. 334, n.

(*z*) *Evans v. Roe* (1872), L. R. 7 C. P. 138.

(*a*) *Leach, V.-C., Ball v. Storie* (1823), 1 L. J. O. S. C. 214; 1 Sim. & St. 218; *per cur. Martin v. Pycroft* (1852), 22 L. J. C. 95; 2 De G. M. & G. 785; *May v. Platt* (1900), 69 L. J. C. 357; (1900) 1 Ch. 616.

(*b*) *Clarke v. Grant* (1807), 14 Ves.

Extrinsic evidence is admissible for many purposes affecting the validity and obligation of a written contract without varying the contents, and therefore without infringing the above general rule:—Extrinsic evidence is necessarily admissible to prove the act of agreement, that is, that the writing was in fact agreed to by the parties as expressing their contract (*c*). In the case of a deed this is proved presumptively by means of the sealing and delivery (*d*). In the case of simple contracts it may be proved by the signatures of the parties appended for that purpose; and in contracts relating to some matters signaturo is required by statute (*e*). Where signature is not required, a writing may be proved as the agreement of the parties by some act of acceptance, as where a proposal in writing by one party is accepted and acted upon by the other (*f*); extrinsic evidence being admissible to prove the act of agreement, and what was the condition of the writing at the time of agreement (*g*).

Cu. IV.
Sect. II.

Extrinsic
evidence
admissible.

To prove the
act of agree-
ment.

Signaturo is presumptive evidence of assent to the document signed; but the presumption may be rebutted by extrinsic evidence explaining the intention and purpose of the signature (*h*): as that the name of a party was signed as agent only, though appearing in the writing as principal, upon an understanding with the other party that he should not be bound as principal (*i*); that an invoice of goods sold was signed as agent only to receive payment for the convenience of the parties, and not as seller (*k*); that an agreement was signed by a party in his own right as well as professedly as agent for another party (*l*). So evidence was admitted to show that a writing purporting to be a contract of sale was signed for a collateral purpose and not as the real contract, and that the price inserted was a merely nominal price pending the ascertainment of the real price (*m*): that an invoice of goods, with a receipt for the

Signature.

519; *Clowes v. Higginson* (1813), 1 V. & B. 524; *Micklethwait v. Nightingale* (1848), 12 Jur. 638.

(*c*) *Wake v. Harrop* (1862), 31 L. J. Ex. 451; 1 H. & C. 202; *Pattle v. Hornibrook* (1896), 66 L. J. C. 141; (1897) 1 Ch. 25; *Carlisle & Cumberland Bk. v. Bragg*, (1911) 1 K. B. 485.

(*d*) *Johnson v. Baker* (1821), 4 B. & Ald. 440; *Ellesmere Brewery v. Cooper* (1895), 65 L. J. Q. B. 173; (1896) 1 Q. B. 75.

(*e*) See post, p. 185.

(*f*) *Reuss v. Peksley* (1866), 35 L. J. Ex. 218; L. R. 1 Ex. 342; *Brogden v. Metrop. Ry.* (1877), 2 Ap. Ca. 666;

Baker v. Yorks. Fire Assce. (1891), 61 L. J. Q. B. 838; (1892) 1 Q. B. 144.

(*g*) *Stewart v. Eddowes* (1874), 43 L. J. C. P. 204; L. R. 9 C. P. 311.

(*h*) *Re Semple* (1846), 3 Jo. & L. 488; *Moore v. Campbell* (1851), 23 L. J. Ex. 310; 10 Ex. 323.

(*i*) *Wake v. Harrop* (1862), 31 L. J. Ex. 451; 1 H. & C. 202.

(*k*) *Holding v. Elliott* (1860), 29 L. J. Ex. 134; 5 H. & N. 117.

(*l*) *Young v. Schuler* (1883), 11 Q. B. D. 651.

(*m*) *Rogers v. Hadley* (1863), 32 L. J. Ex. 211; 2 H. & C. 227.

PART I.

purchase-money, was signed upon a pretended sale in order to protect the goods against creditors (*n*).

Attestation.

The signature and execution of a written instrument may be attested by a witness, who signs a form of attestation appended for that purpose; and in some cases such attestation is required by statute; where not so required, it may be adopted at the will of the parties (*o*). The party in signing attests the writing as his agreement; and the witness in signing attests the signature of the party (*p*); a party cannot himself act as the attesting witness (*q*).—Formerly an attesting witness, if living, was alone permitted to prove the execution of a written document (*r*); but by the Common Law Procedure Act, 1854, s. 26, it was enacted, that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto" (*s*). A witness must be present when the document is executed in order to "attest" the execution (*t*). A deed or writing thirty years old is said to prove itself; it presumptively requires neither attesting witness nor any other witness to signatures and handwriting (*u*).

Attesting witness.**Date of agreement.**

Extrinsic evidence is also admissible to show the time of the signature or other act of agreement: and such evidence is admissible though the written agreement itself contains a date. Although a deed under seal purports to have been executed on a stated date, the parties may aver and prove that it was in fact executed on a different date (*x*). Where two deeds relating to the same matter are dated as executed on the same day, the court construes them, as regards priority, according to the intention expressed therein; but if necessary will inquire which of them was first executed (*y*).

(*n*) *Boures v. Foster* 1858, 27 L. J. Ex. 262; 2 H. & N. 779.

(*o*) See *ante*, p. 91.

(*p*) *Feeshfield v. Reed* (1842), 11 L. J. Ex. 193; 9 M. & W. 404; *Deffell v. White* (1846), 36 L. J. C. P. 25; L. R. 2 C. P. 147.

(*q*) *Seal v. Clavidge* (1881), 50 L. J. Q. B. 316; 7 Q. B. D. 516; *Re Percott* (1891), 60 L. J. Q. B. 567; 1891, 2 Q. B. 151.

(*r*) *Whymon v. Garth* (1853), 22 L. J. Ex. 316; 8 Ex. 803.

(*s*) *Re Rier* (1886), 55 L. J. C. 799; 32 Ch. D. 35.

(*t*) *Ford v. Kettle* (1882), 51 L. J. Q. B. 558; 9 Q. B. D. 139.

(*u*) *Doe v. Phillips* (1845), 15 L. J. Q. B. 47; 8 Q. B. 158; *Re Airey* (1896), 66 L. J. C. 152; (1897) 1 Ch. 164.

(*x*) *Hall v. Gurnore* (1804), 4 East, 477.

(*y*) *Gartside v. Silkstone & Dodworth Coal & Iron Co.* (1882), 51 L. J. C. 828; 21 Ch. D. 762.

Extrinsic evidence is admissible to show that a writing, purporting to be a binding agreement, was signed or agreed to conditionally, that is, upon terms that it should not operate as a contract until the fulfilment of a stated condition, or the happening of a given event. The signing is analogous with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation (*z*). Accordingly, evidence was admitted to prove that a written agreement to transfer the tenancy of a farm was subject to the condition of the landlord giving his consent; which was construed as a condition precedent suspending the operation of the agreement and not a condition subsequent in defeasance of it (*a*). And evidence was admitted to show that an agreement for the purchase of a patent was signed upon the condition of the invention being shown to and approved by a third party (*b*).—The same principle applies to bills of exchange and promissory notes which may be shown to have been signed or indorsed and delivered upon condition, so as not to take effect until the condition is satisfied (*c*).

CH. IV.
SECT. II.

Agreement
signed upon
condition.

Upon the same principle one of the parties may sign an agreement upon the condition that he is not to be bound until it is signed by the other party (*d*); or that the other party should execute a counterpart or duplicate of the written contract (*e*). So where several persons are intended to join in the contract in the same interest, the signature or execution by one of them may from the circumstances of the case be conditional upon the execution by all the others (*f*); as in the case of several persons agreeing to become co-sureties for the debt of another, where the execution is conditional upon the proportional liability of all, with the consequential right of contribution (*g*).

Condition of
other parties
signing.

An agreement may be made contemporaneously with a written contract as part of the transaction, but without being incorporated

Extrinsic
evidence of
collateral
agreement.

a *Jude v. Dixon* (1851), 20 L. J. Ex. 295; 6 Ex. 869; *Wallis v. Little* (1861), 31 L. J. C. P. 102; *Patth v. Hornbrook* (1896), 66 L. J. C. 141; (1897) 1 Ch. 25.

b *Walke v. Littell* (1861), 31 L. J. C. P. 102; 11 C. B. N. S. 369.

c *Fynn v. Campbell* (1856), 25 L. J. Q. B. 277; 6 E. & B. 370.

d *Bell v. Juestra* (1848), 19 L. J. Q. B. 71; 12 Q. B. 317; *Jude v. Dixon* (1851), 20 L. J. Ex. 295; 6 Ex.

869. See Bills of Exchange Act, 1882, s. 33.

e *Mare v. Campbell* (1851), 25 L. J. Ex. 310; 10 Ex. 323.

f *Furness v. Muck* (1857), 27 L. J. Ex. 34.

g *Latch v. Wallake* (1840), 9 L. J. Q. B. 201; 11 A. & E. 959.

h *Leane v. Bernadine* (1856), 25 L. J. C. 331; 8 De G. M. & G. 102; *Ellsmore Brewery v. Cooper* (1895), 65 L. J. Q. B. 173; (1896) 1 Q. B. 75.

PART I.
Agreements collateral to lease.

with it; such agreement is then collateral to the written contract and may be proved by extrinsic evidence (*h*).—Thus where in negotiation for a lease the lessor promised that he would kill down the game during the term, but refused to make it a special provision in the lease, which reserved the game to the lessor; and in consideration of the promise the lessee executed the lease; it was held that there was a binding contract *collateral* to the lease, which might be separately proved and enforced (*i*). So where the lessor of a house promised that if the lessee would take a certain lease he would do certain repairs and provide certain furniture, it was held that the promise operated as a distinct contract collateral to the written lease, and might be proved by parol evidence (*k*). And a representation made by a lessor upon granting a lease that he is restricted from building on the adjacent land, or that the drains of the property demised are in good order, will be enforced against him upon parol evidence, as being a contract collateral to the lease (*l*).—A collateral agreement in variance of the terms of a written contract is also available in equity in answer to a claim for specific performance of the contract according to the written terms; thus in the case of a contract for a lease, with a collateral agreement to pay a sum of money as premium for the lease, the lessee can obtain specific performance only upon the terms of paying the premium (*m*).

Extrinsic evidence of usage of trade.

Extrinsic evidence is admissible to show that a contract in writing was made subject to a usage or custom of the trade or business to which the contract relates, impliedly binding the parties to certain usual or customary terms and conditions not mentioned in the writing. The contract in truth is partly express and in writing, partly implied or understood and unwritten (*n*). The effect of the terms introduced by usage is the same as if they were written in the contract (*o*). The principle is not confined to

h) *Allen v. Pink* (1838), 7 L. J. Ex. 206; 4 M. & W. 140; *Lindley v. Lacey* (1864), 34 L. J. C. P. 7; 17 C. B. N. S. 578.

i) *Morgan v. Griffith* (1871), 40 L. J. Ex. 46; L. R. 6 Ex. 70; *Erskine v. Adams* (1873), 42 L. J. C. 849; L. R. 8 Ch. 756.

l) *Angell v. Duke* (1871), 41 L. J. Q. B. 78; L. R. 10 Q. B. 174.

h) *Piggott v. Stratton* (1859), 29 L. J.

C. 1; 1 De G. F. & J. 33; *Spicer v. Martin* (1888), 58 L. J. C. 309; 14 Ap. Ca. 12; *De Lassalle v. Guildford* (1901), 70 L. J. K. B. 523; (1901) 2 K. B. 215.

m) *Martin v. Pycroft* (1852), 22 L. J. C. 94; 2 De G. M. & G. 785.

n) Sale of Goods Act, 1893, s. 55; *Brown v. Byrne* (1851), 23 L. J. Q. B. 313; 3 E. & B. 793.

o) *Hepworth v. Knight* (1864), 33 L. J. C. P. 298; 17 C. B. N. S. 298.

mercantile contracts, but is applicable to any contract as to which there is a usage, and whether it be a simple contract in writing or a contract under seal (*p*). The usage must not contradict the express terms of the contract (*q*). Thus, where by an indenture of apprenticeship the master covenanted to supply "necessaries" to an apprentice, he was not allowed to assert a usage to charge for certain of the necessaries, which he had so covenanted to supply *gratis* (*r*).

CH. IV.
SECT. II.

Usage
repugnant
to contract.

The intention of the parties to exclude a usage of trade, or to vary its effect, must appear in the writing; parol evidence is not admissible for that purpose. Thus, where by custom of the trade a certain allowance is made to the buyer of goods for warehouse rent, parol evidence is not admissible to show that he agreed for an allowance differing from the trade allowance (*s*). On the other hand the contract may expressly include a usage it would not otherwise be subject to; as in the case of a bill of lading containing the stipulation, "average to be adjusted according to British custom," which is a custom differing from the general usage (*t*).—Whether the written contract is so inconsistent with the usage as to exclude the evidence, is a question of construction, and therefore a question for the court and not for a jury; the province of the jury being restricted to finding the fact of the written contract and the fact of the usage (*u*). But where the written contract is consistent with the usage, it must further be found as a fact that it was made with reference to the usage, under all the circumstances; for, if the contract is not made in the ordinary course of the trade or business in which the usage prevails, the usage presumptively does not attach (*x*).

Intention of
excluding or
varying
usage.

Usage must in all cases be consistent with law; no usage can be set up as binding by contract which is contrary to the general law: as a usage for the debentures of a company to be treated as negotiable (*y*); or a usage for the consignee of goods under a bill

Usage
contrary to
law.

(*p*) *Wigglesworth v. Dallison* (1779), Dougl. 201; 1 Sm. L. C. 528; *Smith v. Wilson* (1832), 1 L. J. K. B. 194; 3 B. & Ad. 728; *Tucker v. Linger* (1883), 52 L. J. C. 941; 8 Ap. Ca. 508.

(*q*) *Gibson v. Young* (1818), 8 Taunt. 510; *The Alhambra* (1881), 50 L. J. P. 36; 6 P. D. 68.

(*r*) *Abbott v. Bates* (1875), 45 L. J. C. P. 117.

(*s*) *Furkes v. Lamb* (1861), 31 L. J. Q. B. 98.

(*t*) *Stewart v. West India SS. Co.* (1872), 42 L. J. Q. B. 19; L. R. 8 Q. B. 88.

(*u*) *Hutchinson v. Bowker* (1839), 9 L. J. Ex. 21; 5 M. & W. 535; *Parker v. Ibbetson* 1858, 27 L. J. C. P. 236; 1 C. B. N. S. 346.

(*x*) *Clayton v. Greyson* (1836), 5 A. & E. 302; *Allan v. Sandins* (1862), 31 L. J. Ex. 397; 1 H. & C. 123.

(*y*) *Crouch v. Crédit Foncier* (1873), 42 L. J. Q. B. 183; L. R. 8 Q. B. 371.

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of lading to have the value of missing goods deducted from the freight of the goods delivered (z). A custom which is contrary to the provisions of an Act of Parliament, or of any order or provisions made under the statutory authority, is void (a).—Usage must also be reasonable: a custom that a landlord is not liable to pay for the tillage left by an outgoing tenant, but that compensation can only be claimed against an incoming tenant, was held unreasonable and void (b). So a custom that an architect is entitled to retain plans prepared by him for his employer after the completion of the work and payment of his remuneration, is bad (c); as is a usage which would make a man a judge in his own case (d).—A usage need not be immemorial (e); it is sufficient if its existence is proved with certainty, and that it is actually or presumptively known to the contracting parties who are then supposed to contract with reference to it (f).

The custom of merchants.

The custom of merchants in mercantile matters, as the negotiation and other incidents of bills of exchange, have been so frequently proved that it is judicially noticed without further proof, and thus becomes part of the general law and evidence of particular usages of merchants, however extensive, is not admissible to the contrary (g).

When binding on third persons.

A person who employs an agent to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one which merely regulates the mode of performing the contract and does not change the intrinsic character of the contract (h). But where the usage of a market disregards the provisions of a statute, the principal will only be bound if and so far as knowledge of the usage is brought

(z) *Meyer v. Dresser* (1864), 33 L. J. C. P. 289; 16 C. B. N. S. 646.

(a) *Andrews v. Morris* 1811, 10 L. J. Q. B. 225; 1 Q. B. 3; *Mortons v. Hall* (1901), 70 L. J. C. 189; (1901) 1 Ch. 842; *Wright v. Zetland Mar.*, 1907, 77 L. J. K. B. 152; 1908, 1 K. B. 63.

(b) *Bondhorn v. Foley* (1878), 47 L. J. C. P. 331; 3 C. P. D. 429.

(c) *Gibson v. Pease* 1905, 74 L. J. K. B. 502; (1905) 1 K. B. 810.

(d) *Robinson v. Mullitt* 1875, 44 L. J. C. P. 262; L. R. 7 H. L. 802.

(e) *Dalby v. Hest* 1819, 1 Br. & B. 224; *Juppoushan Ghose v. Manickchand* 1889, 7 Moo. Ind. 263; *per cur.* *Crosch v. Credit Foncier* 1875, 44 L. J.

Q. B. 183; L. R. 8 Q. B. 371.

(f) *Kirchner v. Vinns* 1859, 12 Moo. P. C. 361; *Tucker v. Linger* (1883), 52 L. J. C. 491; 8 Ap. Ca. 508; *Deconald v. Esser* 1906, 75 L. J. K. B. 688; (1906) 2 K. B. 728.

(g) *Ld. Campbell, Brindley v. Barnett* (1816), 12 Cl. & F. 787, 805; *per cur.* *Gudwin v. Roberts* (1875), 44 L. J. Ex. 157; L. R. 10 Ex. 338. See Bills of Exchange Act, 1882, ss. 31, 97 (2); Sale of Goods Act, 1893, s. 61 (2).

(h) *Sutton v. Tatham* (1839), 8 L. J. Q. B. 210; 10 A. & E. 27; *Baglyffe v. Butterworth* (1847), 17 L. J. Ex. 78; 1 Ex. 425; *Nicholls v. Merry* (1875), 45 L. J. C. 375; L. R. 7 H. L. 530.

home to him (*i*). But a person by employing a broker to effect marine insurances at Lloyd's, is not impliedly bound by usages of that house which are not known to him: because they are the usages of a particular house only, and not general usages of the business (*j*). If with knowledge of the usages he employs a broker there, he is bound by them (*k*).

CH. IV.
SECT. II.

Subject to the above principles, evidence of usage is admitted to introduce additional terms and conditions into a written contract, as in the following cases:—In sales of goods, a usage of the trade that all sales are made by sample (*l*); that the manufacturer selling the goods must deliver goods of his own make (*m*); that a sale of goods by a broker to be paid for by bill is subject to approval by the seller, within a reasonable time, of the sufficiency of the buyer (*n*); that if the broker does not disclose his principal within a reasonable time he is personally liable (*o*); that warrants given for the delivery of the goods sold are free of the seller's lien (*p*); that under a contract for sale of mining shares with payment at a certain future date, the seller is not bound to deliver the shares before the time of payment (*q*); that payment for goods sold, which *prima facie* means payment in cash, is subject to a customary credit; or to a customary discount (*r*); or to a customary allowance to the buyer for warehouse rent (*s*).

Usages supplying terms and conditions. Sales of goods.

Bills of exchange and promissory notes, expressed to be payable at a certain time, are subject to the usage of the place of payment, extending the time of payment by "days of grace"; and evidence is admissible to show the usage of the place. In England the law merchant (which is judicially noticed without proof) added three days of grace to the time expressed for payment; and this is confirmed by the Bills of Exchange Act, 1882. But days of grace are not allowed on bills, notes and cheques payable on

Days of grace on bills and notes.

- (i) *Seymour v. Bridge* (1885), 54 L. J. Q. B. 347; 14 Q. B. D. 460; *Perry v. Barnett* (1885), 54 L. J. Q. B. 466; 15 Q. B. D. 388.
- (j) *Gabay v. Lloyd* (1825), 3 L. J. O. S. K. B. 116; 3 B. & C. 793; *Bartlett v. Pentland* (1830), 8 L. J. O. S. K. B. 261; 10 B. & C. 760; *Sweeting v. Pearce* (1861), 30 L. J. C. P. 109; 9 C. B. N. S. 531.
- (k) *Stewart v. Aberdeen* (1838), 7 L. J. Ex. 292; 4 M. & W. 211.
- (l) *Sykes v. James* (1818), 2 Ex. 111.
- (m) *Johnson v. Raylton* (1881), 50 L. J. Q. B. 753; 7 Q. B. D. 488.

- (n) *Hodgson v. Davies* (1810), 2 Camp. 530.
- (o) *Hutchinson v. Tatham* (1873), 12 L. J. C. P. 260; L. R. 8 C. P. 482.
- (p) *Merchant Bkg. Co. v. Phoenix Assurance Steel Co.* (1877), 46 L. J. Q. B. 118; 5 Ch. D. 205.
- (q) *Fild v. Latham* (1861), 30 I. J. Ex. 163; 6 H. & N. 617.
- (r) *Brown v. Byrne* 1 L. J. Q. B. 343; 3 E. & B. 741; *Lucas v. Forde* (1863), 32 L. J. Q. B. 124; 3 B. & S. 360.
- (s) *Fitches v. Lamb* (1811), 1 L. J. Q. B. 98.

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demand, including those expressed to be payable at sight or on presentation (*t*).—Foreign usages must be proved (*u*); and bills payable abroad, though drawn and indorsed in England, are regulated as to time of payment by the usage of the place of payment; and not only against the acceptor, but also against the drawer and indorser (*x*).

Charter-parties.

Charterparties in general admit evidence of local usage: as to the measurement of the cargo for freight (*y*); as to the place for unloading and delivery of cargo (*z*); as to the manner and charge of loading and packing cargo (*a*); and as to the broker's commission for procuring charters (*b*).—Upon a policy of marine insurance evidence is admissible of usage that the policy does not apply to goods stowed on deck (*c*). But a policy expressly made upon "ship, boats, and other furniture," was held to exclude evidence of usage that boats slung outside the ship were not included (*d*). And a policy upon ship and goods which expressed "that the insurance on the said ship shall continue until she is moored twenty-four hours, and on the goods until safely landed," was held to exclude a usage that the insurance on the goods, as well as on the ship, did not continue beyond twenty-four hours after mooring (*e*). Upon an open policy on goods to be declared, a usage of underwriters attaches that the goods must be declared and are insured in order of shipment (*f*).

Insurance.

Customs of the country.

Upon the same principle leases and agreements between landlord and tenant are impliedly subject to customs of the country respecting the tenancy and cultivation of land (*g*). By custom of the country the outgoing tenant may be entitled to the way-going crops (*h*), or to be compensated for them by the landlord (*i*); or

(*t*) Bills of Exchange Act, 1882, ss. 10, 14.

(*u*) See a list of foreign usages in Chitty on Bills, 10th ed. 255; and in Taylor on Evidence, 5th ed. p. 1009.

(*x*) *Rouquette v. Overmann* (1875), 44 L. J. Q. B. 221; L. R. 10 Q. B. 525; *Horne v. Rouquette* (1878), 3 Q. B. D. 514.

(*y*) *Bottomley v. Forbes* (1838), 8 L. J. C. P. 85; 5 Bing. N. C. 121.

(*z*) *The Jaderen* (1892), 61 L. J. P. 89; (1892) P. 351.

(*a*) *Palbhart v. Cramming* (1855), 24 L. J. Ex. 310; 11 Ex. 105.

(*b*) *Allan v. Sandus* (1862), 31 L. J. Ex. 307; 1 H. & C. 123.

(*c*) *Ross v. Thwaite* (1776), 1 Park, Marine Ins., 23; *Backhouse v. Ripley*

(1802), *ibid.* 24.

(*d*) *Blackett v. Royal Exchange Assur.* (1832), 1 L. J. Ex. 101; 2 Cr. & J. 244.

(*e*) *Parkinson v. Collier* (1797), Park, Marine Ins., 653.

(*f*) *Stephens v. Australasian Ins.* (1872), 42 L. J. C. P. 12; L. R. 8 C. P. 18; *Imperial Marine Ins. v. Fire Insur. Corp.* (1879), 48 L. J. C. P. 424; 4 C. P. D. 166.

(*g*) *Wigglesworth v. Dallison* (1779), 1 Dougl. 201; 1 Smith, L. C. 528. And see Agricultural Holdings Act, 1883.

(*h*) *Wigglesworth v. Dallison* (1779), 1 Dougl. 201; 1 Smith, L. C. 528; *Holding v. Pigott* (1831), 9 L. J. O. S. C. P. 125; 7 Bing. 165.

(*i*) *Bradburn v. Foley* (1878), 47 L. J. C. P. 334; 3 C. P. D. 129.

he may be entitled to retain possession beyond the expiration of his lease for the purpose of working out the crops and improvements (*k*). But the terms of the lease or agreement may be so inconsistent with the custom as to exclude it; as where the lease makes express provision for the way-going crop and other allowances to the outgoing tenant in terms different from the custom (*l*). Where the written terms of a tenancy stated that a certain quantity of manure had been placed upon the land, and the incoming tenant agreed to leave the land in the same state as when taken, it was held that a custom to charge for the manure left was excluded (*m*); so where the lease expressly provided that the tenant on quitting should leave the manure on the land, and made no provision for payment (*n*). But a tenant cannot deprive himself of the compensation to which he is entitled under the Agricultural Holdings Act, 1883 (*o*). By the custom of cultivation the tenant may be entitled to drain the land and charge the landlord with the cost upon quitting (*p*); and the tenant may be entitled to pick stones off the land in the customary process of cultivation and to sell them (*q*).

A common carrier employed to carry goods is presumptively subject to the duties and liabilities attached to the employment by the custom of the realm, which is judicially noticed at common law; as the duty of carrying and delivering all goods offered within a reasonable time and for a reasonable charge, with the liability of insuring the safety of the goods during the carriage (*r*). And a person who describes his business as carrying for all persons to all parts of the kingdom, in the absence of special agreement, presumptively undertakes the same liabilities as a common carrier (*s*).—Also by general custom judicially noticed, an innkeeper is bound to receive and entertain every traveller who offers

Common carriers.

Innkeeper.

(*k*) *Baran v. Delahay* (1788), 1 H. Bl. 5; *Re Paul* (1889), 59 L. J. Q. B. 30; 24 Q. B. D. 247.

(*l*) *Boraston v. Green* (1812), 16 East, 71; *Webb v. Plummer* (1819), 2 B. & Ald. 716; *Hutton v. Warren* (1836), 5 L. J. Ex. 234; 1 M. & W. 166.

(*m*) *Clarke v. Royston* (1815), 14 L. J. Ex. 143; 13 M. & W. 752.

(*n*) *Roberts v. Barker* (1833), 2 L. J. Ex. 268; 1 Cr. & M. 808; *Muncey v. Dennis* (1856), 26 L. J. Ex. 66; 1 H. & N. 216.

(*o*) See sect. 55.

(*p*) *Mousley v. Ludlam* (1851), 21 L. J. Q. B. 64. And see Agricultural Holdings Act, 1883, s. 4.

(*q*) *Tucker v. Linger* (1883), 52 L. J. C. 911; 8 Ap. Ch. 508.

(*r*) *Forward v. Pittard* (1785), 1 T. R. 27; *Wahl v. Pickford* (1841), 10 L. J. Ex. 382; 8 M. & W. 413. See *G. E. Ry. v. Lord's Trustees* (1908), 78 L. J. K. B. 160; (1909) A. C. 109; *Redevictelskabet v. Sjøvare* v. *Doway* (1909), 78 L. J. K. B. 1100; (1909) 1 K. B. 948.

(*s*) *Per cur. Senif v. Farrant* (1874), 44 L. J. Ex. 36; L. R. 10 Ex. 358.

PART I.

Domestic
and other
servants.

himself as a guest; provided there is room for him, and provided that he is fit to be received and ready to pay for his entertainment (*t*). The innkeeper is also bound to take care of the goods of a guest received by him, though not to insure them against accidents; and he is therefore liable for negligence in this respect of himself or his servants (*u*). And the payment of the amount of charges by another does not deprive a person of his character of guest (*x*). This liability is now restricted and regulated by the statute 26 & 27 Vict. c. 41 (*y*). In compensation for his liability the innkeeper has a lien upon all goods brought by a guest within his care for the amount of his charges for entertaining the guest (*z*); and this lien is not lost by reason of security taken by the innkeeper for his charges (*a*). By "The Innkeepers Act, 1878," he is now enabled to enforce his lien by selling the goods in the manner therein provided (*b*). The engagement of a domestic servant is subject to the custom judicially noticed, that the servant may be dismissed after a month's warning, or upon payment of a month's wages (*c*). This custom is held to apply to a head gardener (*d*); to a huntsman (*e*); but not to a governess (*f*). And in engagements of service in particular trades and businesses, a custom to determine the contract by notice is impliedly incorporated, unless the terms of the contract are inconsistent with the custom (*g*). So with a custom in a particular trade that upon a yearly hiring certain holidays should be allowed (*h*). An engagement at a yearly salary, stipulating for an increase at the end of a year, was held not to exclude

(*t*) *Calve's case* (1584), 8 Co. 32; 1 Sm. L. C. 115; *Strauss v. County Hotel Co.* (1883), 53 L. J. Q. B. 25; 12 Q. B. D. 27; *Lamond v. Richard* (1897), 66 L. J. Q. B. 315; (1897) 1 Q. B. 541; *Broune v. Brandt* (1902), 71 L. J. K. B. 367; (1902) 1 K. B. 696.

(*u*) *Calve's case* (1584), 8 Co. 32; 1 Sm. L. C. 115; *Morgan v. Ravey* (1861), 30 L. J. Ex. 131; 6 H. & N. 265.

(*x*) *Wright v. Anderton* (1908), 78 L. J. K. B. 165; (1909) 1 K. B. 209.

(*y*) See *Spice v. Bacon* (1877), 46 L. J. Ex. 713; 2 Ex. D. 463; *Medawar v. Grand Hotel Co.* (1891), 60 L. J. Q. B. 209; (1891) 2 Q. B. 11.

(*z*) *Threlfall v. Borwick* (1874), 44 L. J. Q. B. 87; 1 R. 10 Q. B. 210; *Gordon v. Silber* (1890), 59 L. J. Q. B. 507; 25 Q. B. D. 491; *Robins v. Gray* (1895),

65 L. J. Q. B. 44; (1895) 2 Q. B. 501.

(*a*) *Angus v. McLachlan* (1883), 53 L. J. C. 587; 23 Ch. D. 330.

(*b*) See *Mulliner v. Florence* (1878), 47 L. J. Q. B. 700; 3 Q. B. D. 484.

(*c*) See *Johnson v. Blenkinsopp* (1841), 5 Jur. 870; *Moult v. Halliday* (1897), 67 L. J. Q. B. 451; (1898) 1 Q. B. 125.

(*d*) *Nowlan v. Ablett* (1835), 4 L. J. Ex. 155; 2 C. M. & R. 54.

(*e*) *Nicoll v. Greaves* (1864), 33 L. J. C. P. 259; 17 C. B. N. S. 27.

(*f*) *Told v. Kerriek* (1852), 22 L. J. Ex. 1; 8 Ex. 151.

(*g*) *Johnson v. Blenkinsopp* (1841), 5 Jur. 870; *Parker v. Ibbetson* (1858), 27 L. J. C. P. 236; 4 C. B. N. S. 346.

(*h*) *Reg. v. Stoles-upon-Trent* (1813), 13 L. J. M. C. 41; 5 Q. B. 303.

a custom to determine the hiring of a month's notice at any time (i).

CH. IV.
SECT. II.

Evidence of usage is also admissible to show that words and phrases in a written contract have a special or technical meaning in the trade or business to which the contract relates, differing from the ordinary meaning. "It is competent to receive evidence of the proper meaning of the language . . . 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" (k). Accordingly, the term "month" in a written contract, which *primâ facie* means a lunar month, may be shown by usage of the particular trade or business to mean a calendar month (l). So evidence was admitted to show that in a charterparty or in a bill of lading the term "days" was intended to mean working days (m); that in a theatrical engagement at a weekly salary during three years, the year meant only that portion of the year during which the theatre was kept open (n); and that in a building contract "weekly accounts" meant accounts of day work only, and not of measurement work (o).—Under a policy of insurance evidence was admitted to show that "any port in the Baltic" included the Gulf of Finland (p). A warranty against "particular average" was explained by the usage of underwriters not to include charges incurred to avoid a loss (q). Particular average upon "corn" was explained by usage not to extend to rice (r); and a warranty against "iron cargo" was explained to include steel (s).—The phrases occurring in a charterparty "in turn to deliver" and "in regular terms of loading," may be explained by the usage of the port (t); so also the phrase "arrived in port" (u); and "so near as the ship can safely get" (x).

Usages
explaining
words and
phrases.

(i) *Parker v. Ibbetson* (1858), 27 L. J. C. P. 236; 4 C. B. N. S. 346.

(k) *Parke, B., Shore v. Wilson* (1842), 9 Cl. & F. at p. 555.

(l) *Simpson v. Margitson* (1837), 17 L. J. Q. B. 81; 11 Q. B. 23; *Rogers v. Hull Dock Co.* (1861), 34 L. J. C. 165.

(m) *Cochran v. Retherg* (1860), 3 Esp. 121. See post, p. 621.

(n) *Grant v. Maddox* (1846), 16 L. J. Ex. 227; 15 M. & W. 737.

(o) *Myers v. Sarr* (1860), 30 L. J. Q. B. 9; 3 E. & E. 306.

(p) *Udde v. Walters* (1811), 3 Camp. 16.

(q) *Kidston v. Empire Marine Insce.*

(1867), 36 L. J. C. P. 156; L. R. 2 C. P. 357.

(r) *Scott v. Bourdillon* (1806), 2 B. & P. N. R. 213.

(s) *Hart v. Standard Marine Insce.* (1889), 58 L. J. Q. B. 284; 22 Q. B. D. 499.

(t) *Robertson v. Jackson* (1845), 15 L. J. C. P. 28; 2 C. B. 412; *Leidman v. Schultz* (1853), 23 L. J. C. P. 17; 14 C. B. 38.

(u) *Steamship Co. "Norden" v. Dempsey* (1876), 45 L. J. C. P. 764; 1 C. P. D. 654.

(x) *Neilsen v. Wait* (1885), 55 L. J. Q. B. 87; 16 Q. B. D. 67.

PART I.

Sale of goods
explained by
usage of
trade.

In contracts of sale of goods evidence of usage is admitted to explain words and phrases descriptive of the goods in the trade: as "mess pork of Scott & Co." (*y*); "good" barley and "fine" barley (*z*); "best palm oil, inferior at a fair allowance" (*a*); or identifying the goods: as contained in a shipment "expected to arrive" (*b*); or as to quantity: as "pockets" of hops (*c*); or as to terms of payment: as to be paid for in "from six to eight weeks" (*d*). The expressions "more or less," and "about," annexed to the quantity stated in the contract, do not require evidence in explanation; they presumptively import in themselves some reasonable limits of allowance to be determined by the court upon the circumstances (*e*); or they may mean merely an estimate of the quantity required for certain work otherwise definitely fixed in the contract (*f*).

Evidence of
experts to
interpret
writing.

The evidence of experts or skilled witnesses is admissible to decipher and explain a written contract, which is written in cipher, or in shorthand, or with abbreviations, or otherwise in a manner to be illegible by the court; and it may be referred to a jury, upon such evidence, to find the words of the writing (*g*). It is for the court to read the writing if it can, without putting it to the jury; and abbreviations and clerical errors which are obvious upon the face of the writing may be supplied and amended by the court in reading it (*h*).—The evidence of an interpreter is admitted for translating a contract or words written in a foreign language; and the construction of foreign written contracts is for the court, after taking evidence of the translation, of the technical or peculiar meaning of words, and of the foreign law and foreign rules of construction, as distinct matters of fact (*i*).

Foreign
language.

(*y*) *Powell v. Horton* (1836), 5 L. J. C. P. 204; 2 Bing. N. C. 668.

(*z*) *Hutchison v. Bowker* (1839), 9 L. J. Ex. 24; 5 M. & W. 535.

(*a*) *Lucas v. Bristow* (1858), 27 L. J. Q. B. 364; E. B. & F. 907.

(*b*) *Bold v. Rayner* (1836), 5 L. J. Ex. 172; 1 M. & W. 313.

(*c*) *Spicer v. Cooper* (1841), 10 L. J. Q. B. 241; 1 Q. B. 421.

(*d*) *Ashforth v. Redford* (1873), 43 L. J. C. P. 57; L. R. 9 C. P. 20.

(*e*) *Cross v. Eglen* 1831, 9 L. J. O. S. K. B. 145; 2 B. & Ad. 106; *McConnel v. Murphy* 1873, L. R. 5 P. C. 203.

(*f*) *Tancred v. Steel Co. of Scotland* (1889), 15 Ap. Ca. 125.

(*g*) *Sweet v. Lee* (1811), 3 Man. & G. 452; Taylor on Evidence, § 1159, p. 986, 8th ed.; Wigram on Extrinsic Evidence, Prop. IV.

(*h*) *Remar v. Haycard* (1835), 4 L. J. K. B. 64; 2 A. & E. 666; *Wilson v. Wilson* (1854), 23 L. J. C. 697; 5 H. L. C. 40; *Mourmand v. Le Clair* (1903), 72 L. J. K. B. 496; (1903) 2 K. B. 216.

(*i*) *Di Sora v. Phillips* (1863), 33 L. J. C. 129; 10 H. L. C. 624; *Chatenay v. Brazilian Tel. Co.* (1890), 60 L. J. Q. B. 295; (1891) 1 Q. B. 79.

Extrinsic evidence is admitted of foreign law, where the parties have contracted with reference to that law. Foreign law is not judicially noticed, and is presumptively the same as English law; accordingly it must be alleged and proved in judicial proceedings as matter of fact by the parties themselves, but it must be decided by the court upon the evidence produced (*k*). If alleged and not denied it must be taken to be in fact as alleged (*l*).

CH. IV.
SECT. II.
Extrinsic
evidence of
foreign law.

"All that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to which it is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is" (*m*). By the 24 Vict. c. 11, "an Act to afford facilities for the better ascertainment of the law of foreign countries," it is provided that in an action in any of the superior courts, the court may remit a case with questions for the opinion of a foreign court, for the ascertainment of the law of the foreign state, where there has been a convention with that state for the purpose. The certificate of an ambassador in England of a foreign country is admissible evidence of the law of that country (*n*). The House of Lords as Court of Appeal from judgments of English, Irish, and Scotch courts, takes judicial notice of the law of those countries without evidence (*o*).

"It is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract, or any part of it, is to be governed or applied, must always be a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances" (*p*).

Contracts
incorporating
foreign law.

Primâ facie, the law of the country where the contract is made will govern it, and decide what law was contemplated by the parties as applicable. But the court must ascertain from the nature and subject-matter of the contract, and the other circumstances of the case, by what law it is to be governed (*q*).—The

*Lex loci
contractus.*

Lex fori.

(*k*) *Smith v. Gould* (1842), 4 Moo. P. C. 21; *Lloyd v. Gubert* 1865, 35 L. J. Q. B. 74; L. R. 1 Q. B. 115. *Copin v. Adamson* (1874), 43 L. J. Ex. 161; L. R. 9 Ex. 345; *Caneha v. Murvett* (1889), 40 Ch. D. 543.

(*l*) *Per cur. Lloyd v. Gubert* 1865, 35 L. J. Q. B. 74; L. R. 1 Q. B. 115.

(*m*) *Per cur. Guistrique v. Laro* (1879), 39 L. J. C. P. 350; L. R. 4 H. L. 411; *Godard v. Gray* (1870), 40 L. J. Q. B. 62; L. R. 6 Q. B. 139.

(*n*) *I. y. Oldenburgh* (1884), 53 L. J. P. 46; 9 P. D. 23.

(*o*) *Cooper v. Cooper* 1888, 13 Ap. Ca. 88; Ld. Selborne, *Lipoll v. Kennedy* 1889, 59 L. J. Q. B. 268; 14 Ap. Ca. 449.

(*p*) *Per cur. Jacobs v. Credit Lyonnais* (1884), 53 L. J. Q. B. 158; 12 Q. B. D. 599.

(*q*) *Hamlyn v. Tylcker Distillery Co.*, (1894) A. C. 202; *S. African Breweries v. King* 1899, 69 L. J. C. 171; (1900)

PART I.

Construction
of contracts
as to appli-
cation of
foreign law.

remedy is regulated in all cases by the law of the country in which proceedings are taken, or *lex fori* (*r*); and the rules of the court as to procedure and evidence apply in that country only and not beyond.—The use of the technical language of the law of a foreign country will be treated as showing an intention that it should be construed and operate according to the law of that country (*s*). But “if the contract is to be carried out in whole or in part in another country, 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” (*t*). The expressions and form of a contract entered into in a foreign country are elements to be considered in determining whether it is to be treated as a foreign or an English contract (*u*). The courts have *prima facie* jurisdiction over persons in this country in respect of rights arising out of foreign contracts; though the construction and application of the foreign contract is regulated by foreign law (*x*). But parties to a contract may confer concurrent or exclusive jurisdiction on the courts of a particular country (*y*); except in the case of parties domiciled or ordinarily resident in Scotland or Ireland (*z*).

Charter-
party.

A charterparty is presumptively to be construed and applied, as to loading, according to the law and usage of the port of loading (*a*); as to delivery, according to the law and usage of the port of delivery (*b*); as to arrival in port, according to the custom of the port regulating the time and place at which a ship is considered to have arrived (*c*). A charterparty of a foreign ship, in the ab-

1 Ch. 273; *Spurrier v. La Cloche* (1902), 71 L. J. P. C. 101; (1902) A. C. 446. See *Ridson Iron & Locomotive Wks. v. Furness* (1905), 75 L. J. K. B. 83; (1906) 1 K. B. 49.

(*r*) *Dou v. Lippmann* (1837), 5 Cl. & F. 1; 7 E. R. 303; *Levour v. Brown* (1852), 22 L. J. C. P. 1; 12 C. B. 801; *Exp. Melbourne* (1870), 40 L. J. Bk. 25; L. R. 6 Ch. 64; *Alliance Bk. of India v. Carey* (1880), 49 L. J. C. P. 781; 5 C. P. D. 429.

(*s*) *Chamberlain v. Napier* (1880), 49 L. J. C. 628; 15 Ch. D. 611.

(*t*) *Esher, M. R., Chalmers v. Brazilian Tl. Co.* (1890), 60 L. J. Q. B. 297; (1891) 1 Q. B. 83.

(*u*) *Duncan v. Campbell* (1842), 12 Sim. 616; *Royal Exchange Assce. v. Sjöforsakrings Aktie-Bolaget Vega* (1902),

71 L. J. K. B. 739; (1902) 2 K. B. 384.

(*v*) *Buenos Ayres & Escondido Port Ry. v. G. N. Ry. of Buenos Ayres* (1877), 46 L. J. Q. B. 224; 2 Q. B. D. 210.

(*y*) *Girard v. Meyer* (1796), 2 H. Bl. 603; *Copin v. Adamson* (1875), 45 L. J. Ex. 15; 1 Ex. D. 17; *Thursis Sulphur Co. v. Soc. des Métaux* (1889), 58 L. J. Q. B. 435.

(*z*) *British Wagon Co. v. Gray* (1895), 65 L. J. Q. B. 75; (1896) 1 Q. B. 35.

(*a*) *Cuthbert v. Cunningham* (1855), 24 L. J. Ex. 310; 11 Ex. 405; *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174. See *Little v. Stevenson* (1895), 65 L. J. P. C. 69; (1896) A. C. 108.

(*b*) *Robertson v. Jackson* (1845), 15 L. J. C. P. 28; 2 C. B. 412; *The Jordanen* (1892), 61 L. J. P. 89; (1892) P. 351.

(*c*) *Steamship Co. Norden v. Dempsey*

sence of other indication of intention, is presumptively regulated by the law of the country to which the ship belongs (*d*).—In marine insurance a general average loss is presumptively to be adjusted at the port of discharge, according to the law and usage of that place (*e*); but the contract may require the adjustment to be according to a particular law or custom (*f*).

CH. IV.
SECT. II.

Marine insurance.

The facts and circumstances with reference to which the written contract was made are necessarily admissible in evidence, for the purpose of properly construing and applying the terms, whether they be express or implied (*g*).

Extrinsic evidence to apply the contract.

Extrinsic evidence is necessary to show the identity of the person charged with the party named and described in the written contract; and identity of name and proof of handwriting are presumptively sufficient evidence of this fact (*h*). It may be shown that the party has adopted an assumed name for the purpose of the contract; as where a person bought shares in a company and executed the deed of transfer with the name of his son, being himself the real buyer and chargeable on the shares (*i*).—A deed or writing made *inter partes*, which expressly names the parties, impliedly excludes all others, and evidence is not admissible to vary the effect of the writing in this respect by adding parties (*k*). It may be shown that the party to a written contract was an agent for another party, who may obtain the benefit of the contract as principal or be charged with the liability, consistently with the writing; and extrinsic evidence is admissible to show a verbal agreement that a party executing was not to be under any personal liability under the contract; but it is not admissible to discharge a party who is expressed to be personally contracting, in contradiction of the writing (*l*).

To identify the parties.

(1876), 45 L. J. C. P. 764; 1 C. P. D. 654. See *Reynolds v. Toulminson* (1896), 65 L. J. Q. B. 496; (1896) 1 Q. B. 586.

(*d*) *Lloyd v. Guibert* (1865), 35 L. J. Q. B. 71; L. R. 1 Q. B. 115; *The August* (1891), 60 L. J. P. 57; (1891) P. 328.

(*e*) *Simonds v. White* (1824), 2 L. J. O. S. K. B. 159; 2 B. & C. 805.

(*f*) *Royal Exchange Assce. v. Sjaforeskrings Aktie-Bolaget Vega* (1902), 71 L. J. K. B. 739; (1902) 2 K. B. 384; *De Hart v. Compania Anon. de Seguros Aurora* (1903), 72 L. J. K. B. 817; (1903) 2 K. B. 503.

(*g*) *Ellis v. Thompson* (1838), 7 L. J. Ex. 185; 3 M. & W. 445; *Stuckley v.*

Bailey (1862), 31 L. J. Ex. 483; 1 H. & C. 405; *Proudford v. Hart* (1890), 59 L. J. Q. B. 389; 25 Q. B. D. 42. See *Att.-Gen. v. Clapham* (1855), 24 L. J. C. 177; 4 De G. M. & G. 591; *Re London Corp.* (1910), 77 L. J. C. 622; (1910) 2 Ch. 314.

(*h*) *Greenhields v. Crawford* (1842), 11 L. J. Ex. 372; 9 M. & W. 314; *Sewell v. Evans*; *Roden v. Ryde* (1843), 12 L. J. Q. B. 276; 40 Q. B. 626.

(*i*) *Richardson's case* (1873), 44 L. J. C. 252; L. R. 19 Eq. 588.

(*k*) *Robinson v. Rudkins* (1856), 26 L. J. Ex. 56; *Gandy v. Gandy* (1885), 54 L. J. C. 1151; 30 Ch. D. 57.

(*l*) *Trueman v. Loder* (1840), 9 L. J.

PART I.

Extrinsic evidence to ascertain the subject of contract.

Sale of land.

Sale of goods.

Extrinsic evidence is also necessary to ascertain and identify the subject of the contract. "No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect; but such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument" (*m*). In conveyances and contracts relating to real property, "parcel or no parcel" is always matter of evidence, unless the evidence would add to or contradict a clear specific description of the property (*n*). Accordingly, evidence has been admitted to identify property described, in a contract or conveyance, by situation as being in a particular parish or place (*o*); or by a name, as "the farm," or "the mill property" (*p*); or by the ownership, as "my house," or "Mr. O.'s house" (*q*); or by the occupation of a certain person (*r*). Upon a contract to purchase "the lease and everything," it was held that parol evidence was admissible to show what the lease was, and what was included in "everything" by reference to a previous memorandum of negotiations (*s*). So where a house or land is sold "with the appurtenances," evidence is admissible to prove what is to be included in fact in that description (*t*); and it may be shown that there are in fact continuous and apparent easements, which though not strictly appurtenant, pass with the property without express mention in the written contract or conveyance (*u*).

With a contract for the sale of goods evidence is necessary to apply the written contract to the goods intended: as a contract

Q. B. 165; 11 A. & E. 589; *Higgins v. Senior* (1811), 11 L. J. Ex. 199; 8 M. & W. 834; *Wake v. Harslop* (1862), 31 L. J. Ex. 451; 1 H. & C. 202.

(*m*) *Ld. Wensleydale, Baird v. Fortune* (1861), 4 Macq. H. L. 149; *Skull v. Glenister* (1864), 33 L. J. C. P. 185; 16 C. B. N. S. 81; *G. W. Ry. v. Ross* 1870, 39 L. J. C. 753; L. R. 4 H. L. 650.

(*n*) *Doe v. Gallway* (1833), 2 L. J. K. B. 182; 5 B. & Ad. 43; *Barton v. Davies* 1850, 19 L. J. C. P. 302; 10 C. B. 261; *Lyle v. Richards* (1866), 35 L. J. Q. B. 214; L. R. 1 H. L. 222; *Mellor v. Wilburley* (1905), 74 L. J. C. 475; 1905, 2 Ch. 164.

(*o*) *Shardlow v. Catterill* 1882, 51 L. J. C. 353; 20 Ch. D. 90; *Plant v. Bourn* (1897), 66 L. J. C. 643; (1897) 2 Ch. 281.

(*p*) *Portman v. Mill* (1839), 8 L. J. C. 161; *McMurray v. Spicer* (1868), 37 L. J. C. 505; L. R. 5 Eq. 527.

(*q*) *Ogilvie v. Foljambe* (1817), 3 M. & W. 53; *Owen v. Thomas* (1834), 3 L. J. C. 205; 3 M. & K. 353.

(*r*) *Doe v. Burt* (1787), 1 T. R. 701; *Morley v. M. Dermott* (1838), 8 L. J. Q. B. 152; 8 A. & E. 138; *Mayer v. Lovell* (1874), 43 L. J. C. P. 131; L. R. 9 C. P. 107.

(*s*) *Horsely v. Graham* (1869), 39 L. J. C. P. 58; L. R. 5 C. P. 9.

(*t*) *Thomas v. Owen* (1887), 57 L. J. Q. B. 20; 20 Q. B. D. 225.

(*u*) *Watts v. Kelso* (1871), 40 L. J. C. 126; L. R. 6 Ch. 166; *Broen v. Alabaster* (1887), 57 L. J. C. 255; 37 Ch. D. 490; *Key v. North Rural Council* (1905), 95 L. T. 771.

expressed in a letter offering to buy "your wool" (x). Upon a contract in writing for the supply of certain articles "complete," parol evidence was admitted to show what was understood to be necessary to render them complete (y). Where a memorandum of sale merely mentioned the names of two persons, parol evidence of their relative positions was admitted to show which was the buyer and which was the seller (z). So a contract of sale of goods making no particular mention of time of delivery, and therefore taken as tacitly importing a reasonable time, requires extrinsic evidence of all the circumstances material to determine what is a reasonable time (a).—And a warranty of seaworthiness of a ship is construed and applied according to evidence of the character of the ship and of the voyage; "seaworthiness" being a relative term depending upon the subject and circumstances of the insurance (b).

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SECT. II.

Seaworthi-
ness.

Upon the same principle extrinsic evidence is largely required in the application of written guarantees; the position and circumstances of the parties being material for the purpose of applying the guarantee according to their intention (c). Upon a guarantee of "the promissory note" it is necessary to have evidence of the note referred to (d). A guarantee for the balance of a banking account or for a supply of goods, although *prima facie* appearing to refer to an existing debt, may be construed by evidence of the circumstances as a continuing guarantee, extending to any balance due from time to time (e). A guarantee to a stated amount for the payment of goods to be delivered according to the custom of trading of the parties, which was to account monthly, was construed as continuing and not restricted to one delivery and account (f).

Guarantees.

(x) *Macdonald v. Longbottom* (1850), 29 L. J. Q. B. 256; 1 E. & E. 977.

(y) *Sarl v. Boardman* (1857), 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(z) *Newell v. Radford* (1867), 37 L. J. C. P. 1; L. R. 3 C. P. 52; Sale of Goods Act, 1893, s. 29, sub-s. 2, s. 56.

(a) *Ellis v. Thompson* (1839), 7 L. J. Ex. 185; 3 M. & W. 445.

(b) *Clapham v. Langton* 1864, 34 L. J. Q. B. 46; 5 B. & S. 729; *Quebec Marine Ins. v. Commercial Bk. of Canada* (1870), 39 L. J. P. C. 53; L. R. 3 P. C. 234; *Daniels v. Harris* (1874), 44 L. J. C. P. 1; L. R. 10 C. P. 1; *The Schwann*

(1909), 78 L. J. P. 112; 1909 A. C. 450.

(c) *Heffield v. Meadows* 1869, L. R. 4 C. P. 595; *Leathley v. Syper* (1870), 39 L. J. C. P. 49; L. R. 5 C. P. 595. See *Lloyds v. Harper* (1880), 50 L. J. C. 140; 16 Ch. D. 290.

(d) *Shortrede v. Check* (1834), 3 L. J. K. B. 125; 1 A. & E. 57.

(e) *Wood v. Priestner* 1867, 36 L. J. Ex. 127; L. R. 2 Ex. 282; *Laurie v. Schofield* (1869), 38 L. J. C. P. 290; L. R. 4 C. P. 622; *Coles v. Park* 1869, 39 L. J. C. P. 63; L. R. 5 C. P. 65.

(f) *Hargreave v. Snow* (1829), 8 L. J. O. S. C. P. 46; 6 Bing. 244.

PART I.

Extrinsic
evidence
to explain
latent
ambiguity.

It may happen that in applying a written contract to the facts proved in evidence, an ambiguity arises by reason of there appearing two states of fact equally answering to the writing; as where there are found to be two subjects of property answering to the description in the contract, or two persons of the same name and description, to either of whom the contract might apply. The ambiguity thus arising is called a *latent* ambiguity, because it is not apparent upon the face of the writing; and an exception is then made to the general rule, and extrinsic evidence of the intention of the parties is admitted for the purpose of explaining the ambiguous expression (*g*).—Where a contract was made for the carriage of goods on a railway to a station named, and there appeared to be two stations of the same name, evidence was admitted to show, and the question was put to the jury to decide, which station was intended (*h*). Where property the subject of a lease was described as bounded by a line drawn to a house marked in a map upon the lease, and it appeared in fact that the house was incorrectly placed in the map; it was held upon the construction of the instrument that the boundary line was to be drawn to the house wherever situate, and that the only question of fact was as to the identity and true position of the house (*i*).—But if it appear upon the extrinsic evidence given of the intentions of the parties, that the one party meant one thing and the other party meant another, both equally within the words of the contract, there is then a case of mistake between the parties as to the matter of their agreement; and the agreement as the basis of the contract fails altogether (*k*).

Mistake.

Patent
ambiguity.

An ambiguity appearing on the face of a written contract, which arises upon the expressions used by the parties themselves, is a *patent* ambiguity. The general rule here applies, and no other evidence of intention is admissible than that contained in the writing itself. The ambiguity of expression represents an ambiguity of meaning; and if it is incapable of a reasonable construction or application, the contract to that extent being incapable of being enforced is void (*l*). But, as will appear in the next chapter, where equivocal expressions are used, which

(*g*) Bacon's Maxims, reg. 23, Law Tracts, p. 99; *Horden v. Commercial Union Insce.* (1887), 56 L. J. P. C. 78; *The Carfew* (1891), 60 L. J. P. 53; (1891) P. 131.

(*h*) *Robinson v. G. W. Ry.* (1865), 35 L. J. C. P. 123.

(*i*) *Lyle v. Richards* (1866), 35 L. J. Q. B. 214; L. R. 1 H. L. 222.

(*k*) See *post*, p. 218.

(*l*) Bacon's Maxims, Tracts, p. 99; *Saunders v. Piper* (1839), 8 L. J. C. P. 227; 5 Bing. N. C. 425.

according to one interpretation would allow the contract to be valid, and according to another interpretation would cause it to be invalid, that meaning shall be put upon the expressions which would support the validity of the contract, and evidence of surrounding circumstances may be admitted to assist the interpretation (m).

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As the act of agreement to a written contract must necessarily be proved by extrinsic evidence, any evidence qualifying that act or avoiding its effect must be admissible. Therefore evidence is admissible to prove that an agreement was entered into in fact under such circumstances of mistake or accident that no intention of agreement can be imputed; or that it was induced by the fraud, or duress, or improper influence of one of the parties exercised upon the other, so as to vitiate the act of agreement and render it void or voidable in law, or at least to qualify its legal effect. The rules of law relating to agreements thus made under the influence of mistake, fraud, or duress are postponed for separate treatment (n). Extrinsic evidence is also always admissible to show that an agreement, whether in form of a simple contract or of a bond or covenant under seal, and whether the evidence be or be not consistent with the terms of the contract, is illegal in its matter or purpose upon any of those grounds which render an agreement void by reason of illegality (o).

Extrinsic
evidence of
fraud, duress,
or mistake.

Illegality.

(m) *Haigh v. Brooks* (1839), 10 A. & E. 309; *Furnivall v. Coombes* (1833), 12 L. J. C. P. 265; 5 Man. & G. 736; *Goldshede v. Swan* (1817), 16 L. J. Ex.

284; 1 Ex. 154.

(n) See *post*, pp. 209, 232, 282.

(o) *Collins v. Blantern* (1767), 2 Wils. 341; 1 Sm. L. C. 335. See *post*, p. 515.

CHAPTER IV.

CONTRACTS IN WRITING.

SECT. III.—CONSTRUCTION OF CONTRACTS IN WRITING.

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PART I.

The construction of written contracts belongs to the court.

The rules and principles of the construction or interpretation of written contracts are the same in all courts, whether administering law or equity; though the doubtful construction of a contract may be a sufficient ground for refusing special equitable remedies and leaving the parties to their strict legal rights (*a*). They are also the same for all written contracts, whether contained in an instrument under seal, or in a simple agreement in writing (*b*); nor is there any difference of construction for mercantile contracts, and those made for any other purpose, further than that the words may have a special mercantile or technical meaning (*c*).—The construction of a contract in writing, as of all written instruments, and also of the expressions used therein, belongs to the court alone; and it is the duty of the jury to take the construction from the court; and although it is the province of the jury to find, as ques-

a) Chelmsford, L. C., *Scott v. Liverpool Corp.* (1858), 25 L. J. C. 230; 5 De G. & J. 331.

b) Ellenborough, C. J., *Seddon v.*

Senate (1810), 13 East, 74.

c) Jessel, M. R., *Southwell v. Bowditch* (1876), 45 L. J. C. P. 630; 1 C. P. D. 376.

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tions of fact, the existence and nature of customs and usages, or the meaning of words or phrases used in commerce, it is for the court to pronounce upon the meaning of the contract by the light of the circumstances so ascertained (*d*). The same rule applies to foreign contracts; the construction of which is for the court, after taking evidence of the translation and meaning of the words, and of the foreign law and rules of construction (*e*). Where a written document has been lost and secondary evidence is given of its contents, it is still the province of the court, and not of a jury, to decide upon the evidence of its contents (*f*). Also where the contract is contained in several letters or writings connected together, the construction on the whole is for the court (*g*). But where a contract is contained only partly in writing, and is partly verbal, it becomes a question of fact which may be submitted to a jury upon the whole matter what are the terms of the contract (*h*). The consent of a party to a written contract may in general be given by parol, and whether the consent so given is absolute or conditional is a question of fact upon the evidence (*i*). But if the consent be given in a letter or writing, the construction is for the court; and whether it be absolute or conditional is a question of construction only (*k*). And as the construction of a contract is a matter of law, a party is deemed to consent to be bound by the construction which a court of law shall put upon the instrument (*l*).

Contract partly in writing.

Printed forms are frequently used in commercial contracts, as policies of insurance, charterparties and bills of lading, where the greater part of the provisions is invariable and uniform, and of a known and definite meaning, any modification in form required by the circumstances being supplied in writing; and it is generally true that the importance of words does not vary according as they are printed or written. "The words superadded in writing are entitled nevertheless, if there should be any reasonable

Contract partly printed and partly written.

(*d*) *Webb v. Plummer* (1819), 2 B. & Ald. 746; *Simpson v. Margison* (1817), 17 L. J. Q. B. 81; 11 Q. B. 23; *Skull v. Glenister* (1864), 33 L. J. C. P. 185; 16 C. B. N. S. 81; *Boyes v. Shand* (1877), 46 L. J. Q. B. 561, 2 Ap. Ca. 455.

(*e*) *Di Sora v. Phillips* (1863), 33 L. J. C. 129; 10 H. L. C. 624; *Chatenay v. Breckon Tel. Co.* (1830), 60 L. J. Q. B. 295; (1891) 1 Q. B. 79.

(*f*) *Berwick v. Horsfall* (1858), 27 L. J.

C. P. 193; 4 C. B. N. S. 450. See post, p. 598.

(*g*) *Key v. Cotesworth* (1852), 22 L. J. Ex. 4; 7 Ex. 595. See ante, p. 116; post, p. 118.

(*h*) *Moore v. Garwood* (1819), 19 L. J. Ex. 15; 4 Ex. 681.

(*i*) See ante, pp. 111, 123.

(*k*) *Furness v. Week* (1857), 27 L. J. Ex. 34.

(*l*) *Powell v. Smith* (1872), 41 L. J. C. 734; L. R. 14 Eq. 85; *Stewart v. Kennedy* (No. 2) (1890), 15 Ap. Ca. 108.

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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 words 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" (*m*). Hence words which are obviously left in the printed form by negligence, and which are inconsistent with the words entered in writing, may be rejected (*n*). The filling up of blanks in a printed form with lines is presumptively done only to prevent them being filled up with words, and not to cancel the whole passage (*o*). In a bill of lading the printed words "weight contents and value unknown" were held to be consistent with a precise statement of the weight in writing; being construed as meaning merely that the party signing did not intend to be bound by the statement of weight (*p*). Where a bill of exchange was drawn for a sum written in words in the body of the bill, and a larger sum noted in figures in the margin, the bill being stamped for the larger sum, it was construed as a bill for the written sum only, and the ambiguity being patent, evidence was not admitted to explain it (*q*).—If the document is partly written or altered with a material capable of obliteration, as lead pencil, a preliminary question may arise, whether the part capable of obliteration is intended to remain part of the document, or merely as matter for further deliberation (*r*). Words deleted and initialed form no part of the contract, and cannot be read for the purpose of construing it (*s*).—In deeds and other legal documents, also in Acts of Parliament, it is not usual to insert stops or marks of punctuation; and the court must read them with such stops as will give effect to the intention appearing upon the whole instrument (*t*). If, however, stops, or capital or italic letters, or inverted commas, or any significative marks are introduced, they

Punctuation.

(*m*) *Per cur.* *Robertson v. French* (1803), 4 East, 136; *Blackburn, J., Joyce v. Realm Marine Insce.* (1872), 41 L. J. Q. B. 356; L. R. 7 Q. B. 583; *Glynn v. Margeson* (1893), 62 L. J. Q. B. 466; (1893) A. C. 351.
 (*n*) *Budgeon v. Pembroke* (1877), 46 L. J. Q. B. 409; 2 Ap. Ca. 284; *Western Assec. Co. of Toronto v. Poole* (1903), 72 L. J. K. B. 124; (1903) 1 K. B. 378.
 (*o*) *Gunn v. Thorie* (1863), 33 L. J. Q. B. 97; 6 B. & S. 298.

(*p*) *Jessel v. Bath* (1867), 36 L. J. Ex. 149; L. R. 2 Ex. 267.

(*q*) *Saunderson v. Piper* (1839), 8 L. J. C. P. 227; 5 Bing. N. C. 425.

(*r*) *Lucas v. James* (1849), 18 L. J. C. 329; 7 Hare, 410.

(*s*) *Inglix v. Buttery* (1878), 3 Ap. Ca. 552.

(*t*) *Keayon, C. J., Doe v. Martin* (1790), 4 T. R. 65.

must be allowed their proper effect in construing the instrument (*u*).

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SECT. III.

Construction
according to
ordinary
meaning.

Some rules and maxims are laid down in general terms for the construction of written contracts:—"The leading rule of construction is that "in construing wills and indeed statutes, and all other 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 or inconsistency, but no further" (*x*). The words used are presumptively to be understood in their plain ordinary and popular meaning, and in the sense attributed to them when the contract was entered into; technical words used in technical subjects are to be understood in their proper technical meaning; and mercantile terms used in mercantile contracts are to be understood in their ordinary mercantile meaning (*y*). And it is immaterial that the interpretation adopted upon a consideration of the entire instrument is not that contemplated by the parties at the time of making the contract (*z*).—Accordingly a contract for the supply of goods terminable on the "insolvency" of the buyer, was construed according to the ordinary meaning of insolvency, that is, an inability in fact to pay debts; and not the technical meaning of insolvency by statute (*a*). A covenant in a separation deed that the wife should not "associate" with a named person was construed literally to include all intercourse whatsoever, and not to be restricted to criminal intercourse (*b*). A contract stipulating against carrying on a business "in London," was construed in the proper literal meaning of "The City of London"; there being nothing in the context, or in the usage of the business, requiring a different meaning (*c*). A

u See *Child v. Elsworth* (1852), 2 De G. M. & G. 679; *Gawthlett v. Carter* (1853), 23 L. J. C. 219; 17 Beav. 586.

x *Id.* *Wensleydale, Grey v. Pearson* (1857), 26 L. J. C. 481; 6 H. L. C. 61; *Blair v. Gordon* (1903), 72 L. J. K. B. 114; 1903 1 K. B. 556.

y *Per cur.* *Robertson v. French* (1803), 4 East. 135; *Ashworth v. Redford* 1873, 43 L. J. C. P. 57; L. R. 9 C. P. 20; *Holt v. Calliper* (1881), 50 L. J. C. 311; 16 Ch. D. 718; *G. W. Ry. v. Carpall*, *United China Clay Co.*, 1908, 78 L. J. C.

105; (1909) 1 Ch. 218. See *ante*, p. 133.

(*z*) *Westbury, L. C., G. W. Ry. v. Ross* 1870, 39 L. J. C. 553; L. R. 1 H. L. 650.

(*a*) *Parker v. Gossage* 1835, 5 L. J. Ex. 1; 2 Cr. M. & R. 617; *Boddlecombe v. Bond* (1835), 5 L. J. K. B. 47; 1 A. & E. 332.

(*b*) *Dormer (Lord) v. Knight* (1809), 1 Taunt. 417.

(*c*) *Mallon v. May* (1844), 13 L. J. Ex. 48; 13 M. & W. 511.

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warranty in an insurance against "iron" cargo was construed in the ordinary generic meaning of "iron," as including steel (*d*). Upon the same principle, a proviso for re-entry in a lease expressed to take effect upon breach of any of the covenants "hereinafter contained," is applicable only to such covenants as follow the proviso, and if there are not any such in the lease, the proviso is inoperative, although there may be covenants preceding the proviso (*e*). A lease expressed to be determinable in seven or fourteen years, "if the parties should so think fit," was construed literally as determinable only by the consent of both parties (*f*). And a deed of assignment of a debtor's business upon trust to carry on and sell the business, and to divide the profits and proceeds of sale amongst all the creditors in proportion to the amount of their debts, was construed, according to the natural meaning of the language, not to admit of any resulting trust for the debtor in respect of a surplus produced by the profits and sale over the amount of the debts in full (*g*).—By the same rule, upon a question arising as to the meaning of the word "or" in a contract, it is to be construed in its ordinary and proper sense, as a disjunctive particle; unless the context or the facts to which the contract is applied require it to be construed as a conjunctive particle equivalent to "and"; or as merely identifying the connected terms (*h*).

Construction according to general intention.

A concurrent leading rule of construction, which may sometimes operate exceptionally to the former, is that the particular words of the contract are to be construed with reference to the intention drawn from whole; as expressed in the maxim, "*verba intentioni debent inservire*" (*i*). "It ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intention of the parties than to any particular words which they may have

(*d*) *Hart v. Standard Marine Insur.* (1888), 58 L. J. Q. B. 284; 22 Q. B. D. 199.

(*e*) *Doe v. Godwin* (1815), 4 M. & S. 265.

(*f*) *Forrell v. Tranter* (1864), 34 L. J. Ex. 6; 3 H. & C. 158.

(*g*) *Smith v. Cooke* (1891), 60 L. J. C. 607; (1891) A. C. 297.

(*h*) *Boh v. Rayner* (1836), 5 L. J. Ex. 172; 1 M. & W. 343; *Elliott v. Turner*

(1845), 15 L. J. C. P. 49; 2 C. B. 446; *Tielens v. Hooper* (1856), 20 L. J. Ex. 78; 5 Ex. 830.

(*i*) *Smith v. Compton* (1832), 1 L. J. K. B. 13; 3 B. & Ad. 189; *Rigby v. G. W. Ry.* (1849), 18 L. J. Ex. 404; 4 Ex. 220; *Saner v. Bilton* (1878), 47 L. J. C. 267; 7 Ch. D. 824; *Bickmore v. Dimmer* (1902), 72 L. J. C. 96; (1903) 1 Ch. 158.

used in the expression of their intent" (*k*). But a clear provision, unconnected with the other parts of a written contract, must receive a literal construction without any qualification (*l*).

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—According to this rule, the operative part of a written instrument may be construed with reference to the recitals of the object and intention. "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" (*m*). The operation of a deed conveying land may be extended or restricted by the recital of what is intended to be conveyed (*n*): releases and powers of attorney are usually expressed in general terms, and greater effect is given to recitals in controlling the operative part than is the case with other documents (*o*).

Operative
words
restricted by
recitals.

It may be referred to this rule that obvious mistakes in a written instrument, such as clerical or grammatical errors, misspelling, misnomer and the like, may be read as corrected by the context; also words obviously omitted may be supplied (*p*); and words which are obviously repugnant or insensible may be rejected (*q*).—If the subject of contract be sufficiently identified by name or otherwise, an additional description which is simply false and inapplicable may be rejected; as expressed in the maxims, "*falsa demonstratio non nocet cum de corpore constat*," and "*veritas nominis tollit errorem demonstrationis*" (*r*). But if the question is between construing the words as a restrictive limitation or as a false description, the former construction prevails; according to the maxim, "*non accipi debent verba in falsam*

Correction of
mistakes.

False
description.

k) *Per cur. Ford v. Beech* (1843), 17 L. J. Q. B. 114; 11 Q. B. 852. See *Re London Corp.* (1910), 79 L. J. C. 622; (1910) 2 Ch. 314.

l) *Young v. Raineck* (1849), 18 L. J. C. P. 73; 7 C. B. 310.

m) *Esher, M. R., Ex p. Davies* (1883), 17 Q. B. D. 286.

n) *Walsh v. Trevelyan* (1850), 19 L. J. Q. B. 458; 15 Q. B. 733; *Rooke v. Kensington Lord* (1856), 25 L. J. C. 795; 2 K. & J. 753; *Jenner v. Jenner* (1866), 35 L. J. C. 329; L. R. 1 Eq. 361.

o) *Fyler v. Homersham* (1815), 4 M. & S. 423; *Dunby v. Cautts* (1885), 54 L. J. C. 577; 29 Ch. D. 500. See post,

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p) *Wilson v. Wilson* (1854), 23 L. J. C. 697; 5 H. L. C. 40; *Mourmond v. Le Clair* (1903), 72 L. J. K. B. 496; (1903) 2 K. B. 216; *Re Dayrell* (1904), 73 L. J. C. 795; (1904) 2 Ch. 496.

q) *Furnivall v. Coombes* (1843), 12 L. J. C. P. 265; 5 Man. & G. 736; *Indyeon v. Pembroke* (1877), 46 L. J. Q. B. 109; 2 Ap. Ca. 284; *Cheshire Law Committee v. Lewis* (1881), 50 L. J. C. P. 121.

r) *Mogge v. Lavell* (1874), 43 L. J. C. P. 131; L. R. 9 C. P. 107; *Ex p. National Provincial Bk. of England* (1876), 46 L. J. B. 11; 4 Ch. D. 241; *Early v. Rathlone* (1888), 57 L. J. C. 652.

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demonstrationem, quæ competunt in limitationem veram" (s).

A bill of sale of "all the household goods and furniture of every kind and description whatsoever in the said house, more particularly mentioned and set forth in an inventory of oven date" was held not to be "a case of false demonstration, but a restriction of the operative words; so that nothing passed except what was specified in the inventory" (t).

Several writings construed together.

Upon the same principle if several deeds or writings are connected as parts of one contract, they are to be construed with reference to one another and to the general intention (u). Thus, a bond and the condition of defeasance are to be construed together as one contract (x); and a lease and counterpart, being in the same terms or intended so to be, make but one deed in law, and a mistake or ambiguity in one may be read as corrected by the other (y). So with contracts by letter, each letter must be construed with reference to the whole correspondence (z).—Consequently, if several documents construed together operate as a bill of sale, it is held that all must be duly registered under the Bills of Sale Acts (a). And if a collateral contract construed together with a registered bill of sale operates as a defeasance of the latter, the bill of sale is void because not complete (b).

General words restricted to things ejusdem generis.

It is a rule of construction that general words are to be construed in application to the particular purpose for which they are used; according to the maxim, "*verba generalia restringuntur ad habilitatem rei vel personæ*." Hence general words following an enumeration of specific things, especially where the list is exhaustive, are construed as applicable primarily to things *eiusdem generis* with those before specially enumerated (c). A policy of marine insurance stating amongst perils insured, "restraint of kings, princes, and people of what nation, condition,

(s) *Mayer v. Lovell* (1871), 43 L. J. C. P. 131; L. R. 9 C. P. 107.

(t) *Wood v. Rowliffe* (1851), 20 L. J. Ex. 285; 6 Ex. 407.

(u) *Whithread v. Smith* (1854), 23 L. J. C. 611; 3 D. & G. M. & G. 727; *Gartside v. Silkstone & Dadswoth Coal & Iron Co.* (1882), 51 L. J. C. 828; 21 Ch. D. 761.

(x) *Coles v. Hulse* (1828), 7 L. J. O. S. K. B. 29; 8 B. & C. 568.

(y) *Matthews v. Smallwood* (1910), 79 L. J. C. 322; (1910) 1 Ch. 777. See post, Pt. I., Chap. VI., Sect. I.

(z) See ante, p. 116.

a. *Beckett v. Tower Assets Co.* (1891), 60 L. J. Q. B. 432; (1891) 1 Q. B. 638; *Mans v. Pepper* (1905), 71 L. J. K. B. 452; (1905) A. C. 102.

b. *Edwards v. Harens* (1894), 63 L. J. Q. B. 363; (1894) 1 Q. B. 587.

(c) *Crompton v. Jarratt* (1885), 54 L. J. C. 1109; 30 Ch. D. 298; *Lambourn v. Mellan* (1903), 72 L. J. C. 617; (1903) 2 Ch. 268; *Larson v. Sylvastrer* (1908), 77 L. J. K. B. 993; (1908) A. C. 295; *Thompson v. Dargatzis & Co.* (1909), 79 L. J. K. B. 287; (1910) 1 K. B. 410.

or quality soever," was construed as including people collectively or their ruling powers only, and not individual people (d). A policy in the ordinary form against "all other perils and losses" is restricted to casualties similar to those specifically enumerated (e).

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SECT. III.

It is a rule of construction, concurrent with the above, that between different meanings that is to be preferred which tends to support the contract; according to the maxim, "*verba ita sunt intelligenda, ut res magis valeat quam pereat*" (f). Thus, the expression "from the day of the date," which is *primâ facie* exclusive of the day, may be construed as including it, if necessary to render the contract valid (g). A statement of the consideration of a contract which might be construed in the past or present tense, as in consideration of "having agreed" or "having advanced," will be treated as an equivocal phrase susceptible of explanation by parol evidence, or taken as referring to a transaction simultaneous with the promise in order to support it, and not to a past transaction which would defeat it (h). Where the parties named in a deed covenanted in a manner which purported to bind them in a corporate capacity as churchwardens and overseers, it was held that inasmuch as they had no corporate capacity to contract to the effect intended, the deed must be construed as binding them personally; and an express proviso against any personal liability was rejected as repugnant to their covenant (i).—And "it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken;" as expressed in the maxim, "*ea est accipienda interpretatio quæ vitio caret*" (k).

Construction
in favour of
validity.

A rule of construction, subordinate to those above mentioned, requires that an ambiguity of expression is to be taken most

Words
construed
strictly

(d) *Nesbitt v. Lushington* (1792), 1 T. R. 783.

(e) *Thames and Mersey Marine Ins. v. Hamilton* (1887), 56 L. J. Q. B. 626; 12 Ap. Ca. 484; *N.S. Knutsford v. Tillmanns* (1908), 77 L. J. Q. B. 977; (1908) A. C. 406.

(f) *Follwell v. Stacy* (1847), 16 L. J. Q. B. 132; 9 Q. B. 1033.

(g) *Pugh v. Leeds (Duke)* (1777), Cowp. 714; *Wilkinson v. Gaston* (1846), 15 L. J.

Q. B. 339; 9 Q. B. 137.

(h) *Haigh v. Brooks* 1839, 10 A. & E. 509; *Goldshede v. Swan* (1847), 16 L. J. Ex. 284; 1 Ex. 151.

(i) *Furnival v. Coombes* (1843), 12 L. J. C. P. 265; 5 Man. & G. 736.

(k) Co. Lit. 42 a; Bacon's Maxims, Tracts, p. 47; *Kay, J., Mills v. Dunham* (1891), 60 L. J. C. 367; (1891) 1 Ch. 690.

PART I.
against the
person using
them.

strongly against the party using it; as expressed in the maxim, "*verba fortius accipiuntur contra proferentem*." This rule is the last to be resorted to, and is never to be relied upon but where all other rules of construction fail. It is applicable, according to its purport, only to such words as can be attributed exclusively to the one party, and not to words that are the common language of both parties (*l*). Thus, a guarantee for the supply of goods contained in a letter written by the surety to the creditor was construed most strongly against the writer, as constituting a continuing guarantee, and not confined to one occasion only (*m*). A distinction is taken between an indenture and a deed poll; in an indenture executed by both parties, the words may sometimes be considered as the words of both, but in a deed poll the words used can only be ascribed to the executing party (*n*). A policy of life insurance, which is ordinarily prepared by the insurance office in the form of a deed poll, is construed most strongly against the company: and a policy expressed to be made upon the basis of a declaration of particulars, and subject to the condition that if any statement in the declaration was untrue the policy should be void, was construed to refer in the condition only to statements intentionally untrue, and not to the statements merely incorrect (*o*).

Application
to grants.

In construing grants, the words may be imputed to the grantor only, and taken most strongly against him; but the construction of a grant must be upon the instrument considered as a whole, and therefore the *habendum* may be used to qualify the general terms of the grant (*p*). Also the covenants of the grantor are to be taken most strongly against himself, due regard being paid to the intention as collected from the whole context of the instrument (*q*).

(*l*) Bacon's Maxims, reg. 3, Tracts, pp. 42, 46; Shepp. Touch. by Preston, 87, 88; *Burrell v. Dryer* (1884), 9 Ap. Ca. 315.

(*m*) *Hayreave v. Smea* (1829), 8 L. J. O. S. C. P. 46; 6 Bing. 214.

(*n*) *Paridge v. Cole* (1669), 1 Wms. Saund. 548; *Wood v. Copper Miners' Co.* (1849), 18 L. J. C. P. 293; 7 C. B. 906. See *Daves v. Tredwell* (1881), 18 Ch. D. 354.

(*o*) *Foxes v. Manchester & London Assoc.* 1863), 32 L. J. Q. B. 153; 3 B. & S. 917; *Hennings v. Seftree Life Assoc.* 1905), 74 L. J. C. 231; (1905) 1 Ch. 365; *Joel v. Law Union & Crown*

Insee. (1908), 77 L. J. K. B. 1108; (1908) 2 K. B. 863.

(*p*) *Goodtitle v. Gibbs* (1826), 4 L. J. O. S. K. B. 284; 5 B. & C. 709; *Wolveridge v. Steward* (1833), 3 L. J. Ex. 360; 1 Cr. & M. 614. See Willes, J., *Williams v. James* (1867), 36 L. J. C. P. 259; L. R. 2 C. P. 581; Jessel, M. R., *Leach v. Schneider* (1874), L. R. 6 Ch. 666, n.; and *Taylor v. St. Helens* (1877), 46 L. J. C. 857; 6 Ch. D. 270.

(*q*) Shepp. Touch. by Preston, p. 166; *Browning v. Wright* (1799), 2 B. & P. 18; *Smith v. Compton* (1832), 1 L. J. K. B. 43; 3 B. & Ad. 189.

But with written contracts, the expressions of which are agreed to by both parties, and cannot be imputed to the one more than to the other, if a stipulation is capable of two meanings, each equally consistent with the language employed, that shall be adopted which is most against the person making the promise or covenanting and in favour of the other party (*r*). The condition of a bond is construed in favour of the obligor (*s*). Restrictive conditions of sale are construed in favour of the purchaser (*t*). And "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" (*u*). Upon the same principle where there is an absolute promise, either in express terms or implied, and an exception engrafted upon it, the exception is to be construed strictly, and extends only so far as it is expressed with clearness and certainty: and if the language of the exceptive clause be contradictory, inconsistent or obscure, it will not qualify the general liability (*v*). Thus, the exception in a bill of lading of loss by "thieves" was construed to apply only to thieves from without and not to thieves within the ship who were under the control of the master (*y*). A stipulation in a charterparty that deck cargo should be carried "at merchant's risk," was held to except only the liabilities of the shipowner as carrier, but not a claim for general average for the jettison of deck cargo (*z*). And a shipowner can only relieve himself from liability for the negligence of his servants by unequivocal expressions of intention to do so (*a*). Upon the same principle an exception from an absolute grant is construed strictly against the grantor (*b*).

CH. IV.
SECT. III.

Contracts
in words
common to
both parties.

Exceptions
construed
strictly.

It is a principle of construction that any words in a deed which show an agreement to do a thing make a covenant (*c*). It is

Constructive
covenants
and contracts.

(*r*) *Worde v. Worde* (1852), 16 Beav. 103; *per cur.* *McConnell v. Murphy* (1873), L. R. 5 P. C. 219; *Re Etherington & Lanes, & Yacks, Accident Insur.* (1909), 78 L. J. K. B. 684; (1909) 1 K. B. 591.
(*s*) *Bathie v. Wagg* 1667, 1 Wms. Saund. 81.

(*t*) *Knight-Bruce, V.-C., Sutton v. Mapp* 1816, 2 Coll. C. C. 562.

(*u*) *Maule, J., Cockburn v. Alexander* (1848), 18 L. J. C. P. 74; 6 C. B. 814.

(*v*) *Elderslie S.S. Co. v. Borthwick* (1905), 74 L. J. K. B. 338; 1905 A. C. 93; *Nelson Line v. Nelson* (1907), 77 L. J. K. B. 82; (1908) A. C. 16; *Chartered Bk. of India, Australia & China v.*

British India Steam Nav. Co. (1909), 78 L. J. P. C. 111; (1909) A. C. 369.

(*y*) *Taylor v. Liverpool & Great Western Steam Co.* (1874), 43 L. J. Q. B. 205; L. R. 9 Q. B. 546.

(*z*) *Barton v. English* 1883, 53 L. J. Q. B. 133; 12 Q. B. D. 218.

(*a*) *The Parlatour* 1904, 73 L. J. P. 59; (1904) P. 286; *Elderslie S.S. Co. v. Borthwick* (1905), 74 L. J. K. B. 338; (1905) A. C. 93.

(*b*) *Ballou v. Denning* 1826, 1 L. J. O. S. K. B. 311; 5 B. & C. 812; *Savill Bros. v. Bethell* (1902), 71 L. J. C. 652; (1902) 2 Ch. 523.

(*c*) 1 Com. Dig. tit. Covenant A 2,

PART I.

always matter of construction to discover what is the sense and meaning of the words employed by the parties—"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, and 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, 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" (d). Thus, if it be *agreed* between A. and B. that B. shall pay A. a sum of money for his land, and both parties seal the agreement, there is a covenant by A. to convey the land, for "agreed" is the word of both (e). And in general, a deed in which "it is agreed and declared" that property shall be settled or dealt with in a certain manner is construed as a covenant by all the parties executing, according to their several interests, that the provisions of the deed in regard to the property shall be carried out (f). Upon this principle a simple acknowledgment of a debt in a deed under seal *primâ facie* imports that it must be paid, and therefore a covenant to pay it; but if it appears to be made for a special purpose, as a mortgage or security or trust, the effect will not be extended beyond the purpose intended (g). So an agreement to pay or remunerate a person proportionately to the annual return from a business or undertaking for a period of years, may import a contract by the buyer to continue a business or find work during the stipulated period (h).—In leases, a covenant by the lessee to repair the demised premises, "the said premises being

Covenants
in leases.

Emterby v. Sampson (1830), 6 Bing. 614; *Wateridge v. Steward* (1833), 3 L. J. Ex. 360; 1 Cr. & M. 614; *Rogby v. G. W. R.* (1845), 15 L. J. Ex. 60; 14 M. & W. 811; *Williams v. Burrell* 1845, 11 L. J. C. P. 48; 1 C. B. 402.

(d) *Frederic Williams v. Burrell* 1845, 11 L. J. C. P. 98; 1 C. B. 402.

(e) *Twidale v. Cole* 166, 1 Wms. Saund. 518; *Wood v. Copper Miners' Co.* (1849), 18 L. J. C. P. 293; 7 C. B. 906.

(f) *Re De Ras' Trusts* (1885), 55 L. J. C. 73; 31 Ch. D. 81; *Re Smith, W. N.* (1900) p. 75.

(g) *Couchney v. Taylor* (1843), 12 L. J. C. P. 320; 6 Man. & G. 851; *Issacson v. Horwood* (1868), 37 L. J. C. 209; 1 L. R. 3 Ch. 225; *Jackson v. N. E. Ry.* (1877), 17 L. J. C. 303; 7 Ch. D. 573.

(h) *McIntyre v. Belcher* 1863, 32 L. J. C. P. 251; 14 C. B. N. S. 651; *Re Railway and Electric Appliances Co.* 1888, 57 L. J. C. 1027; 38 Ch. D. 597; *Ogden, Ltd. v. Nelson* 1905, 74 L. J. K. B. 433; (1905) A. C. 109; *Thornhill v. Bossor* 1906, 75 L. J. K. B. 688; 1906) 2 K. B. 728.

previously put in repair" by the lessor, imports a covenant by the lessor to put the premises into repair (*i*). A covenant in a lease to "keep" premises in repair imports putting them in repair (*k*). A covenant to plough and cultivate the demised premises, "except the rabbit warren and sheep walk," was held to import a covenant not to plough the latter (*l*). And a covenant by the tenant "that he shall at all times during the term fold the flock of sheep which he shall keep upon the demised premises upon such parts where the same have been usually folded," was held to import a covenant to keep a flock of sheep upon the premises and fold them there (*m*).—"But it must be clear that the words are intended to operate as an agreement, and not merely as words of condition or qualification" (*n*). A covenant by the lessee not to assign the demised premises without the consent of the lessor, "such consent not being arbitrarily withheld," is construed, not as importing a covenant by the lessor against withholding his consent arbitrarily, but only as a conditional covenant of the lessee (*o*). And an assignment of a lease, subject to the payment of the rent and the performance of the covenants contained in the lease, does not import a covenant by the assignee: who is impliedly liable to indemnify the assignor only so long as he remains in possession as assignee (*p*).

CH. IV.
SECT. III.

The terms of a recital in a deed may import a covenant. Thus, where a lease, after reciting an agreement that the lessee should pull down an old building and erect a new one, contained an express covenant by him to keep and leave such new building in repair, it was held that there was a constructive covenant by the lessee to erect the building according to the recital (*q*). A recital in a composition deed, that the debtor had agreed to pay a given composition to all his creditors, was held to amount to a covenant on which a creditor might sue for his composition (*r*). But the recital of an agreement does not create a covenant where there is

Covenant
imported in
recital.

(*i*) *Cumock v. Jones* (1849), 18 L. J. Ex. 204; 3 Ex. 233.

(*k*) *Pope v. Hume* (1847), 16 L. J. Ex. 130; 16 M. & W. 541; *Samr v. Bilton* (1878), 47 L. J. C. 267; 7 Ch. D. 815.

(*l*) *St. Albans (Duke v. Ellis)* (1812), 16 East, 352.

(*m*) *With v. Plummer* (1819), 2 B. & Ald. 746; *S. P., Sheersbury v. Earl v. Gould* (1819), 2 B. & Ald. 487.

(*n*) *Per cur., Walveridge v. Steward* (1833), 3 L. J. Ex. 360; 1 Cr. & M. 644.

(*o*) *Taylor v. Biggs* 1873, 13 L. J. Ex. 95; L. R. 9 Ex. 151.

(*p*) *Walveridge v. Steward* (1833), 1 L. J. Ex. 360; 1 Cr. & M. 644.

(*q*) *Easterly v. Sampson* (1830), 6 Bing. 614; 1 Cr. & J. 105.

(*r*) *Brooks v. Jennings* (1866), L. R. 1 C. P. 476.

PART I.

Covenant
implied
in law.

an express covenant to be found in the witnessing part relating to the same subject-matter (*s.*). And "the court ought to be cautious in spelling a covenant out of a recital of a deed; because that is not the part of a deed in which covenants are usually expressed" (*t.*).

"A covenant in law 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" (*u.*). Thus at common law the words "give" or "grant" implied in law a warranty or covenant for title (*x.*). But this covenant was taken away by the Law of Property Amendment Act, 1845, s. 4.—In a lease by deed the word "demise" implies a covenant in law for title, and for the quiet enjoyment of the demised premises during the term (*y.*). But an express covenant to the like effect supersedes or qualifies the implied covenant, according to the maxim, "*expressum facit cessare tacitum*"; and the lessor may by express covenant limit the liability to his own acts (*z.*). A covenant in law is implied upon the part of the lessee from the words "yielding and paying" used in the reservation of rent (*a.*).

Limitation
of implied
covenants.

A covenant in law, as the covenant for quiet enjoyment implied in the word "demise," is limited to the estate of the lessor and ceases with the determination of that estate (*b.*); whereas a covenant in fact, though arising by construction only, has no such implied limitation, but presumptively covers the whole term demised (*c.*). Also the liability of the lessee upon mere covenants in law is limited to his retaining the privity of estate with the lessor, and ceases upon an assignment of the lease to another

(*s.*) *Dawes v. Tredwell* (1881), 18 Ch. D. 351.

(*t.*) *Per cur. Farrall v. Hilditch* (1859), 28 L. J. C. P. 221; 5 C. B. N. S. 854.

(*u.*) *Per cur. Williams v. Burrell* (1815), 14 L. J. C. P. 98; 1 C. B. 402.

(*v.*) *Nokes' case* (1599), 4 Co. 81 a; Co. Lit. 381 a; Shepp. Touch. by Preston, 181, 184.

(*w.*) *Nokes' case* (1599), 4 Co. 81 a; *Baynes v. Lloyd* (1895), 61 L. J. Q. B. 787; 1895 2 Q. B. 610. See *Jones v. Lavington* (1902), 72 L. J. K. B. 98; (1903) 1 K. B. 253.

(*x.*) *Line v. Stephenson* (1838), 7 L. J. C. P. 263; 5 Bing. N. C. 183.

(*y.*) *Thursby v. Plant* (1669), 1 Wms. Saund. 280, 305, n. (f); *Frygon v. Arthur* (1823), 1 L. J. O. S. K. B. 138; 1 B. & C. 410.

(*z.*) *Penfold v. Abbott* (1862), 32 L. J. Q. B. 67; *Baines v. Lloyd* (1895), 61 L. J. Q. B. 787; (1895) 2 Q. B. 610.

(*a.*) *Williams v. Burrell* (1845), 14 L. J. C. P. 98; 1 C. B. 402; *Lock v. Furse* (1865), 34 L. J. C. P. 201; 19 C. B. N. S. 96; *Stuart v. Jay* (1903), 73 L. J. K. B. 97; (1904) 1 K. B. 362.

person; an express or constructive covenant continues according to its terms notwithstanding such assignment (d).

CH. IV.
SECT. III.

By the Conveyancing Act, 1881, s. 7, a party who is expressed to convey as beneficial owner, settlor, mortgagor, trustee, personal representative of a deceased person, committee of a lunatic, or under an order of the court, is deemed to covenant for title, against incumbrances, and for further assurance, in manner therein provided.

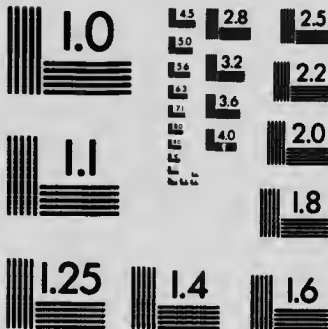
Covenants
implied
under the
Convey-
ancing Act.

(d) *Walker's case* (1513), 3 Co. 22 a; *Thomas* (1883), 52 L. J. Q. B. 340; 10
Anriol v. Mills (1790), 1 T. R. at p. 98. Q. B. D. 48; *Baynton v. Morgan* (1888),
See *Thuraby v. Plant* (1669), 1 Wms. 58 L. J. Q. B. 139; 22 Q. B. D. 74.
Saund. 200. n. (10); *Swansen (Corp.) v.*



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CANADIAN NOTES.

Written Proposal Accepted Orally is a Written Contract.

In *Ellis vs. Able*, 10 O. A. R., 226, it was held by Burton, J. A., that when a proposal is made in writing by one party and adopted *ad idem* by the other, either verbally or by action upon it, the contract is a written one and subject therefore to the parol evidence rule.

Resolution of Council on Application is Contract in Writing.

In *Ville de Chicoutimi vs. Lagari*, 27 S. C. R., 329, a resolution of the town council of Chicoutimi, based upon an application made by the respondent for permission to construct water works in the town and lay the necessary pipes in the streets, was held to constitute a contract in writing and a written agreement within the meaning of article 1033a of the Code of Civil Procedure of Lower Canada.

Whole Correspondence Must be Considered.

In *Jones vs. DeWolfe*, Coutlee's Digest, 348, it is laid down that where it is sought to establish a contract by correspondence the whole of the correspondence relating to the matter in question which has passed between the parties must be taken into consideration. Accordingly where a letter by plaintiff to defendant and replied to by the latter made a complete contract but, before there was any performance or breach, other letters passed from which it appeared that both parties still treated the matter as being in negotiation, it was held, affirming the judgment appealed from, that no binding contract had been concluded between the parties.

In *Betts vs. Smith et al.*, 16 O. A. R., 421, a committee acting to superintend the reception of a large number of persons advertised for tenders in a newspaper for the supply of meals. The advertisement contained a number of statements as to the number of persons to be present at the proposed assemblage. Plaintiff tendered and his tender was accepted. The Common Pleas Division held that the tender and its acceptance constituted the whole contract, but it was held, on appeal, that the advertisement and requirements formed part of the contract and that the plaintiff was not limited to his rights under the tender and acceptance.

In *North West Transportation Co. vs. McKeuzie*, 25 S. C. R., 38, it was also laid down that where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. The case of *Hussey vs. Horne-Payne*, 4 Ap. Ca., 311, was followed.

It was held that a shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped. Where a shipper accepts what purports to be a bill of lading under circumstances which would lead him to infer that it formed a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary the terms of a prior mutual assent.

In *Regina vs. MacLean*, 8 S. C. R., 210, under the statute providing for the printing, binding and like work for the several departments, the under Secretary of State advertised for tenders for the printing "required by the several departments of the Government." The suppliants tendered for such printing and an indenture was executed by which they agreed to perform and execute, etc., all jobs or lots of printing for the several departments of the Government, reports, etc., of every description and kind soever coming within the denomination of Departmental printing and all the work and services connected therewith and appertaining thereto as set forth in the requisitions from time to time to be made on behalf of the several departments. It was held, having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance and the contract, that the contractors should have all the printing that should be required by the several departments of the Government.

Construction of Writing.

In *McRae vs. Marshall*, 19 S. C. R., 10, by an agreement under seal between plaintiff, the inventor of a certain machine, and defendant, the proprietor of patents therefor, plaintiff agreed

to obtain patents for improvements and assign the same to the defendant, who, in consideration, agreed to employ him for two years to place the patents on the market with a salary and percentage. Plaintiff agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the engagement at any time after six months from its date, paying salary and share of profits, if any, to date of cancellation. By one clause of the agreement the employer was to be the absolute judge of the manner in which the duties were to be performed and had the right to dismiss defendant at any time for incapacity or breach of duty. Defendant was summarily dismissed for alleged incapacity and disobedience of orders.

It was held, reversing the Appeal Court of Ontario, that the agreement gave the employer the right at any time to dismiss defendant for incapacity or breach of duty without specifying any particular act calling for such dismissal, but that such dismissal did not deprive plaintiff of his claim for a share of the profits of the business.

In *Cadioux vs. Montreal Gas Co.*, 28 S. C. R., 382, an agreement to furnish gas contained an express provision that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours' notice in writing. Notices were sent in writing to the consumer that his gas would be shut off at a certain number on a street named unless he paid arrears of gas bills due upon another property. It was held by the Supreme Court of Canada that such notices could not be considered as notices given under the contract for the purpose of cancelling it. As stated in the note in *Coutlée's Digest*, 315, this decision was subsequently reversed by the Privy Council and the appeal was allowed. Per Sir Henry Strong, J.: "There is nothing in the Act to limit the right of the Company to the service pipes of the defaulter in a particular building or in respect of a particular meter in respect to which the default has been committed." 1899 A. C., 592.

In *Laberge vs. Equitable Life Assurance Society*, 24 S. C. R., 595, the medical staff of the Society at Montreal consisted of a medical referee, a chief medical examiner and two or more alternative medical examiners. In 1888, plaintiff was appointed an alternative examiner in pursuance of the suggestion to the

manager by local agents that it was advisable to have a French-Canadian on the staff. By this commission plaintiff was entitled to the privilege of such examinations as should be assigned to him by or required during the absence, disability or unavailability of the chief examiner. After plaintiff had served for four years it was found that his methods of holding examinations were not acceptable to applicants and he was requested to resign, which he refused to do, and another French-Canadian was appointed as an additional alternate examiner and most of the applicants thereafter went to the latter. Plaintiff then brought an action against the Company for damages for loss of business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the General Manager had promised him all the examinations of French-Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the Company on the understanding that the examination fees would be more than sufficient to pay the premium and he asked for repayment of the amounts paid by him for such insurance.

It was held that, by the contract made with plaintiff, the Company were only to send him such cases as they saw fit and could dismiss him or employ other examiners at their pleasure; that the manager had no authority to contract with him for any employment other than that specified in his commission and that he had no right of action for repayment of his premium, it being no condition of his employment that he should insure his life and there being no connection between the contract for insurance and that for employment.

In *Western Assurance Co. vs. Temple*, 31 S. C. R., 373, by a condition in a policy of insurance against fire, the policy was to become void "if the assured is not the sole and unconditional owner of the property or if the interest of the assured in the property, whether as owner, trustee, mortgagee, lessee or otherwise is not truly stated." It was held that a mortgagor was sole and unconditional owner within the terms of the condition.

In *North British & Mercantile Ins. Co. vs. McLellan*, 21 S. C. R., 288, an agreement by which defendant undertook to cut and store ice provided that the ice-houses and all implements were to be the property of P., who, after completing the contract, was

to convey the same to defendant and defendant was to deliver ice to vessels to be sent by P., who was to be obliged to accept only good merchantable ice so delivered and stored. It was held that the property of the ice was in defendant and that it was only the buildings and implements which were to be the property of P. under the agreement and not the ice which was at defendant's risk and shipped by him.

In *Ashfield vs. Edgell*, 21 O. R., 195, a contractor for the erection of buildings, was to supply all labour, material, etc., and all work and materials as delivered on the premises were to be considered the property of the owner and not to be removed without his consent. He was not to sublet any part of the work without the architect's consent and, having done so, was ordered to discontinue by the architect. It was held that he was entitled to remove from the premises material placed there after he was directed to discontinue, as well as material delivered off the premises and his plant constituting fixtures and apparatus necessary for carrying on his business, but not to remove any material placed there before he was ordered to discontinue.

In *Munro vs. Westville*, 36 N. S. R., 313, a building contract contained a provision that the work should be completed by the contractor by a specified date with a penalty of five dollars a day as liquidated damages for each day that the work should remain unfinished after that date. It was agreed on the part of the defendant that the contractor should be put in possession of the premises and should be furnished with the lines and levels by another fixed date and that for every day thereafter he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages or otherwise against the defendant by reason of said delay. It was held that the clause of the contract denying the plaintiff's right to an action for damages applied to the giving possession of the premises only and not to the delay in furnishing lines and levels, and that plaintiff was entitled to recover for extra work resulting from the latter delay.

One of the clauses of the contract provided that if alterations were required in the work a fair and reasonable valuation of work added or omitted should be made by the architect and that the sum payable to plaintiffs should be increased or diminished

by such amount provided that where the amount was not agreed upon the contractor should proceed with the work on the written order of the architect and that the amount payable therefor should be fixed as further provided. It was held that alterations under this clause only required a written order where the architect and contractor differed as to the valuation; also that the furnishing of plans by the architect shewing additional work was a written order within the meaning of the contract; also, that the burden was upon plaintiff of shewing that work claimed for as extra was ordered by the architect.

It was held also that the delay in putting plaintiff in possession of the premises and in furnishing lines and levels and delay caused by extra work which he was called upon to do relieved plaintiff from the obligation to complete his work by the date agreed and that defendant was debarred from enforcing payment of the penalty agreed upon.

In *Electric Dispatch Co. vs. Bell Telephone Co.*, 20 S. C. R., 83, the respondent company carried on business and executed orders by telephone for messenger boys, cabs, etc., which it sold to the appellant company, agreeing, among other things, to not transmit or give in any manner directly or indirectly any orders for messengers, cabs and so on to any person or persons, company or corporation, except the appellant company. The G.N.W. Company afterwards established a messenger service for the purposes of which the wires of the telephone company were used. In an action for breach of the agreement with the appellant company and injunction to restrain the respondent company from allowing their wires to be used for giving orders for messages, etc., it was held that the telephone company, being ignorant of the nature of communications sent over their wires by subscribers, did not transmit such orders within the meaning of the agreement, that the use of the wires by subscribers could not be restricted and that the respondent company was under no obligation even if it were possible to do so to take measures to ascertain the nature of all communications with a view to preventing such orders being given. The decision affirms that of the Ontario Appeal Court. 17 O. A. R., 292.

In *County of York vs. Toronto Gravel Road, etc., Co.*, 11 O. A. R., 765, the defendant company, who were empowered by

government to run a traction engine over certain highways in the County of York and who by the charter were allowed to construct a tramway in the county to be worked by horse or by steam power on such terms as might be agreed on with the municipalities through which the road might pass, entered into an agreement with the county whereby it was agreed that the Company should be at liberty to lay down a tramway along a certain road, that the tolls should not exceed a certain specified rate, that the Company if required should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh, that in case horses, carriages, teams, etc., met the vehicles of the Company the latter should have the right of way and that, so soon as this agreement should have been ratified by the said corporation, the said Company should forthwith withdraw their said traction engine from the public highway of said county and should discontinue the use of the said traction engine and of any other traction engine upon or along such highway. The Company was restrained from the use of steam power on the tramway in the Ontario Divisional Court and the appeal was dismissed by the Court of Appeals equally divided as also by the Supreme Court of Canada. 12 S. C. R., 517.

In *City of Montreal vs. Canadian Pacific Rly'way Co.*, 33 S. C. R., 396, it was held that the words "from" and "to" streets mentioned in specifications for the construction of works undertaken by an agreement in writing as shewn on a plan annexed to and declared to form part of the contract were not necessarily exclusive, and in the case in question where the agreement provided that the works should be constructed "along Notre Dame Street from Berri Street to Lacroix Street as shewn on the said plan," the words "along" meant as far as the plan shewed along Notre Dame Street not exceeding the most distant side of Lacroix Street. The contention was that the plan was annexed to the written agreement merely for the purpose of illustration and that the words of the agreement would not include the constructions shewn on the plan over any portion of either Berri Street or Lacroix Street. This contention was sustained in the dissenting opinion of Mills and Armour, JJ.

In *Dempster vs. Bauld*, 37 N. S. R., 330, in an action to recover an amount claimed under a contract to provide materials for

reseating a church, plaintiff's right to recover depended upon whether the words "seat" and "lining" in the contract should be read with a comma or a hyphen between them. In the former case the plaintiff would be bound to furnish the seats complete and in the latter case he would be bound only to furnish the material of which the seats were to be constructed. The trial Judge decided in favour of the reading contended for by defendant, placing the comma between the words as in the contract, on the ground that to admit plaintiff's construction would be to ignore the actual reading and to give an unusual and improper meaning to the word lining, and to materially vary the words of the contract.

In *Ottawa Electric Co. vs. St. Jacques*, 31 S. C. R., 636, a contract for supplying light to a hotel contained this provision: "This contract is to continue in force for not less than thirty-six consecutive calendar months from the date of first burning and thereafter until cancelled in writing by one of the parties hereto. * * * Special conditions, if any. This contract to remain in force after the expiration of the said thirty-six months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the thirty-six months the lease was renewed for five years longer. It was held, reversing the judgment of the Court of Appeal of Ontario, that neither of the parties to the contract had the right to cancel it against the will of the other during the renewed term.

In *Marcus vs. Smith*, 17 F. C. C. P., 416, an endorsement on a contract for the sale of land extending the time for payment was held not to do away with the provision for forfeiture on default, but to incorporate the extended time in the agreement as if originally there.

In *Boyd vs. Shouldice*, 22 Grant's, Ch., 1, a bond for conveyance of land to be conveyed by a father to the husband of his daughter contained a recital that the obligor, the father, desired that the land should go to the male issue of his daughter and her husband. The recital of this wish was held to be no part of the agreement between the parties and did not qualify or modify the agreement.

In *Bradford vs. O'Brien*, 7 U. C. Q. B., 562, it was held that a receipt in the form, "Received of B. & C. a note they held against A. L., on which there was a balance due September 1, 1842, of \$400.33, which is to be paid to them in Michigan treasury dollars; also a balance of account of \$57.17, which is to be paid in current money if enough is collected, if not in warrants. D. O. B.," could not be considered on the face of it, evidence of a promise by defendant personally to pay these debts.

In *Tilt vs. Silverthorne*, 11 U. C. Q. B., 519, the defendant, in consideration that the plaintiff would deliver to him 3,000 bushels of wheat, promised to deliver to him within a reasonable time therefrom 500 barrels of flour. It was held that the word "therefrom" must be construed to mean "thereafter" and, this being the proper construction of the agreement, it was no defence to plead that the defendant's mill containing the wheat was burned down through negligence on his part, though this would have been an excuse if the other construction could have been adopted.

In *Patterson vs. Prince*, 7 U. C. Q. B., 528, in an action of trespass, before the verdict was taken plaintiff's attorney and the defendant signed a paper by which it was agreed that the costs should be left to be taxed, etc., and the value of the mesne profits decided, etc., in case a verdict should be given for the plaintiff. It was held that those words, "in case a verdict should be given for the plaintiff," left it open for the defendant to contend against a verdict at the trial upon any ground in law or upon the merits. The contention against this ruling was that, if a verdict was given for the plaintiff on the point of title, the defendant must be held liable on this writing for mesne profits and costs, that is, that he could not defeat his liability on any other grounds, while the defendant insisted that the writing did not preclude him from contending against a verdict on other grounds besides the mere question of plaintiff's title to the premises and defendant's occupation.

In *McBain vs. Kinnear*, 23 O. R., 313, a building contract provided that work was to be completed under a penalty by November 31st. It was held that the work must be completed by the 30th of November.

In an agreement for discontinuance of a business, in *North American Glass Co. vs. Bardsley*, 24 S. C. R., 490, the contract provided that if at any time during five years a furnace should be started by other parties the agreeing companies could terminate their agreement and certain payments provided for to one of them should cease unless he could shew that the said furnace or furnaces at the time of said notice could not have a production of more than a hundred dollars a day. It was held that this clause meant that the furnace so started did not have an actual output worth more than one hundred dollars a day on an average for a reasonable period and did not mean mere capacity to produce that quantity whether actually produced or not.

In *Thompson vs. Fowler*, 23 O. R., 644, a contract for hiring a steam tug was in the form, "I agree to charter tug 'J. K. Ward,' R. Thompson, owner, to tow two barges from Rockville to Dexter, New York, for which I agree to pay, etc., owner to supply engineer and captain." There were circumstances in evidence to throw light upon the understanding of the contract and it was held to be not a demise of the tug but a contract of hiring.

In *Bickford vs. the Town of Chatham*, 16 S. C. R., 235, a municipal corporation agreed with a railway company to pay a bonus on certain conditions, one of which was that the company should construct at or near the corner of certain named streets a freight and passenger station with all the necessary accommodation connected by switches, sidings or otherwise with said road. It was held that this condition was not complied with by the erection of a station building not used nor intended to be used and for which proper officers such as station master, ticket agent and so on, were not appointed. Strong, J., dissenting, held that the condition only called for the construction of a building with the required accommodation and connections and did not amount to a covenant to run the trains to such station or make any other use of it.

In *Wythe vs. Mfg. Accident Co.*, 5 O. R., 153, an employer's liability policy provided that the defendants should pay plaintiff all sums up to a certain limit and full costs of suit, subject to the condition that if any proceedings were taken to

enforce any claim the Company should have the absolute conduct and control of defending the same, retaining or employing their own solicitors and counsel. It was held that the plaintiff was not entitled to claim from the defendant the amount of a judgment obtained against him by an employee in an action defended by the plaintiff with his own solicitor and counsel, leaving the defendants to shew as a defence or by way of counter-claim that they could have done better by defending it themselves, nor was an offer by the plaintiff at the time when the action was at issue and on the peremptory list for trial the following day to hand over the defence to the defendant's solicitor a sufficient compliance with the condition.

In *Coulson vs. Gzowski*, 22 U. C. Q. B., 33, plaintiff undertook to build bridges for the Grand Trunk Railway to be shipped on board steamship from Great Britain to Montreal, the defendants paying the difference between the freight and insurance by steamships and first class sailing ships. It was held that they were bound to pay such difference on all shipments not merely on those made at a time when sailing vessels could be procured.

In *Reesor vs. Provincial Insurance Co.*, 33 U. C. Q. B., 357, to an action on a fire policy there was a plea upon equitable grounds that, by the policy, whenever the defendant should pay any loss to the insured he agreed to assign over all his right to recover satisfaction therefor from any other person, town or other corporation, or to prosecute therefor at the charge and for the account of the defendants if requested. It was considered that, under this provision, the defendants had not a right to elect whether the plaintiff should assign or prosecute. The point does not seem to have been expressly decided.

In *Haren vs. Hughes*, 27 O. A. R., 1, the owner of certain land agreed to lease to the plaintiff "the following described premises," mentioning them, "and hereby lease and agrees to give and convey to plaintiff all mineral rights on such premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on such premises all necessary tools, machinery and conveniences for mining, quarrying and boring and to erect buildings for said tools and for housing, etc., and for housing employees, and also to drain said premises and build necessary railroad. Said (plaintiff) also agrees if he uses

said property under this agreement to take therefrom the amount of 50,000 cords of stone and to pay therefor twenty-five cents per cord. Said owner hereby agrees that he will give no other party or corporation any rights on said premises on or before August 1st, 1897. Unless said (plaintiff) utilizes said premises for said purposes on or before said date this lease shall be null and void." It was held that the plaintiff was not entitled to the exclusive possession of the land or to quarry all the stone thereon, but only to quarry 50,000 cords.

In *Middleton vs. Flannigan*, 25 O. R., 417, in a contract for excavation, it was provided that all machinery and other plant, materials and things whatsoever provided by the Company were until completion of the work to be the property of the Company when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words "teams and horses" were respectively used as well as the word "plant." It was held that under the contract horses were not included in the word "plant" and that expert evidence was not admissible to explain the meaning of the contract in this respect.

In *Fitchie vs. Hogg*, 35 F. C. Q. B., 94, on a sale of malleable iron works and all machinery and tools in and about the said works connected therewith, it was questioned whether annealing pots used in the manufacture of iron would pass under the word tools, but it was held that the question was for a jury.

In *Steinhoff vs. McRae*, 13 O. R., 546, one of the conditions of sale was that the timber was to be removed by one Tully within two years. It was held that the effect of the condition was that he was only to have the right to cut and remove the timber within two years from the date of the agreement. The question was whether Tully was to have only the right to cut and remove the timber during the two years following the date of the agreement, or whether there was, on the other hand, an absolute sale of the timber with an undertaking or promise on the part of Tully to remove it within two years, in which case the omission to cut and remove the trees would not revert the property in the trees in the original owner.

In *Victoria Harbour Lumber Co. vs. Irwin*, 24 S. C. R., 607, by an agreement in writing defendant agreed to sell and plain-

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tiff to purchase timber to be delivered free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted, settlement to be made inside of thirty days in cash, less two per cent., etc. It was held that this clause did not give the purchaser thirty days after delivery for payment, but that it provided for delivery by vendor and payment by the purchasers within thirty days from the date of the contract, and that, if the purchasers accepted the timber after the expiration of thirty days from such date, which event was not provided for in the contract, an action would lie for the price immediately.

In *Harris vs. Buntin*, 16 U. C. Q. B., 59, the declaration charged that plaintiff, having recovered judgment against A. & Co., was about to sell their goods and in consideration that plaintiff would withdraw his writ defendants promised to pay the amount. It appeared that A. & Co., made an assignment to the defendants of all their goods in trust to pay rent and certain executions of which plaintiff's was one, according to their legal priority. This assignment was executed by the defendants but not by the plaintiff. It was put in at the trial by the plaintiff and it was proved that defendants had received monies under it but no promise was shewn by them except what was in the deed, which recited that defendants had agreed to pay these claims out of the property assigned if sufficient. It was held that the plaintiff could not recover, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods.

Words Construed Against Party Using Them.

In *Stephens vs. Gordon*, 22 S. C. R., 61, the plaintiff was the owner of a farm, about two-thirds of which was heavily wooded and the rest cleared and cultivated. Defendant became the purchaser of the trees and timber under an agreement providing, among other things, that the purchaser should have full liberty to enter upon the lands for the purpose of removing the trees and timber at such times and in such manner as he may think proper, but reserving to the plaintiff the full enjoyment of the land save in so far as might be necessary for cutting and removing the trees, etc. It was held that the defendants had a right to remove the timber by the most direct and available

route, provided they acted in good faith and not unreasonably, and that the reservation in favour of the plaintiff did not minimize or modify the defendant's right to remove the trees across the cleared ground.

Terms not to be Imported by Implication.

In *Morris vs. Dimmick*, 25 O. R., 291, in a written contract of agency, the principal agreed to pay to the agent a fixed commission on all sales of goods manufactured by the former effected through or by the latter. The contract was made terminable at the end of a year by a month's notice by either party, but it contained no express agreement for the principal to employ for any period or to manufacture any goods and it was held that these terms could not be imported into the contract by implication.

In *Archibald vs. The Queen*, 2 Ex. R., 374, the suppliant had a contract to carry mails along a certain route. In the construction of a government railway the Crown obstructed the highway used by suppliant in the carriage of such mails and rendered it more difficult and expensive to him to execute his contract. It was held that there was no implied undertaking on the part of the Crown that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of suppliant's contract more onerous than it would have been.

In *Hill vs. Ingersoll and Port Burwell Gravel Road Co.*, 32 O. R., 194, an agreement in writing signed by the plaintiff and defendants' superintendent, not under seal and not purporting to be made by defendants, who were an incorporated company, was in part as follows: "I (the plaintiff) have this day agreed with (the defendants) to furnish good gravel and deliver the same in the centre of the road-bed * * * and the Company agree to pay at the rate of \$2.40 per cord; and it is further agreed that my tolls * * * shall be free during the full term of this agreement, etc., and it is further agreed that this agreement for gravel to hold good as long as the Company keep the road and as long as my gravel holds good." It was held that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require

for the portion of the road referred to in the writing as long as he was able and willing to supply it was not to be implied from the terms of the writing and the taking of gravel from another person was not a breach of the agreement.

It was held in *Regina vs. McFarlane*, 7 S. C. R., 216, that an express or implied contract for safe transport was not created with the Crown because an individual paid tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

In *The Queen vs. Demers*, 1900 A. C., 103, where the respondent contracted with the government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the government did not expressly contract to give to the respondent all or any of the said work, it was held that a stipulation to that effect could not be implied and that there was no breach of the contract by reason of some of such work being so withheld.

But in *Clarke vs. The Queen*, 2 Ex. C. R., 141, a party to whose rights the suppliant succeeded entered into a contract with the Crown, December 1st, 1879, to supply for a given time "such quantities of paper and of such variety as may be required or desired from time to time for the printing and publishing of the Canada Gazette and the Statutes of Canada and of such official and departmental and other reports, forms, documents, and other papers as may at any time be required to be printed and published, or as may be ordered from time to time by the proper authorities according to the requirements of Her Majesty in that behalf." Attached to the contract and made part thereof was a schedule and specification shewing the kind of paper to be supplied and the price to be paid therefor, but in which no mention was made of double duty, the paper ordinarily though not exclusively used for departmental printing. It was held that notwithstanding this omission the contractor had agreed to supply and the Crown by implication had agreed to purchase among other papers that required for departmental printing.

In *Gilbert Blasting and Dredging Co. vs. The King*, 33 S. C. R., 21, the suppliants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they

should provide all labour, plant, etc., for executing and completing all the work set out or referred to in the specification, viz., all the dredging and other work connected with the deepening and widening of the Cornwall canal on section number 8 not otherwise provided for, on a date named, that the several parts of this contract shall be taken together to explain each other and to make the whole consistent, and, if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated, the contractors will, at their own expense, execute the same as though it had been properly described. There were other provisions not necessary to be stated. After a portion of the work had been done the Crown abandoned the plan of constructing dams as contemplated by the contract and adopted another plan, the work on which was given to other contractors. The suppliants, after the work was completed, filed a Petition of Right for the profits which they would have made had the work been given to them.

It was held, affirming the judgment of the Exchequer Court, that the contract contained no express covenant by the Crown to give all the work done to the suppliant, and the statute by which it was declared that no contract on the part of the Crown could be implied from anything contained in the signed contract or from the position of the parties at any time, prohibited any implied covenant therefor.

In the following case, however, there was a term implied which was not in the agreement:

In *Snider vs. McElric*, 27 O. A. R., 339, by an agreement under seal defendant sold to the plaintiff a house and the goodwill of his medical practice and bound himself in the sum of \$400 to be paid to plaintiff in case he should set up or locate himself in the practice of medicine or surgery within five years within a radius of five miles. It was held that there was an implied agreement by the vendor not to resume practice; that the sum of \$400 was liquidated damages for the breach and that the plaintiff was entitled to that sum or an injunction but not to both.

Parol Evidence Inadmissible to Vary Writing.

In *Graham vs. Graham*, 2 R. & C., 265 (N.S.), the defendant made a promissory note in favour of plaintiff for part of the

consideration money mentioned in a deed. Plaintiff's witness proved the making of the note and the signing, sealing and delivery and testified further that it was agreed between the parties that the deed should be left at the house of a certain justice of the peace for the purpose of having the plaintiff's wife examined as to her release of dower and that the note was not to be recoverable until such examination and certificate were made. The wife refused to go before a justice and acknowledge release of her dower. It was held that the delivery of the deed constituted a good consideration for the note and that no parol evidence of an agreement to vary the terms of the note should have been received.

In *Saults vs. Eaket*, 11 Man., 597, defendant having given a written order to the plaintiff for a binder, it was delivered to him, but he afterwards returned it, claiming that he was not satisfied with it. At the trial the evidence shewed that, either at the time of the negotiations or after the order had been signed, a verbal agreement had been made between the defendant and the plaintiff's agent to the effect that if the binder did not work to the defendant's satisfaction he could return it. It was held that the verbal agreement could not be proved. If such a term was made at the time of the negotiation it should have been inserted in the writing and the attempt to introduce it was an attempt to vary a writing by evidence of a contemporary oral term. If the agreement was made subsequently to the negotiations it was without consideration. The cases of *Lindley vs. Lacey*, *Morgan vs. Griffith*, and *Erskine vs. Adeane*, were distinguished on the ground that in each of these cases the verbal agreement sought to be proved was collateral and on a subject distinct from that to which the written contract related.

In *Kenny vs. the Queen*, 1 Ex. C. R., 68, the suppliant entered into a written contract in 9th August, 1875, with the Dominion Government to remove and carry in barges all rails then or thereafter to be landed from sea-going vessels upon wharves in the harbour of Montreal during the season of navigation in that year and deliver them at the rock-cut on the Lachine Canal. Suppliant duly entered upon the execution of his contract and no complaint was made on behalf of the government as to his work. Some time in September, when suppliant had carried

only a small quantity of rails, the government cancelled the contract, and employed other persons, whereupon suppliant filed the petition of right. It was alleged by suppliant that the official acting on behalf of the government had represented to him that a very large quantity of rails would have to be carried by such contractor. It was held that the evidence of such representations formed no part of the contract, but that, although the suppliant could not import into the contract such representations, under the terms of the written contract he was entitled to remove all rails landed from ships in the harbour of Montreal during the year 1875.

In *McQueen vs. McQueen*, 9 U. C. Q. B., 536, a promise for value received to pay to two persons named or their order a sum of money specified "to be paid in yearly proportions" was held to be evidence of an account stated and that the effect of it was to make the money payable at all events after the expiration of two years. The learned judge directed the jury that if the construction of the writing was that the money was payable in two years, plaintiff was entitled to recover, but if not until after four years they should find for the defendant. It was further held that parol evidence could not be admitted of an agreement that the money should not be payable for four years, or until after the death of plaintiff's father. The headnote states that the effect of the agreement was to give two years for payment, but the judgment is simply that it did not give more than two years.

Parol Evidence to Show Unreality of Consent.

In *American Abell Co. vs. Tourond*, 19 Man., 660, it was held that when a man capable of reading and understanding a document and having an opportunity to do so affixes his signature to it though without reading it, he should be held bound by its contents, but that rule does not apply when a man incapable of reading a document is induced to sign it by a representation that it is an entirely different document. The plaintiff's agent in this case had assured the defendant that a separator which he was agreeing to sell to him was in first class condition and would do first class work, and if not he should be at liberty to return it. It was held that the defendant was not bound, not being able to

read English, by anything which was not in the bargain as made, although in the paper signed which he had been assured was a paper shewing the bargain as made.

Parol Evidence of Collateral Agreement, etc.

In *Dunsmuir vs. Loewenburg et al.*, 30 S. C. R., 311. Dunsmuir gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned. The agreement provided for a commission of five per cent. on the selling price, such commission to include all expenses. H. failed to effect the sale. It was held, affirming the judgment appealed from, in an action by H. to recover expenses incurred in an endeavour to make a sale and reasonable remuneration, that parol evidence was admissible to shew that the written document did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses and that the question as to whether there had or had not been such collateral agreement was one that should have been submitted to the jury.

In *Wilson vs. the Windsor Foundry Co.*, 31 S. C. R., 381. the plaintiff carried on business at Montreal under the style of A. R. Williams & Co., and sued the respondent for the price of an engine ordered in writing and other machinery supplied in connection with repairs to the foundry amounting to \$495.91. The order was given through the plaintiff's agent W. The principal defence was that the Company supposed it was dealing with a Company carrying on business in Toronto as the A. R. Williams Machinery Co., with which it had had previous dealings, and which at the time had in its possession machinery belonging to defendant to the value of \$780, which it was agreed with W. should be accepted in payment for the machinery ordered. The Supreme Court, affirming the judgment of the court appealed from, affirmed the decision of the trial judge who found that the business carried on in Montreal was distinct from that carried on in Toronto, but that, at the time the order was given the defendant believed it was contracting with the Toronto Company, and that there were surrounding circumstances to lead to the belief that the businesses carried on in Montreal and Toronto were one and the same. He held that the plaintiffs were bound by the bargain made with W. and, on the ground that it was not

inconsistent with the written agreement to prove that payment was to be made otherwise than in cash, he received evidence of the agreement relied on by the defendant.

In *Calder vs. Hawett*, 5 Terr., 1, where a verbal order was taken for goods, one of the terms being a six months' credit in a certain event, and plaintiff's agent signed a memorandum containing all the terms of the contract except this one, and the defendant subsequently wrote cancelling the order which he had given, which led to further correspondence, and in none of the letters was any reference made to the term of six months' credit, it was held that evidence could be given of that term as it did not appear in any of the documents submitted to constitute the memorandum in writing. The letter cancelling the contract could not be taken as constituting an acceptance of the goods. It was not meddling with the goods, it was an act not done in relation to the goods themselves, but in relation to the order for the goods.

CHAPTER V.

STATUTORY REQUIREMENTS.

SECT. I.—CONTRACTS WITHIN THE STATUTE OF FRAUDS AND
SALE OF GOODS ACT, 1893.

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THE Statute of Frauds, and the Sale of Goods Act, 1893, so far as it replaces the Statute of Frauds, apply as well to a sale by auction, as to a sale by private contract, and whether the subject-matter of the contract be land or goods (*a*). Statute of
Frauds :
application of.

The provisions of the Statute of Frauds which affect contracts Contracts. are the 1st, 2nd, 3rd, and 4th sections, which apply to future transactions, and enact in effect:—Sect. 1. "All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments made or created by livery of seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding."—Sect. 2. "Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at least of the full improved value of the thing demised."—Sect. 3. "And more-

(*a*) *Blagden v. Bradbear* (1806), 12 Ves. 466; *Kenworthy v. Schofield* (1824), 2 L. J. O. S. K. B. 175; 2 B. & C. 945.

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over that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to or out of any messuages, manors, lands, tenements, or hereditaments shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law."—Sect. 4. "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Leases.

The sections 1, 2, 3, relate primarily to the creation and transfer of estates and interests in land, a subject which does not fall within the scope of this work. They are here noticed because they include leases, which operate by way of contract between landlord and tenant, besides demising the land. Also these sections require formalities in part similar to those of the 4th and 17th sections, and they are so far subject to the same construction. Sect. 17 is now replaced and substantially re-enacted by the Sale of Goods Act, 1893, s. 4. By the Real Property Act, 1845, s. 3, a lease of any tenements and hereditaments for a term exceeding three years, and whereon the rent reserved does not amount unto two third parts at least of the full improved value was "void at law unless made by deed." But it might be effective in equity as an agreement for a lease (b); and if the agreement was one of which a court of equity would grant specific performance, must now be treated as a lease in fact to all intents and purposes by force of the Judicature Act, 1873 (c). The Real Property Act,

Lease by deed.

(b) *Parker v. Taswell* (1858), 27 L. J. C. 812; 2 De G. & J. 559; *Kusel v. Watson* (1879), 48 L. J. C. 413; 11 Ch. D. 129.

(c) *Walsh v. Lonsdale* (1882), 52 L. J. C. 2; 21 Ch. D. 9; *Louther v. Heaver* (1889), 58 L. J. C. 485; 41 Ch. D. 248;

1845, s. 3, has therefore a very limited application now. Leases made by deed do not require the further formality of signature as required by the Statute of Frauds (*d*). Leases not exceeding three years from the making thereof, within the above exception of sect. 2, are held to be thereby also excepted from the 4th section of the statute, which requires writing and signature for contracts concerning interests in land; such leases may therefore still be made as at common law without deed or writing (*e*). The exception includes all leases which do not necessarily exceed the term of three years; a lease which may last less than three years, though it may last longer, is within the exception (*f*). It includes leases for a term to commence at a future time, provided the term does not extend beyond three years from the making of the lease (*g*). A lease for a term of less than three years, with a right in the lessee by giving notice to continue it beyond three years, is within the exception (*h*).

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Lease not
exceeding
three years.

Prior to the Judicature Act, a demise which was not by deed was not absolutely void of effect, and might operate as an agreement for a lease, if capable of that construction. It could be the ground of an action for not accepting or not granting the lease, or for any other breach (*i*); or regulate the conditions of a tenancy subsisting in fact upon an entry and occupation under it, though not effective in creating the term of years agreed upon (*k*).—But unless it satisfied the requirements of the 4th section of the Statute of Frauds in regard to writing and signature, as being a contract concerning an interest in land, or an agreement not to be performed within a year, there was no right of action against the lessee for damages for not taking possession, even where the lease was valid, as falling within the exception contained in sect. 2 of the statute (*l*).

Agreement
for lease.

Zimble v. Abrahams (1902), 72 L. J. K. B. 103; (1903) 1 K. B. 557.

(*d*) *Arline v. Whiston* (1842), 12 L. J. C. P. 58; 4 Man. & G. 801.

(*e*) *Edge v. Stratford* (1831), 9 L. J. O. S. Ex. 101; 1 Cr. & J. 391; *Bolton (Lord) v. Tomlin* (1836), 6 L. J. K. B. 45; 5 A. & E. 856.

(*f*) *Cotton, L. J., Ex p. Voisey* (1882), 52 L. J. C. 121; 21 Ch. D. 164.

(*g*) *Per cur. Edge v. Stratford* (1831),

9 L. J. O. S. Ex. 101; 1 Cr. & J. 391; *Bolton (Lord) v. Tomlin* 1836, 6 L. J. K. B. 45; 5 A. & E. 856.

(*l*) *Hand v. Hall* (1877), 46 L. J. Ex. 603; 2 Ex. D. 355.

(*i*) *Stranks v. St. John* (1867), 36 L. J. C. P. 118; L. R. 2 C. P. 376.

(*k*) *Martin v. Smith* (1874), 43 L. J. Ex. 42; L. R. 9 Ex. 50.

(*l*) *Per cur. Edge v. Stratford* (1831), 9 L. J. O. S. Ex. 101; 1 Cr. & J. 391.

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Section 4. *Special promise by executor or administrator to answer damages out of his own estate.*Special
promise by
executor.

The executor or administrator of a deceased person is liable to answer damages in respect of the liabilities of the testator or intestate only to the extent of the assets which come to his hands, to be administered in due course; and a promise to pay is presumptively referable to his liability in that character. But he may give a special promise to answer such damages out of his own estate; and such promise must satisfy the requirements of the statute, in addition to the necessary conditions of a binding contract (*m*).—The promise must be made upon a valid consideration; and forbearance by a creditor of the deceased to sue the executor would form such a consideration (*n*); but executors may render themselves liable to pay a debt of their testator *de bonis propriis*, by acts or conduct amounting to an admission of assets (*o*).—An executor or administrator cannot be charged with the payment of a legacy or distributive share as a debt upon an implied promise, the proper remedy being by a suit for the administration of the estate; and a special promise to pay out of his own estate must satisfy the requirements of the statute, and must also be made upon a valid consideration (*p*). But if there be a sufficient admission of assets, the executor may be charged upon his admission with the legacy as a debt for money had and received, or upon an account stated, and made liable to pay amount *de bonis propriis* (*q*).

Promise to
pay legacy
or distribu-
tive share.Section 4. *Special promise to answer for the debt, default or miscarriages of another person.*Promise to
answer for
debt of
another.

The criterion by which it is determined whether the promise is within the statute is whether the person whose debt, default or miscarriage is guaranteed is liable as well as the guarantor.

(*m*) *Forth v. Stanton* (1669), 1 Wms. Saund. 220; *Rann v. Hughes* (1778), 4 Bro. P. C. 550; 7 T. R. 550, n.; *Philpot v. Bryant* (1828), 6 L. J. O. S. C. P. 182; 4 Bing. 717.

(*n*) *Barber v. Fox* (1670), 2 Wms. Saund. 418.

(*o*) *Childs v. Moulin* (1821), 2 Br. & B.

460; *Re Marrin* (1905), 74 L. J. C. 699; (1905) 2 Ch. 490.

(*p*) *Becks v. Strutt* 1794, 5 T. R. 690; *Jones v. Tanner* (1827), 6 L. J. O. S. K. B. 71; 7 B. & C. 542.

(*q*) *Davis v. Reppner* (1672), 2 Lev. 3; 1 Vent. 120. See ante pp. 75, 79.

if there is a dual liability to the promisee the case is within the statute; but if goods are applied to another or work done for him upon the credit of the promiser only, the case is not within the statute, because there is no debt of another (*x*). A promise to pay for goods supplied to an infant, not being necessities, is not within the statute, because the infant is not liable (*s*). And the statute does not apply to a debt for which the promiser himself is liable, though the payment of it may exonerate another (*t*). Upon the same principle a warranty by an agent of his authority to contract a debt or liability for another, as by ordering goods or work on his account, is not within the statute, because it only guarantees that the principal is bound, not that he will pay the debt (*u*). And the engagement of an agent, by which he guarantees the performance of contracts made for his principal, is held not to be within the statute, though it may result in payment of the debt of another (*x*).

Where the promise is founded upon some *new* consideration sufficient in law to support it, and is not merely for the debt, default or miscarriage of another, such an undertaking, though in effect it be to answer for another person, is considered as an *original* promise, and not within the statute (*y*): as a promise to pay the debt of a person who had been arrested under a *cat. sat.* on condition of his discharge from custody, because the original debt was extinguished by that form of execution (*z*); so where a purchaser of goods, being unable to pay for them, transferred the benefit of his contract to a third party, who promised to pay the price instead of the former, who was discharged, the new promise to pay was held not to be within the statute (*a*). A promise to pay a composition on the debts of another in consideration of the creditors assigning their debts to the promiser is not within the statute, because it amounts to a purchase of the debts, and not a promise to pay them (*b*). So, where an assignment of

Promise in consideration of discharge of debtor.

(*r*) *Barkway v. Darnell* (1705), 8alk. 27; 1 Sm. L. C. 287; *Harburg India Rubber Comb Co. v. Morton* (1902), 71 L. J. K. B. 529; (1902) 1 K. B. 778. See *Re Hoyle* (1892), 62 L. J. C. 182; (1893) 1 Ch. 84.

(*s*) *Harris v. Huntbach* (1757), 1 Burr. 373.

(*t*) *Laey v. McNeile* (1824), 1 Dowl. & R. 7; *Overell v. Coppeck* (1856), 26 L. J. C. 269.

(*u*) *Lakeman v. Mountstephen* 1870,

29 L. J. Q. B. 275; L. R. 7 H. L. 17.

(*x*) *Sutton v. Grey* (1894), 63 L. J. Q. B. 633; (1894) 1 Q. B. 285.

(*y*) *Forth v. Stanton* (1669), 1 Wms. Saund. at p. 229.

(*z*) *Butcher v. Stewart* 1813, 12 L. J. Ex. 391; 11 M. & W. 857.

(*a*) *Browning v. Stallard* (1814), 5 Taunt. 450.

(*b*) *Anstey v. Martin* (1804), 1 B. & P. N. R. 124.

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a debt or an order for payment upon the debtor is accepted in discharge of a debt of the assignor to the assignee, a promise by the debtor to pay the assignee instead of his original creditor is not within the statute, because it is a promise to pay his own debt, and not that of his creditor, which is discharged (*c*).

Debts due to third party.

The statute applies only to debts and liabilities due to the promisee himself: promises to answer for debts or liabilities due to a person other than the promisee are not within the statute. Thus where a person assigns the benefit of a debt or contract to which he is entitled and which he guarantees to the assignee, his guarantee is not within the statute, because the debt or liability is due to himself and not to the assignee (*d*).

Debts due by the promisee.

For the same reason a promise made to the bailiff of a County Court, in consideration of his releasing a debtor from arrest, to pay the debt, was held valid although not in writing (*e*).—Also a promise of indemnity or promise to answer for a debt or liability due by the promisee himself is not within the statute (*f*): as a promise to pay a promissory note which the promisee had made to another person (*g*); a promise to indemnify against the costs of an action to be brought or defended by the promisee (*h*).

Indemnities.

—So an indemnity given to a person for becoming bail for the appearance of another on a criminal charge is not within the statute, because there is no debt or duty owing from the person bailed to the person who becomes bail (*i*). But an indemnity given to the surety in a bail bond in a civil action was held within the statute, on the ground that in civil proceedings there is a legal duty in the person bailed towards his bail to keep him harmless by surrendering or paying the debt (*k*).

Promise resulting in discharge of debt.

A promise is not brought within the statute merely because it results in discharging the debt or liability of another, where such is not the primary object or intention: as a promise to pay off a lien on property which the creditor holds for the debt of another, in consideration of his giving up possession, though the payment of the lien would *prima facie* discharge the debt (*l*); a promise by

(*c*) *Lacy v. McNeile* (1824), 4 Dowl. & R. 7; *Hodgson v. Anderson* (1824), 3 B. & C. 842.

(*d*) *Hurycave v. Parsons* (1844), 14 L. J. Ex. 200; 13 M. & W. 570.

(*e*) *Reader v. Kingham* (1862), 32 L. J. C. P. 108; 13 C. B. N. S. 344.

(*f*) *Guild v. Conrad* (1894), 63 L. J. Q. B. 721; (1894) 2 Q. B. 885.

(*g*) *Eastwood v. Kenyon* (1840), 9 L. J. Q. B. 409; 11 A. & E. 438.

(*h*) *Adams v. Dansey* (1830), 8 L. J. O. S. C. P. 165; 6 Bing. 506.

(*i*) *Cripps v. Hartnoll* (1863), 32 L. J. Q. B. 381; 4 B. & S. 414.

(*k*) *Green v. Cresswell* (1839), 9 L. J. Q. B. 63; 10 A. & E. 453.

(*l*) *Castling v. Aubert* (1802), 2 East,

a sub-purchaser of goods to pay off the lien of the seller for the original price, in order to obtain possession of the goods sold (*m*); a promise to a landlord to pay the rent actually due by his tenant, in consideration of the former giving up possession of the goods distrained, or refraining from levying a distress (*n*).

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SECT. I.

A promise to answer for future or contingent debts of another is within the statute: as a promise to answer for a debt for goods to be sold to him on the faith of such promise (*o*); a promise to discount bills to be accepted by another in payment of goods to be supplied to him upon credit of the bills (*p*); a promise to answer for the rent of another accruing due in future (*q*).—A promise to give a guarantee for the debt of another is as much within the statute as the guarantee itself (*r*). But a promise to procure another person to sign a guarantee for the debt of another is not within the statute, though the guarantee would be (*s*). The guarantees of parties to bills of exchange and negotiable instruments, as that of the drawer or indorser for payment by the acceptor, are created and regulated by the custom of merchants independently of the Statute of Frauds (*t*).

Future debts.

Guarantee.

The terms *default* and *miscarriage* comprehend wrongful acts creating a liability for damages which are not breaches of contract; as a default in surrendering to bail in a civil action (*u*); or a liability for damages wrongfully done to the goods of the promisee, which the promiser undertakes to answer for (*x*).

Default and miscarriage.

It was formerly necessary that the consideration should be expressed in the written instrument, but by the Mercantile Law Amendment Act, 1856, s. 3, it is enacted that no promise to answer for the debt, default, or miscarriage of another person, which satisfies the requirements of the statute as to writing and signature, shall be deemed invalid to support an action, suit, or other proceeding, "by reason only that the consideration for such promise does not appear in writing, or by necessary inference from

Consideration for the promise.

325. See *Harburg India Rubber Comb Co. v. Martin* (1902), 71 L. J. K. B. 529; 1902, 1 K. B. 778.

(*m*) *Fitzgerald v. Dressler* (1859), 29 L. J. C. P. 113; 7 C. B. N. S. 374.

(*n*) *Edwards v. Kelly* (1817), 6 M. & S. 204; *Bampton v. Paulin* (1827), 5 L. J. O. S. C. P. 167; 4 Bing. 264.

(*o*) *Matson v. Wharham* (1787), 2 T. R. 80.

(*p*) *Mallett v. Bateman* (1863), 35 L. J. C. P. 40; L. R. 1 C. P. 163.

(*q*) *Thomas v. Williams* (1830), 8 L. J. O. S. K. B. 314; 10 B. & C. 664.

(*r*) *Per cur. Mallett v. Bateman* (1863), 35 L. J. C. P. 43; L. R. 1 C. P. 170.

(*s*) *Bushell v. Bevan* (1834), 3 L. J. C. P. 279; 1 Bing. N. C. 103.

(*t*) *Wilkinson v. Unwin* (1881), 50 L. J. Q. B. 338; 7 Q. B. D. 636.

(*u*) *Green v. Cresswell* (1839), 9 L. J. Q. B. 63; 10 A. & E. 453.

(*x*) *Kirkham v. Marter* (1819), 2 B. & Ald. 613.

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Representations as to credit of another.

a written document." But a valid consideration is necessary to support the promise (*y*).

Promises to answer for another are further provided for by the Statute of Frauds Amendment Act, 1828, s. 6, that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing signed by the party to be charged therewith" (*z*). The liability for a representation made to another with the intention that he should act upon it depends upon the fraudulent effect of such representation, if untrue, and not upon contract; and the liability, therefore, does not require a consideration to support it (*a*).

Agreement upon consideration of marriage.

Section 4. *Agreement made upon consideration of marriage.*

Agreements consisting of mutual promises to marry are held not to be here intended; therefore they do not require written evidence under this statute (*b*). By the Evidence Further Amendment Act, 1869, s. 2, no plaintiff can recover a verdict in an action for breach of promise of marriage unless his or her evidence is corroborated by some other material evidence of the promise (*c*). An agreement to give money, or land, or a house, or to make a settlement or a will, in consideration of marriage, is within the Statute of Frauds (*d*); and marriage is an acceptance of such agreement, and is equivalent to a consideration of value (*e*). An agreement of this kind cannot be enforced against a person or as a charge upon his estate, unless it is complete as an agreement, and satisfies the requirements of the statute (*f*). But

(*y*) *Wain v. Walters* (1804), 5 East, 10; 1 Sm. L. C. 310, and notes. See *post*, p. 182.

(*z*) *Tatton v. Wade* (1856), 25 L. J. C. P. 240; 18 C. B. 336; *Swift v. Jewsbury* (1873), 43 L. J. Q. B. 56; L. R. 9 Q. B. 301.

(*a*) See *ante*, p. 3; Eldon, L. C., *Frans v. Ricknell* (1801), 6 Ves. 186; *Ruben v. Great Fynall Consolidated* (1906), 75 L. J. K. B. 843; (1906) A. C. 439.

(*b*) *Cork v. Baker* (1717), 1 Strange, 31.

(*c*) *Widdowson v. Walpole* (1891), 60 L. J. Q. B. 702; (1891) 2 Q. B. 531.

(*d*) *Mostaen v. Maxwell* (1720), 1 P. Wms. 618; 1 S. r. 235; *Caton v. Caton* (1865), 34 L. J. C. 564; L. R. 1 Ch. 137; affirmed 36 L. J. C. 886; L. R. 2 H. L. 127.

(*e*) *Luders v. Anstey* (1799), 4 Ves. 501; *Shadwell v. Shadwell* (1860), 30 L. J. C. P. 115; 9 C. B. N. S. 159; *Frost v. Frost* (1881), 50 L. J. C. 69; 17 Ch. D. 365, n.

(*f*) *Dashwood v. Jermy* (1879), 12 Ch. D. 774; *Ex p. Whitehead* (1884), 54 L. J. Q. B. 210; 14 Q. B. D. 419.

a marriage settlement may be rectified upon parol evidence where property has been omitted therefrom by mistake (*g*). A memorandum of the agreement in writing made after the marriage is sufficient to satisfy the statute, as in the case of a recital of an ante-nuptial agreement to settle contained in a post-nuptial settlement (*h*).

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SECT. I.

If a person, in order to induce a marriage, make a representation as to the present ownership of property, upon the faith of which the marriage takes place, he will not be allowed to assert a claim to that property inconsistent with his representation, and this whether he has been guilty of a fraud, or upon the ground of estoppel by his conduct, and not upon the ground of contract; therefore an infant may be bound, and it is not necessary that the representation should be in writing under the statute in order to charge him with the consequences (*i*). But representations of intentions respecting the future disposition of the promiser's property, as of making a settlement or will, made upon consideration of marriage, if binding as contracts, are within the statute; consequently writing is necessary to establish them, notwithstanding the marriage may have taken place upon the faith of their performance (*k*); for marriage alone does not constitute such part performance of a parol contract as will take it out of the operation of the statute upon equitable grounds (*l*).

Representations to induce marriage.

Section 4. *Contract or sale of lands, tenements or hereditaments, or any interest in or concerning them.*

"The words 'lands, tenements, and hereditaments,' in that section appear to me to have been used by the legislature to denote a fee simple, and the words 'any interest in or concerning them' were used to denote a chattel interest or some interest less than the fee simple" (*m*). The following contracts are within this description:—A contract to give or take a lease or tenancy of a house

Contract or sale of interest in land.

(*g*) *Johnson v. Bragge* (1900), 70 L. J. C. 41; (1901) 1 Ch. 28. See *post*, p. 217.

(*h*) *Re Holland* (1902), 71 L. J. C. 518; (1902) 2 Ch. 360.

(*i*) *Montefiori v. Montefiori* (1762), 1 W. Bl. 363; *Neville v. Wilkinson* (1782), 1 Bro. C. C. 543; *Mills v. Fox* (1887), 57 L. J. C. 56; 37 Ch. D. 153.

(*k*) *Hammersley v. De Biel* (1845), 12

Cl. & F. 45. And see *Jorden v. Money* (1854), 23 L. J. C. 865; 5 H. L. C. 185; *Re Fickus* (1899), 69 L. J. C. 161; (1900) 1 Ch. 331.

(*l*) *Caton v. Caton* (1865), 34 L. J. C. 564; L. R. 1 Ch. 137.

(*m*) *Per Littledale, J., Evans v. Roberts* (1826), 4 L. J. O. S. K. B. 313; 9 B. & C. at p. 839.

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or land (*n*); or to assign a lease or tenancy (*o*); or to surrender a tenancy to the landlord in favour of another (*p*); or merely to give up possession of a house to another (*q*); or to make a disposition of land by will (*r*); or the sale of a business, together with possession of the premises where it is carried on (*s*); or a contract to procure a lease or interest in land for another, though the contractor himself has no interest, and acts merely as agent (*t*). An offer to sell, and the exercise of an option to purchase land is within the statute, and is not effectual unless made in writing signed (*u*).—

Parol lease.

A parol lease within the exception of sect. 2 of the statute, upon entry of the lessee, is valid; but as a contract concerning an interest in land it is within the above description, and no action can be brought upon it against the lessee for not taking possession (*x*); but a contract for a mere licence to reside in or use premises, or a specific part of premises, not involving the exclusive possession, as a contract for board and lodging in the house of another, is not within the statute (*y*).

Equitable interests.

Equitable interests in land are within the statute; as the interest of a purchaser under a contract of sale, or of a lessee under an agreement for a lease (*z*); the beneficial interest in a mortgage or charge upon land (*a*); an equity of redemption (*b*); an equitable charge upon rent (*c*).—An equitable mortgage by deposit of title deeds is an exception; it is taken out of the statute because the contract, as regards the deposit, is performed, and parol evidence is admissible to explain the possession of the deeds and the terms upon which they are held (*d*). But an agreement to make an equitable mortgage by deposit not accompanied by a transfer of deeds must be evidenced by writing signed (*e*). Also further

Equitable mortgage.

(*n*) *Merchell v. Wallace* (1837), 6 L. J. K. B. 217; 7 A. & E. 49; *Faghan v. Hancock* (1816), 16 L. J. C. P. 1; 3 C. B. 766.

(*o*) *Buttmore v. Hayes* (1839), 9 L. J. Ex. 44; 5 M. & W. 456.

(*p*) *Ceking v. Ward* (1845), 15 L. J. C. P. 245; 1 C. B. 858.

(*q*) *Kelly v. Webster* 1852, 21 L. J. C. P. 163; 12 C. B. 283.

(*r*) *Maddison v. Alderson* (1881), 52 L. J. Q. B. 466; 8 Ap. Ca. 487.

(*s*) *Swart v. Hawling* (1855), 24 L. J. C. P. 76; 15 C. B. 652; *Hodgson v. Johnson* (1859), 28 L. J. Q. B. 88; E. B. & E. 685.

(*t*) *Halsey v. Graham* (1869), 35 L. J. C. P. 58; L. R. 5 C. P. 9.

(*u*) *Birmingham Canal v. Cartwright*

(1879), 48 L. J. C. 552; 11 Ch. D. 421.

(*x*) *Edge v. Stratford* (1831), 9 L. J. O. S. Ex. 101; 1 Cr. & J. 391.

(*y*) *Wright v. Stacert* (1860), 29 L. J. Q. B. 161; 2 E. & E. 721.

(*z*) *Kelly v. Webster* (1852), 21 L. J. C. P. 163; 12 C. B. 283.

(*a*) *Toppin v. Lomas* (1855), 24 L. J. C. P. 114; 16 C. B. 145; *Driver v. Broad* (1893), 63 L. J. Q. B. 12; (1893) 1 Q. B. 744.

(*b*) *Massey v. Johnson* (1817), 17 L. J. Ex. 182; 1 Ex. 255.

(*c*) *Ex p. Hall* (1879), 48 L. J. Bk. 79; 10 Ch. D. 615.

(*d*) *Russel v. Russel* (1783), 1 Bro. C. C. 269; 2 Wh. & T. L. C. 76.

(*e*) *Ex p. Coombe* (1819), 4 Madd. 249.

charges upon an equitable mortgage by deposit are not within the statute and may be created without writing; as they are supported by the continued possession of the deeds (*f*). But an equitable mortgage or charge cannot be established without writing where the alleged mortgagee is already in possession of the deeds in another right (*g*). Further advances cannot be charged upon a legal mortgage without the written evidence required by the statute; because the deeds are held by the legal mortgagee in right of ownership and not merely as depositary (*h*).

CH. V.
SECT. I.

The sale of emblements, that is, crops produced by cultivation, *fructus industriales*, though in a growing state and intended to remain on the land until maturity, and to be then severed, is not a sale of any interest in land within this section; but is a sale of goods within sect. 4 of the Sale of Goods Act, 1893, which replaces sect. 17 of the Statute of Frauds (*i*): as a sale of a growing crop of corn (*k*): or of a growing crop of potatoes (*l*). A growing crop of grass (*m*), or growing trees or underwood (*n*), and a growing crop of fruit on fruit trees (*o*), are the natural produce of the land, and not emblements, and a contract for the sale of these must be in writing, for they savour of the land. Where the growing crops are sold or relinquished with the possession as appurtenants of the land, though at a separate valuation, as in contracts between landlord and tenant or between an outgoing and incoming tenant, the contract is entire and concerns an interest in land within the statute (*p*). But a contract for the sale of crops or produce of land, whether emblements or not, to be delivered or taken as goods, without the intention of passing any interest or property until severance, is a sale of goods; as a contract for the sale of potatoes or other produce, then being in the ground, to be taken by the buyer immediately at so much per bushel or per acre (*q*), or to be left and taken by the buyer when ripe at so much per

Sale of
emblements.

Natural
crops.

Crops sold
with the
land.

Produce sold
as goods.

(*f*) *Jones v. Roe* (1851), 23 L. J. C. 819; 5 De G. M. & G. 461.

(*g*) *Ex p. Broderick* (1887), 56 L. J. Q. B. 665; 18 Q. B. D. 766.

(*h*) *Ex p. Hooper* (1815), 1 Mer. 7; 19 Ves. 477.

(*i*) Sale of Goods Act, 1893, ss. 4, 62. See *Impey v. Mayo* (1669), 1 Wms. Saund. at p. 391, n. (*g*); *Marshall v. Green* (1875), 45 L. J. C. P. 154; 1 C. P. D. 35.

(*k*) *Jones v. Flint* (1839), 9 L. J. Q. B. 252; 10 A. & E. 753.

(*l*) *Erons v. Roberts* (1829), 4 L. J. O. S. K. B. 313; 5 B. & C. 829.

(*m*) *Curvington v. Reeds* (1837), 6 L. J. Ex. 25; 2 M. & W. 248.

(*n*) *Trot v. Anty* (1820), 2 Br. & B. 99; *Scovell v. Buxall* (1827), 1 Y. & J. 396.

(*o*) *Robwell v. Phillips* (1817), 11 L. J. Ex. 217; 9 M. & W. 501.

(*p*) *Falmouth Dock v. Thomas* (1832), 2 L. J. Ex. 57; 1 Cr. & M. 89.

(*q*) *Parker v. Staniland* (1809), 11 East, 362; *Harcwick v. Brown* (1813), 2 M. & S. 205.

PART I.

Profits
à prendre.

bushel (*r*); or for the sale of the timber in trees when standing, at so much per foot or at a fixed price, whether to be cut by the seller or the buyer (*s*).

A contract for a profit à prendre, as a right to taking game, is within the statute (*t*); and a right of entering upon land and taking part of the soil (*u*). A sale of the feed of a pasture to be taken by the cattle of the buyer is a profit à prendre within the statute; but a contract by the owner of the pasture to agist cattle, that is, to take them in to feed, imports no interest in land and is not within the statute (*x*).

Easements
and licences.

A contract for an easement over land, as an easement of light, is within the statute (*y*). But a contract for a mere licence to enter and use land, importing no interest in the land, is not within the statute (*z*); as a contract for the use of a graving dock for the repair of a ship; and an action will lie for not admitting the ship into the dock under such contract, though not in writing (*a*). A licence is revocable, unless coupled with a valid grant of property (*b*); as in the case of a sale of goods lying upon the seller's land, or of timber to be felled, with licence to the buyer to enter and take the goods, or fell the timber, in which case the seller cannot countermand the licence (*c*); but such a licence is not implied by law in a sale of the goods (*d*). Upon the sale of a growing crop of grass by parol with licence to enter to cut and take it, the licence is revocable; because the seller cannot be charged upon such a contract without writing (*e*). A contract for the sale of the building materials of a house, to be taken down by the buyer, and cleared off the ground within a certain time, was held to be a contract for an interest in land within the statute, which could not be enforced unless evidenced by writing (*f*).

(*r*) *Sainsbury v. Matthews* (1838), 8 L. J. Ex. 1; 4 M. & W. 313.

(*s*) *Smith v. Sherman* (1829), 7 L. J. O. S. K. B. 296; 9 B. & C. 561; *Marsshall v. Green* (1875), 45 L. J. C. P. 153; 1 C. P. D. 35.

(*t*) *Webber v. Lee* (1882), 51 L. J. Q. B. 485; 9 Q. B. D. 315.

(*u*) *Smart v. Jones* (1863), 33 L. J. C. P. 154; 15 C. B. N. S. 717; *Morgan v. Russell* (1908), 78 L. J. K. B. 187; (1909) 1 K. B. 357.

(*v*) *Jones v. Flint* (1839), 9 L. J. Q. B. 252; 10 A. & E. 753.

(*y*) *McManus v. Cooke* (1887), 56 L. J. C. 662; 35 Ch. D. 681.

(*z*) *Wright v. Staver* (1860), 29 L. J.

Q. B. 161; 2 E. & E. 721.

(*a*) *Wells v. Kingston-upon-Hall* (1875), 44 L. J. C. P. 257; L. R. 10 C. P. 402.

(*b*) *Per car. Wood v. Leadbitter* (1345), 14 L. J. Ex. 161; 13 M. & W. 838.

(*c*) *Wood v. Manley* (1839), 9 L. J. Q. B. 27; 11 A. & E. 34; *James, Jones & Sons, Ltd. v. Tankerville (Earl)* (1909), 78 L. J. C. 674; (1909) 2 Ch. 440.

(*d*) *Williams v. Morris* (1841), 11 L. J. Ex. 126; 8 M. & W. 488.

(*e*) *Currington v. Roots* (1836), 6 L. J. Ex. 95; 2 M. & W. 248.

(*f*) *Lavery v. Parsell* (1888), 57 L. J. C. 570; 39 Ch. D. 508.

By the common law chattels affixed to land became part of the freehold, according to the maxim, "*quicquid plantatur solo, solo cedit*" (*g*). But this rule has been modified so as to give effect to rights against the freeholder. In the case of agricultural land, a tenant has a statutory power to remove fixtures even after his term has ceased, subject to a right in the landlord to purchase (*h*). Apart from statute, a tenant is entitled to remove during the term chattels (conventionally known as tenant's fixtures) affixed by him to the land (*i*). The right which the tenant thus possesses is a right to sever and remove, and not an interest in land, and a verbal contract by which an outgoing tenant relinquished the right to his landlord or an incoming tenant was good, because it did not relate to an interest in land, nor was it a sale of "goods, wares, and merchandise" within sect. 17 of the Statute of Frauds (*k*); and would seem not to be a sale of goods within the meaning of sect. 4 of the Sale of Goods Act, 1893 (to be hereafter noticed), which includes under the term "goods"—"things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" (*l*). Unless fixtures were removed during the term, they acquired the quality of land, and a licence by a landlord to an outgoing tenant to enter after the determination of his term and sever them would, at any rate at law, have required the solemnity of a deed (*m*). After severance, fixtures are chattels (*n*). The provisions of the Bills of Sale Act, 1878, require the registration of bills of sale of fixtures when separately assigned or charged (*o*).

CH. V.
SECT. I.
Fixtures.

A contract by a landlord pending a lease to lay out money in buildings, repairs, or improvements is not within the statute, because the buildings become part of the land demised and confer no additional interest on the tenant; and a contract by the tenant to pay an additional sum with the rent is not within the statute.

Collateral
agreement
for building
or repair.

(*g*) Broome, Legal Maxims, 7th ed. 305; see Martin, B., *Elliott v. Bishop* (1854), 24 L. J. Ex. 33; 10 Ex. 196.

(*h*) Agricultural Holdings Act, 1908 s. 21.

(*i*) *Elwes v. Maw* (1802), 3 East, 38; 2 Sm. L. C. 10th ed. 183. See *Leigh v. Taylor* (1902), 71 L. J. C. 272; (1902) A. C. 157; *Reynolds v. Ashby* (1904), 73 L. J. K. B. 946; (1904) A. C. 466; *Re Hulse* (1905), 74 L. J. C. 216; (1905) 1 Ch. 406.

(*k*) *Hallen v. Runder* (1834), 3 L. J.

Ex. 260; 1 Cr. M. & R. 266; *Lee v. Gaskell* (1876), 45 L. J. Q. B. 540; 1 Q. B. D. 700.

(*l*) Sale of Goods Act, 1893, s. 62.

(*m*) *Roffey v. Henderson* (1851), 21 L. J. Q. B. 49; 17 Q. B. 574.

(*n*) *Dalton v. Whitterton* (1842), 12 L. J. Q. B. 55; 3 Q. B. 961.

(*o*) *Small v. Nat. Prov. Bank* (1894), 63 L. J. C. 270; (1894) 1 Ch. 686; *Re Brooke* (1894), 64 L. J. C. 21; (1894) 2 Ch. 600.

PART I.**Partnership
in land.**

unless the sum is charged upon the land as rent, so as to enlarge the interest of the landlord (*p*). A collateral agreement that in consideration of accepting a lease or tenancy upon certain terms the landlord will do repairs or put in furniture is not within the statute, because not importing any obligation to take or give the lease or tenancy (*q*). So also a request to purchase the residue a term of years in a house, and a promise to repay the money expended is outside the statute (*r*).

A contract of partnership is not brought within the statute merely by reason that the object of the partnership involves the possession and use of land; though in the result it may confer an interest in the real assets acquired under it (*s*). But a contract for a partnership in a mine belonging to one of the contracting parties, which would give the other party an interest in the mine, was held to be within the statute (*t*). Where the real property of a partnership is vested in the partners, for a legal or equitable estate, the interest of each partner is during the partnership an interest in land within the statute (*u*); and an agreement to withdraw from a partnership, importing that the retiring partner must assign to the continuing partners his share in the real assets, must be evidenced by writing. But if real estate be vested in trustees for the benefit of a partnership, and the partners, as such, have no interest except in a share of the profits made, as is the case in a cost book mining company, the interest of a partner is not an interest in land within the statute (*x*). Upon the dissolution of a partnership there is an implied trust for conversion of the assets into money, for the purpose, after paying the partnership debts, of distribution amongst the partners, and the share of each is considered as personal estate (*y*).

**Shares in
companies
holding land.**

Shares in incorporated bodies holding real estate for the purposes of their trade or business, are generally such as to give the shareholders no interest in the land, but only a share of the profits

(*p*) *Doublan v. Read* (1832), 1 L. J. K. B. 269; 3 B. & Ad. 899.

(*q*) *Mann v. Mann* (1874), 43 L. J. C. P. 241; *Angell v. Duke* (1875), 44 L. J. Q. B. 78; L. R. 10 Q. B. 174.

(*r*) *Boston v. Boston* (1903), 73 L. J. K. B. 17; (1904) 1 K. B. 124.

(*s*) *Dale v. Hamilton* 1846, 16 L. J. C. 126; 5 Hare, 359; *Re De Nicols* 1900, 69 L. J. C. 680; 1900 2 Ch. 410.

(*t*) *Coddick v. Skidmore* (1857), 27

L. J. C. 153; 2 De G. & J. 52.

(*u*) *Gray v. Smith* (1889), 59 L. J. C. 145; 43 Ch. D. 208.

(*v*) *Watson v. Spratley* (1854), 24 L. J. Ex. 53; 10 Ex. 222; *Powell v. Jessop* (1856), 25 L. J. C. P. 199; 18 C. B. 336; *Walker v. Bartlett* (1856), 25 L. J. C. P. 263; 18 C. B. 815.

(*y*) *Lake v. Coddock* (1732), 3 P. Wms. 158; 2 Wh. & T. L. C. 952. See the Partnership Act, 1890, s. 22.

made, and are therefore not within the statute *z*; and in some cases it is expressly provided by statute that the shares shall be personal estate and not of the nature of real estate *a*. Shares of the above kinds are not within the description of "goods" contained in sect. 62 of the Sale of Goods Act, 1893 *b*.

CA. V.
SECT. I.

SECTION 4. *Agreement that is not to be performed within the space of one year from the making thereof.*

This description comprises contracts which are in terms incapable of being completely performed within the year *c*, as a contract to take in a literary work to be published periodically in parts extending over more than a year, and to be paid for as the parts are delivered *d*; a contract to pay an annuity for five years *e*.—A contract of service for a term of more than a year is within the statute and must be evidenced by writing *f*; so a contract for a year's service, to commence at a future day *g*; but a contract for a year's service to commence the next day is not within the statute, because the day of making the contract is not reckoned *h*. Where the parties after a yearly hiring continue the service without express agreement, a fresh hiring for a year is implied from the expiration of the first year, and this implied fresh hiring is not within the statute *i*.—An agreement for a lease for more than a year, or for a year commencing at a future day is within the statute, and must be evidenced by writing; though an actual lease for a term within the exception of the 2nd section may be made by parol *k*; and an agreement for the sale of goods not to be performed within a year is also within the section, although there has been an acceptance and actual receipt of the goods by the buyer of part of the goods sold *l*.

Agreement
not to be
performed
within a year.

z *Bradley v. Holdsworth* (1838), 7 L. J. Ex. 153; 3 M. & W. 122; *Humble v. Mitchell* (1839), 9 L. J. Q. B. 29; 11 A. & E. 205.

a See the Companies Clauses Consolidation Act, 1845, s. 7; the Companies (Consolidation) Act, 1908, s. 22.

b See *post*, p. 174.

c *Peter v. Campton* (1673), Skinn. 353; 1 Sm. L. C. 303.

d *Randell v. Pennamond* (1869), 11 East, 112.

e *Swett v. Lee* (1811), 3 Man. & G. 452.

f *Gyand v. Richmond* (1816), 15 L. J. C. P. 180; 2 C. B. 835.

g *Bedain v. Rossiter* (1879), 18 L. J. Q. B. 362; 11 Q. B. D. 123.

h *Smith v. Gold Coast and Ashanti Explorers, Ltd.* 1903, 72 L. J. K. B. 235; 1903 1 K. B. 538.

i *Boston v. Collier* (1827), 5 L. J. O. S. C. P. 189; 1 Bing. 309.

k *Bolton v. Tinsley* 1836, 6 L. J. K. B. 45; 5 A. & E. 856.

l *Prestid Miners' Co. v. Garners, Ltd.* 1910, 79 L. J. K. B. 1113; (1910) 2 K. B. 776; on appeal, (1910) W. N. 176.

PART I.

Contract
which may
be performed
within the
year.

Contracts which may possibly be performed within the year are not within the statute: as a contract to pay a sum of money to a person on the day of his marriage, though the marriage did not take place within a year (*m*); a contract to leave money by will (*n*); and a promise by a person that his executor shall pay a sum of money (*o*). So an agreement between husband and wife for a separation, and for the husband to allow the wife a weekly sum for the maintenance of herself and children, was held not to be within the statute (*p*).

Contracts which may be performed within the year on one side only, though they cannot be performed within the year on the other side, are not within the statute (*q*); as a contract for the sale and assignment of a patent, to be paid for by instalments extending beyond a year, which may be performed by the seller within the year (*r*); or a contract between a landlord and tenant for the landlord to lay out 50*l.* in improvement of the premises, no time being fixed for so doing, and the tenant to pay 5*l.* a year in addition to the rent during the remainder of the term (*s*). Where an intending lessee, during the treaty for a lease for eight years, obtained from the intending lessor a verbal promise that he would kill down the game and not let the shooting during the tenancy, and the lease was afterwards executed, it was held by James and Mellish, L.J.J., that there was a binding collateral agreement, although the question of the Statute of Frauds was pointedly raised in argument (*t*). This decision was not brought to the attention of the Divisional Court in a recent case (*u*) in which it was held that writing is essential although the contract may be performed within a year by one of the parties.

A contract which in terms extends the period of performance beyond a year, is not taken out of the statute by reason that it may be defeated or put an end to within the year: as the contract for the hire of a carriage from a coachmaker for five years for an annual payment, but which by the custom of the trade is deter-

(*m*) *Peter v. Compton* (1673), Skinner, 353; 1 Sm. L. C. 303.

(*n*) *Fenton v. Emblers* (1762), 3 Burr. 1278; *Ridley v. Ridley* (1865), 31 L. J. C. 462.

(*o*) *Wells v. Horton* (1826), 5 L. J. O. S. C. P. 41; 4 Bing. 40.

(*p*) *Macgregor v. Macgregor* (1888), 57 L. J. Q. B. 591; 21 Q. B. D. 424.

(*q*) *Miles v. New Zealand Alford Estate* (1886), 55 L. J. C. 801; 32 Ch. D. 266.

(*r*) *Cherry v. Heming* (1819), 19 L. J. Ex. 63; 4 Ex. 631; *Smith v. Neale* (1857), 26 L. J. C. P. 143; 2 C. B. N. S. 67.

(*s*) *Donellan v. Read* (1832), 1 L. J. K. B. 269; 3 B. & Ad. 899.

(*t*) *Erskine v. Adeane* (1873), 42 L. J. C. 849; L. R. 8 Ch. 756.

(*u*) *Reese v. Jennings* (1910), 79 L. J. K. B. 1137; (1910) 2 K. B. 522.

Contracts
defeasible
within the
year.

minable at any time within that period on payment of a year's hire (*x*): a contract of service for a term of more than a year, though determinable by notice within a year (*y*).

CH. V.
SECT. I.

Contract for the sale of any goods for the price of ten pounds sterling or upwards.

The material provisions of the Sale of Goods Act, 1893, relating to the proof of contracts are contained in sect. 4, which in these terms: "(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." And by sect. 62 the expression "goods" includes all chattels personal other than things in action and money. . . . The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." These provisions replace sect. 17 of the Statute of Frauds and sect. 7 of the Statute of Frauds Amendment Act, 1828.

Contract for
the sale of
goods.

If no price be fixed in the contract to determine the value, it is a question of fact whether the goods sold are of the value of ten pounds, so as to bring the contract within the statute (*r*). A contract of sale at a certain price is not taken out of the statute by reason of the price being enhanced by the carriage and delivery of

Value of
the goods
sold.

(*r*) *Birch v. Liverpool (Earl)* (1829),
9 B. & C. 392.

Ex. 267; 1 H. & N. 81.

(*s*) *Harman v. Reye* (1856), 25 L. J.

(*y*) *Dobson v. Collins* (1856), 25 L. J.

C. P. 257; 18 C. B. 587.

PART I.

the goods at a certain place (*a*). But the employment of a carrier as an agent to buy goods, and to carry and deliver them to the employer is not a contract within the statute (*b*).

Emblements.

The inclusion of emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before or under the contract of sale, in the definition of goods is merely confirmatory of the older law (*c*).

Fixtures.

Where an outgoing tenant relinquishes his right to remove fixtures to the landlord or to an incoming tenant for a valuation, the contract is not a contract concerning an interest in land within sect. 4 of the Statute of Frauds, as before mentioned, nor is it apparently within sect. 4 of the Sale of Goods Act, 1893, if no severance of the chattels from the land be contemplated (*d*). Shares in a joint stock banking company are *chores in action* (*e*), and expressly excluded from the definition of "goods" in sect. 62, as set out above. For the same reason railway shares and scrip (*f*) and bonds of a foreign government (*g*) are not within the section.

Contracts for work and labour in making goods.

A contract for work and labour expended in making goods with the materials of the employer is not a sale of goods within the statute (*h*). A contract for a person to work up his own materials in making an article, and to deliver it completed, may be a contract for work and labour and the materials incident to the employment, or a contract for the sale of goods, according to the circumstances: thus a contract for contriving a machine for a certain purpose (*i*), a contract with a printer to print a book (*k*), are contracts for work and labour and materials, and not for the sale of goods. On the other hand, a contract for the manufacture and delivery of a machine (*l*), a contract with a miller for the delivery of flour (*m*), or with any manufacturer for the delivery of the produce of his manufacture (*n*), a contract to make a set of

Contracts for goods to be made.

(*a*) *Astley v. Emery* (1815), 4 M. & S. 262.

(*b*) *Cobbold v. Gaston* (1821), 2 L. J. O. S. C. P. 38; 1 Bing. 399.

(*c*) See *ante*, p. 167.

(*d*) See *ante*, p. 167.

(*e*) *Humble v. Mitchell* (1839), 9 L. J. Q. B. 29; 11 A. & E. 265; *Colonial Bk. v. Whimney* (1886), 56 L. J. C. 43; 11 Ap. Ca. 426.

(*f*) *Baillie v. Bell* (1846), 16 L. J. C. P. 18; 3 C. R. 284; *Knight v. Barber* (1846), 16 L. J. Ex. 18; 16 M. & W. 66.

(*g*) *Heseltine v. Siggers* (1848), 18 L. J.

Ex. 166; 1 Ex. 856.

(*h*) *Bayley, J., Atkinson v. Bell* (1828), 6 L. J. O. S. K. B. 258; 8 B. & C. 277.

(*i*) *Grafton v. Armistage* (1815), 15 L. J. C. P. 20; 2 C. B. 336.

(*k*) *Clay v. Yates* (1856), 25 L. J. Ex. 237; 1 H. & N. 73.

(*l*) *Atkinson v. Bell* (1828), 6 L. J. O. S. K. B. 258; 8 B. & C. 277.

(*m*) *Garbutt v. Watson* (1822), 5 B. & Ald. 613.

(*n*) *Wilks v. Atkinson* (1815), 6 Taunt. 11.

artificial teeth (*o*), a contract with an artist for a work of art (*p*), to be delivered when completed, are not contracts for work and labour, but for the sale of goods.

CH. I.
SECT. I.

A contemporaneous (*q*) purchase and sale of several articles, the value of which collectively is above ten pounds, although the value of each article may be less than ten pounds, may form, according to the circumstances, one contract or several. Where the prices are agreed upon with reference to taking several articles together, there is presumptively one contract including all; and such would be the presumption from a joint order for several articles, unless explained (*r*); and the same presumption is made where an order is given for goods comprising some ready made, and some to be made and delivered at a future time *s*. But where a person gave an absolute order for some goods, and at the same time made an offer for others, which was reserved for consideration, and afterwards the seller sent all the goods together, it was held that there was not one complete contract, and the buyer might accept the goods ordered, and refuse the rest *t*.—At a sale of goods by auction in lots there is *prima facie* a distinct contract in respect of each lot sold (*u*). The parties may subsequently combine the sales of the several lots by entering them together in writing as one contract *x*. In the case of a sale of land by auction in lots, there is also presumptively a distinct contract in respect of each lot sold (*y*); but as between vendor and purchaser, the purchaser of two or more lots may be entitled to insist upon a good title being shown to all the lots, if one or more of the lots cannot be profitably enjoyed without the other (*z*).

Contract
for sale of
several
articles.

Sale by
auction.

(*o*) *Lee v. Griffin* (1861), 30 L. J. Q. B. 252; 1 B. & S. 272.

(*p*) *Isaacs v. Hardy* (1881), 1 Cab. & E. 287.

(*q*) *Bigg v. Whisking* (1853), 14 C. B. 193.

(*r*) *Bulley v. Parker* (1823), 1 L. J. O. S. K. B. 229; 2 B. & C. 37; *Elliott v. Thomas* (1838), 7 L. J. Ex. 129; 3 M. & W. 170.

(*s*) *Scott v. Eastern Counties Ry.* (1813), 13 L. J. Ex. 14; 12 M. & W. 31.

(*t*) *Price v. Lea* (1843), 1 L. J. O. S.

K. B. 215; 1 B. & C. 150.

(*u*) Sale of Goods Act, 1893, s. 58; *Emmerson v. Helles* (1809), 2 Taunt. 38; *Ross v. Dormer* (Lord) (1832), 4 B. & Ad. 77.

(*x*) *Franklyn v. Lamond* (1847), 16 L. J. C. P. 221; 4 C. B. 637.

(*y*) *Walling v. Horwood* (1847), 12 Jur. 48.

(*z*) *Lewin v. Guest* (1826), 1 Russ. 325; *Dykes v. Blake* (1838), 7 L. J. C. P. 282; 4 Bing. N. C. 463. See *Pers v. Lambart* (1811), 7 Beav. 516.

CHAPTER V.

STATUTORY REQUIREMENTS.

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PART I.

Forms required by statute.

It is purposed here to treat first of the requirements of the Statute of Frauds and the Sale of Goods Act, 1893, respecting the note or memorandum in writing, and then to treat, in order, of the other modes of exception, namely, the acceptance and receipt of part of the goods sold, and the giving of something in earnest or in part payment. It may be mentioned that the statutory requirements respecting the note or memorandum in writing, prescribed by the 4th and 17th (the latter now replaced by the 4th section of the Sale of Goods Act, 1893) sections of the Statute of Frauds, were the same in effect (a). The formalities of writing and signature by the parties or their agents, required by the 1st and 3rd sections for the creation or assignment of estates and interests in land are expressed in similar terms (b).

Memorandum in writing.

If the parties have originally made their contract in writing, that writing alone contains the contract by virtue of their agree-

(a) *Jessel, M. R., Shadlow v. Cuttill* (1882), 51 L. J. C. 356; 20 C. D. 93; *Lucas v. Dixon* (1880), 58 L. J. Q. B. 161; 22 Q. B. D. 357; *Pence v.*

Gardner (1897), 66 L. J. Q. B. 457; (1897) 1 Q. B. 688.
(b) *Autu*, p. 157.

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ment to that effect (c); and, if signed by the party charged, it also supplies a sufficient note or memorandum of the contract for the purpose of the statute. If they have not made their contract in writing, the party seeking to charge the other with it must resort to some writing signed by him containing the terms of the contract charged, in order to satisfy the statute. If an original memorandum is lost, the contents may be proved by secondary evidence; and the construction of the documents so proved is for the court, as in the case of the original document (d). Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing in that it may be made at any time after the contract, or before the action; and any number of memoranda may be made, all being equally originals (e). But a memorandum made after the commencement of an action is not sufficient to maintain that action (f).

When to be made.

The following notes and memoranda have been held sufficient to satisfy the statute:—A letter, the contents of which express the terms of the contract, or refer to a document which expresses them (g); an invoice or bill of parcels signed by the party to be charged (h); a receipt containing the terms of the agreement, though not admissible as evidence of payment for want of a stamp (i); an order book of a tradesman containing a list of the articles bought or sold, and signed by the buyer or the seller, against whom it will be sufficient evidence, although he keeps the book in his own possession (k); a letter written and signed by one of the contracting parties addressed to his own agent, and containing the terms of the contract (l); the written and signed instructions delivered to the clerk of a telegraph office, in pursuance of which he sent a telegram referring to the offer of a contract and accepting it (m); a recital in a will (n) or a

Writings held sufficient.

- (c) *Int.*, p. 113.
(d) *Berwick v. Horstall* (1858), 27 L. J. C. P. 193; 4 C. B. N. S. 459; *Reed v. Price* (1909), 78 L. J. K. B. 1137; (1909), 2 K. B. 721.
(e) *Erle, J., Sweeney v. Archibald* (1851), 20 L. J. Q. B. 531; 17 Q. B. 107; *Bailey v. Sweeting* (1861), 30 L. J. C. P. 150; 9 C. B. N. S. 813; *Re Holland* (1902), 71 L. J. C. 518; (1902) 2 Ch. 360.
(f) *Lucas v. Dixon* (1889), 58 L. J. Q. B. 161; 22 Q. B. D. 357.
(g) *Bailey v. Sweeting* (1861), 30 L. J. C. P. 150; 9 C. B. N. S. 813; *Carr v. Hastings* (1881), 50 L. J. Q. B. 575; 7

- Q. B. D. 125.
(h) *Schneider v. Norris* (1814), 2 M. & S. 286; *Durwell v. Evans* (1862), 31 L. J. Ex. 537; 1 H. & C. 171.
(i) *Evans v. Prothero* (1852), 21 L. J. C. 772; 1 Do G. M. & G. 572.
(k) *Johnson v. Dodgson* (1837), 6 L. J. Ex. 185; 2 M. & W. 633; *Sart v. Baydillon* (1856), 25 L. J. C. P. 78; 1 C. B. N. S. 188.
(l) *Gibson v. Holland* (1865), 35 L. J. C. P. 5; L. R. 1 C. P. 1.
(m) *Godwin v. Francis* (1870), 39 L. J. C. P. 121; L. R. 5 C. P. 295.
(n) *Re Hoyle* (1892), 62 L. J. C. 182; (1893) 1 Ch. 81.

PART I.

Broker's sale
notes.

deed (*o*); an affidavit in Chancery proceedings concerning another matter, containing the terms of agreement (*p*); the minutes of a board meeting of a company signed by the chairman, containing an entry of a draft agreement, and of a resolution of the board that it should be signed (*q*).—The language of the decisions respecting the effect of bought and sold notes cannot be reconciled: these bought and sold notes are signed and delivered by the broker on behalf of his principals, and are, or should be, identical: if one of the notes be produced it is sufficient to charge the other party, whether he be charged as buyer or seller, as it will be presumed that the other agrees with it, merely substituting the word "bought" for the word "sold" or *vice versa* (*r*). If the broker has not entered, or signed a sufficient memorandum in his own book, and the notes differ in any material point there is no binding contract (*s*). But where the broker has made an entry of the contract in his own book and signed it, the better opinion is that there is sufficient to satisfy the statute, and the entry forms the ruling memorandum, whether there be bought and sold notes, or not, and any variance between the bought and sold notes is immaterial (*t*).

Memorandum
contained in
several
writings.

The note or memorandum may consist of several writings, if sufficiently connected by internal reference either direct or inferential; and extrinsic evidence is admissible to apply the references, and to identify the writings referred to (*u*). Thus a correspondence between the parties by letters sufficiently connected together by their contents, and containing or referring to documents containing the terms of the contract, constitutes a sufficient note in writing (*x*). A letter acknowledging an agreement according to

(*o*) *Re Holland* (1902), 71 L. J. C. 518; 1902) 2 Ch. 360.

(*p*) *Backhouse v. Young* (1856), 26 L. J. C. 157; 4 Drew. 1.

(*q*) *Jones v. Victoria Guaranty Dock* (1877), 46 L. J. Q. B. 219; 2 Q. B. D. 314.

(*r*) *Goss v. Albala* (1826), 5 L. J. O. S. K. B. 31; 6 B. & C. 117; *Porton v. Crafts* (1861), 33 L. J. C. P. 189; 16 C. B. N. S. 11.

(*s*) *Grant v. Fletcher* (1826), 5 B. & C. 436; *Grogson v. Rock* (1843), 4 Q. B. 787; *Sevenright v. Archibald* (1851), 20 L. J. Q. B. 529; 17 Q. B. 103.

(*t*) *Sevenright v. Archibald* (1851), 20 L. J. Q. B. 529; 17 Q. B. 103; *Thompson*

v. Gardner (1876), 1 C. P. D. 777.

(*u*) *Radway v. Wharson* (1857), 27 L. J. C. 16; 6 H. L. C. 238; *Jones v. Victoria Guaranty Dock* (1877), 46 L. J. Q. B. 219; 2 Q. B. D. 314; *Long v. M'liar* (1879), 18 L. J. C. P. 596; 4 C. P. D. 456; *Oliver v. Harding* (1889), 59 L. J. C. 255; 44 Ch. D. 205; *Taylor v. South* (1893), 61 L. J. Q. B. 331; 1893) 2 Q. B. 65. See *per* Holroyd, J., *Keworth v. Schofield* (1821), 2 L. J. O. S. K. B. 175; 2 B. & C. 915.

(*x*) *Jackson v. Love* (1822), 1 Bing. 9; *Porton v. Rust* (1872), 41 L. J. Ex. 173; L. R. 7 Ex. 279; *Wylson v. Brown* (1887), 56 L. J. C. 855; 34 Ch. D. 599.

"instructions" given to a solicitor, where parol evidence was admitted to identify the instructions (*g*). So a letter referring to "terms agreed upon" or "our arrangement," may be identified with a previous memorandum of terms (*z*); and a guarantee of "the promissory note" (*a*); and a letter referring to a memorandum of agreement, and supplying particulars in which the memorandum was deficient (*b*); and a letter referring to an invoice or bill of parcels sent upon a sale of goods, &c. A letter written after a sale by auction referring to the particulars or conditions of sale will charge the party with the conditions, though he did not sign them *d*. So a contract of sale of property and a separate plan may be incorporated by reference (*e*). An envelope and the letter which it encloses are sufficiently connected together to supply the necessary evidence under the statute (*f*).

Several writings cannot for this purpose be connected by extrinsic evidence only, without any internal reference or connection (*g*): as where a person signed his name in a book as a subscriber to a work to be published according to a printed prospectus, but the signed book contained no reference to the prospectus (*h*). So the conditions prepared for a sale by auction, will not be incorporated in the document signed, unless they are also annexed or referred to therein (*i*). So it was held not sufficient to connect two separate documents that they were sent in the same envelope, one signed and the other unsigned and headed "supplement," but without internal reference (*k*). But the statutory provisions are satisfied if two documents refer independently to the same parol agreement, and together express the terms of the agreement, though without reference to one another (*l*).

(*a*) *Ridgway v. Wharton* 1857, 27 L. J. C. 16; 6 H. L. C. 238.

(*b*) *Burmann v. James* (1868), L. R. 3 Ch. 508; *Care v. Hastings* (1881), 50 L. J. Q. B. 575; 7 Q. B. D. 125.

(*c*) *Shortt v. Cook* (1831), 3 L. J. K. B. 125; 1 A. & E. 57.

(*d*) *Allen v. Bennet* (1810), 3 Taunt. 169; *Coombs v. Wilkes* (1891), 61 L. J. C. 12; (1891) 3 Ch. 77.

(*e*) *Saunders v. Jackson* (1800), 2 B. & P. 238; *Wilkinson v. Evans* (1866), 2 L. J. C. P. 224; L. R. 1 C. P. 407.

(*f*) *Dobell v. Hutchinson* (1835), 4 L. J. K. B. 201; 3 A. & E. 355; *Filby v. Hoosell* (1896), 65 L. J. C. 852; (1896) 2 Ch. 737.

(*g*) *Hodges v. Horsfall* 1829, 1 Russ.

& M. 116; *New Valley Drainage Comtee. v. Dunkley* 1876, 1 Ch. D. 1.

(*h*) *Pearce v. Gardner* (1857), 66 L. J. Q. B. 157; (1897) 1 Q. B. 688.

(*i*) *Taylor v. Smith* (1893), 61 L. J. Q. B. 331; (1893) 2 Q. B. 65.

(*j*) *Boydell v. Drummond* (1809), 11 East, 142.

(*k*) *Cowley v. Watts* 1853, 22 L. J. C. 591; *Perce v. Caff* (1873), 13 L. J. Q. B. 52; L. R. 9 Q. B. 210; *Roskton v. Wharmore* (1878), 47 L. J. C. 629; 8 Ch. D. 467.

(*l*) *Kramheim v. Johnson* (1876), 45 L. J. C. 132; 7 Ch. D. 60.

(*m*) *Stables v. Watson* (1885), 51 L. J. C. 626; 28 Ch. D. 305.

PART I.

Contents of
the memo-
randum.

The note or memorandum, both under the 4th section of the Statute of Frauds and under the 4th section of the Sale of Goods Act, 1893, must contain all the material terms of the contract as made and charged, leaving none to be proved by parol evidence. The writing must sufficiently indicate the date when it was entered into and the contracting parties; it must express the consideration and the promise or obligation of the contract; and it must import the agreement of the party charged to the terms expressed (*m*).

The parties
to the
contract.

The writing is insufficient if it does not name (*n*) both the contracting parties, or describe them in such a manner as to identify them. Thus a letter addressed "sir," but not giving any name or description of the party intended, is insufficient (*o*); as is also a memorandum or offer of an agreement for a sale or a lease of land signed by the proposed purchaser or lessee, but in which the proposed vendor or lessor is not designated (*p*). A memorandum in the terms:—"A. agrees to buy the marble purchased by B. &c.," was held insufficient as not mentioning a seller, the name B. being used only to identify the goods (*q*). But a memorandum of sale containing the names of two parties, without specifying which was buyer and which seller, was held sufficient as applied to the circumstances, from which it appeared that one was a dealer in the article sold and the other a buyer (*r*). And where the buyer wrote his name in the "order book" of the seller at the head of an entry of the articles bought, and the book contained the name of the seller on the fly-leaf at the beginning, it was held sufficient (*s*). It has also been held that an envelope and a letter which is shown by evidence to have been enclosed in it, are so connected together that the envelope may be used to supply the name of one of the parties, but the writing will be insufficient without more to charge the addressee with the contract (*t*). An agent may contract on behalf of his principal, or in his own name without

Description
as principal.

(*m*) *Rann v. Hughes* (1778), 4 Bro. P. C. 27; 7 T. R. 350 (*n*); *Hain v. Watters* (1804), 5 East, 10; 1 Sm. L. C. 310; *Van Praagh v. Everidge* (1903), 72 L. J. C. 260; (1903) 1 Ch. 434.

(*n*) *Graham v. Musson* (1839), 8 L. J. C. P. 321; 5 Bing. N. C. 603; *Graham v. Fretwell* (1841), 11 L. J. C. P. 11; 3 Man. & G. 368.

(*o*) *Williams v. Lake* (1859), 29 L. J. Q. B. 1; 2 E. & E. 349; *Carr v. Lynch* (1900), 69 L. J. C. 345; (1900) 1 Ch. 613.

(*p*) *Williams v. Jordan* (1877), 46 L. J.

C. 681; 6 Ch. D. 517; *Coombs v. Walkes* (1891), 61 L. J. C. 42; 1891) 3 Ch. 77; *Filby v. Hoare* (1896), 65 L. J. C. 852; (1896) 2 Ch. 737.

(*q*) *Vandenbergh v. Spooner* (1866), 35 L. J. Ex. 201; L. R. 1 Ex. 316.

(*r*) *Norrell v. Radford* (1867), 37 L. J. C. P. 1; L. R. 3 C. P. 52.

(*s*) *Sayl v. Boardillon* (1856), 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(*t*) *Kronheim v. Johnson* (1876), 45 L. J. C. 132; 7 Ch. D. 60; *Pearce v. Gardiner* (1897), 66 L. J. Q. B. 457; (1897) 1 Q. B. 688.

reference to his principal; in either case it is in general open to show by parol evidence who is the principal, for the purpose of charging him or entitling him to sue, according to the law of principal and agent, notwithstanding the statute (*u*).—A memorandum of sale describing a party merely as "vendor" is not sufficient to indicate or identify any person, although the purchaser at the time of making the contract knew who the vendor was (*x*). A description of the vendor as "the proprietor," "owner," or "mortgagee" of the property is sufficient to identify him and satisfies the statute (*y*); but the description of a vendor as "landlord" is not sufficient (*z*). A description as "the legal personal representative" of a person named (*a*), or "the trustee selling under a trust for sale" (*b*) is sufficient. A memorandum of sale in which it appeared that the vendors were a company in possession of the property, though not otherwise disclosing the name or identity, was held sufficient (*c*).

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SECT. II.

Description
as vendor.

The memorandum must sufficiently express the consideration for the promise (*d*). A writing containing a promise to serve in a trade or employment for a given time, without an undertaking to employ or any other consideration, was held insufficient (*e*). A memorandum of sale not mentioning a price imports a sale at a reasonable price and is sufficient, if such was the contract in fact made (*f*). So, an order for goods "on moderate terms" is a sufficient memorandum of a contract to that effect (*g*). A memorandum of an agreement to buy goods, signed by the buyer only, is sufficient to charge him, because it imports the correlative consideration of selling (*h*). And upon this principle either the

The con-
sideration.

(*u*) *Bateman v. Phillips* 1812, 15 East, 272; *Hood v. Barrington* 1868, L. R. 6 Eq. 218; *Willes, J., Cooper v. Cook* 1868, L. R. 3 C. P. at p. 200; *Fidly v. Housell* 1896, 65 L. J. C. 852; (1896), 2 Ch. 737. And see *Peterson v. Gaudasque* 1812, 15 East, 62; 2 Sm. L. C. 355.

(*x*) *Potter v. Duffield* 1874, 43 L. J. C. 472; L. R. 18 Eq. 4; *Jurcott v. Hunter* (1886), 56 L. J. C. 111; 31 Ch. D. 182.

(*y*) *Sch. v. Lambert* (1876), 43 L. J. C. 470; L. R. 18 Eq. 1; *Rossiter v. Miller* 1878, 48 L. J. C. 10; 3 Ap. Ch. 1124.

(*z*) *Coombs v. Welkes* 1891, 61 L. J. C. 12; (1891) 3 Ch. 77.

(*a*) *Thack v. Topham* 1877, 37 L. T. 308.

(*b*) *Cathens v. King* 1876, 46 L. J. C. 381; 5 Ch. D. 660.

(*c*) *Commins v. Scott* (1875), 44 L. J. C. 553; L. R. 20 Eq. 11.

(*d*) *Wain v. Walters* 1801, 5 East, 10; 1 Sm. L. C. 310.

(*e*) *Lox v. Whitcomb* 1828, 6 L. J. O. S. C. P. 213; 5 Bing. 34; *Sykes v. Derson* 1839, 8 L. J. Q. B. 102; 9 A. & E. 693.

(*f*) *Sale of Goods Act*, 1893, s. 8. *Howdy v. McLane* (1834), 3 L. J. C. P. 162; 10 Bing. 482; *Valpy v. Gibson* (1847), 16 L. J. C. P. 241; 4 C. B. 837.

(*g*) *Ashcroft v. Morrin* (1842), 11 L. J. C. P. 265; 1 Man. & G. 450.

(*h*) *Egerton v. Mathews* (1895), 6 East, 307.

PART I.

The consideration of
guarantees.

bought or the sold note of a broker acting for both parties is sufficient to charge either party (*i*).—Exception has been made of guarantees or “promises to answer for the debt, default, or miscarriages of another person,” by the Mercantile Law Amendment Act, 1856, s. 3, which enacts that no such promise shall be deemed invalid to support an action “by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.” Under this Act the consideration of the contract may be proved by parol evidence; but the promise must still be complete in the writing, independently of the parol evidence admitted to prove the consideration (*k*). And the written guarantee, though not containing the consideration, is subject to an agreement stamp (*l*). If the guarantee is also an agreement not to be performed within a year, it seems the consideration must appear in the writing (*m*).

The promise
charged.

The memorandum must express the promise or obligation of the contract, either in direct terms or by reference, with sufficient certainty to enable the court to ascertain and enforce it (*n*). A memorandum of an agreement to grant a lease is insufficient, in which the duration of the term is not mentioned or ascertainable by inference or construction (*o*); or in which the commencement of the term cannot be ascertained (*p*); nor can any presumption be drawn as to the commencement of the term merely from the date of the agreement (*q*). A memorandum of a sale of land not limiting the interest to be conveyed would be sufficient as *prima facie* importing the whole interest of the vendor, if such was in fact the contract (*r*); but an agreement for the sale of a leasehold interest to be effected by means of an underlease, without limiting the reversion to be reserved, was held insufficient (*s*).—So the memorandum of a sale must describe the subject of sale sufficiently to enable the court to identify it. Descriptions of the

The property
sold.

(*i*) *Parton v. Crofts* (1864), 33 L. J. C. P. 189; 16 C. B. N. S. 11.

(*j*) *Holmes v. Mitchell* (1859), 28 L. J. C. P. 301; 7 C. B. N. S. 331.

(*k*) *Glover v. Hackett* (1857), 26 L. J. Ex. 416; 2 H. & N. 487.

(*l*) See *Morrell v. Coran* (1877), 47 L. J. C. 73; 7 Ch. D. 151.

(*m*) *Cor v. Middleton* (1851), 23 L. J. C. 618; 2 Drew. 209.

(*n*) *Fitzmaurice v. Boyley* (1860), 9 H. L. C. 78; *Austen v. Newham* 1906, 75 L. J. K. B. 563; (1906) 2 K. B. 167.

(*p*) *Blair v. Sutton* 1817, 3 Mer. 237; *Re Lander and Bagley* 1892, 61 L. J. C. 707; (1892) 3 Ch. 41.

(*q*) *Marshall v. Berridge* (1882), 51 L. J. C. 329; 19 Ch. D. 233; *Rock Portland Cement Co. v. Wilson* (1883), 52 L. J. C. 214.

(*r*) *Boyer v. Cooper* (1813), 11 L. J. C. 287; 2 Ha. 408; *Southern v. Harriman* (1866), 11 W. R. 487.

(*s*) *Dobbing v. Evans* (1867), 36 L. J. C. 474. See *Wood v. Beard* (1876), 46 L. J. Ex. 100; 2 Ex. D. 30.

subject of sale as "the mill property" (*t*); as "The Jolly Sailor, offices, &c." (*u*); and as "the house, &c.," or "Mr. O.'s house" (*x*); and as "the property sold at the Sun Inn" (*y*), have been held sufficient. Letters concerning the sale of a colliery and referring to the "property" were held not to be a sufficient memorandum of a contract charged for the sale of the colliery, including the plant, machinery and effects (*z*). A memorandum of sale of certain articles to be supplied "complete" was held sufficient, parol evidence being admissible to apply the term "complete" to the subject and circumstances of the contract (*a*).

The note or memorandum must show the agreement of the party to the terms charged. A letter refusing to sign an agreement the draft of which had been previously agreed upon was held insufficient (*b*). A letter referring to a previous memorandum of terms and withdrawing consent to it, written while the matter still rested in negotiation, is insufficient (*c*). A letter enclosing a draft conveyance, undated and unsigned, which contained the recital of a contract of sale, was held insufficient, because the proposed deed had no operation until executed, and therefore was no admission of an existing contract (*d*). But a proposal or memorandum of terms signed by the party charged, and showing his consent, is sufficient, though the acceptance or consent of the other party is proved by parol only (*e*).—If the writing admits the contract charged, it is immaterial that it also repudiates liability for an alleged reason which does not affect the validity of the contract (*f*). A letter admitting a contract as stated, but asserting a construction according to which the party charged would not be liable, is sufficient to prove the contract, and the liability will depend upon the true construction (*g*). Upon the same principle a letter admitting the contract, but disputing the breach, is sufficient (*h*). And a letter admitting the purchase of goods sent according to an invoice, but

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Agreement
of party
charged.

Memorandum
denying
liability.

(*t*) *McMurray v. Spicer* (1868), 37 L. J. C. 505; L. R. 5 Eq. 536.

(*u*) *Naylor v. Goodall* (1877), 47 L. J. C. 53.

(*x*) *Ogilvie v. Fuljame* (1817), 3 Mer. 53; *Owen v. Thomas* (1834), 3 L. J. C. 205; 3 M. & K. 353.

(*y*) *Shardlow v. Cotterill* (1882), 51 L. J. C. 353; 20 Ch. D. 90.

(*z*) *Fale of Neath Coll. v. Furness* (1876), 45 L. J. C. 276.

(*a*) *Sart v. Bourdillon* (1856), 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(*b*) *Wood v. Midgley* (1854), 23 L. J. C. 553; 5 De G. M. & G. 41.

(*c*) *Warner v. Willington* (1856), 25 L. J. C. 662; 3 Drew. 523.

(*d*) *Munday v. Asprey* (1879), 49 L. J. C. 216; 13 Ch. D. 855.

(*e*) *Ross v. Pidsley* (1865), 35 L. J. Ex. 218; L. R. 1 Ex. 342.

(*f*) *Bailey v. Sweeting* (1861), 30 L. J. C. P. 150; 9 C. B. N. S. 812.

(*g*) *Burton v. Rust* (1872), 41 L. J. Ex. 173; L. R. 7 Ex. 279.

(*h*) *Jackson v. Lowe* (1822), 1 Bing. 9.

PART I.

Memorandum
varying from
contract.

refusing to accept or pay for them by reason of the goods being damaged in the transit (*i*). But directions respecting the route by which goods are to be delivered relate to the mode of performance, and not to the substance of the contract, and therefore need not be in writing (*k*).

The written memorandum must also agree with the contract charged, without leaving any material term or variation to be supplied by parol evidence. An agreement for a lease simply, is not a sufficient memorandum of a contract to take a lease with restrictive covenants (*l*). A memorandum of a sale of goods not mentioning a price, and therefore presumptively importing a reasonable price, is not sufficient to charge a contract at a fixed price, or at a price to be fixed in a manner agreed upon (*m*). Letters agreeing to buy an estate at a stated price, presumptively to be paid in one sum, are not a sufficient memorandum of a contract to pay the price by instalments (*n*). At a sale by auction an entry made of the lot purchased and the price is not sufficient to include the conditions of sale (*o*). A broker's sale note in absolute terms is not a sufficient note of a sale in fact made upon conditions as to quality (*p*). A letter admitting a sale of goods as charged, but asserting an additional stipulation for delivery at a certain time (*q*); or asserting a condition as to quality (*r*); or asserting that the goods were bought by sample (*s*), is not sufficient. But a mere error in the description of the property, or other such mistake as would be matter for rectification, is not material to the sufficiency of the memorandum of agreement (*t*).

—And where the writing is charged as a written contract, and therefore exclusively binding, it is open to the party charged to dispute the agreement to it as such, and to show that it does not

i *Wilkinson v. Evans* 1866, 35 L. J. C. P. 221; L. R. 1 C. P. 497.

k *Erle, C. J.*, *Wilkinson v. Evans* 1866, 35 L. J. C. P. 221; L. R. 1 C. P. 107; *Leather Cloth Co. v. Hieronymus* 1874, 11 L. J. Q. B. 54; L. R. 10 Q. B. 110.

l *Swilling v. Thomas* 1874, 43 L. J. C. 506; L. R. 17 Eq. 303.

m Sale of Goods Act, 1893, s. 8; *Archel v. Levy* (1834) 3 L. J. C. P. 98; 10 Bing. 276; *Hoodin v. McLaine* (1834), 3 L. J. C. P. 102; 10 Bing. 182.

n *Cairns v. C. H. Bessy v. H. Bessy* 1879, 48 J. C. 816; 4 Ap. Ca. 317.

o *Peters v. Corf* 1873, 13 L. J. Q. B. 52; L. R. 9 Q. B. 210.

p *Pitts v. Beckett* (1845), 14 L. J. Ex. 358; 13 M. & W. 743.

q *Cooper v. Smith* (1812), 15 East, 103; *Richards v. Porter* (1827), 6 L. J. O. S. K. B. 175; 6 B. & C. 437.

r *Smith v. Newman* (1829), 7 L. J. O. S. K. B. 296; 9 B. & C. 561.

s *Archer v. Bagges* (1850), 20 L. J. Ex. 51; 5 Ex. 625.

t *Re Boudier* (1876), 46 L. J. Bk. 11; 4 Ch. D. 244; *Johnson v. Bragge*, (1900) 70 L. J. C. 11; 1901 1 Ch. 28.

express the contract in fact made (*u*). "The statute does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*x*); as where it is contained in letters forming part of a correspondence before the negotiation is completed (*y*).

CR. V.
SECT. II.

The memorandum must be signed by the party charged or by his agent (*z*). The insertion of the name in any part of the writing in a manner to "authenticate the instrument" is sufficient (*a*); as in the case of a memorandum or letter written in the third person (*b*); or with a printed heading "Memorandum from A. B." (*c*); or a telegram with the name of the sender at the head (*d*). An entry of a sale written by the party in a book of his own stating his name as buyer was held sufficient to charge him (*e*); so an invoice or bill of parcels delivered by the seller to the buyer, in which the seller's name appeared at the commencement as seller (*f*).—It matters not for what purpose the signature was put, if in fact it authenticates the document (*g*). The signature of the chairman of a board of directors to the minutes of a meeting in which the agreement is entered is sufficient (*h*). And it has been said that if a party to a written memorandum sign as witness with knowledge of the contents, he may be charged with an agreement recited or referred to in the document (*i*). But a formal agreement commencing with the names of the parties, and concluding "as witness our hands," without any signatures appended, was held insufficient, because intended to be signed by subscription only (*k*). And where the

Signature of
the party
charged.

(*u*) *Lockett v. Nicklin* (1850), 19 L. J. Ex. 403; 2 Ex. 93. See *ante*, p. 123.

(*x*) *Selborne, L. C., Jervis v. Beridge* (1873), 42 L. J. C. 518; L. R. 8 Ch. 351; *Hussey v. Horne Payne* (1880), 48 L. J. C. 816; 4 Ap. Ca. 323.

(*y*) *Bristol, Cardiff and Swansea Grated Bread Co. v. Muggs* (1890), 59 L. J. C. 472; 44 Ch. D. 616.

(*z*) See *post*, p. 187.

(*a*) *Abinger, C. B., Johnson v. Dodgson* (1837), 6 L. J. Ex. 185; 2 M. & W. 659; *Chelmsford, L. C., and Id. Westbury, Caton v. Caton* (1867), 36 L. J. C. 886; L. R. 2 H. L. 127.

(*b*) *Ogilvie v. Poljanbe* (1817), 3 Mer. 53; *Proport v. Parker* (1830), 1 Russ. & M. 625; *Bleakley v. South* (1810), 11 Sim. 150.

(*c*) *Tierret v. Gripps* (1879), 48 L. J. C. 567.

(*d*) *Gudwin v. Francis* (1870), 39 L. J. C. P. 121; L. R. 5 C. P. 295.

(*e*) *Johnson v. Dodgson* (1837), 6 L. J. Ex. 185; 2 M. & W. 653.

(*f*) *Schneider v. Norris* (1811), 2 M. & S. 286.

(*g*) *Re Hoyle* (1892), 62 L. J. C. 182; (1893), 1 Ch. 81.

(*h*) *Jones v. Victoria Graving Dock* (1877), 46 L. J. Q. B. 219; 2 Q. B. D. 311.

(*i*) *Welford v. Brazely* (1747), 3 Atk. 504. But see *Gosbell v. Archer* (1834), 4 L. J. K. B. 78; 2 A. & E. 509; and *ante*, p. 123.

(*k*) *Hubert v. Treherne* (1842), 11 L. J. C. P. 78; 3 Man. & G. 743.

PART I.

Acknowledgment of signature.

name occurs in the document only for a particular purpose, or with reference to a part only, and not as authenticating the whole, it is not sufficient (*l*).—A signature to a memorandum of terms which is afterwards altered may be made sufficient by acknowledgment of it when the contract is complete; a final acceptance operates presumptively as an acknowledgment of the previous signature, and the state of the document when finally accepted may be shown by parol evidence (*m*). Upon the same principle alterations in a complete and signed contract, made by consent of the parties, may be considered as authenticated by the existing signatures, if so intended (*n*).

Mode of signature.

The statute does not in terms require signing by name, signing may be by a mark (*o*); or by a surname without a christian name (*p*); but it is doubtful if initials alone can be described as a "signature" (*q*). A mere description of the person without a signature, as in a letter subscribed only "your affectionate mother," is not sufficient (*r*). The signature may be printed, as in the heading of a bill of parcels (*s*), provided the circumstances show a recognition of it as a signature (*t*); or it may be impressed with a stamp (*u*). A document in print or in ink may be signed in pencil; but it must appear that the pencil writing was intended as a signature, and not merely as a deliberative memorandum (*x*).—A deed is sufficiently executed by sealing and delivery, and does not require to be signed merely because it contains a contract within the Statute of Frauds (*y*).

Memorandum signed by one party only.

A memorandum signed by the party charged is sufficient, although there is no signed writing upon which to charge the other party: for the statute prevents an action being brought only where there is no writing signed by the party to be charged; and a party may be thus chargeable with a contract on which the remedy on his

l *Thompson v. Gilgall* (1818), 2 H. L. C. 131; *Caton v. Caton* (1867), 36 L. J. C. 886; L. R. 2 H. L. 127.

m *Stewart v. Edwards* (1874), 13 L. J. C. P. 204; L. R. 9 C. P. 311.

n *Black v. Gompert* (1852), 21 L. J. Ex. 278; 7 Ex. 862.

o *Baker v. Denney* (1838), 7 L. J. Q. B. 137; 8 A. & E. 94; *Harrison v. Etris* (1842), 11 L. J. Q. B. 197; 3 Q. B. 117.

p *Orleis v. Fuldum* (1817), 3 Mer. 53.

q See *Harbert v. Morau* 1827, 5

L. J. O. S. C. P. 56; 12 Moo. 216; *Savet v. Lee* (1841), 3 Man. & G. 452; *Chichester v. Cobb* (1866), 14 L. T. 133.

r *Selby v. Selby* (1817), 3 Mer. 2.

s *Schneider v. Norris* (1811), 2 M. & S. 286.

t *Touret v. Cripps* (1879), 18 L. J. C. 567.

u See *Bennett v. Brauffitt* (1867), 37 L. J. C. P. 25; L. R. 3 C. P. 28; *Reg. v. Cooper* (1890), 59 L. J. Q. B. 265; 24 Q. B. 533.

x *Lucas v. Jams* (1849), 18 L. J. C. 329; 7 Hare, 410.

y See *ante*, p. 90.

part would fail for want of evidence to satisfy the statute (*z*). It is sufficient for the party charged to have signed the proposal of an agreement which the other party has accepted verbally (*a*); and where a written and signed offer is expressed in the alternative, a verbal acceptance of one alternative is sufficient (*b*); but if it appears that the party charged signed only conditionally upon the other party binding himself by a signature, there is no contract unless the latter has signed (*c*). A party by bringing an action upon a contract admits the alleged contract to be binding against himself; and as he cannot be heard to disaffirm any part of the contract on which he is suing, he must perform all such acts on his part as are stipulated for as conditions precedent to the liability of the defendant (*d*).

CH. V.
SECT. II.

The memorandum may be signed by an agent of the party charged. The 1st and 3rd sections of the Statute of Frauds expressly require the agent to be authorised by writing: under the 4th and 17th sections the agent may be authorised without writing (*e*); and a written authority does not seem to be required by the 4th section of the Sale of Goods Act, 1893. An agent may not delegate even the mere act of signing, unless such special circumstances exist as to lead to the inference that the principal intended that the agent was to have that power (*f*); as where the person appointed agent was a marksman, and held the top of the pen whilst another person wrote his name (*g*). Standing by without objection to the deputy acting will in general be taken as an assent to the delegation of authority (*h*). And in all cases the subsequent ratification by the principal of the signature of an agent is equivalent to a prior authority (*i*). The authority given

Signature by
agent.

House and
estate agent.

z *Leach v. Freeman* (1801), 9 Ves. 351; *Leach v. Mathews* (1805), 6 East. 307; *Leathrop v. Bryant* (1836), 5 L. J. C. P. 217; 2 Bing. N. C. 735; *Liverpool Borough Bank v. Echels* (1859), 28 L. J. Ex. 122; 1 H. & N. 139.

a *Russ v. Puckstep* (1866), 35 L. J. Ex. 218; L. R. 1 Ex. 312.

b *Lover v. Kuffler* (1901), 70 L. J. C. 395; 1901, 1 Ch. 543.

c *Moore v. Campbell* (1854), 23 L. J. Ex. 310; 10 Ex. 323. See *Abbleton v. Archer* (1884), 54 L. J. Q. B. 12; 14 Q. B. D. 1.

d *Russ v. Puckstep* 1866, 35 L. J. Ex. 218; L. R. 1 Ex. 312; *Baker v. Yorkshire Fur & Lfz Assn.* (1891),

61 L. J. Q. B. 838; (1892, 1 Q. B. 141.

e *Person, Emerson v. Hells* (1809),

2 Taunt. 46; *Tindal, C. J., Aechal v. Levy* 1831, 3 L. J. C. P. 98; 10 Bing. 378; *Hard v. Pilling* (1869), 38 L. J. C. 718; L. R. 4 Ch. 548.

f *Bell v. Balls* (1897), 66 L. J. C. 397; 1897, 1 Ch. 663.

g *Hobbs v. Langley* (1811), 11 L. J. C. 17; 1 Y. & C. Ch. 175.

h *Bird v. Boulter* (1833), 4 B. & Ad. 143; *Sims v. Langley* (1894), 63 L. J. C. 535; 1894, 2 Ch. 318.

i *Machon v. Duen* (1828), 6 L. J. O. S. C. P. 181; 1 Bing. 722. See post, p. 319.

- Part I.** to a house and estate agent to procure a purchaser for property; or an authority given to an agent to receive applications "to treat and view"; or an authority "to act as agent in and about the purchase," is held not to import authority to sign a contract of sale (*k*). But where an owner of real estate gives instructions to an agent to sell property for him, and agrees to pay a commission on the purchase price, the agent is authorised to sign a contract of sale (*l*).—A solicitor has no general authority to sign a contract for his client; and an authority given to a solicitor to prepare and send a formal draft contract of a prior verbal agreement to the purchaser was held not to authorise him to sign for the vendor; nor to bind the vendor by a signature to a letter enclosing the draft contract and stating the terms of agreement (*m*).—A broker, being authorised to contract by the custom of trade, has authority to charge his principal by signing a sale note within the scope of his commission (*n*).—An auctioneer by the general usage of public auctions is agent for both parties to sign a memorandum of the sale; and the buyer by giving his name presumptively authorises the auctioneer to sign it (*o*). "But in order to make a valid contract, the document the auctioneer signs on behalf of the buyer must contain all the terms of the contract, the contract being, in fact, subject to the conditions contained in the catalogue, and the purchase being at the price noted at the time" (*p*). The auctioneer must sign the memorandum, if not as he knocks down the property or lot, at any rate within a short delay (*q*). The authority of an auctioneer does not extend beyond the auction; and upon a subsequent sale by private contract of unsold lots, though upon the same conditions as at the auction, he retains no authority to charge the buyer by signing (*r*). Also a private arrangement between the seller and buyer as to the mode of payment supersedes the authority of the auctioneer to bind the buyer in that respect by
- Solicitor.**
- Broker.**
- Auctioneer.**

k. Godwin v. Bond (1868), 39 L. J. C. F. 121; L. R. 5 C. P. 299; *Hammer v. Bond* (1871), 44 L. J. C. 53; L. R. 19 Eq. 108; *Yale of North Coll. v. Furness* (1876), 45 L. J. C. 276.

l. Rosenbaum v. Nelson (1900), 69 L. J. C. 569; (1900) 2 Ch. 267.

m. Smith v. Webster (1876), 45 L. J. C. 528; 3 Ch. D. 49.

n. Green v. Affido 1826, 5 L. J. O. S. K. B. 31; 6 B. & C. 117; *Sierowright v. Archibald* (1851), 20 L. J. Q. B. 529;

17 Q. B. 103; *Thompson v. Gardner* 1876, 1 C. P. D. 777.

o. Farnham v. Hoels (1809), 2 Taunt. 38; *White v. Frost* (1811), 4 Taunt. 209.

p. Blackburn, J., Perce v. Giff 1873, 43 L. J. Q. B. 52; L. R. 9 Q. B. 214.

q. Bell v. Bells (1897), 66 L. J. C. 397; (1897) 1 Ch. 663.

r. Moss v. Carr (1856), 26 L. J. Ex. 39; 1 H. & N. 481.

signing the conditions of sale (*s*). And when the seller knows that the buyer is contracting as agent only without any intention of binding himself, the seller could not charge him personally upon the signature of the auctioneer (*t*).—An auctioneer's clerk, as such, has not the same general authority; but where he is openly employed at the auction to take down the names of the buyers without objection from them, such an authority may be inferred (*u*). The signature of the auctioneer's clerk merely "as witness" to the signature of the purchaser will not charge the vendor (*x*). The instructions given at a telegraph office to transmit a message in the usual way is a sufficient authority to the clerk to sign and deliver the message, so as to charge the party sending it with a contract offered or accepted in the message (*y*).

Ch. V.
Sect. 11.

Auctioneer's
clerk.

Telegraph
clerk.

Where there are only two contracting parties, one of them cannot act as agent for the other for the purpose of signing (*z*), and therefore, although an auctioneer can in general sue a buyer in his own name, he cannot do so upon a contract which he has himself signed as agent for the buyer (*a*). But the same person may be authorised to act as agent to sign for both the contracting parties, either presumptively from the general character of the agency, as with brokers and auctioneers as above stated, or he may be specially or impliedly authorised by both parties (*b*). Accordingly, the clerk of an auctioneer vendor may sign the name of the purchaser to the contract or memorandum, and thus make an enforceable contract between them (*c*). Where the agent of the seller entered the names of both the parties in a memorandum of the sale which he then delivered to the buyer, it was held that the mere receipt and acceptance of the memorandum by the buyer was no evidence of authority for the signature on his part (*d*). But under like circumstances, where the party on receiving the memorandum requested the agent to alter it, and then accepted

One party
signing for
the other.

Same person
agent for
both parties

(*s*) *Bartlett v. Parnell* (1836), 5 L. J. K. B. 169; 4 A. & E. 792.

(*t*) See *Williamson v. Burton* (1862), 31 L. J. Ex. 170; 7 H. & N. 899.

(*u*) *Bird v. Boulter* (1833), 4 B. & Ad. 443; *Sims v. Landray* (1891), 63 L. J. C. 535; (1894) 2 Ch. 318; *Bell v. Bulls* (1897), 66 L. J. C. 397; (1897) 1 Ch. 663.

(*x*) *Goshell v. Archer* (1834), 1 L. J. K. B. 78; 2 A. & E. 500.

(*y*) *Godwin v. Francis* (1870), 39 L. J. C. P. 121; L. R. 5 C. P. 295.

(*z*) *Faybrother v. Simmonds* (1822), 5 B. & Ad. 333; *Sharman v. Brandt* (1871), 10 L. J. Q. B. 312; L. R. 6 Q. B. 720.

(*a*) *Faybrother v. Simmonds* (1822), 5 B. & Ad. 333.

(*b*) See *ante*, p. 188; *Henderson v. Barnwell* (1827), 1 Y. & J. 387.

(*c*) *Bird v. Boulter* (1833), 4 B. & Ad. 443; *Flint v. Wadding* (1852), 22 L. J. C. 92; 9 Ha. 618.

(*d*) *Murphy v. Boese* (1874), 44 L. J. Ex. 40; L. R. 10 Ex. 126.

PART I.

Revocation
of authority
to sign.

it in its altered state, he was taken to have acknowledged an authority to sign for him (*e*). Where the buyer of goods, after receiving the broker's bought note, repudiated the contract merely upon the ground that it was not signed, he was held to have admitted the authority to make the contract, which might then be proved by the sold note, or by the signed entry in the broker's book (*f*). Where the buyer requested the agent of the seller to enter and sign a note of the contract in the buyer's book, it was held that the request to the agent applied only to charging his own principal as seller, and not to sign also for the buyer (*g*).

The authority may be revoked at any time before signing: as in the case of a broker the authority may be revoked before signing the sale note, though the terms of sale have been agreed upon (*h*); and in the case of an insurance broker before signing the policy, though the underwriter has signed the slip from which the policy is to be drawn (*i*): in the case of an auction sale it does not appear to be settled whether the authority of an auctioneer to sign the catalogue or a memorandum can be revoked after the lot has been knocked down to the buyer (*k*).

Agent
signing as
principal.

If the agent be duly authorised, the signature of the name of the agent is sufficient to charge the principal (*l*). If the contract be made in the name of the agent, the unnamed principal may claim the benefit of it and may be charged with it, subject to the equities subsisting in each case between the party charged and the agent, according to the general law of principal and agent (*m*). "If a written contract be made in this form, 'A. B. agrees to sell Blackacre to C. D. for 1,000*l*.'; then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract; and there is a memorandum of the agreement in writing sufficient to satisfy the Statute of Frauds" (*n*). Where the agent having contracted

(*e*) *Durrell v. Evans* 1862, 31 L. J. Ex. 337; 1 H. & C. 174.

(*f*) *Thompson v. Gardiner* (1876), 1 C. P. P. 777.

(*g*) *Graham v. Masson* 1839, 8 L. J. C. P. 324; 5 Bing. N. C. 603; *Graham v. Fretwell* (1841), 11 L. J. C. P. 11; 3 Man. & G. 368.

(*h*) *Farmer v. Robinson* (1805), 2 Camp. 339, n.

(*i*) *Warwick v. Stale* (1811), 3 Camp. 127.

(*k*) See *Doy v. Wells* 1861, 30 Beav. 220; *Bell v. Balls* (1897), 66 L. J. C.

397; (1897), 1 Ch. 663. See *post*, p. 331.

(*l*) *White v. Proctor* (1811), 1 Taunt. 209; *Trueman v. Loder* (1810), 9 L. J. Q. B. 165; 11 A. & E. 589; *Dale v. Humphrey* (1858), 27 L. J. Q. B. 390; E. B. & E. 1001.

(*m*) *Bateman v. Phillips* (1812), 15 East, 272; *Hood v. Barrington* (1868), L. R. 6 Eq. 218; *Filby v. Hounsell* 1896, 65 L. J. C. 852; (1896) 2 Ch. 737. See *ante*, p. 180.

(*n*) *Jessel, M. R., Commings v. Scott* (1875), 41 L. J. C. 564; L. R. 20 Eq. 16.

in his own name claims the benefit of the contract for himself, his principal may prove the agency against him, and against anyone claiming through him, as well as against the other contracting party, for the purpose of enforcing his own right to the contract, by parol evidence, though the contract in question must satisfy the statute (o). And where the agent in breach of his duty purchases on his own account with his own money and takes the conveyance to himself, he is in the position of a trustee, and his principal can compel a conveyance from him without the written evidence of a trust required by the Statute of Frauds, sect. 7, there being a trust arising "by the implication or construction of law" within sect. 8 (p).

CH. V.
SECT. II.

The 4th section of the Sale of Goods Act, 1893, relating to the sale of goods of the value of 10*l.* or upwards, also excepts from its operation cases in which "the buyer shall accept part of the goods so sold, and actually receive the same." These words are an exact reproduction of sect. 17 of the Statute of Frauds, which they replace. Upon an acceptance and receipt within the statute being proved, the contract is left to the ordinary rules of evidence, and may be proved in the form in which it was in fact made (q). The acceptance and receipt, as with the memorandum in writing, must be complete before an action can be brought upon the contract (r).

Acceptance
and receipt of
goods.

Acceptance.

The statute requires that the buyer shall accept and actually receive the goods, and both requisites must be proved: the acceptance may be made before and independently of the actual receipt of the goods, or it may be inferred from the same facts and circumstances (s). According to the earlier judicial decisions on the 17th section of the Statute of Frauds, the acceptance was understood to be such an act as precluded the buyer from disputing the performance of the contract as to the goods accepted: but it was subsequently decided that such an acceptance was not intended, and that the buyer might accept and receive the goods in a manner to satisfy the statute, and render himself chargeable upon a parol contract, without precluding himself from disputing the delivery

(o) *Hard v. Pilling* 1869, 38 L. J. C. 718; L. R. 4 Ch. 518; *Care v. Mackenzie* 1877, 16 L. J. C. 564. See *Chattock v. Muller* 1878, 8 Ch. D. 177.

(p) *Rockefoucauld v. Boustead* (1896), 66 L. J. C. 74; (1897, 1 Ch. 196.

(q) *Lockett v. Nicklin* 1818, 12 L. J.

Ex. 403; 2 Ex. 93; *Tomkinson v. Staught* (1856), 25 L. J. C. P. 85; 17 C. B. 697.

(r) *Parke, B., Bill v. Bannett* (1811), 11 L. J. Ex. 81; 9 M. & W. 41.

(s) *Edan v. Goodfield* (1811), 1 Q. B. 302; *Cusack v. Robinson* (1861), 30 L. J. Q. B. 261; 1 B. & S. 299.

PART I.

of goods according to the contract (*t*); and this is confirmed by clause 3 of sect. 4 of the Sale of Goods Act, 1893 (*u*). Where specific goods have been selected for purchase by the buyer, there is *primâ facie* an acceptance within the statute, which, if followed by a receipt of the goods, admits proof of the contract by parol evidence (*x*). An examination by the buyer of goods delivered under a verbal contract for the purpose of ascertaining whether they satisfy the contract is held to be an acceptance within the statute, as admitting that the goods are delivered under a contract which justifies such dealing with them; and though the goods are afterwards rejected, the contract may be proved by parol evidence (*y*).

Receipt.

The actual receipt requires a taking possession of the goods by the buyer as a matter of fact; as where the goods were loaded into the buyer's cart sent by him to take them away (*z*). Where the goods were removed to a warehouse used by the buyer for the purpose of warehousing and packing, and were there weighed and packed in sheeting of the buyer, but it was a term that they were not to be removed thence without payment of the price: it was held that the delivery and receipt of possession was complete: for that the seller retained no possession or lien, relying only upon the promise not to remove the goods (*a*). If the buyer refuses to receive the goods he cannot be charged with a parol contract, notwithstanding a previous acceptance (*b*). The motive of refusal is not material; as where the buyer having become insolvent refuses to receive the goods in order to restore them to the seller instead of taking them for the benefit of creditors (*c*). And the effect of the refusal is independent of the truth or sufficiency of the reason alleged: as that he made a mistake in buying them, or that the goods are not the same as he bought, or that they do not satisfy the contract (*d*). If he accepts and

Refusal to receive.

t. Page v. Morgan (1885), 54 L. J. Q. B. 431; 15 Q. B. D. 228; *Taylor v. Smith* (1892), 61 L. J. Q. B. 331; (1893) 2 Q. B. 65.

(*u*) *Abbott v. Wolsen* (1895), 64 L. J. Q. B. 587; (1895) 2 Q. B. 97; *Taylor v. G. E. Ry.* (1901), 70 L. J. K. B. 199; (1901) 1 K. B. 774.

(*x*) *Saunders v. Topp* (1849), 18 L. J. Ex. 374; 4 Ex. 390; *Kershaw v. Ogden* (1865), 34 L. J. Ex. 159; 3 H. & C. 717; *Cusack v. Robinson* (1861), 30 L. J. Q. B. 261; 1 B. & S. 299.

(*y*) Sale of Goods Act, 1893, ss. 1-3; 35; *Abbott v. Wolsen* (1895), 64 L. J.

Q. B. 587; (1895) 2 Q. B. 97. See *Perkins v. Bell* (1892), 62 L. J. Q. B. 91; 1893 1 Q. B. 193.

(*z*) *Kershaw v. Ogden* (1865), 34 L. J. Ex. 159; 3 H. & C. 717.

(*a*) *Dodds v. Varley* (1840), 12 A. & E. 632.

(*b*) *Balby v. Parker* (1823), 1 L. J. O. S. K. B. 229; 2 B. & C. 37.

(*c*) *Nicholson v. Bower* (1858), 28 L. J. Q. B. 97; 1 E. & E. 172.

(*d*) *Phillips v. Bistolfi* (1824), 2 L. J. O. S. K. B. 116; 2 B. & C. 511; *Johnson v. Dutton* (1837), 6 L. J. Ex. 185.

receives the goods in fact, it is immaterial that he disputes the terms on which he is charged as receiving them; the contract may then be proved by parol evidence (*e*).

CH. V.
SECT. II.

The delivery of the goods to a carrier or to a warehouseman or wharfinger appointed by the buyer, and the receipt of the goods by such agent, though it may discharge the contract of the seller, does not alone constitute an acceptance or actual receipt by the buyer within the statute; such agents having no general authority beyond the carriage and custody of the goods (*f*). And this rule does not seem affected by the statutory provision of sect. 32 of the Sale of Goods Act, 1893, that delivery to the carrier is generally to be regarded as *prima facie* delivery to the buyer, the enactment being merely directed to change of property in the goods (*g*). And the delivery of the goods by the carrier at their destination where they lie at the disposal of the buyer, is not alone sufficient (*h*); as goods carried on a railway and delivered at a station named by the buyer, where they lie at his orders (*i*). Until acceptance and receipt the property does not pass; the goods remain at the risk of the seller, and he may retake possession of the goods as against the buyer or his trustee in bankruptcy, though they have been carried to their destination and are no longer *in transitu* (*k*). If the buyer after the goods have been delivered to his carrier or agent deals with them as owner, as by reselling to another, or by altering the destination, he may be taken to have accepted and received them, without an actual receipt into his own possession (*l*). So though acceptance of the bill of lading of goods shipped for carriage would not be sufficient, yet the consignee may so deal with it as to preclude himself from disputing that he has accepted and received the goods as owner (*m*). So if the buyer, knowing the goods to be in the possession of his carrier or warehouseman and lying at his

Receipt by
carrier or
agent.

(*e*) *Tonkinson v. Staight* (1856), 25 L. J. C. P. 85; 17 C. B. 697; *Abbott v. Walsey* (1893), 64 L. J. Q. B. 587; (1895) 2 Q. B. 97.

(*f*) *Meredith v. Meigh* (1853), 22 L. J. Q. B. 403; 2 F. & B. 361; *Hunt v. Bush* (1858), 27 L. J. Q. B. 271; F. B. & F. 494.

(*g*) See *Wait v. Baker* (1818), 17 L. J. Ex. 307; 2 Ex. 1.

(*h*) Sale of Goods Act, 1893, s. 34; *Hunt v. Hecht* (1853), 22 L. J. Ex. 293; 8 Ex. 814.

(*i*) *Norman v. Phillips* (1845), 14 L. J. Ex. 306; 14 M. & W. 277.

(*k*) *Cumbray v. Bristol & Exeter Ry.* (1858), 27 L. J. Ex. 401; 3 H. & N. 510; *Nicholson v. Bower* (1858), 28 L. J. Q. B. 97; 1 E. & E. 172; *Smith v. Hudson* (1865), 34 L. J. Q. B. 145; 6 B. & S. 431.

(*l*) *Morton v. Tibbitt* (1850), 19 L. J. Q. B. 382; 15 Q. B. 428; *Currie v. Anderson* (1860), 29 L. J. Q. B. 87; 2 E. & E. 592.

(*m*) *Meredith v. Meigh* (1853), 22 L. J. Q. B. 403; 2 E. & B. 361; *Currie v. Anderson* (1860), 29 L. J. Q. B. 87; 2 E. & E. 592.

PART I. disposal, does not notify to the seller within a reasonable time his refusal of them, he may be taken to have accepted and received them (*n*).

Constructive
delivery and
receipt.

There may be a constructive delivery and receipt sufficient to satisfy the statute by a transfer of the right of possession, without any change of possession in fact. This may occur under the following conditions:—Where the possession is already in the buyer, but not the right of possession, which is then transferred to him;—where the possession remains in the seller, but the right is transferred;—where the possession remains in a third party, and the right is transferred.

Where the
goods are in
possession of
the buyer.

Where the goods are already in the possession of the buyer in right of the seller, a constructive delivery and receipt may be effected by the parties consenting to a change of the possession to the buyer in his own right. Thus, where the goods were in the possession of a person as agent for sale, and it was verbally agreed between him and the owner that he should buy them himself, and he thereupon resold them to a third party: it was held that there was sufficient evidence of an acceptance and receipt to charge him as the buyer (*o*). Where, on the other hand, a person in the possession of a house and furniture as tenant agreed with the owner of the furniture to buy it at a valuation, but upon the valuation being made refused to pay it, and gave notice to the owner to remove the furniture: it was held that there was no evidence of an acceptance and receipt (*p*). And where the landlord, under similar circumstances, repudiated the bargain as incomplete, it was held that there was no evidence of acceptance and receipt (*q*).

Where the
goods remain
in the posses-
sion of the
seller.

A constructive delivery and receipt may also take place where the goods remain in the actual possession of the seller, by a transfer of the right of possession with the consent of both parties. In each case the question to be determined is whether the possession which actually remains in the seller is a possession in the seller by virtue of his original property in the goods, or whether it has become a possession as agent or bailee of the buyer, and for the determination of this question the existence of a

(*n*) *Bushel v. Wheeler* (1844), 15 Q. B. 447, n.

(*o*) *Edan v. Dudfield* (1841), 1 Q. B. 302.

(*p*) *Lillywhite v. Devereux* (1846), 15 M. & W. 285.

(*q*) *Taylor v. Wakefield* (1856), 6 E. & B. 765.

seller's lien affords a convenient test. Where a person having sold a horse requested the buyer to lend it to him for a journey, which the buyer assented to; it was held to be an acceptance and receipt of the horse within the statute; for the lending of the horse operated a change of the possession (*r*). So where a person bought a carriage and requested the seller to keep it for him, which he consented to do, the buyer using it when he required (*s*). So upon a sale of spirits kept in a bonded warehouse belonging to the sellers, to lie in bond until the credit expired, where the sellers sent an invoice to the buyer specifying the casks which were entered in their books as sold to the buyer, by which entry they were precluded from removing them out of bond; it was held that there was evidence of an acceptance and receipt (*t*). A resale or attempted resale of the goods or part of them by the buyer is evidence to charge him with a contract on the footing of an acceptance and receipt, but unless there is evidence of a removal of the goods or part of them, it would seem that there is not sufficient evidence to charge the seller (*u*). Where trees standing on the seller's land were sold as timber for immediate removal, and the buyer cut down some and sold the top and lop, it was held there was a sufficient acceptance and receipt, though there was no actual removal from the land (*x*).

On the other hand, it was held in the following cases that there was no evidence of receipt:—Where a person bought a horse and requested the seller to keep it for him and put it out to grass, and the seller put it out in his own name (*y*); where a person ordered a waggon to be built for him, and while it was in progress upon the builder's premises employed a workman of his own to fix on the ironwork and a tilt with his own materials (*z*); where a person bought several articles at a shop, some of which he marked and some were measured and cut off larger pieces in his presence, but upon the goods being sent to him he refused to receive them (*a*). And where part out of a larger bulk of goods are sold, and are to remain in the seller's possession until wanted; and the

Insufficient
constructive
receipt.

(*r*) *Marrin v. Wallis* (1856), 25 L. J. Q. B. 369; 6 E. & B. 726.

(*s*) *Beaumont v. Brengeri* (1847), 5 C. B. 301.

(*t*) *Castle v. Swarder* (1861), 30 L. J. Ex. 310; 6 H. & N. 828.

(*u*) *Chaplin v. Rogers* (1800), 1 East, 192; *Blenkinsop v. Clayton* (1817), 7 Taunt. 597.

(*x*) *Marshall v. Green* (1875), 45 L. J. C. P. 153; 1 C. P. D. 35.

(*y*) *Carter v. Toussaint* (1822), 5 B. & Ald. 855.

(*z*) *Maherley v. Sheppard* (1833), 2 L. J. C. P. 181; 10 Bing. 99.

(*a*) *Baldev v. Parker* (1823), 1 L. J. O. S. K. B. 229; 2 B. & C. 37.

PART I.

Seller's lien
for price.

seller afterwards measures out the quantity sold, which is then set apart for the buyer, there is no sufficient delivery and receipt, unless the buyer has assented to the specific appropriation, even where he has seen and approved of the bulk (b).—Where a horse was sold for a ready money price and the buyer used it, but requested the seller to keep it for a time when he would fetch it away; it was held that the seller retained his lien and that there was no delivery (c). Upon a sale upon credit with immediate delivery, though the goods may remain in the actual possession of the seller, there is no lien whilst the credit lasts; but a right arises upon the insolvency of the buyer, to refuse delivery without payment of the purchase money unpaid (d); unless the person claiming delivery is a purchaser for value, from the original buyer, and the seller has assented to his right to delivery (e).

Where the
goods are in
possession of
an agent.

Where the goods at the time of the sale are in the possession of a bailee or agent of the owner, a constructive delivery and receipt may be effected by the assent of all the parties, namely, the seller, the buyer, and the actual possessor; but unless the actual or constructive assent of the last named be obtained, there is no transfer of right to the possession of the goods except in those cases in which the right to the goods has been transferred by a document of title, such as a bill of lading (f). A mere delivery order given by the seller to the buyer is no receipt by the latter until communicated to the agent and accepted by him as transferring the possession; nor is a mere delivery order given by the seller to the agent, until communicated by the latter to the buyer (g). And a warrant given by a warehouseman or wharfinger to the owner of goods, undertaking to deliver the goods to him or his assignee, which the owner on selling the goods assigns to the buyer, is no receipt by the latter, until the holder of the goods has notice of the assignment and agrees with the buyer to hold for him as owner (h).

Delivery
order.

(b) *Howe v. Palmer* (1820), 3 B. & Ald. 321.

(c) *Tempest v. Fitzgerald* (1820), 3 B. & Ald. 680.

(d) Sale of Goods Act, 1893, s. 41; *Blaxam v. Sanders* (1825), 4 B. & C. 949; *Ex p. Chalmers* (1873), 42 L. J. Bk. 37; L. R. 8 Ch. 289; *Grice v. Richardson* (1877), 47 L. J. P. C. 48; 3 Ap. Ca. 319.

(e) *Stovell v. Hughes* (1811), 14 East, 308; *Knights v. Whiffen* (1870), 40 L. J. Q. B. 51; L. R. 5 Q. B. 660.

(f) Sale of Goods Act, 1893, s. 29 (3); *Salter v. Woolham* (1841), 10 L. J. C. P. 145; 2 Man. & G. 650; *Wood v. Tussell* (1844), 6 Q. B. D. 231. See *Ex p. Barrow* (1877), 46 L. J. Bk. 73; 6 Ch. D. 783; *Gigg v. National Guardian Assoc.* (1891), 61 L. J. C. 11; (1891) 3 Ch. 206.

(g) *Bentall v. Burn* (1824), 3 L. J. O. S. K. B. 42; 3 B. & C. 423.

(h) *Farina v. Home* (1846), 16 L. J. Ex. 73; 16 M. & W. 119.

Acceptance and receipt of part of the goods sold is sufficient to except the sale from the operation of the statute; and a sample of the goods is sufficient, if it be delivered and accepted as part of the bulk (*i*); but the presumption is that a sample is merely a specimen of the goods contracted to be delivered, and not part of the bulk (*k*).—A contemporaneous purchase and sale of several articles is, according to the circumstances, to be regarded as one contract or several contracts. Where the transaction is to be regarded as involving but one contract, the acceptance and receipt of one article or of one parcel or kind of the goods is sufficient to take the whole contract out of the statute (*l*); but where the proper inference is that each sale and purchase involves a distinct contract, the contrary rule obtains (*m*). A contract having been verbally made for the sale of a mare for 20*l.*, but upon the terms that if the mare should prove to be in foal the buyer would on receiving 12*l.* from the seller return it on request; it was held to be one entire contract, and not separate contracts of sale and resale, and that the acceptance and receipt of the mare took the whole contract out of the statute (*n*).

CH. V.
SECT. II.

Acceptance
and receipt
of part of
goods sold.

Acceptance of
goods under
several
contracts.

The 17th section of the Statute of Frauds excepted, and the substituted sect. 4 of the Sale of Goods Act, 1893, also excepts from its operation the cases in which "the seller shall give something in earnest to bind the bargain or in part payment." Earnest and part payment, it is said, are two distinct things; but earnest may also avail as part payment. Earnest is lost if the party fails to perform the contract, and is presumptively brought into account as payment if he performs it (*o*). A mode of striking a bargain said to be customary in places, by the buyer drawing a shilling across the hand of the seller, was held not to take the case out of the statute, as it does not amount to giving anything even for a moment (*p*).

Earnest or
part payment.

The part payment contemplated is something apart from the contract itself, and in affirmation of it. Thus where goods were

Part pay-
ment.

(*i*) *Hinde v. Whitehouse* (1806), 7 East, 558; *Gilliat v. Roberts* (1850), 19 L. J. Ex. 410; *Gardner v. Grout* (1857), 2 C. B. N. S. 340.

(*k*) *Cooper v. Elston* (1796), 7 T. R. 14.

(*l*) *Elliott v. Thomas* (1838), 7 L. J. Ex. 129; 3 M. & W. 170; *Scott v. Eastern Counties Ry.* (1843), 13 L. J. Ex. 14; 12 M. & W. 33; *Bigg v. Whisking*

(1853), 14 C. B. 195.

(*m*) *Jenner v. Smith* (1869), L. R. 4 C. P. 270. See *ante*, p. 175.

(*n*) *Williams v. Burgess* (1839), 8 L. J. K. B. 286; 10 A. & E. 499.

(*o*) *Fry v. L. J. Howe v. Smith* (1884), 53 L. J. C. 1055; 27 Ch. D. 102.

(*p*) *Blenkinsop v. Clayton* (1817), 7 Taunt. 597.

PART I.

sold upon the terms that a debt due from the seller to the buyer should be set off as part payment of the price, and when the goods were sent the buyer refused to receive them; it was held that, the discharge of the debt resting only in agreement until completion of the contract, there was no part payment within the statute (*q*). The completion of such an agreement by delivery and receipt of the goods would operate effectually in discharge of the debt, and might be proved for that purpose, although the agreement was within the statute and could not have been enforced (*r*).

(*q*) *Walker v. Nussey* (1847), 16 L. J. Ex. 129; 16 M. & W. 302; *Norton v. Davison* (1899), 68 L. J. Q. B. 265; (1899) 1 Q. B. 101.

(*r*) *Lavery v. Turley* (1860), 30 L. J. Ex. 49; 6 H. & N. 239. See *post*, p. 643.

CHAPTER V.

STATUTORY REQUIREMENTS.

SECT. III.—OPERATION OF THE STATUTE OF FRAUDS, AND SALE
OF GOODS ACT, 1893.

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The enactment by the 4th section of the Sale of Goods Act, 1893, that the contracts there mentioned "shall not be enforceable by action." more fully gives legislative sanction to the decisions on the 17th section of the Statute of Frauds that no contract within its description "shall be allowed to be good." The operation of the statute upon the contract was held to be the same under the 4th and 17th sections of the Statute of Frauds. "It is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract" (a). And if no action can be brought upon a contract for want of evidence to satisfy the statute, it cannot be made available between the parties by way of plea, or replication, or counterclaim, when properly put in issue by the opposite party (b). —These statutory provisions are part of the *lex fori*, and it follows that a foreign contract of a description to which the statute applies

Statute
operates
upon the
evidence.

Foreign
contracts.

(a) *Ld. Blackburn, Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 489.

(b) *Carrington v. Root* (1837), 6 L. J. Ex. 95; 2 M. & W. 248; *Noble v. Ward* (1866), 36 L. J. Ex. 91; L. R. 2 Ex. 135.

PART I.

The statute
must be
pleaded.

cannot be enforced in the courts of this country, unless the requirements of the statute in respect of evidence are satisfied (c).

Under the Judicature Acts the Statute of Frauds must be specially pleaded in the High Court (d). It must not be pleaded inferentially, but with a distinct reference to the statute (e); nor in general terms, but with a distinct statement of the point in which it operates upon the contract charged (f). But the omission to plead the statute is matter of amendment (g). In the County Court the defendant must give notice of this defence (h).

Contracts
partly within
the statute.

No action can be maintained without the proof required by the statute upon a contract which is indivisible, if part of the contract be within it, although that part may have been executed: as a verbal promise, in consideration of releasing a distress for the rent of another, to pay the rent due and also future rent, being within the statute as to the future rent, cannot be enforced for the recovery of the rent due (i). And a contract for the sale of goods to the value of 10*l.*, together with other things not within the statute, for a certain price, was held to be an entire contract upon which no action could be brought for the price without evidence in writing (k).—Upon the same principle a parol contract made for the letting of a house upon the terms of the landlord sending in furniture was held to be an entire contract; upon which, being within the statute as to the house, no action could be brought for not sending in the furniture (l). And upon a verbal letting of a house upon the terms of the tenant paying the cost of alterations and taking the furniture at a valuation, the price of the furniture and the costs of alterations cannot be recovered by action (m). And a verbal agreement between an incoming tenant and an outgoing tenant for the possession of the land, that the latter should settle with the landlord for the rent due, was treated as an entire contract, consequently the incoming tenant

(c) *Leroux v. Brown* (1852), 22 L. J. C. P. 1; 12 C. B. 801.

(d) Order XIX. rr. 15, 20; Order XXV. r. 1. See *Cuthing v. King* (1877), 46 L. J. C. 281; 5 Ch. D. 660; *Fletcher v. Fletcher* (1881), 50 L. J. C. 735.

(e) *Clarke v. Callow* (1876), 4 L. J. Q. B. 53; *Byrd v. Nunn* (1877), 47 L. J. C. 1; 7 Ch. D. 284.

(f) *Pullen v. Leach* (1879), 18 L. J. C. P. 394.

(g) *Bramming v. Odhams* (1896), 75 L. T. 602.

(h) County Ct. Rules, 1903, Order X. r. 18.

(i) *Thomas v. Williams* (1830), 8 L. J. O. S. K. B. 664; 10 B. & C. 664.

(k) *Harman v. Reere* (1856), 25 L. J. C. P. 257; 18 C. B. 587.

(l) *Meachlen v. Wallner* (1837), 6 L. J. K. B. 217; 7 A. & E. 49.

(m) *Vaughan v. Hancock* (1816), 16 L. J. C. P. 1; 3 C. B. 766.

could not bring an action to recover the past rent for which the landlord had levied a distress (*n*). But where an incoming tenant contracted with the outgoing tenant for the sale of the crops, and also of the dead stock, at distinct prices; it was held that there were distinct contracts, and that an action might be brought for the price of the latter which had been accepted, though the sale of the former was within the statute (*o*).

CH. V.
SECT. III.

Contracts partly in writing and partly by parol, or contracts in writing with parol variations, are equivalent as regards the rules of evidence to parol contracts, and may be met by the defence of the statute (*p*). Contracts in writing with collateral parol contracts concerning the same matter cannot be met directly by the statute; and the collateral parol agreement may be charged in answer to a claim for specific performance, notwithstanding the statute; and specific performance of the written contract will be granted only upon the terms of admitting and performing the parol agreement (*q*).

Contracts
partly in
writing.

But the contract exists as a fact, for the statute is only concerned with the evidence by which it is established affirmatively; accordingly the court can take cognizance of the contract for other purposes, and all acts done under it may be referred to the contract for their legal validity and efficacy (*r*). Money paid by a party under a contract for the sale of land in which a party is insufficiently described, cannot be recovered back so long as the other party is able, ready and willing to execute the contract, and there is no failure of the consideration for the payment (*s*). Where a promissory note was given in payment of the purchase-money of land, it was held to be no defence to an action on the note that there was no memorandum in writing of the contract of sale, without showing further that the vendor had refused performance on his part (*t*). Upon the same principle where a debtor agreed verbally with his creditor to give up to him the possession of a house in discharge of the debt and the possession was given up

Operation of
the statute
upon executed
contracts.

(*n*) *Hodgson v. Johnson* (1858), 28 L. J. Q. B. 88; E. B. & E. 685; but see *Palbrook v. Laues* (1876), 45 L. J. Q. B. 178; 1 Q. B. D. 284.

(*o*) *Mayfield v. Wadley* (1824), 3 L. J. O. S. K. B. 31; 3 B. & C. 357.

(*p*) See *ante*, p. 117.

(*q*) See *ante*, p. 126.

(*r*) *Selborne, L. C., Maddison v. Al-*

derson (1853), 52 L. J. Q. B. 737; 8 Ap. Ca. 467.

(*s*) *Thomas v. Brown* (1876), 45 L. J. Q. B. 811; 1 Q. B. D. 711. See *Palbrook v. Laues* (1876), 45 L. J. Q. B. 178; 1 Q. B. D. 281.

(*t*) *Jones v. Jones* (1840), 9 L. J. Ex. 178; 6 M. & W. 84.

PART I.

accordingly, the debt was discharged (*u*). And an agent employed to buy goods for another and to pay the price, may recover the money so paid at the request of his employer, though the contract for the goods did not satisfy the statute (*x*). Upon the same principle a contract concerning an interest in land within the statute, as the sale of a growing crop of grass to be taken by the buyer, though not available as a contract for want of evidence to satisfy the statute, may be put in evidence as a licence to enter upon the land, in defence to an action of trespass (*y*). And an express contract within the statute, though it may not be chargeable in an action, serves to prevent any different contract being charged respecting the same matter, or any different presumption being raised from acts done in pursuance of the contract (*z*).

Operation upon part executed contract.

Execution of the statute does not take it out of the operation of the statute, as to any part remaining executory, except under the equitable doctrine of part performance; and the Judicature Acts have made no difference in this respect (*a*). Thus in the case of an agreement to sell or transfer an interest in land for a promised sum of money, the interest having been transferred according to the agreement, the promise to pay could not be charged at law upon the contract without written evidence to satisfy the statute (*b*). But an implied debt may arise upon the executed consideration of a contract within the statute, according to the general principles relating to executed considerations (*c*). And where a party after accepting part performance of the consideration repudiates the contract and relies upon the statute, the other party may rescind the contract and charge him for the part executed consideration which he has received and kept (*d*). So in the case of a contract of service to continue for more than a year and a wrongful dismissal during the service, the servant may recover for the executed service though he cannot sue for the wrongful dismissal without proving a contract in writing (*e*).

Debt implied from executed consideration.

(*u*) *Lavery v. Turley* (1860), 30 L. J. Ex. 49; 6 H. & N. 239.

(*x*) *Powle v. Gunn* (1838), 7 L. J. C. P. 206; 4 Bing. N. C. 445.

(*y*) *Wood v. Manley* (1839), 9 L. J. Q. B. 27; 11 A. & E. 34; *J. Jones & Sons, Ltd. v. Tankerville (Earl)* (1909), 78 L. J. C. 674; (1909) 2 Ch. 440.

(*z*) *Britain v. Rossiter* (1879), 48 L. J. Q. B. 362; 11 Q. B. D. 123.

(*a*) *Boydell v. Drummond* (1809), 11 East, 142; *Britain v. Rossiter* (1879),

48 L. J. Q. B. 362; 11 Q. B. D. 123. See post, p. 205.

(*b*) *Teal v. Auty* (1820), 2 Br. & B. 99; *Cocking v. Ward* (1845), 15 L. J. C. P. 245; 1 C. B. 858; *Sanderson v. Graves* (1875), 44 L. J. Ex. 210; L. R. 10 Ex. 234.

(*c*) See ante, p. 35.

(*d*) *Mavor v. Pyne* (1825), 4 L. J. O. S. C. P. 36; 3 Bing. 285.

(*e*) *Snelling v. Huntingfield (Lord)* (1834), 3 L. J. Ex. 232; 1 Cr. M. & R.

But so long as a contract subsists no new contract can be implied from acts done under it, and such acts must be referred to the contract only (*f*).—Upon this principle where a contract imports an indemnity for expenses under it, and no action will lie upon the contract for want of written evidence, the expenses incurred and paid may be charged as an implied debt arising from the payment; the contract operating as a request to make the payment (*g*). And a verbal guarantee of a debt, though within the statute, may operate as a request in fact to pay it, so as to entitle the surety to recover the payment from the principal debtor (*h*).—Where a party has received, under a verbal contract within the statute, money which he is liable to pay over to another, it may be claimed by the latter as an implied debt for money received to his use; and the verbal contract may be proved to explain the terms on which the money was received; as a verbal agreement to pay over to a landlord, a proportion of the premium to be received from the incoming tenant, by the outgoing tenant, in consideration of the landlord's consent to an assignment of the tenancy (*i*).—And a party may become bound by an account stated respecting money paid under a contract within the statute; though the money could not be recovered under the contract for want of evidence to satisfy the statute (*k*).

CH. V.
SECT. III.

Money paid.

Money received.

Account stated.

The construction and operation of the statute is the same in equity as at law; unless there is some special equitable ground for taking a case out of its operation (*l*). The mere want of writing cannot be made the ground of jurisdiction; and there is no fraud in merely taking advantage of the statute (*m*). But where it is part of the agreement that it should be put in writing, which is prevented by fraud, it is said that there is equitable ground for relief against the statute by admitting parol evidence (*n*).

Operation of the statute in equity.

20; *Britain v. Rossiter* (1879), 48 L. J. Q. B. 362; 11 Q. B. D. 123.

(*f*) *Britain v. Rossiter* (1879), 18 L. J. Q. B. 362; 11 Q. B. D. 123.

(*g*) *Knowlman v. Blount* (1874), 44 L. J. Ex. 210; L. R. 9 Ex. 307; *Pulbrook v. Lacey* (1875), 45 L. J. Q. B. 178; 1 Q. B. D. 284.

(*h*) *Alexander v. Fane* (1836), 5 L. J. Ex. 187; 1 M. & W. 511.

(*i*) *Griffith v. Young* (1810), 12 East, 513.

(*k*) *Cocking v. Wood* (1845), 15 L. J. C. P. 215; 1 C. B. 858.

(*l*) *Cranworth, L. C., Caton v. Caton* (1865), 31 L. J. C. 564; L. R. 1 Ch. 146.

(*m*) *Cottenham, L. C., Kitch v. Grandley Union (Guardians)* (1868), 1 L. J. C. 127; 2 Ph. 648; *Selborne, J. C., Maddison v. Alderson* (1883), 32 L. J. Q. B. 737; 8 Ap. Ch. 467.

(*n*) *Thurlow, L. C., Hatchchurch v.*

PART I.

Where
possession of
land given
under
contract.

Exception has been made in equity in the case of contracts concerning interests in land within the 4th section of the statute, where possession of the land contracted for has been in fact delivered and accepted under the contract; in which case the court will receive evidence of the contract without regard to the statute in order to carry out the terms upon which possession was given. The exception probably arose by permitting a party to sue upon a contract disclosed by the facts given in evidence in support of a plea of justification to an action for trespass to land at the common law, but the principle is now rested on this, that possession of land of another is presumed not to be wrongful, but by agreement; and therefore it is necessary to inquire into the agreement in order to limit the possession according to its terms and conditions (o). Thus the admission of a tenant into possession under an agreement for a lease takes the agreement out of the statute and admits parol evidence of the terms for the purpose of enforcing the lease (p). And possession taken before a parol contract for a lease, and subsequently continued, if unequivocally referable to the contract, may constitute an act of part performance (q). The possession of a house was held to admit parol evidence of an agreement to grant the possession for life in consideration of the payment of the ground rent and taxes (r). And where a father verbally promised in consideration of his daughter's marriage to give her a house, and upon the marriage taking place put her in possession; it was held that the promise was taken out of the statute and might be proved by parol evidence in support of the possession (s). Entering upon land and giving directions respecting alterations and improvements to a house in the course of erection are sufficient acts of part performance by a purchaser to entitle the vendor to enforce the contract against him (t). The right of a party to enforce a contract upon the ground of part performance is dependent upon the title and acts of the party sued, and the knowledge of the party seeking to enforce the verbal

Bevis (1789), 2 Bro. C. C. 565; *Turner, L. J., Wood v. Midgley* (1854), 23 L. J. C. 553; 5 De G. M. & G. 41.

(o) *Grant, M. R., Gregory v. Mighell* (1811), 18 Ves. 328; *Plumer, M. R., Morphet v. Jones* (1818), 1 Swanst. 172.

(p) *Gregory v. Mighell* (1811), 18 Ves. 328; *Morphett v. Jones* (1818), 1 Swanst. 172.

(q) *Hodson v. Heuland* (1896), 65 L. J. C. 754; (1896) 2 Ch. 428.

(r) *Coles v. Pilkington* (1874), 44 L. J. C. 381; L. R. 19 Eq. 171.

(s) *Ungley v. Ungley* (1876), 46 L. J. C. 854; 5 Ch. D. 887; *Sharman v. Sharman* (1892), 67 L. T. 831.

(t) *Dickinson v. Barrow* (1904), 73 L. J. C. 701; (1904) 2 Ch. 339.

contract (*u*).—But as the jurisdiction of the court to award damages under Lord Cairns' Act is merely in substitution for the equitable remedy, where the remedy by specific performance is lost the right to damages under that Act disappears with it (*x*).

CH. V.
SECT. III.

The continuance of a tenant in possession is presumptively referable to a continuance of his tenancy, and is not sufficient to take an alleged new agreement out of the statute (*y*). Nor are acts which are referable to an existing tenancy sufficient; as cultivating the ground and doing ordinary repairs (*z*). But an alteration in the possession which is unequivocally referable to a new agreement is sufficient; as the payment of an increased rent (*a*); draining the land and laying down pasture (*b*); laying out money in buildings and improvements (*c*); sub-letting to a new tenant who lays out money in improvements with the knowledge of the landlord (*d*); altering buildings so as to acquire a new easement of light (*e*).—Upon the same principle the delivery and possession of title deeds, as security for a debt, creates an equitable mortgage and may be established by parol evidence (*f*).

Alteration of
existing
possession.

Possession of
title deeds.

But the principle of part performance thus stated is not applied to any other contracts than those concerning the possession of land (*g*). It does not apply to a contract of service not to be performed within a year, which is not taken out of the statute by service rendered under it (*h*); nor to a contract in consideration of marriage, which is not taken out of the statute by performance of the marriage (*i*); nor to contracts to answer for the debt of another, though performed by the party guaranteed giving credit (*k*).—Payment of the purchase-money under a contract of

Extent of
doctrine of
part performance.

(*u*) *Blow v. Sutton* (1817), 3 Mer. 257; *Morgan v. Miahon* (1853), 22 L. J. C. 897; 3 De G. M. & G. 24; *Ecclesiastical Commrs. v. Woodhouse* (1895), 64 L. J. C. 329; (1895) 1 Ch. 552.

(*x*) *Lavery v. Packer* (1888), 57 L. J. C. 570; 39 Ch. D. 308.

(*y*) *Brennan v. Bolton* (1842), 2 Dr. & War. 349; *Brady's case* (1867), 15 W. R. 753.

(*z*) *Frame v. Dawson* (1807), 14 Ves. 386.

(*a*) *Nunn v. Fabian* (1865), 35 L. J. C. 140; L. R. 1 Ch. 35; *Miller v. Sharp* (1899), 68 L. J. C. 322; (1899) 1 Ch. 622.

(*b*) *Mundy v. Jolliffe* (1839), 9 L. J. C. 95; 5 M. & Cr. 167.

(*c*) *Lester v. Foweraker* (1700), Colles,

P. C. 108; 1 Wh. & T. L. C. 460; *Sutherland v. Briggs* (1841), 11 L. J. C. 36; 1 Hare, 26.

(*d*) *Williams v. Evans* (1875), 44 L. J. C. 319; L. R. 19 Eq. 547.

(*e*) *McManns v. Cooke* (1887), 56 L. J. C. 662; 35 C. D. 681.

(*f*) *Ante*, p. 166.

(*g*) *Selborne, L. C., and Id. Blackburn, Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 467; but see *Kay, J., McManns v. Cooke* (1887), 56 L. J. C. 662; 35 C. D. 681.

(*h*) *Britain v. Rossiter* (1879), 48 L. J. Q. B. 362; 11 Q. B. D. 123.

(*i*) *Caton v. Caton* (1865), 34 L. J. C. 564; L. R. 1 Ch. 137; *Johnstone v. Moppin* (1891), 60 L. J. C. 241.

(*k*) *Id. Blackburn, Maddison v. Alder-*

PART I.
Payment of
purchase-
money or
expenses.

sale of land has no effect in taking the contract out of the statute (*l*); but the purchaser acquires a lien upon the land for the sum paid; or may recover it as money received to his use, upon failure of the consideration (*m*). And payment of the expenses preparatory to completion have no effect in taking the contract out of the statute; as the expenses of surveying and valuing, of preparing and examining abstracts of title, and other expenses of a similar kind incurred upon the supposition of a valid contract (*n*). So formerly the payment of the auction duty which is a condition imposed upon the bidding, and not an act in performance of the contract (*o*).—With contracts for the sale of goods of the value of 10*l.* and upwards, part performance is expressly provided for by statute, which excepts the cases where the buyer shall accept part of the goods or give something in earnest or in part payment (*p*).

Operation of
the statute
upon the
property in
goods sold.

A contract for the sale of goods within the 4th section of the Sale of Goods Act, 1893, which does not satisfy the requirements of the statute is not effectual to pass any property in the goods to the buyer (*q*). He cannot maintain an action for a wrongful conversion of the goods until the statute is satisfied and the contract capable of being proved; nor is it sufficient to have obtained a memorandum in writing after the conversion was committed (*r*). Consequently the buyer under such contract has no insurable interest, and cannot recover upon a policy then effected by him upon the goods; nor will an acceptance and receipt of part of the goods after the loss has occurred, though it may take the contract out of the statute from that time, be effectual to support his claim (*s*).—But if a buyer, having obtained a delivery order, resells the goods and transfers the order, the sub-vendee may obtain a good title under the Factors Act, 1877, though no action could have been maintained by the buyer in respect of the original

son (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 467.

(*l*) *Chinan v. Cooke* (1802), 1 Sch. & Lef. 22; Selborne, L. C., *Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 467.

(*m*) *Rose v. Watson* (1864), 33 L. J. C. 385; 10 H. L. C. 672; *Whitbread & Co. v. Watt* (1902), 71 L. J. C. 424; (1902) 1 Ch. 835. See *ante*, p. 68.

(*n*) *Whaley v. Bayneal* (1765), 1 Bro.

P. C. 345; *Clerk v. Wright* (1737), 1 Atk. 13.

(*o*) *Buckmaster v. Harrop* (1806), 7 Ves. 341.

(*p*) See *ante*, pp. 191, 197.

(*q*) *Nicholson v. Bower* (1858), 28 L. J. Q. B. 97; 1 E. & E. 172.

(*r*) *Fellhouse v. Bindley* (1862), 31 L. J. C. P. 204; 11 C. B. N. S. 869.

(*s*) *Stockdale v. Dunlop* (1840), 9 L. J. Ex. 83; 6 M. & W. 224.

sale (*t*). And a verbal contract within the statute may be set up as giving a priority of claim to the property affected by it against a third party, who, not being personally charged upon it, cannot plead the statute (*u*).

CH. V.
SECT. III.

Upon the same principle, unless there is an enforceable contract, a buyer cannot in general sue the carrier, to whom the goods have been delivered by his order, for a loss of or injury to the goods; the carrier is liable only to the consignor, who may retake the goods at any time until the buyer has accepted and received them; nor can the liability be changed, nor a new liability created, by acceptance, or payment, or a memorandum in writing, made after the happening of the loss or injury complained of (*x*).

Liability of
carrier to
buyer or
seller.

In the case of goods sold for a sum exceeding 10*l.*, the buyer acquires no proprietary right transmissible to his trustee in bankruptcy, unless the statutory formalities are complied with; and this either by the act of a buyer, who, finding himself in insolvent circumstances, has refused to receive them (*y*), or by the act of an unpaid seller reclaiming and obtaining redelivery of his goods (*z*).—A note or memorandum in writing, where there has been no acceptance or payment by the buyer and the goods remain in the possession of the seller, is an “assurance of personal chattels” within the Bills of Sale Act, 1878, and requires registration in order to pass the property as against the trustee in bankruptcy and execution creditors of the seller (*a*).

Bankruptcy
of buyer.

Bankruptcy
of seller.

t) *Hugill v. Masker* (1889), 58 L. J. Q. B. 171; 22 Q. B. D. 364.

u) *North, v., Miles v. New Zealand Alford Estate Co.* (1885), 54 L. J. C. 1035; 32 Ch. D. 266.

x) *Coats v. Chaplin* (1842), 11 L. J. Q. B. 483; 3 Q. B. 483; *Coombs v. Bristol & Exeter Ry.* (1858), 27 L. J. Ex. 401; 3 H. & N. 510; *Smith v. Hudson*

(1865), 34 L. J. Q. B. 145; 6 B. & S. 431.

y) *Nicholson v. Bower* (1858), 28 L. J. Q. B. 97; 1 E. & E. 172.

z) *Smith v. Hudson* (1865), 34 L. J. Q. B. 145; 6 B. & S. 431; *Bolton v. Lonex & Yorks. Ry.* (1866), 25 L. J. C. P. 137; L. R. 1 C. P. 431.

a) *Re Roberts* (1887), 56 L. J. C. 952; 36 Ch. D. 196.

CANADIAN NOTES.

Corroboration Under Ontario Statute.

In *Smith vs. Jamieson*, 17 O. R., 626, in an action for breach of promise of marriage, the defendant admitted the promise, but said that he was an infant when he made it and that there was no ratification in writing after majority. The plaintiff insisted that there was no engagement between her and the defendant until he became of age and the jury found accordingly. There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence not being inconsistent with the precise engagement sworn to by the plaintiff as having been entered into after the majority of the defendant on the date named. It was held that the evidence satisfied the requirements of the statute, R. S. O. ch. 61, sec. 6, and that it was not necessary that it should go so far as to negative the promise which defendant admitted he made before majority.

In the same case it was sworn by the plaintiff that "the engagement was to be a year's engagement and we were to be married in the following August." It was held that this was not an agreement not to be performed within a year.

"Interest in Land."

In *Oswald et al vs. Whitman*, 22, N. S. R., 13, a lease of land was made for a term of five years with a provision that at the end of the term the lessee should have the power of removing buildings to be erected thereon, the lessor to have the refusal of them. The lessor declined to buy and the lessee sold the right to remove the building to defendant. The building rested on piers of stone and wood, earth and stone being dumped between the piers after the building was erected, the whole resting on the surface. It was held that the lessee had the right to remove the building and could sell this right to the defendant and further that the contract did not come within the Statute of Frauds.

In *Murdoch vs. Currell*, 25, N. S. R., 293, plaintiff and defendant entered into an agreement in writing for the purchase of land from B. The writing was delivered to B and plaintiff and defendant entered into possession and cut and removed hay. Before the consideration money was paid, plaintiff and defendant agreed verbally that plaintiff should relinquish his interest in consideration of \$25.00 to be paid him by defendant and that B

should be requested to make the deed to defendant alone. It was held by two members of the court that the agreement did not necessarily involve an interest in lands, that plaintiff was entitled to recover, the consideration for defendant's promise being the agreement on plaintiff's part to abandon the agreement between themselves and induce B to convey to defendant. Two other members of the court held that the agreement was one for the disposal of an interest in land, but having been completely executed by the plaintiff, he was entitled to recover the consideration notwithstanding the Statute of Frauds.

In *Liscomb Falls vs. Bishop*, 35 S. C. R., 539, it was held that where a licensee of mining areas from the Crown under the Nova Scotia mining law erects a stamp mill on wild lands of the Crown for the purpose of testing ores, all the various parts of the mill being placed in position resting upon the land by their own weight or steadied by bolts, so that the whole installation could be removed without injury to the freehold, the mill is a chattel, or at any rate, a trade fixture, removable by the licensee during his license or lease, and is consequently subject to seizure under execution.

In *Wolfenden et al. vs. Wilson*, 33 U. C. Q. B., 442 (1873), it was decided that a contract to furnish a tombstone and put it up was a sale of goods, &c., Robinson, C. J., saying, "The fact that the seller may have agreed to place it in a particular graveyard or particular part of the cemetery would not make it any the less a chattel. The sale of a pump would be the sale of a chattel, though the seller had agreed to place it in position on the grounds of the purchaser. The purchase of a steam-engine would be the purchase of a chattel, though the seller might agree to fit it up."

In *Stuart vs. Mott*, 23 S. C. R., 384, it was held that an agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it was sold was not a contract for sale of an interest in land within the Statute of Frauds. Per Strong, C. J., "It was said that the Statute of Frauds was a defence. The answer to this is that the agreement to be enforced was not one conferring an interest in land, but exclusively relating to an interest in money. It is true

this money is to arise from the sale of land or of a mining interest, but that on authority can, I conceive, make no difference after the land or mining interest has been actually sold. It is not sought to enforce any trust or contract to sell the land. That would be a different case. Here the sale has taken place and the only question is as to the share of the price received. There are many American cases in point. *Trowbridge vs. Weatherbee*, 11 Allen, Mass., 361, is an express authority shewing that in a case like the present to enforce a promise to pay money out of the proceeds of the sale of land, brought after the sale has taken place, the Statute of Frauds has no application.

Immovables by Destination.

In *Laine et al. vs. Beland*, 26 S. C. R., 419, an action was brought by plaintiff to re-vendicate an engine and two boilers under a resolutive condition contained in an agreement providing that until fully paid for they should remain the property of plaintiff, and all payments on account of the price should be considered as rent for their use and further that, upon default, plaintiff should have the right to resume possession and remove the machinery. The machinery had previously been embedded in the foundation of a saw mill which had been sold separately to the defendants and, at the time of the agreement, the boilers were still attached to the building, but the engine had been taken out and was lying in the mill-yard. While in this condition the defendant hypothecated the mill property to another and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered.

It was held that the agreement between plaintiff and the defendant could not be considered a lease, but as rather a sale subject to a resolutive condition, with a clause of forfeiture as regards the payment made on account. But, whether the agreement was a lease or sale on condition, plaintiff having, as respects the boilers and their accessories, consented to their incorporation with the immovable and dealt with them while so incorporated, they became immovable by destination within the terms of article 379, of the Civil Code and subject to the duly registered hypothecs of the respondent.

Partnership Dealing in Lands.

In *Archibald vs. McNerhanie*, 29 S. C. R., 564, it was held that a partnership may be formed by a parol agreement, notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. Per Strong, C. J., "I take it to be established now that a partnership may always be proved by parol, and if it turns out that the assets consist of land or interest in land bought for the purpose of being sold again, such land will be treated as any other property not coming within the Statute. The principle is this, all assets of a partnership are considered as personality, and that, upon an application of equitable conversion, for ultimately in order to a winding up of the partnership everything must be sold and converted into money. This is applied to other questions besides that of the applicability of the Statute of Frauds. For instance, in a partnership for dealing in land the lands are not considered as realty going to the heirs of one of the partners, but as belonging to the personal representatives for whom a court of equity treats the heirs as a trustee. *Derby vs. Derby*, 3 Drew, 495, *Wiley vs. Wiley*, 4 Grant, 278. I find it laid down in a text book published during the present year. Thompson on Equity, p. 603, that this is now the accepted doctrine in England. It is there said, 'A partnership may be constituted by a mere parol agreement notwithstanding that the partnership is to deal in land.' "

Gwynne and Sedgewick, J.J., dissented, but not because of any difference of opinion on the principle referred to so far as the report shows.

Growing Crops, Trees, etc.

The earliest Canadian case in which a question was raised as to growing crops was that of *Haydon vs. Crawford*, 3 O. S., 583. (1834). In this case Robinson, C. J., after citing the English cases, expressed the opinion that the sale of a crop of corn ready for the harvest was the sale of a mere chattel and did not require a writing to make the alienation of it legal. Macaulay, J., treated it as an open question whether the sale was not within the Statute of Frauds as an interest in land. The question cannot now be considered open to doubt. The sale of a growing crop, whether the property is to pass before or after severance, is not an agreement for an interest in land, and it is hardly to be

doubted that it is within the terms of the statute as a sale of goods, wares and merchandise. The case of *fructus naturales*, such as trees and grass, has been considered in the cases which follow.

The Canadian case of *Summers vs. Cook*, 28 Grant, Ch. 179, occurred in the Court of Chancery, Ontario. The purchasers agreed to buy all the merchantable white and red pine timber suitable for their purpose, standing, lying or being on certain premises owned by the vendor, for the price or sum of six hundred dollars, payable four hundred dollars on date of agreement, and the balance in one year, with the provision that the timber should be cut or removed off the lands on or before a date eight years later than the agreement. Blake, V. C., distinguished the case of *Smith vs. Surman*, 5 B. & C., 561, as a case in which the sale was of timber when cut and severed at so much a foot, and was therefore not a contract for lands or any interest therein. Commenting on *Marshall vs. Green*, he says: "I think we have in this case an unfortunate extension of the intelligible rule that growing trees are an interest in the land, and that it is to be regretted that this question is left to depend upon the length of time the party has to remove the property purchased. Be this as it may, *Marshall vs. Green* would have to be almost indefinitely extended if the clause 'the trees to be got away as soon as possible,' (which were the words of the agreement in *Marshall vs. Green*,) be enlarged so as to cover a possible period of eight years."

Proudfoot, V. C., who delivered a dissenting opinion, referred to *Marshall vs. Green*, L. R. 1, C. P. D., 35, without the disapproval implied in Vice Chancellor Blake's remark and stated the rule deducible from the cases to be that if the trees were purchased for the timber as they stood, and not with the intention of allowing them to increase in size and become more valuable from remaining in the soil, they are to be considered as chattels. This was the criterion applied in *Marshall vs. Green*, which was acknowledged to be unsatisfactory by Coleridge, C. J., who adopted it. It is certainly not so easy to apply as the principle that the sale of a tree is an agreement concerning an interest in land if it is the intention that the property should pass before severance, and an agreement for the sale of goods if the property is not to pass until after severance from the soil.

In *Laurentide Paper Co. vs. Alexander Baptist*, 41 S. C. R., 105, it was held that a deed of sale of the right during twenty years to cut and remove standing timber, with permission to make and construct such roads as might be necessary for that purpose, did not affect the title to the land on which the trees were growing, but merely conveyed a personal right to the timber as and when cut under the license. The registration of such a deed in conformity with the civil code of Lower Canada respecting the registration of real rights was unnecessary and, if effected, could not operate to secure to the vendee any right or priority of title in or to the timber as against a subsequent purchaser of the lands. The case of *Watkins vs. Perkins*, Q. R., 16, K. B., 471, was distinguished by the Chief Justice because in that case the question was as to the rights of the holder of a timber license with respect to timber cut in trespass on limits bought from the Crown, which rights were settled by a special provision of the statute regulating the sale and management of Crown Lands under which the limits were bought.

In *Handy vs. Carruthers et al.*, 25 O. R., 279, a sale of standing timber not to be severed immediately was held under the general rule to be a contract for an interest in land. Street, J., said, "Upon the question as to whether this sale is to be treated as a sale of an interest in land, or a sale of chattels, the authorities are in a most unsatisfactory condition. The current of the later cases seem to have set towards a return to the general rule so far as possible, that a contract for the sale of growing timber which was not to be severed immediately is a contract for the sale of an interest in land. It is extremely difficult to say upon what principle it can be said that a sale of trees to be severed in two years is a sale of chattels, while a sale of trees to be severed in ten years is a sale of an interest in land. Following the cases above cited from our own court, *Summers vs. Cook*, 28 Grant, 179, *McNeill vs. Haynes*, 17 O. R., 479, I think that the parol sale herein intended was a sale of an interest in land, that is to say, a parol sale of timber with a parol license to enter upon the land for the purpose of cutting and removing the trees."

It was held that the license justified the trespass claimed for, and that, having been founded upon a valuable consideration, it might be shewn as an answer to the plaintiff's claim and that the objection founded upon the Statute of Frauds was met by shewing the part-performance.

Fixtures.

The Canadian cases on the subject of fixtures deal for the most part with the question as to the right to take such property under *feri facias*. In *Wallon et al. vs. Jarvis*, 13 U. C. Q. B., 616 (1856), however, the question was raised as to the application of the Statute of Frauds. An engine and boiler had been in a saw-mill which had burned down and remained there set in bricks and bolted timbers let into the ground. The Sheriff offered them for sale, which was held to be clearly illegal, as they were then fixed to the freehold and could not be taken as chattels. On the return day of the writ, the debtor sold them verbally to the plaintiff, who detached them from the mill and removed them to another place. Robinson, C. J., stated the question whether, while things stood there attached to freehold, it was competent to the owner of the fee to make a verbal sale of them or whether the fourth section of the Statute of Frauds would apply, and said: "My personal impression is, that the fourth section of the Statute of Frauds does not apply to anything of this nature affixed to the soil, but not deriving nourishment from it, like trees growing; but the sale of such things so situated would effect nothing more, while they continued attached, than a license to enter upon the land and detach them from it, and as soon as they were detached they became chattels, etc."

There are two cases in the Supreme Court of Canada which raise the question of the right of the Sheriff to seize and sell under *feri facias*, but they throw no light on the application of the Statute of Frauds. They are *La Banque d'Hochelaga vs. The Waterous Engine Works*, 27 S. C. R., 406 (1897), and *Liscombe Falls Gold Mining Co. vs. Bishop*, 35 S. C. R., 539 (1904).

Sale of Goods Distinguished From Contract for Work.

In *Thomas vs. Miller*, 28 N. B., 202, plaintiff agreed to get, procure and deliver to defendant a quantity of hemlock at a certain price per cord, to be peeled from trees growing on land held by defendant under license from the Crown, under which license defendant was liable to pay stumpage for all timber cut, the bark to be surveyed by the defendant's surveyor. It was held that the agreement was substantially a contract to pay plaintiff for his labour in peeling, curing and hauling the bark,

and not a contract of sale of bark to defendant, and that defendant was not entitled to have the bark delivered to him free from the lien of the Crown for stumpage.

Grain Delivered to Warehouse to be Mixed and Equivalent Quantity Returned is a Sale.

In *Lawlor vs. Nicol*, 12 Man., 224, it was held that where wheat or other merchandise was received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods were so mixed up with others that they could not be returned, and the well understood course of the business was that, unless a price was agreed on, the party delivering the goods could only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties was really one of sale and not of bailment, whether the vendor was to receive the price in money or an equal quantity of goods, or had an option to do either, as the property in the goods had passed to the warehouseman. "In such a case the Statute of Frauds offered no bar to the recovery of the price or value of the goods so stored in case the warehouseman denied the receipt of the same."

A case occurs in the Territories Law Reports, vol. 4, p. 64, *Cargo vs. Joyner*, in which it was held that delivery of tickets for grain shewed only delivery to the miller, but did not prove a sale to him.

Rescission of Purchase is it not a Sale to Vendor?

In *Brassert vs. McEwen*, 10 O. R., 179, goods were sold by the plaintiff to McClung, Briggs & Co., in Toronto. Before the notice was given which would stop the goods in transitu, the purchasers had paid the freight and duty and removed the goods to their own warehouse. But negotiations took place between the plaintiffs and the purchasers, which resulted in a verbal agreement by the latter to hold the goods subject to the plaintiff's orders, and the purchasers on a later day wrote plaintiff's agent to the same effect. The question arose as to whether this agreement was within the Statute of Frauds. Cameron, C. J., seems to have held that it was, and this is apparently the decision of the court, but the Chief Justice says: "In arriving at this con-

clusion I cannot say that my mind has been free from doubt as to whether the transaction is within the 17th section or not. As a resale it would clearly be so. But, though clearly the goods were in possession of McClung, Briggs & Co., it does not seem so plain that parties situated as the plaintiff and McClung, Briggs & Co. were, the latter could not be allowed to say under the circumstances, 'We do not wish to keep your goods; we cannot pay for them, and wish you to take them back,' and plaintiff assenting thereto, why from the time of such assent the former should not be deemed and treated as bailees of the goods, holding them for the plaintiff's benefit, without violating the said provisions of the Statute of Frauds."

Compare *Mason vs. Redpath*, 39 U. C. Q. B., 157, where it was held that the goods had not passed to the purchaser and the contract of sale could be rescinded.

Sale by Sheriff.

In *Flintoft vs. Elmore*, 18 U. C. C. P., 274, (1868), Richards, C. J., said, "If a sale by an auctioneer comes within the section, I do not see any good reason for holding that the sale by the sheriff should not; the reason for the statute applying would hold good as much in one case as the other. If the sheriff is allowed to sue for the price of goods sold by him, he and his bailiff have as much interest in the sale as the auctioneer has when he sells and has to sue in his own name. I see no good reason for creating a distinction between the two kinds of sale."

The point had been decided in the same way in *Mingaye vs. Corbett*, 14 U. C. C. P., 557, (1864), in which it was held "that a sale of goods and chattels by a sheriff under a writ of execution comes within the 17th section of the Statute of Frauds, and requires a memorandum in writing or a delivery of the goods sold to bind the sale."

In *Witham vs. Smith*, 5 Grant's, Ch. 203, where a sale of lands had been made by a sheriff, it was held that the contract must be in writing under the Statute of Frauds.

Guarantee Distinguished From Absolute Contract.

In *Lindsay vs. Rose*, 3 Kerr. (N. B.), 576, the defendants entered into a written contract with T. by which he was to deliver

to them a quantity of lumber at a certain time. They afterwards agreed with plaintiff to transfer to her the balance of lumber coming from T. for which they acknowledged to have received payment in full from the plaintiff and guaranteed to see the lumber delivered at the time specified in the agreement with T. It was held that this was an absolute contract by the defendants to deliver the lumber and not a guarantee that T. should deliver it, and that the plaintiff had nothing to do with T's contract except to ascertain the time of delivery.

In *Boorstein vs. Moffatt, et al.*, 36 N. S. R., 81, an action brought by plaintiff against the defendants for work done and materials provided, the evidence shewed that the defendant Gillis, entered into a contract with the defendant Moffatt for the building of a house and that Moffatt employed plaintiff to do the work of painting and glazing. Moffatt failed to make payment as agreed, and plaintiff thereupon wrote to Gillis who told him to go ahead and he would see him paid. It was held that there being no evidence to shew that the defendant Moffatt was to be discharged, the promise made by the defendant Gillis was within the fourth section of the Statute of Frauds and, not having been made in writing, could not be enforced; also that, in view of the form of action, there was no necessity for pleading the statute.

In *Nichols vs. King*, 5 U. C. Q. B., 324, the defendant King contracted with a company to make a highway, and Garside, the other defendant, was surety of the company for the fulfillment of King's contract. King thereupon employed plaintiff to cut out for him certain timber at a stipulated price, and while plaintiff was engaged in cutting the timber, failed in his contract with the company. The surety, Garside, upon King's failure, told plaintiff to go on with his work and he would see him paid. It was held that under these facts there was no joint contract between King and Garside with plaintiff, but that King was primarily liable on his contract and Garside secondarily liable as guarantor.

Contract not to be Performed Within Year.

In *Bonnet vs. Peck*, 2, Pugsley, (N.B.), 316, the defendant undertook to give or procure for the plaintiff a situation as clerk

or book-keeper at a thousand dollars a year in consideration for which the plaintiff was for a certain sum to give the defendant a deed of his interest in certain land and to use his influence with the other heirs to procure deeds to the defendant. It was held that this contract was not void for uncertainty nor was it a contract not to be performed within a year.

See also *Smith vs. Jamieson*, note, p. 208a.

In *Hamilton vs. McDowell*, 5 U. C. Q. B., O. S. 720, the plaintiff contracted to clear twenty acres of the defendant's land, receiving for his labour all the wood cut there, and he was to be allowed fourteen months to perform his contract. It was held that this was not within the statute. "In the present case it was not specifically stated that the agreement should not be performed within a year and the nature of the contract does not show that such was the understanding of the parties. On the contrary, it rather proves the reverse. The plaintiff * * * was at liberty to clear it as soon as he thought proper, but was obliged to complete the whole work within fourteen months at farthest, and there is nothing to show that he might not have cleared all the land in six months. We incline, therefore, to think that the agreement is not within the words or spirit of the act which only embraces contracts not to be performed within a year, and not those which may be performed according to the agreement within that period, although a longer time is allowed by the terms of the contract at the election of the parties interested."

In *Reid vs. Harding*, 2 Hammy (N. B.), 137, a contract not in writing was entered into on the 26th of May for the supply of a regiment with groceries for a year from first of June following, subject to be sooner determined in case the regiment should leave the province. It was held that this was within the fourth section of the Statute of Frauds.

In *Harper vs. Davies*, 45 U. C. Q. B., 442, it was held in accordance with the case of *Brittain vs. Rossiter*, that, on a verbal agreement made in November for the hiring of defendant for the year from the first of December then following, there could be no recovery for wrongful dismissal because the contract was not one to be performed within the year.

In *Booth vs. Prittie*, 6 O. A. R., 680, the agreement for service as alleged by the plaintiff was made in February, 1880, whereby the defendant was to pay plaintiff for his services while he should remain in defendant's employment at the rate of five hundred dollars a year for one year, and thereafter at such salary as might be agreed upon, the plaintiff to enter upon his duties and his salary to commence on the 3rd of March then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year and for such longer period as might be agreed upon. This was held to be clearly within the statute.

In *Slater vs. Smith*, 10 U. C. Q. B., 630, an agreement to provide the plaintiff with board and lodging during the term of his natural life was held not to be within the Statute of Frauds, because it would not necessarily endure beyond the year, but in *Davies vs. Appleton*, 25 U. C. C. P., 376, the plaintiff entered into a verbal agreement with defendant to canvass Canada for subscribers to a certain book, and on completing Canada, to go to Liverpool and canvass for subscribers in England, the plaintiff to be paid three dollars a week for each subscriber in Canada and eight dollars in England. In an action for terminating the agreement it was stated by plaintiff in his evidence that the agreement as to Canada and England was all one and that it would take from eight to twelve months to complete Canada, and over two years to do the work in England.

This was held to be a contract not to be performed within a year, that being the intention of the parties and apparent from the nature of the employment, and that the plaintiff therefore could not recover.

In *Strong vs. Bent, et al.*, 31 N. S. R., 1, plaintiff and defendant entered into a verbal agreement for the hiring of plaintiff by defendant for a year to begin at a future date not then determined. Plaintiff began working for defendant some months afterwards and was dismissed. It was held that he could not recover on the contract for want of compliance with the Statute of Frauds, and that a letter from defendant which was relied upon to take the case out of the Statute could not be supplemented by parol evidence.

In *Nicholls vs. Nordheimer*, 22 U. C. C. P., 48, the plaintiff agreed with the defendant for the purchase of a piano at a certain price, and upon certain terms of payment. Defendant agreeing to guarantee that the instrument was then free from defect and should so continue for five years, and that, in case of its becoming defective within that period, defendant would, upon plaintiff's returning it within that time, refund the purchase money.

The County Court judge had decided, in accordance with the well established cases, that the words in the fourth section of the statute "not to be performed" meant, not to be performed on either side, and a verbal agreement was good for more than one year, provided that all that was to be done on one side was to be done within the year. With reference to this reasoning, Magarty, C. J., said that the goods in this case were bought and the purchase money paid or secured to be paid by notes given at the same time so that the mere dealing of sale and purchase was completed. The action was brought on a verbal bargain, which was to be in force for five years, and if the goods became defective, the plaintiff should have the right to return them and the defendant should be bound to pay back the purchase money. Before the plaintiff could call on the defendant to perform his part of the bargain he had, on finding the goods defective, to return them to the defendant who then, and not till then, was to pay the money. There was certainly, therefore, something to be done and a very important something to be done on the plaintiff's part before he could demand his money. He could return the goods any time within five years, if defective. For these reasons he held the judgment of the County Court judge to be erroneous.

In *Halloran vs. Moon*, 28 Grant's Ch. 319, it was held that the court would enforce a verbal agreement although it was to do an act that was not to be performed within a year from the time of making the agreement where the consideration had been executed.

In *Christie vs. Clarke*, 27 U. C. Q. B., 21, the plaintiff contracted with the defendant for the sale of the good-will of a business. Plaintiff's part of the agreement was to be performed within a year, though defendant's portion was to extend beyond that limit.

It was held, of course, that the Statute of Frauds would not apply.

In *Trimby vs. Lanktree*, 25 O. R., 109, it was also held that the Statute of Frauds did not apply to a contract which had been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side. The case was that the plaintiff delivered sheep to the defendant within a year from the making of the verbal contract under which the latter was to deliver double the number to the plaintiff at the expiration of three years.

Recovery on Quantum Meruit.

In *Wier vs. Letson*, 3 R. & C. (N.S.), 299, the defendant previously to the first of April, 1876, engaged with plaintiff by parol as clerk at a fixed rate per annum with a share of profits on a separate branch of the business. On February 14th, 1877, defendant asked for and obtained a fortnight's leave of absence when an accounting was gone into and plaintiff gave defendant his promissory note, which he afterwards paid, for the balance of his salary up to the end of the year, April 1st, 1877. Defendant did not return, and plaintiff brought action for non-fulfilment of his contract of service and for money had and received. It was held that, although the plaintiff could not recover on the count for non-fulfilment of defendant's contract, as that was not to be performed within a year, he could recover on the money count, as the defendant had received payment for services to be performed within a few weeks from the time of giving the note and which services defendant did not render.

See also *Brown vs. Nelson*, post, p. 90.

Requisites of Memorandum; Signature.

In *the Bank of British North America vs Simpson*, 24 U. C. C. P., 354, the court affirmed the principle that a written memorandum is not itself the agreement, but only evidence of the agreement, and held, therefore, that where the memorandum contained the names of the two contracting parties the subject-matter of the contract and the promise it was binding on the parties signing it, though not signed by the other party. The agreement was one for service as a clerk to the plaintiff bank.

In *Foster vs. Anderson*, 16 O. L. R., 565, among the words of description of the parcel of land agreed to be sold, the contract contained the words: "Being the premises known as number twenty-two Ann Street." The correct number was twenty-four, and the defendant owned no other property in Ann Street. The words quoted were rejected as surplusage, and there remained sufficient with parol evidence to satisfy the Statute of Frauds. Osler, J. A., *dubitante*.

In *Macintosh vs. Moynihan*, 18 O. A. R., 237, the defendant, Moynihan, being the owner of land which he was desirous of selling, prepared a document in the form of an offer and agreement to purchase from him through named agents his property therein described. It contained the name of no purchaser and was unsigned. It was held that this memorandum did not become binding upon him when a purchaser was subsequently found who signed the offer. Osler, J., dissenting, held that such an instrument was a proposal to sell to anyone who accepted the offer, and became a binding memorandum when signed by the purchaser, but this dissenting opinion does not seem to grapple with the question as to the necessity of a signature by Moynihan, the party to be charged. On the other hand, the judgment of the court seems to be based upon the ground, not simply that there was not a sufficient memorandum, but that there was no contract, though it may be that the Court merely meant that there was no sufficient memorandum signed by the party to be charged.

In *Thomson vs. Ede*, 22 O. A. R., 105, the familiar principle was applied that the written memorandum of an oral guarantee was required only for the purpose of evidence and a letter or other writing subsequently given by the guarantor, sufficiently shewing the terms of his undertaking, would suffice. A letter shewing the terms, written by the guarantor, partly on his own behalf and partly on behalf of a firm of debtors, and signed by him in the firm name and in his own for them, "Per proc." was held sufficient to bind him.

In *Mingay vs. Corbett*, 14 U. C. C. P., 557 (1864), already cited on the point that a sale by the sheriff, under execution, is within the Statute of Frauds, the memorandum was signed by the purchaser in a book, acknowledging the amount of his bid

for the goods, but no memorandum was signed by the auctioneer, and it was held that the purchaser could not recover in his action against the sheriff.

Signature by Agent.

In *Gillespie vs. Grover*, 3 Grant's, Ch. 558, it was questioned whether a letter written by a third person and signed by him addressed to the intended wife and delivered to her by the intended husband with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing within the Statute of Frauds signed by the agent of the party to be charged.

But in *Taillifer vs. Taillifer*, 21 O. R., 237, an ante-nuptial contract, not signed by the parties, but by notaries in their own names, they having full authority to do so, was held to be sufficient authority within the Statute of Frauds.

The contract in question was entered into before two notaries for Lower Canada residing in the district of Montreal, and was shewn to have been a good and valid contract according to the law of Lower Canada, but the judgment of the court seems to say that the contract would have been considered sufficiently well executed if tested by the law of the forum.

Receipt may not be Memorandum of Contract.

In *McBride vs. Silverthorne*, 11 U. C. Q. B., 545 (1854), the defendant sold wheat to be delivered at the buyer's mill, and the buyer signed a receipt in this form: "Received in store from Mr. Joseph McBride fifty-one bushels twenty-one pounds fall wheat at £s.d. amounting to £s.d. currency." The actual agreement between the parties was not embodied in this memorandum, which was, in fact, merely a receipt given to show the amount acknowledged to have been delivered. It was held that the actual contract could be proved. It will be observed that the plaintiff was not relying upon the receipt as a memorandum of the contract. The defendant relied on it as showing a contract "to store" the wheat. But the receipt was not inconsistent with a contract to sell, and it was not necessary to enquire what the effect would have been if there had been a conflict.

Letter Repudiating may be Memorandum.

A letter repudiating obligation may be a memorandum to satisfy the Statute. A letter of an agent to his principal may be a memorandum of the principal's agreement with another. In *Ockley et al. vs. Masson et al.*, 6 O. A. R., 108, for non-delivery of groceries, it was shown that one Kerr, who made the sale as agent for the defendants, had entered the sale in a book not produced; but the plaintiff produced a list of the things ordered, and their prices. Kerr sent the order in a letter to the defendants, who thereupon wrote plaintiffs saying that Kerr had reported a sale which they (the defendants) could not approve, but would accept for certain articles enumerated. Plaintiffs insisted on the completion of the order in full, and the defendants cancelled it altogether. This was held to be sufficient memorandum of the contract, notwithstanding the defendant's disapproval, therein expressed, of part of the order. The letter of Kerr to his principals not having been produced, although called for by the notice to produce, it was held that the Court might presume, if necessary, that it stated anything further which might be necessary to the plaintiff's case, and in particular that it might be assumed that Kerr had in his letter, stated that he had made a sale of the goods to the plaintiffs at the prices named in the list. The authority for the large presumption thus stated by the Court to be reasonable is said to be found in the cases cited in Broom's Legal Maxims, in illustration of the rule, *omnia praesumuntur contra spoliatores*.

In *Haubner vs. Martin*, 22 O. A. R., 468, the principle of *Bailey vs. Sweeting* was applied, and it was held that a letter referring to the terms of a contract made by an agent, but denying the authority of the agent to make it, was a sufficient memorandum within the Statute of Frauds; Burton, J. A. dissenting, on the ground that there was no admission of the bargain in the writing except by striking out that portion of the letter which denied the agent's authority.

The decision of the Supreme Court affirmed the principle that a writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memorandum under the seventeenth section of the Statute of Frauds may be used for that purpose, though it repudiates the sale. *Haubner vs. Martin*, 26 S. C. R., 142.

Variation or Discharge by Parol.

In *Mulgreave vs. Pringle*, Draper, V. C. K. B., 269, the head note reads as follows: "A agreed to pay B for a lot of land upon receiving a deed. B offered a deed when A declared his inability to pay and proposed new terms, which were accepted. Held that B. was thereby relieved from the necessity of tendering a deed to entitle him to sue A. or rescind the contract; that B. was at liberty to rescind the contract and might do so by parol, and that an agreement in writing within the Statute of Frauds might be waived discharged and determined by a subsequent verbal agreement. Qu.? Whether before or after the breach of the agreement." Per Robinson, C. J.: "Without examining the question whether in general an agreement in writing respecting an interest in land can be discharged by parol, I am of opinion that there is no ground for setting aside this verdict. * * * It is plain that the defendant ought in common honesty to have given up the land and all claim to the title or possession. * * * The question of a parol agreement reseinding a written one does not present itself here. If it did, there is an apparent contradiction in some of the authorities on that head that would render a strict examination of them necessary." Macaulay, J., cited from Sugden on Vendors and Purchasers that it is universally considered that an agreement in writing concerning land may be discharged, although it cannot be varied by parol.

In *Clements vs. Fairchild*, 15 Man., 478, it is said that if the parties to a contract enter verbally into an agreement to be substituted for it, such new agreement, although by reason of the Statute of Frauds it cannot be enforced, will have the effect of discharging and cancelling the written contract. In such case neither party can enforce the new agreement or recover damages for the breach of the written contract. Any money, however, or other consideration that may have been paid or given under the substituted agreement by one of the parties to the other may be recovered back or its value sued for by such party.

In *Lawrence vs. Errington*, 21 Grant's Ch., 261, the owner of land, by memorandum in writing, sold the timber thereon and when the time verbally agreed upon for its removal was nearly

expired the vendor told his vendee that he might have another year in which to complete the cutting and removal of the timber. It was held that the vendor was not at liberty afterwards to revoke such extension of time. The defendant, after agreement for extension of time, had desisted from further work on the lot, and it was on his recommencing that the plaintiff applied to the Court for an injunction, alleging that the agreement set forth by the defendant was void under the Statute of Frauds, and that the license to cut for a year was a revocable one which could be and was put an end to. The defendant proved clearly that, under the agreement actually made between the parties, he was entitled to the timber cut. The agreement alleged by the plaintiff differed from the one in writing, and it was held that the plaintiff's case therefore failed, and that the defendant had, notwithstanding the requirements of the Statute of Frauds, shewn such a state of facts as, under the authorities, would warrant the Court in refusing plaintiff relief.

Parol Evidence of Trust Notwithstanding Statute.

In *Barton vs. MacMillan*, 20 S. C. R., 404, property having been advertised for sale under a power in the mortgage, the owner's wife arranged with the mortgagee to redeem it by making a part-payment and giving another mortgage. To enable her to pay the amount B. agreed to lend it for a year, taking an absolute deed of the property. The deed was accordingly made, but in the name of B.'s daughter, who subsequently claimed that she had the property absolutely and for her own benefit. It was held that the evidence proved that the daughter was aware of the agreement made with B., and she must be held to have taken the property in trust, as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given as to the agreement with the plaintiff. Strong, J., dissented solely because of a different view of the evidence.

Parol Evidence to Identify Subject-matter.

In *Johnson vs. Wilson*, 28 U. C. C. P., 432, the negotiations related to the purchase of plaintiff's good-will, license and furniture, and, in a letter written by the defendant, he offered to take the stuff at a valuation, and again wrote modifying his

offer. The plaintiff telegraphed, accepting the offer of two thousand dollars down, time for balance. It was held that the term "time for balance" could be explained from the previous correspondence shewing that October was meant, and that the meaning of the word "stuff" had been explained by parol evidence, the agreement being thus sufficiently validated within the Statute of Frauds.

In the case of *O'Donnough vs. Stammers*, 11 S. C. R., 358, a memorandum of contract for the sale of land was made out by piecing together the parts of a correspondence between the parties with the conditions of sale. The correspondence is too long to be reproduced with advantage, but Ritchie, C. J., delivering the judgment of the Court, said that if it could for a moment be doubted that the contract was not sufficiently made out without the introduction of parol evidence to identify the documents referred to in the correspondence, the evidence of the defendant himself placed beyond all doubt the identity of the documents referred to in his letters as being the terms of the contract, and Strong, J., after referring to the case of *Ridgeway vs. Wharton*, 3 D. M. & G., 693, said that subsequent cases, so far from having shown the statement of the law made by Lord Cranworth in that case to be too loose, had, on the contrary, much relaxed the principle as to the admissibility of parol evidence for the purpose of identification. He refers in this connection to the case of *Bauman vs. James*, L. R. 3 Ch. 508, as an authority showing that where the reference was to a contract or agreement generally without saying or implying that such contract was in writing, parol evidence was admissible to identify the contract so referred to with the terms of an agreement set out in some prior unsigned or imperfect writing. He considered that the case of *Bauman vs. James* seemed to sanction a much greater infringement upon the enactment and policy of the Statute of Frauds than previous authorities had admitted, and particularly to overstep the limitation as to admissibility of parol evidence laid down by Lord Cranworth in *Ridgeway vs. Wharton*. "It is, however, the decision of a Court of Appeal, and has not, so far as I have been able to discover, been questioned by any late judicial decision, although it is true that it has been strongly disapproved by text writers."

There can be no doubt that the law as laid down in *Ridgeway vs. Wharton* is extended by the case of *Bauman vs. James*, but the latter case, so far from being overruled by any later decision, is still further extended by the case of *Long vs. Miller*, 4 C. P. D., 455, in which the defendant vendor of land was selling to the plaintiff, who signed a clear and full agreement and paid a deposit, but the defendant merely signed a receipt as follows: "Received of Mr. George Long the sum of thirty-one pounds as a deposit on the purchase of three plots of land at Hammer-smith." In this memorandum signed by the defendant there was no reference in the receipt to any unsigned paper even, but only to the fact of a transaction having taken place, and no connection with any other writing could possibly be made without oral evidence, but Lord Bramwell said: "The receipt uses the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence."

Part-performance.

In *Coates vs. Coates*, 14 O. R., 195, it was held that the staying of an action relating to the land in question was a sufficient part-performance of the contract relating thereto to take the case out of the Statute of Frauds. Prondfoot, J., cites extensively from Fry on Specific Performance, concluding that the plaintiff, with the consent of the defendant, had stayed his action, and was thus delayed in the prosecution of his remedy, and it would be a fraud to allow the defendant to benefit by the act and escape performance because the agreement was not in writing.

The Canadian cases on part-performance to take a case out of the Statute of Frauds and enable the Court to decree specific performance will be found in the Canadian Notes to Fry on Specific Performance, page 318c.

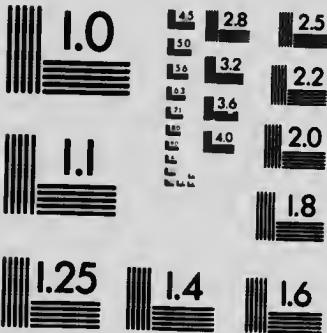
Other Cases of Parol Evidence.

The case of *Anderson vs. Douglas*, 18 Man., 254, is an illustration of the principle that collateral agreements and subsidiary conditions may be proved by parol notwithstanding the Statute of Frauds in cases for specific performance.



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CHAPTER VI.

CAUSES VITIATING AGREEMENT.

SECT. I.—MISTAKE.

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An agreement, apparently complete and sufficient to create a contract, may be affected by causes which under certain conditions render it void or voidable of legal effect. These causes are classed under the heads of Mistake, Fraud, and Duress or undue influence, and are so treated in the three sections of this chapter.

Mistake is occasioned by ignorance or misconception of some matter, under influence of which an act is done; so that the intention and legal consequence presumptively attributable to the act are rebutted or modified by evidence of the mistake.—Mistake may occur in a matter of law or in a matter of fact. But every person is presumed to know the law; and a party cannot in general allege ignorance or mistake of law in avoidance of his acts or contracts. The application of this principle is treated hereafter.—Mistake in a matter of fact may in general be alleged in avoidance of the consequences of acts and agreements. Mere forgetfulness is not necessarily equivalent to mistake (*a*); and

(*a*) *Barrow v. Isaacs* (1890), 60 L. J. Q. B. 179; (1891) 1 Q. B. 417.

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a person is not allowed to allege mistake in a matter of fact which it was his duty to know, or which, having the means of knowledge, it was wilful or negligent for him not to know; for in such cases knowledge is imputed to him (*b*).

Modes of affecting agreement.

Mistake affecting agreements may be distinguished as follows:—It may affect the act of agreement, so that a party appears to agree when in fact he does not; or it may affect the expression of the terms of agreement, which therefore express incorrectly or insufficiently the actual intention; or it may occur in the facts and circumstances which form the inducement to the agreement, so that the agreement made is not intended to apply to the actual facts and circumstances.—Further distinctions appear in the effect of mistake in the above cases: where the mistake is that of one party only, known or not known to the other; and where it is a mistake common to both parties.

Mistake in the act of agreement.

A person may always dispute the act charged against him as importing agreement; he may show that it was done with a different intention and under circumstances which do not render him responsible for the other party accepting it as agreement. Even in the case of agreements in writing and deeds signed and sealed, though a party cannot vary the written terms, he may contradict or qualify the extrinsic act of signing or sealing, which is the evidence of agreement (*c*). As if a person intending to sign an agreement as an attesting witness signs it by mistake in the wrong place as a party to be bound, the signing is a mere accident attended with no legal effect (*d*).

Execution of deed or writing.

If a person who is unable to read is informed of the contents of a deed or writing by another person reading or explaining it to him, and it is read or explained erroneously, he may deny that it is his deed; for it is at the risk of the party to whom the deed is made, being present, that the true effect be declared, if required; but if he do not require it, he is bound by the deed (*e*). Where the nature of a written document, and not merely its legal effect, has been misrepresented to the executing party, it has

(*b*) *Tindal, C. J., Bell v. Gardiner* (1842), 11 L. J. C. P. 195; 4 Man. & G. 11; James, L. J., *Re Metcalfe* (1879), 49 L. J. C. 192; 13 Ch. D. 236; *Tamplin v. James* (1880), 15 Ch. D. 215; *Goddard v. Jeffreys* (1881), 51 L. J. C. 58.

(*c*) See *ante*, p. 123.

(*d*) *Rex v. Longnor* (1833), 2 L. J. M. C. 62; 4 B. & Ad. 647; *Bramwell, B., Wake v. Horrap* (1861), 30 L. J. Ex. 277; 6 H. & N. 768.

(*e*) *Simons v. G. W. Ry.* (1857), 2 C. B. N. S. 620; *Howatson v. Webb* (1907), 77 L. J. C. 32; (1908) 1 Ch. 1.

been held that he could treat the document as a nullity, even as against a *bonâ fide* transferee for value of a negotiable instrument; as where the indorsement of a bill of exchange was obtained upon the representation that it was a guarantee—which it does not seem to have occurred to the court or to the plaintiff's advisers was the true legal effect of the transaction (*f*)—he was held not to be bound, there being no negligence to preclude him from asserting the mistake (*g*); and upon the authority of this decision it was held that a person who, without negligence, signed a promissory note upon the representation that he was merely attesting the execution of a deed, was entitled to dispute his liability to a holder for value without notice (*h*); but the weight of authority is certainly in favour of holding an executing party to his contract in favour of third parties, though mistaken in the legal effect, unless he is an illiterate or there is some other additional incident, even where he was induced to execute it by fraudulent misrepresentation of the effect, for fraud does not render a transaction void, but only voidable at the option of the party defrauded (*i*). And a person cannot deny the execution of a deed or instrument merely upon the ground that it is used for a different purpose than he intended (*k*).

Upon the same principle where a bidder at an auction is mistaken as to the identity of the property for which he bids, there is a mistake as to the subject-matter, and consequently not that *consensus ad idem* which is essential to the validity of a contract (*l*).

Bidding at auction by mistake.

Where there is a mistake in the expression of the agreement, the effect is different in the case of the mistake of one party only, and in that of a mistake common to both.—For the simple case of a mistake of one party only in the expression of the agreement, it is sufficient to recur to the elementary principle that the law judges of the matter of an agreement exclusively from the expressions of intention which are communicated between the parties. Conse-

Mistake in expression of the agreement.

Mistake of one party.

(*f*) Bills of Exchange Act, 1882, s. 55, sub-s. 2.

(*g*) *Foster v. Mackinnon* 1869).

L. J. C. P. 310; L. R. 4 C. P. 701.

(*h*) *Lewis v. Clay* (1897), 67 L. J. Q. B. 221.

(*i*) *Hunter v. Walters* (1871), 41 L. J. C. 175; L. R. 7 Ch. 75; *Bonhôte v.*

Henderson (1895), 64 L. J. C. 556; (1895)

1 Ch. 742; affd. 1895 2 Ch. 202;

Howatson v. Webb (1907), 77 L. J. C. 32;

(1908) 1 Ch. 1; *Carlisle & Cumberland Bk.*

v. Bragg, (1911) 1 K. B. 485.

(*k*) *Hunter v. Walters* (1871), 41 L. J. C. 175; L. R. 7 Ch. 75.

(*l*) *Van Praagh v. Everidge* (1903), 72

L. J. C. 260; (1903) 1 Ch. 434. See

ante, p. 2.

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quently, as a general rule, an agreement is not affected by the mistake of either party in expressing the terms, of which the other party has no notice or intimation (*m*). In the case of an agreement in writing this is no more than an application of the general rule that the written terms cannot be varied by extrinsic evidence of intention (*n*); and it is the duty of the court in general to construe and apply an agreement in writing without regard to the views of either party respecting the meaning (*o*).—In cases of marine insurance, if the assured under a floating policy (that is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by his subsequent declaration) declares a risk upon goods shipped by a ship which he names under a *bonâ fide* mistake, and intending another, the underwriter, having taken the name and particulars of the ship from the assured, is nevertheless liable if the error has been made in good faith, for the erroneous declaration may be rectified even after loss or arrival (*p*). Where an insurance company granted a policy upon the life of a third party according to the terms of the proposal sent in by the assured, which contained a condition exempting the insurer from liability under the special circumstances of the death, the assured were not permitted to allege that the condition was inserted by mistake, there being no mistake of the company or in the policy (*q*).

Specific
performance
of agreement
with mistake.

The court cannot grant specific performance of an agreement according to the intention of a party instead of the expression of his intention; or rectify an agreement upon a mistake of one of the parties only, because in such case there would be no real agreement by which to rectify it (*r*). Where a vendor by mistake has included in the contract of sale property not intended to be sold, the court cannot compel the purchaser against his will to complete the sale exclusive of that property (*s*). Though in some cases where the

(*m*) See *ante*, p. 2.

(*n*) See *ante*, p. 119.

(*o*) *Midland G. W. Ry. v. Johnson* (1858), 6 H. L. C. 798; *Prison Commissioners v. Middlesex* (1882), 51 L. J. Q. B. 433; 9 Q. B. D. 506; *Stewart v. Kennedy* (No. 2) (1890), 15 Ap. Ca. 108.

(*p*) *Marine Insce. Act*, 1906, ss. 26, 29; *Ionides v. Pacific Fire & Marine Insce.* (1872), 41 L. J. Q. B. 190; L. R. 7 Q. B. 517; *Davies v. National Marine Insce.*

(1891), 60 L. J. P. C. 73; (1891) A. C. 485.

(*q*) *Fowler v. Scottish Equitable Life Insce.* (1858), 28 L. J. C. 225.

(*r*) *Bradford Earl v. Romney Earl* (1862), 31 L. J. C. 497; 30 Beav. 431; *Bentley v. Mackay* (1862), 31 L. J. C. 697; 4 De G. F. & J. 275; *May v. Platt* (1900), 69 L. J. C. 357; 1900) 1 Ch. 616.

(*s*) *Alvanley v. Kinnaird* (1849), 2 Mac & G. 1.

mistake is not material, as a small difference in quantity, the court will grant specific performance with compensation for the deficiency (*t*). Where a party has insisted and acted upon a mistaken construction, the court may refuse to grant performance in any form and dismiss the action (*u*); but it would seem that unless his conduct amounts to a final election, he is not precluded from obtaining relief upon the contract according to its true construction, or that insisted upon by the other party (*x*).

On the other hand the court will not grant specific performance against a party who was under a material mistake in expressing the agreement, where there is some reasonable ground for the mistake, or great hardship in enforcing it (*y*). Accordingly the court in general refuses specific performance against a vendor who has by mistake included in the contract property which he did not intend to sell (*z*). And specific performance was refused against a vendor who had instructed his auctioneer to sell subject to the reservation of a right of way, but the auctioneer by mistake signed the contract upon particulars of sale which omitted the reservation (*a*); so where there was a mistake of the auctioneer as to the reserved price (*b*). Where an offer was made by letter to sell at a price written as 1,250*l.* in mistake for 2,250*l.*, which was accepted by letter, the court refused to enforce the contract at the written price, the vendor having given notice of the mistake immediately upon discovery (*c*). So specific performance was refused of an agreement for a lease in which the lessor omitted by mistake the payment of a premium (*d*). Where the reversion of land leased at a rent was sold, the vendor supposing that he would retain the rent (which was incident to the reversion), as well as the purchase-money, it was held that the purchaser could not have specific performance upon any other terms (*e*).—Where prior to the Judicature Acts the court would have dismissed a suit without prejudice to the right of the plaintiff to bring an action at law,

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SECT. I.

Mistake
ground for
refusing
specific
performance.

(*t*) See post, Pt. V., Chap. V., Sect. II.
(*u*) *Cloues v. Higginson* (1813), 1 V. & B. 524; *Marshall v. Berridge* (1882), 51 L. J. C. 329; 19 Ch. D. 233.
(*v*) *Preston v. Luck* (1884), 27 Ch. D. 497.
(*w*) *Watson v. Murston* (1853), 4 De G. M. & G. 230; *Denny v. Hancock* (1871), 40 L. J. C. 193; L. R. 6 Ch. 1; *Goddard v. Jaggons* (1881), 51 L. J. C. 58; *Re*

Hare and O'More (1900), 70 L. J. C. 45; 1901) 1 Ch. 93.

(*z*) *Baxendale v. Sault* (1855), 24 L. J. C. 385; 19 Beav. 601.

(*a*) *Manser v. Back* (1848), 6 Ha. 443.

(*b*) *Day v. Wells* (1861), 30 Beav. 220.

(*c*) *Webster v. Creil* (1861), 30 Beav. 62.

(*d*) *Wood v. Searth* (1855), 2 K. & J. 33.

(*e*) *Wycombe Ry. v. Donnington Hospital* (1866), L. R. 1 Ch. 268.

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Mistake of
one party
known to
the other.

the court, in refusing specific performance on the ground of the mistake of the party charged, must now give the other party the damages, if any, which he has sustained by reason of the mistake (*f*).

"The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it. And in considering the question in what sense a promisee is entitled to enforce the promise, it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent" (*g*). A knowledge of the mistake, if the party in error be not corrected, may amount to fraud, and be a ground for setting aside the contract altogether, unless rectification of the mistake be consented to (*h*). Thus where the rent was entered in a lease by mistake at a less sum than agreed to the knowledge of the lessee, but the lessor executed the lease in ignorance of it; it was held that the lessee must either give up the lease, or take a corrected one at the higher rent (*i*). So where a lessor granted a lease of land, knowing that as to part he had no title, and the lessee took the lease in ignorance of the defect of title, it was held that the lessee had an election either to have the lease annulled, or to take the part for which title could be given with damages for the rest under the covenant for title (*k*).

Mistake in
expression of
agreement
common to
both parties.

By the rule of common law, a written contract as expressed by the parties could not be varied by extrinsic evidence of intention, for the purpose of correcting mistakes in the expression (*l*). But the Court of Chancery administered relief against such mistakes by conforming the performance to the real agreement, and if necessary by rectifying the written contract, and incidentally thereto by restraining proceedings at law upon the contract as

(*f*) *Tamplin v. James* (1880), 15 Ch. D. 215.

(*g*) *Hannen, J., Smith v. Hughes* (1871), 40 L. J. Q. B. 221; L. R. 6 Q. B. 597.

(*h*) *Paget v. Marshall* (1885), 54 L. J. C. 575; 28 Ch. D. 255; *May v. Platt*

(1900), 69 L. J. C. 357; (1900) 1 Ch. 616.

(*i*) *Garrod v. Frankel* (1862), 31 L. J. C. 604; 30 Beav. 445.

(*k*) *Mostyn v. Mostyn Coal Co.* (1876), 45 L. J. C. P. 401; 1 C. P. D. 145.

(*l*) See ante, p. 119.

written (*m*). Now under the Judicature Acts this equitable jurisdiction is conferred on all the courts thereby constituted; but all causes and matters for the rectification, or setting aside, or cancellation of deeds or other written instruments are ordinarily to be tried in the Chancery Division (*n*). In the exercise of equitable jurisdiction, evidence of a common mistake of both parties in expressing their agreement is generally admissible for all purposes. If a plaintiff claims specific performance of a contract in the terms in which it is drawn up, the defendant may resist the claim by showing that it was drawn up by mistake and does not represent correctly the terms of agreement (*o*). If it appears from the evidence of the defendant what the real agreement was, the plaintiff must submit to take specific performance of the agreement so proved, or his claim will be dismissed (*p*); and the defendant himself may obtain specific performance according to the contract proved, without resorting to a cross action to rectify the writing (*q*).

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SECT. I.

Specific
performance.

There is an original jurisdiction in equity to rectify a written contract containing a mistake of both the parties in expressing the agreement, and to make it accord with the agreement intended to be expressed (*r*). "Courts of Equity do not rectify contracts: they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts" (*s*). A plaintiff may claim, in one and the same action, rectification of a contract together with specific performance of the contract as rectified (*t*). "In such cases it is necessary to prove not only that there has been a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really so intended" (*u*); and for this purpose the court necessarily receives evidence of the true agreement in con-

Rectification
of written
contract.

(*m*) See *infra*.

(*n*) Judicature Act, 1873, ss. 21, 34; see *Mostyn v. Mostyn Coal Co.* 1876, 15 L. J. C. P. 401; 1 C. P. D. 145.

(*o*) *Clayton v. Hugginson* (1813), 1 V. & B. 521; *Mosey v. Bagnwood* (1861), 10 Jur. N. S. 957; affg. 1862, 4 De G. F. & J. 351.

(*p*) *Ranchbottom v. Gordon* (1812), 1 V. & B. 165; *Gordon (Lord) v. Hertford (Mory.)* 1817, 2 Madd. 106; *Smith v. Wheatecroft* (1878), 47 L. J. C. 715; 9 Ch. D. 223.

(*q*) *Fitz v. Clayton* 1807, 13 Ves. 549;

Hugginson v. Clarke 1808, 15 at p. 525.

(*r*) *Hardwicke, L. C., Henkle v. Royal Exchange Assn.* 1749, 1 Ves. sen. 318; *May v. Platt* (1906), 69 L. J. C. 357; 1906, 1 Ch. 616.

(*s*) *James, V.-C., Mackenzie v. Coulson* 1869, L. R. 8 Eq. 375.

(*t*) *Olley v. Fisher* 1885, 56 L. J. C. 208; 31 Ch. D. 367.

(*u*) *Turner, L. J., Bentley v. Mackay* (1862), 31 L. J. C. 709; 4 D. F. & J. 286; *James, V.-C., Mackenzie v. Coulson* 1869, L. R. 8 Eq. 375.

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tradition of the written agreement (*x*), and parol evidence of the mistake is admissible to rectify the writing, though the contract is one required to be proved by writing by the Statute of Frauds (*y*); for the statute must be specially pleaded by way of defence, either originally or by amendment (*z*).—The court will grant the relief to a plaintiff who himself drew the instrument with the mistake (*a*); and can grant it upon the uncontradicted evidence of the plaintiff alone where no further evidence can be obtained (*b*). But there can be no relief against a defendant denying a mistake (*c*).

Rectification of policy.

In the case of marine insurance, the preliminary slip or memorandum of the terms agreed upon, although invalid at law and in equity for want of statutory formalities, may yet be resorted to as evidence of intention; and a mistake in the policy corrected by the slip, even after a loss has supervened (*d*). Where the slip for the insurance of a ship described the risk as beginning *at* and *from* a named port, and the policy by mistake described it as *from* the port only; the policy was rectified so as to cover a loss *at* the port (*e*). Under an open policy of insurance upon goods to be declared as shipped in order of shipment, it was held that the insured might, according to a usage of merchants and underwriters, correct a mistake in the order of declaring the shipments after a loss had become known, so as to bring the goods within the insurance (*f*).—A bill of exchange, drawn in renewal of a former bill between an indorsee, drawer, and acceptor, had by mistake the name of the indorsee inserted in the place of drawer, in which form the bill was accepted and indorsed to him; and an action commenced by him as indorsee having been met by the defence that his name appeared on the bill as drawer, he sued in equity for rectifi-

Bill of exchange.

(*x*) *Grant, M. R., Winch v. Winchester* (1812), 1 V. & B. 378.

(*y*) *Mortimer v. Shortall* (1842), 2 Dr. & War. 363; *Ex p. Nat. Prov. Bk. of England* (1876), 46 L. J. Bk. 11; 4 Ch. D. 211.

(*z*) *Catling v. King* (1877), 46 L. J. C. 5; 5 Ch. D. 660; *Duckins v. Pourhyn (Lord)* (1878), 48 L. J. C. 304; 4 Ap. Ch. 51; *James v. Smith* (1890), (1891) 1 Ch. 384; *Bramming v. Othman* (1897), 75 L. T. 602.

(*a*) *Ball v. Storie* (1823), 1 L. J. O. S. C. 214; 1 Sim. & S. 27.

(*b*) *Hayley v. Pearson* (1879), 43 Ch. D. 545.

(*c*) *Mortimer v. Shortall* (1842), 2 Dr.

& War. 363; *May v. Platt* (1900), 69 L. J. C. 357; 1900) 1 Ch. 616.

(*d*) *Cory v. Patton* (1872), 41 L. J. Q. B. 195, n.; L. P. 7 Q. B. 304; *Ionides v. Pacific Fire & Marine Insce.* (1872), 41 L. J. Q. B. 190; L. R. 7 Q. B. 517.

(*e*) *Mutton v. London Assec.* (1739), 1 Atk. 545.

(*f*) *Marine Insce. Act*, 1906, s. 29; *Stephens v. Australasian Insce.* (1872), 42 L. J. C. P. 12; L. R. 8 C. P. 18; *Imperial Marine Insce. v. Fire Insce. Corp.* (1879), 48 L. J. C. P. 124; 4 C. P. D. 166; *Davies v. National Marine Insce.* (1891), 60 L. J. P. C. 73; (1891) A. C. 485.

cation of the instrument, and for an injunction against the defence at law; and the court held that, the remedy failing at law, the bill must be rectified (*g*).

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SECT. I.

In the case of a unilateral mistake, there can in general be no remedy except upon the covenants, after conveyance of the estate (*h*). "Parcel or no parcel" is a question of fact (*i*); and evidence of mistake respecting the property conveyed has in some cases been readily admitted to rectify conveyances, although this consideration has not always been given full effect to (*k*). A conveyance has been rectified where a part only of the property sold was conveyed instead of the whole (*l*); or that more was conveyed than was intended (*m*). So in proceedings in bankruptcy where a memorandum of mortgage misdescribed the property, which was otherwise specifically identified, the court ordered that the document must be treated as rectified so as to give the security intended (*n*).—The court rectified a lease by making the lessee liable for land tax according to the written agreement for the lease (*o*). And a lease of a house "together with all lights and easements thereto belonging," was read with the addition of a proviso contained in the agreement for the lease, excluding any right to light over the adjacent property of the lessor, in an action against the latter for obstruction of the light (*p*).—Marriage settlements are rectified upon the following principles:—If articles are drawn up, and a settlement afterwards made before marriage, without reference to the articles, in case of difference between them, the settlement would presumptively prevail, as being the later document and made while the parties are still at liberty to make a new agreement; but evidence is admissible to prove that the settlement was intended to follow the articles, and that the difference was a mistake, and the settlement may then be rectified. If, however, the settlement expressly purports to be made in pursuance of the articles, that is sufficient without further evidence, and the difference between them will be rectified.

Rectification
of convey-
ance.

Leases.

Marriage
settlements.

g *Druitt v. Parker* (1868), 37 L. J. C. 11; 1 R. 5 Eq. 131.

h *Thomas v. Powell* (1791), 2 Cox, 394; *Jolliffe v. Baker* (1883), 52 L. J. Q. B. 609; 11 Q. B. D. 255; *May v. Platt* (1900), 69 L. J. C. 357; (1900) 1 Ch. 616.

i *Id.*, p. 138.

k *Thompson v. Hickman* (1907), 76 L. J. C. 254; (1907) 1 Ch. 550.

l *White v. White* (1873), 12 L. J. C. 288; 1 R. 15 Eq. 217.

m *Wright v. Giff* (1856), 25 L. J. C. 803; 22 Beav. 207; *Booth v. Kyle* (1907), 76 L. J. C. 294; (1907) 1 Ch. 564.

n *Ex p. Nat. Prov. Bk. of England* (1877), 46 L. J. Bk. 11; 4 Ch. D. 241.

o *Murray v. Parker* (1851), 19 Beav. 305.

p *Selaman v. Giff* (1875), 44 L. J. C. 551; 1 R. 20 Eq. 114.

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If articles are made before marriage and the settlement is made after, and not in conformity with the articles, although not expressed to be made in pursuance of the articles, the court will rectify the settlement, because upon the face of it not what the parties were bound to (*q*). The court can only rectify a marriage settlement, where there is evidence of a different intention at the time when the deed was executed (*r*). The court may act upon the evidence of the plaintiff alone (*s*); but will only act with reluctance upon affidavit evidence, unless there is corroboration by documentary evidence (*t*).

Setting aside
contract
where no real
agreement.

Where it appears that no real agreement existed between the parties, the court cannot rectify the written contract: but if necessary may set it aside. "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument. It is impossible for the court to rescind or alter a contract with reference to the terms of the negotiation which preceded it" (*u*). And "if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument" (*x*).—Accordingly, where an agreement was drawn up for the lease of land described as "in the occupation of S.," both parties having in fact agreed that some land should be taken from that occupation, but without agreeing as to the quantity or place; the court refused to rectify the agreement according to the views of either party, or to grant specific performance as it stood (*y*). Where it appeared that one party intended to purchase a property at the price of 2,500*l.*, and the other party, having a lease with the option of purchase for 2,000*l.*, intended to sell his lease and option for 500*l.*; and an agreement was drawn up purporting to buy and sell the lease and option for 2,500*l.*; it was held that

(*q*) *Logg v. Goldwire* (1736), Ca. temp. Talbot, 20; 2 Wh. & T. L. C. 770.

(*r*) *Floris v. Floris* (1861), 3 De G. F. & J. 667; *Tucker v. Bennett* (1888), 57 L. J. C. 507; 38 Ch. D. 1.

(*s*) *Honley v. Pearson* (1879), 13 Ch. D. 545.

(*t*) *Banholte v. Henderson* 1895, 64 L. J. C. 300; (1895), 1 Ch. 712.

(*u*) *James, V.-C., Mackenzie v. Coulson* (1869), L. R. 8 Eq. 375; *Darvelly Earl v. L. C. & D. Ry.* (1867) 36 L. J. C. 101; L. R. 2 H. L.

(*x*) *Turner, J., Watley v. Mackay* (1862), 31 L. J. C. 709; 4 De G. F. & J. 286.

(*y*) *Townshend (Marq.) v. Stangroom* 1801, 6 Ves. 328.

as the agreement expressed the intention of neither party it must be set aside (z).

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SECT. I

Where a written contract contains a mistake which is apparent upon the face of the instrument, it will be construed in accordance with the obvious intention, both at law and in equity (a). Upon this principle the word "pounds" has been supplied to the number given (b); the condition of a bond to pay "one pounds" was read as "one hundred pounds" (c); "the condition of this obligation shall be void" was read "this obligation" shall be void (d); and the condition of a bond to be void "if the obligor did pay" was read "did not pay" (e). So the date of a promissory note was read as corrected by a contemporaneous memorandum made by the drawer upon the note stating the date of falling due (f). Where in a series of deeds relating to the same transaction, 1,200*l.* was written in one instance instead of 1,400*l.*, the court read it correctly without a suit to rectify the mistake (g). And a lease for "the term of 94 years" at a rent payable "during the said term of 91 years hereby demised" was construed by the counterpart, which with the lease form but one deed, to mean a term of 91 years only (h).—Where there is an apparent mistake in the name of a person, or where the name of one person has been written in mistake for that of another, or has been omitted, the court will read the instrument with the mistake corrected (i).—Upon the same principle in a marriage settlement the word "heirs" was added throughout in the limitations of the real estate, as being obviously necessary to support the trusts (k). But in general there can be no relief merely by reason of a mistake as to the legal effect (l). And where a lease, after setting

Apparent
mistake
corrected by
construction.

(z) *Price v. Leg* 1863, 32 L. J. C. 530; 4 Giff. 235.

(a) *Wilson v. Wilson* (1851), 23 L. J. C. 697; 5 H. L. C. 40.

(b) *Coles v. Hume* (1828), 7 L. J. O. S. K. B. 29; 8 B. & C. 568; *Hounmand v. Le Chae* (1903), 72 L. J. K. B. 496; (1903) 2 K. B. 216.

(c) *Waugh v. Bussell* 1814, 5 Taunt. 707.

(d) *Mantel v. Hareby* (1669), 2 Wms. Saund. 6th ed. 78.

(e) *Butler v. Wigg* (1667), 1 Wms. Saund. 81, n. (2).

(f) *Fitch v. Jones* (1855), 21 L. J. Q. B. 293; 5 E. & B. 238.

(g) *Schulze v. Lockwood* 1863, 33 L. J. C. 106; 32 Beav. 436. S. P., *Elliot v. Freeman* 1863, 7 L. T. N. S. 715.

(h) *Burchell v. Clark* 1876, 46 L. J. C. P. 115; 2 C. P. D. 88.

(i) *Spivey v. Topham* (1802), 3 East, 115; *Ry. v. Woodlale* (1844), 11 L. J. M. C. 13; 6 Q. B. 519; *Wilson v. Wilson* (1851), 23 L. J. C. 697; 5 H. L. C. 40.

(j) *Dent v. Chyngton* 1834, 33 L. J. C. 503. (k) *Re Woolf's Trusts* 1876, 3 Ch. D. 211.

(l) *Midland G. W. Ry. v. Johnson* (1858), 6 H. L. C. 798; *Stewart v. Kennedy* (No. 2—1899), 15 Ap. Ca. 108.

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out certain covenants of the lessee, went on to provide for a right of re-entry by the lessor if any of the covenants "hereinafter contained" on the part of the lessee should be broken, and there were no further covenants on the part of the lessee; the court refused to reject the words "hereinafter contained" for the reason that the mistake might have been in the omission of the covenants (*m*).

**Mistake
apparent in
applying the
contract.**

Upon a like principle where an obvious mistake appears in applying the contract to the facts, the instrument will be construed and applied according to the intention: as where an agreement bearing a certain date referred to a bill of exchange "payable at three months from this date," and it appeared that the only bill applicable bore a different date (*n*); and where an agreement to let a house described it by number, and it appeared that the house intended bore a different number (*o*). So in the case of insurance of a ship, if the ship is sufficiently identified a mistake in the name is immaterial (*p*). And generally, where the subject of contract is sufficiently ascertained a mere error of description (*falsa demonstratio*) may be rejected or corrected in the application (*q*).

**Ambiguous
expressions.**

A written contract may be expressed in such general or ambiguous terms as to admit of different constructions; in which case, though the written contract must be applied, if possible, according to its terms, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party, so that there is no real agreement between them. And extrinsic evidence of the mistake is thus admissible to prevent the contract being enforced against the intention of either party (*r*).—Thus where the particulars of a sale by auction were so ambiguous as to render it doubtful whether the timber upon the estate was included with the land, and the vendor and purchaser accepted them with the different meanings, it was held that specific performance could not be

(*m*) *Doe v. Godwin* (1815), 4 M. & S. 265.

(*n*) *Way v. Hearn* (1862), 32 L. J. C. P. 34; 13 C. B. N. S. 292.

(*o*) *Hutchins v. Scott* 1837, 6 L. J. Ex. 186; 2 M. & W. 809.

(*p*) Marine Insee. Act, 1906, ss. 26, 29; *Le Mesurier v. Vaughan* (1805), 6

East, 382; *Ionides v. Pacific Fire & Marine Insee.* (1872), 41 L. J. Q. B. 190; L. R. 7 Q. B. 517; *Davies v. National Fire & Marine Insee.* (1891), 60 L. J. P. C. 73; (1891) A. C. 485.

(*q*) See *ante*, p. 147.

(*r*) See *ante*, p. 140.

decreed upon the construction of either party (*s*). Where a contract was made for the sale of the reversion of an undivided moiety of an estate, describing the property as then let at a certain rent, but leaving it doubtful whether the half or the whole of the said rent was incident to the reversion, the court refused specific performance according to the construction of the vendor of a sale of half the rent, upon the ground that the purchaser believed that he had purchased the whole (*t*).

A written agreement, though expressed in certain unambiguous terms, yet in reference to the facts may be found to admit equally two different applications. There is then a *latent* ambiguity which may be explained by extrinsic evidence of the intention of the parties as to the application of the contract; and if it appears that each party mistook the intention of the other, and that they intended different things by the same expression, then the basis of agreement fails and the contract is void (*u*).—Thus, where an agreement was made for a lease of premises “as per plan agreed upon,” and it appeared that two plans had been inspected, but neither finally accepted by both parties, it was held that there was no agreement which could be specifically enforced (*x*). Where a contract was made for the sale of a cargo “to arrive on Peerless from Bombay,” and it appeared that there were two ships of that name then arriving from Bombay, and that the buyer meant the one, and the seller meant the other; it was held that there was no contract (*y*). The master of a ship chartered it upon certain terms as to freight to a broker, who again chartered it in his own name to a shipper upon different terms; the shipper loaded a cargo and took bills of lading from the master conditioned for “freight payable as per charter party”; each of them intended the bill of lading to refer to his own charter party and knew nothing of the other; it was held that “the bill of lading being ambiguous and equally capable of being applied to the one charter party as to the other, could not be a contract or evidence of a contract between the parties”; and that for the same diversity of intention there was no implied liability to the master to pay a reasonable freight (*z*).

(*s*) *Higginson v. Clowes* (1808), 15 Ves. 516; *Clowes v. Higginson* (1813), 1 V. & B. 521.

(*t*) *Swaistland v. Dearsley* (1861), 30 L. J. C. 652; 29 Beav. 430.

(*u*) See *ante*, p. 140.

(*x*) *Hodges v. Horsfall* (1829), 1 Russ. & M. 116.

(*y*) *Raffles v. Wichelhaus* (1864), 33 L. J. Ex. 160; 2 H. & C. 906.

(*z*) *Smidt v. Tiden* (1874), 43 L. J.

PART I.

Mistake of
fact inducing
the agree-
ment.

Mistake of
one party.

Mistake in
quality of
goods.

Mistake in
identity of
party.

A mistake may be made in some fact or circumstance, collateral to the agreement itself, which materially induces one or both of the parties to make the agreement, so that in reference to the real facts and circumstances, the intention of agreement fails; the consequences of which are different where the mistake is that of one party only and where it is common to both parties.—The mistake of a party in some fact or circumstance which may have induced him to make the agreement, if it does not enter into the agreement as a condition of warranty, and if the other party is not implicated in the mistake, is immaterial to the validity at law and cannot be alleged in avoidance of the agreement; as where a sale was made of a hundred chests of tea out of a certain cargo, warranted equal to a sample shown at the time of the sale, which the seller then mistook for, but which was not in fact, a sample of that cargo (*a*); where a builder took a contract for work to be completed for a certain sum, upon an erroneous statement of the quantities which had been taken out by the architect, the employer not knowing or being responsible for the mistake (*b*); where a person applied for shares in a company under a mistaken belief that he required them to qualify himself as a director, and upon the winding up of the company was made a contributory (*c*).—Where a person buys an article upon his own opinion as to its nature, or quality, or adaptability to some purpose, which proves to be mistaken, his mistake, unless induced by the seller, is immaterial to the validity of the contract, as there is in general no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale (*d*). Thus, where a sale of oats was made by a sample which the buyer, a trainer of horses, supposed to be old oats and therefore suitable for his purpose, nothing being said at the time about the quality of the oats; it was held that unless the seller understood the buyer to stipulate as to the quality of the oats the sale was good, though the oats were in fact new and not suitable to the purpose of the buyer (*e*).—Upon the same principle a mere mistake as to the identity of the person with whom a contract is in fact made is

Q. B. 399; L. R. 9 Q. B. 146. See other examples, *ante*, p. 219.

(*a*) *Scott v. Littledale* (1858), 27 L. J. Q. B. 201; 8 E. & B. 815.

(*b*) *Scrivenor v. Pask* (1866), L. R. 1 C. P. 715.

(*c*) *Fowler's case* (1872), 12 L. J. C. 9; L. R. 14 Eq. 316.

(*d*) Sale of Goods Act, 1893, s. 14. See *post*, pp. 240, 266, 267.

(*e*) *Smith v. Hughes* (1871), 19 L. J. Q. B. 221; L. R. 6 Q. B. 597.

immaterial to the validity, in the absence of fraud or misrepresentation inducing the mistake; but if the contract was not in fact offered to the party in question, so that there was an original variance between the person to whom the offer was addressed and the person purporting to accept it, there would in fact be no agreement to found a contract (*f*).

CH. VI.
SECT. I.

The mistake of a party in a matter inducing his agreement affords in general no answer to a claim for specific performance: as where a purchaser bought a house under the mistake that it was situated in a particular county, of which he wished to become a freeholder (*g*); where a purchaser bought land in the mistaken expectation of procuring a consent which was required for building on it (*h*); where a purchaser was under a mistake of his own, that a piece of land occupied with the land sold formed part of it (*i*); where a vendor had made a mistake in the valuation of timber, which was sold by auction with the land at a fixed price (*k*); where a lessee agreed to take a mining lease at a fixed rent and royalties under the mistaken supposition that a vein of coal existed in the demised land, there being no warranty or misrepresentation as to the existence of the coal (*l*). But where a lessor granted an underlease for a longer term than he possessed, under a mistake as to the duration of his term, it was held that the lessee, who might have inquired into the lessor's title, had no claim for compensation, the contract being silent on the matter (*m*).

Specific
performance
granted.

But the court may refuse specific performance against a party who was induced to enter into the contract by mistake of some material fact, where there would be hardship amounting to injustice in enforcing it; though the other contracting party was not implicated in the mistake, nor aware of it; but must, where prior to the Judicature Acts it would have dismissed a suit for specific performance without prejudice to proceedings at law, proceed to assess damages for any loss he may have sustained (*n*): as where a vendor sold land under the mistake that he was selling in his own right and would be entitled to the purchase-money

Specific
performance
refused.

(*f*) See *ante*, p. 18.

(*g*) *Shirley v. Davis*, cited by Eldon, L. C., in *Drewe v. Hanson* (1802), 6 Ves. 571.

(*h*) *Adams v. Weare* (1784), 1 Bro. C. C. 567.

(*i*) *Tamplin v. James* (1889), 15 Ch. D. 215.

(*k*) *Griффiths v. Jones* (1873), 12 L. J. C. 468; L. R. 15 Eq. 279.

(*l*) *Jefferys v. Fairs* (1876), 46 L. J. C. 113; 4 Ch. D. 448.

(*m*) *Clayton v. Leech* (1889), 41 Ch. D. 103.

(*n*) *Tamplin v. James* (1880), 15 Ch. D. 215.

PART I.

absolutely; whereas he would be entitled only as trustee for re-investment (*o*); where trustees sold for a very inadequate price in mistake of the real value through the negligence of their surveyor in withholding a valuation (*p*); where the vendor had instructed an agent to make a reserve bidding, who by mistake omitted to bid (*q*); and where a purchaser at an auction purchased a lot in mistake for the one he intended to purchase (*r*). If the mistake is as to the power of the party to complete the contract, the court must refuse specific performance on account of his incapacity to perform it (*s*).

Mistake of
fact caused
by the other
party.

Specific
performance
refused.

If the mistake which induced the contract was caused by the other party intentionally or unintentionally, or if the other party knew of the mistake without having caused it, different questions arise. If the mistake was caused intentionally by a misrepresentation made for the purpose of inducing the contract, it is a fraud, the consequences of which are treated in the next section. If the mistake was caused unintentionally, but by negligence of the other party or of his agent, or by any means for which he is responsible, the court will refuse him specific performance of the contract, and in some cases will rescind it altogether (*t*): as where leasehold property was sold under particulars of sale omitting mention of a substantial ground rent, specific performance was refused (*u*). Where a purchaser bought a building lot upon an estate according to a plan annexed to the particulars of sale, and with the condition that no public-house should be built upon the estate; and the plan omitted a plot reserved by the vendor for building a public-house; it was held that the vendor must either admit the restrictive condition to extend to the plot reserved, or must have his bill for specific performance dismissed (*x*). So where a purchaser was misled as to the boundary of the property sold by the plan prepared by the vendor's surveyor (*y*). And a misstatement of the length of term held by a tenant of the land sold, which did not appear to the disadvantage of the purchaser, was held no

(*o*) *Howell v. George* (1815), 1 Mad. 1.

(*p*) *Mortlock v. Buller* 1804, 10 Ves. 292.

(*q*) *Mason v. Armitage* (1806), 13 Ves. 25.

(*r*) *Malins v. Freeman* (1836), 6 L. J. C. 133; 2 Keen, 25; *Van Praagh v. Everidge* (1903), 72 L. J. C. 260; 1903 1 Ch. 434.

(*s*) See *post*, Pt. V., Chap. II., Sect. II.

(*t*) See *Waddam v. Hearn*, 7 Ves. 211; 2 Wh. & T. L. C. Eq. 513.

(*u*) *Jones v. Rimmer* (1880), 49 L. J. C. 775; 14 Ch. D. 592.

(*x*) *Bascomb v. Beckwith* (1869), 38 L. J. C. 536; L. R. 8 Eq. 100.

(*y*) *Denny v. Hancock* (1870), 40 L. J. C. 193; L. R. 6 Ch. 1.

ground for refusing specific performance to the vendor (*z*). But it is not easy to reconcile the decisions respecting the precision necessary to be observed in describing houses in a town by reference to street and number, so as to bind a purchaser who makes a mistake without carelessness (*a*).—Where property was advertised for sale absolutely, and at the auction conditions of sale were for the first time produced and read, to the effect that it was subject to mortgages, a purchaser who bought in ignorance of the conditions was held entitled to have the contract rescinded, upon the ground that he was misled into it by the mode of conducting the sale (*b*). And where the property was described as "inclosed by a wall" fronting a public road, and in fact the wall was not part of the property and severed it from the road, the purchaser was held entitled to have the contract rescinded (*c*).

CH. VI.
SECT. I.

Contract
rescinded.

The mistake of one of the parties as to a fact inducing his agreement may be known to the other party, without his causing it or being responsible for it; in which case the validity of the contract will depend upon circumstances. If a person contract with another, knowing him to be under a mistake, without informing him, and it is understood on both sides that the contract is made upon the tacit basis of the mistake, it would be equivalent to a fraudulent inducement, and would entitle the other party to avoid the contract (*d*). But if it be clearly understood that the mistaken party is acting upon his own judgment, without any common understanding with the other party, his mistake would afford no sufficient ground for avoiding the contract: as in the case above cited, where new oats were sold by sample without any other representation as to their quality, which the buyer bought in mistake for oats to serve his special purpose as a trainer of horses, nothing being said at the time about old oats: it was held that the passive acquiescence of the seller in the mistake of the buyer did not entitle the latter to avoid the contract: that there was no legal obligation on the seller to inform the buyer that he was under a mistake, not induced by the act of the seller: and that there was no common understanding that the sale was for old oats (*e*).—In some contracts, which are therefore called contracts

Mistake of
fact known
to the other
party.

Contracts
uberrimæ
fidei.

(*z*) *Goddard v. Jeffreys* (1881), 51 L. J. C. 57.

(*a*) *White v. Bradshaw* (1851), 16 Jur. 738; *Stanton v. Tattersall* (1853), 1 Sm. & G. 529.

(*b*) *Torrance v. Bolton* (1872), 42 L. J.

C. 177; L. R. 8 Ch. 118.

(*c*) *Brewer v. Brown* (1885), 54 L. J. C. 605; 28 Ch. D. 309.

(*d*) See next section.

(*e*) *Smith v. Hughes* (1871), 40 L. J. Q. B. 221; L. R. 6 Q. B. 597.

PART I. *uberrimæ fidei*, it becomes the duty of the one party to inform the other of every material fact within his knowledge of which the other party is not already informed, so as to prevent any ignorance or mistake in the latter; and the communication of all material facts is a condition of the validity of the contract. The familiar examples are contracts of insurance against risks, in which it is the duty of the assured to describe fully and correctly the risk; also partnerships; compositions with creditors; and contracts offered by the prospectus of a company; in which everything must be communicated which it is material for the parties to know (*f*).

Mistake
of both
parties in
fact inducing
the agree-
ment.

Contracts
conditional
upon sup-
posed facts.

Where there is a mistake of both parties in a fact materially inducing the agreement, the effect depends upon whether the agreement is to be taken absolutely according to its terms; or whether it is to be taken as impliedly conditional upon the existence of the supposed state of facts, and intended to be inoperative and void with reference to the real facts and circumstances, as in the following cases:—A contract for the sale of the cargo of a ship, supposed to be then on its voyage, was held to import the condition of the cargo being then in existence, so that, the cargo having been previously sold by the captain of the ship, the contract was void (*g*). So a time policy upon a ship made in ignorance of the then loss of the ship is void; but if the ship exists, there is no implied condition of its state, and the policy attaches for the full value insured (*h*). A policy on goods on a voyage "lost or not lost" attaches, though the goods, unknown to both parties, have arrived safely; and the premium is chargeable (*i*). An insurance of goods on a voyage, made in ignorance that it was illegal by reason of war having been declared at the port of sailing, was held void, and the premium paid recoverable (*k*). A voyage policy, made in ignorance that the ship had previously arrived at the port of destination, is an insurance of the unknown risk, and the premium paid is not recoverable as upon a void policy (*l*). Upon the same principle, where a contract was made for the supply of

(*f*) Marine Insurance Act, 1906, ss. 17, 18, 19, 20; *Cockshott v. Bennett* (1788), 2 T. R. 763; *Law v. Law* (1904), 71 L. J. C. 169; (1905) 1 Ch. 140. And see post, pp. 237, 562.

(*g*) *Conturrier v. Hastie* (1856), 25 L. J. Ex. 253; 5 H. L. C. 673.

(*h*) *Barker v. Janson* (1868), 37 L. J. C. P. 105; L. R. 3 C. P. 303.

(*i*) *Bradford v. Symondson* (1881), 50 L. J. Q. B. 583; 7 Q. B. D. 456.

(*k*) *Oom v. Bruce* (1810), 12 East, 225.

(*l*) *Stone v. Ocean Marine Insur.* (1876), 45 L. J. Ex. 361; 1 Ex. D. 81.

an article according to a sample, which contained a latent defect unknown to both parties; it was held that the contract was to be taken, as intended by the parties, according to the sample as supposed to be sound, and without regard to the defect (*m*). And in the case of a sale of forged documents and securities, which both parties suppose to be genuine, the sale is void and the price paid may be recovered (*n*). Upon the same principle a contract for the sale of a life annuity is conditional upon the annuitant being alive at the date of the contract: and the purchase-money paid in ignorance of his death may be recovered (*o*). If an annuity be granted upon the basis of a statement by the grantee of the age of the nominee, it is avoided by an erroneous statement, though unintentionally so, and the payments on both sides may be recovered (*p*). The sale of a policy of insurance is deemed, *prima facie*, to be conditional upon the life being in existence (*q*). If a policy upon the life of a person be forfeited for non-payment of the premiums, a power to revive the policy is conditional upon the then continuance of the life; but if payment of the premiums may be postponed by the terms of the policy, a payment made after the death but before the expiration of the extended time under the conditions will be effective to save the policy (*r*). An agreement made between the assignee of a tenant for life and the remainderman respecting the timber on the estate, which the tenant for life was entitled to cut, in ignorance of the fact that he was then dead, was held void, because intended to take effect only upon the supposition of his being alive (*s*). Where rent was paid and received for the occupation of land under a lease for lives in ignorance of the death of the persons upon whose lives the lease depended, it was held that no implication of a new tenancy could arise from such receipt of rent (*t*).—A common mistake of both parties as to the title of property sold may be asserted in avoidance of a contract of sale, notwithstanding a condition in the contract precluding any investigation of the title;

CH. VI.
SECT. I.

Contracts
conditional
upon life.

Mistake as
to title.

(*m*) *Drummond v. Van Ingen* (1887), 56 L. J. Q. B. 563; 12 Ap. Ca. 281. Confirmed by Sale of Goods Act, 1893, s. 15.

(*n*) See *ante*, p. 69.

(*o*) *Strickland v. Turner* (1852), 22 L. J. Ex. 115; 7 Ex. 208.

(*p*) *Att.-Gen. v. Ray* (1874), 43 L. J. C. 478; L. R. 9 Ch. 397.

(*q*) *Scott v. Coulson* (1903), 72 L. J. C.

500; (1903) 2 Ch. 249.

(*r*) *Pritchard v. Merchants & Tradesmen's Mutual Life Assoc.* (1858), 27 L. J. C. P. 169; 3 C. B. N. S. 622; *Stuart v. Freeman* (1902), 72 L. J. K. B. 1; (1903) 1 K. B. 47.

(*s*) *Cochrane v. Willis* (1865), 35 L. J. C. 36; L. R. 1 Ch. 58.

(*t*) *Doe v. Crago* (1848), 17 L. J. C. P. 263; 6 C. B. 90.

PART I.

Mistake in
measure-
ment.Mistake in
value.

as where in fact the property belonged to the purchaser and not to the seller as supposed (*u*). And a common mistake of this kind may entitle the purchaser to recover his purchase-money, or a proportionate part, in spite of the general rule that, after completion, the only remedy of a purchaser in respect of title is upon the covenants for title, if any, given by the vendor (*x*). A purchaser was held entitled to repudiate a contract for the sale of a building lease, entered into by him in the mistaken belief that restrictive covenants contained in a former conveyance had been extinguished (*y*).—A contract of sale of real estate may be rescinded at the suit of either vendor or purchaser by reason of a mistake of both parties as to the acreage, to the extent of rendering the contract in effect substantially different to that intended (*z*); but words qualifying a statement of the acreage, as “by estimation,” “more or less,” or the like, imposes on the purchaser the risk of a slight deviation from the quantity named, and precludes him to that extent from objecting that he was mistaken in the quantity (*a*). Where an agreement was made for a lease of minerals described as included within a fault “supposed to run in the direction shown upon the plan,” and supposed to include a stated number of acres “or thereabouts”; and in working the minerals a fault was discovered running in a different direction to that supposed and including a much greater area; it was held that the agreement could not be enforced according to that state of facts (*b*).—Where an agreement was made for the sale of a manor with all the lord's rights, in ignorance of both parties that the manor included valuable wastes and other rights; it was held that the purchaser could not have specific performance, except with exclusion of those rights (*c*). So an agreement for the division of an intestate's estate which was made under a material mistake as to the value was set aside (*d*); as was an agreement between a creditor and the trustee of a bankrupt in settlement of

(*u*) *Cooper v. Phibbs* (1869), L. R. 2 H. L. 119; *Jones v. Clifford* (1876), 45 L. J. C. 815; 3 Ch. D. 779.

(*x*) *Johnson v. Johnson* (1802), 3 Bos. & P. 162. See *ante*, p. 68.

(*y*) *Ellis v. Rogers* (1885), 29 Ch. D. 661.

(*z*) *Leslie v. Thompson* (1851), 20 L. J. C. 561; 9 Ha. 238; *Durham (Earl) v. Leyard* (1863), 34 L. J. C. 589; 34 Beav. 611; *Aberaman Ironworks v. Wickens* (1868), L. R. 4 Ch. 101; *Jacobs v.*

Revell (1900), 69 L. J. C. 879; (1902) 2 Ch. 858.

(*a*) *Winch v. Winchester* (1812), 1 V. & B. 375; *Portman v. Moll* (1826), 2 Russ. 570. See *Cross v. Eglin* (1831), 9 L. J. O. S. K. B. 145; 2 B. & Ad. 106.

(*b*) *Davis v. Shepherd* (1866), 35 L. J. C. 581; L. R. 1 Ch. 410.

(*c*) *Barendale v. Seale* (1855), 24 L. J. C. 385; 19 Beav. 601.

(*d*) *Cocking v. Pratt* (1750), 1 Ves. sen. 100.

the debt, both parties being in ignorance of concealed property of the bankrupt (e). So an agreement to buy shares in a company, in ignorance that a petition for winding up the company had been presented, was held void (f); and an agreement to take shares in a company issued upon the basis of an amalgamation with another company, which was then supposed to be valid but afterwards set aside as *ultra vires* (g).

CH. VI.
Sect. I.

On the other hand, though the parties may be under a mistake, their contract may be made unconditional, and independent of the real state of facts: as where a ship was sold and assigned by a deed in which the seller covenanted that he then had power to sell; and it appeared that the ship had become a wreck at the time of the sale, of which both parties were ignorant; it was held that the covenant was absolute, and that if the ship had ceased to exist at the time of the sale there was a breach of the covenant; but if it still existed as a ship, however damaged, there was no breach, for the covenant imported no warranty as to the condition of the ship (h). Where the residue of a lease was sold and conveyed, which by a mistake in the date of commencement was twelve years longer than supposed at the time of the sale; the court refused to reopen the transaction, the intention being to convey the entire lease (i). So where an underlease was granted, under a mistake, for a longer term than the lessee possessed, it was held that the underlessee, who might have inquired into the title, had no claim to compensation, there being no contract for compensation (k). Nor would a covenant for quiet enjoyment necessarily entitle him to damages (l). The sale of a specific chattel, if it be accurately identified in substance, is absolute, and independent of any mistake or erroneous supposition respecting the qualities and accidents of the article (m). And where new shares were offered by a company and accepted, under the mistaken supposition that the company had obtained a contract requiring an extension of their business; it was held that the

Contracts
independent
of mistake.

Sale of
specific
chattel.

(e) *Ex p. Jarvis* (1879), 48 L. J. Bk. 45; 10 Ch. D. 179.

(f) *Emmerson's case*, (1866), 36 L. J. C. 177; L. R. 1 Ch. 433.

(g) *Bank of Hindustan v. Alison* (1871), 40 L. J. C. P. 117; L. R. 6 C. P. 222; *Wynne's case* (1873), L. R. 8 Ch. 1002.

(h) *Barr v. Gibson* (1838), 7 L. J. Ex.

124; 3 M. & W. 390.

(i) *Okill v. Whittaker* (1847), 16 L. J. C. 154; 2 Ph. 388.

(k) *Clayton v. Lecch* (1889), 41 Ch. D. 103.

(l) *Kelly v. Rogers* (1892), 61 L. J. Q. B. 604; (1892) 1 Q. B. 910.

(m) See Sale of Goods Act, 1893, s. 14.

PART I. contract to take the shares was absolute, for that the mistake did not affect the substance or validity of the shares (*n*).

Mistake in
matter of law.

The parties are understood to contract upon the common basis of the general law, equally known to both, so that a mistake of law can never be alleged by one party in avoidance of his agreement, unless the other party was implicated in causing the mistake (*o*). Thus, where a lessor contracted to grant a lease for seven or fourteen years, which by a general rule of legal construction gives the option to the lessee, he could not allege in answer to a claim for specific performance that he understood and intended the option to be with the lessor; the mistake being not as to the terms, but as to the legal effect, which he was bound to know (*p*). So a person who has become a shareholder in a company in respect of shares illegally issued at a discount, though he could not have been compelled to accept them, cannot allege his ignorance of the law in relief of the liability to pay the full amount of the shares (*q*).—Upon the same principle a person who has paid money with a full knowledge of the facts, but under a mistake of law as to his liability to pay it, or as to the legal validity of the consideration for which he pays it, has in general no claim to recover it back either at law or in equity (*r*). A mistake of both parties as to the legal meaning or construction of the terms of a written contract is no answer to a claim upon the contract as it stands, but may be a foundation for a case for the purpose of rectifying it, if it does not express the contract which was intended by them (*s*).

Mistake as
to private
rights.

Private rights of property, though they are the result of rules of law, or depend upon rules of law applied to the construction of legal instruments, are generally to be considered as matters of fact; and if parties contract under a common mistake of their relative and respective rights, the contract is liable to be set aside as inapplicable to the state of rights really existing. Accordingly it is said that "in the maxim '*ignorantia juris haud excusat*,' the word *jus* is used in the sense of denoting general law, the

(*n*) *Kennedy v. Panama, N. Z. & Austr. Mail Co.* (1867), 36 L. J. Q. B. 263; L. R. 2 Q. B. 587.

(*o*) *Stewart v. Kennedy* (No. 2) (1890), 15 Ap. Ca. 108. See *post*, p. 234.

(*p*) *Powell v. Smith* (1872), 41 L. J. C. 734; L. R. 14 Eq. 85.

(*q*) *Re Railway Time Tables Co.* (1889), 58 L. J. C. 501; 42 Ch. D. 98.

(*r*) See *ante*, p. 66.

(*s*) *Irham (Lord) v. Child* (1781), 1 Bro. C. C. 92; *Midland G. W. Ry. v. Johnson* (1858), 6 H. L. C. 798. See *ante*, p. 215.

ordinary law of the country; but when the word '*ius*' is used in the sense of denoting a private right, that maxim has no application" (*t*).—Thus where an agreement was made between the tenant for life and the portioners of a settled estate under the mutual mistake that upon the construction of the settlement the portions were a present charge, the court having decided that they were not chargeable until the death of the tenant for life set aside the agreement (*u*). And a resettlement of family estates by the father tenant for life and the son tenant in tail, made upon the supposition that the father had a power of charging the estates with portions, which he purported to release, was set aside as founded upon mistake (*x*). So a mortgage account, which had been settled with compound interest and half-yearly rests under the mutual mistake that such was the legal effect of the mortgage deed, was reopened by the court and settled at simple interest (*y*).

But if the parties enter into an agreement for the purpose of settling their rights with full knowledge of the doubts arising upon them, the court will enforce such agreement: "Parties may be erroneously advised as to the law, but they may be told in what circumstances the question of law depends, and in what mode it may be tried, and they may determine (whether the advice they receive be well or ill founded) whether they will give up the question in favour of the party with whom it arises" (*z*).

Upon this principle "where family agreements have been fairly entered into without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement" (*a*). And a family compromise may be binding although entered into under a mistake induced by a solicitor acting for all parties, but not where the legal adviser has suppressed material facts (*b*).

CH. VI.
SECT. I.

Settling
doubtful
rights.

Family
settlements.

(*t*) *Ld. Westbury, Cooper v. Phibbs* (1867), L. R. 2 H. L. 170; *Ld. Chelmsford, Beauchamp (Earl) v. Winn* (1873), L. R. 6 H. L. 231.

(*u*) *Lawton v. Campion* (1854), 23 L. J. C. 505; 18 Beav. 87.

(*x*) *Fane v. Fane* (1875), L. R. 20 Eq. 698.

(*y*) *Daniell v. Sinclair* (1880), 50 L. J. C. P. 50; 6 Ap. Ca. 181.

(*z*) *Turner, L. J., Stone v. Godfrey* (1851), 23 L. J. C. 774; 5 De G. M. & G. 76.

(*a*) *Eldon, L. C., Gordon v. Gordon* (1821), 3 Swanst. 463. See *Stapilton v. Stapilton* (1739), 1 Atk. 2; 1 Wh. & T. L. C. 223.

(*b*) *Stewart v. Stewart* (1839), 6 Cl. & F. 911; *Re Roberts* (1905), 74 L. J. C. 483; (1905) 1 Ch. 704.

CHAPTER VI.

CAUSES VITIATING AGREEMENT.

SECT. II.—FRAUD AND MISREPRESENTATION.

§ 1. CONTRACTS INDUCED BY FRAUD OR MISREPRESENTATION.

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CH. VI.
SECT. II.

This section is confined to the effects of fraud and misrepresentation operating between the two parties to an agreement. An agreement made in fraud of a third party, a stranger to the agreement, is affected by the fraud in a different manner; the agreement is then made for a fraudulent and, therefore, illegal purpose, and is absolutely void by reason of the illegality of the transaction (a). The contract or debt implied in law from the obtaining money by fraud has been dealt with in a previous section (b). An agreement, apparently complete and sufficient to create a contract, may be vitiated by fraud, entitling a party

(a) See *post*, Pt. III., Chap. IV.

(b) See *ante*, p. 55.

to avoid its effect by showing that he was induced to agree by the fraud of the other party. The questions here to be considered are: what constitutes such fraud as entitles the party to avoid his agreement; and under what circumstances, and with what consequences, such avoidance takes place. The defect in the agreement consists in the one party inducing the other to agree by some misrepresentation or untrue statement intentionally made for that purpose. It necessarily involves a mistake in the party so induced; which, as affecting him only, would not vitiate his agreement; but there is the additional circumstance that the other party causes the mistake for the purpose of inducing the agreement, and the party causing the mistake is therefore precluded from holding the other bound *(c)*. The misrepresentation may be made by express words or by conduct; the question in each case being, what was the meaning intended to be conveyed *(d)*.

Ch. VI.
Sec. II.

Misrepresentation.

There is a general presumption of law in favour of the validity of a contract; accordingly, the person alleging that he has been induced to enter into a contract by fraud must establish the fact as against the party denying it *(e)*. Other examples of this principle will appear hereafter in discussing the capacity of the parties *(f)* or the burden of proof where illegality is alleged *(g)*. But in actions or proceedings taken to avoid an agreement alleged to have been obtained by fraud, it is sufficient to prove the facts and circumstances which render the agreement voidable in law, without alleging or proving as a fact a fraudulent motive or intention beyond that of obtaining the agreement *(h)*. The misrepresentation may be made with the motive of benefiting the party by his acting upon it, and yet be not the less fraudulent in its legal effect *(i)*.

Fraudulent intention.

The misrepresentation by which the agreement is effected must be of a matter of fact; a misrepresentation of a matter of general

Misrepresentation of fact.

(c) See *ante*, p. 214.
(d) See *ante*, p. 2.
(e) *Cavendish Bentuck v. Fenn* (1888), 57 L. J. C. 552; 12 Ap. Ca. 652; *Parsons v. National Fire and Marine Insur.* (1891), 60 L. J. P. C. 73; (1891) A. C. 485; *Whitehorn Bros. v. Davison*, 1911) 1 K. B. 463.
(f) See *post*, pp. 386, 415.
(g) See *post*, p. 515.
(h) *Buller, J., Parsley v. Freeman*

(1789), 3 T. R. 60; 2 Smith, L. C. 64; *Parke, B., Thom v. England* (1853), 22 L. J. Ex. 243; 8 Ex. 725; *per cur.*, *Sturges v. Chadbourn* (1804), 20 L. J. Ex. 382; 5 H. & N. 890; *Rouilly, M. R., Ship v. Crosskill* (1870), 39 L. J. C. 552; L. R. 10 Eq. 85. As to an action for fraud, see *post*, p. 251.
(i) *Ld. Blackburn, Smith v. Chadwick* (1844), 53 L. J. C. 879; 9 Ap. Ca. 201.

PART I.

Misrepresentation of law.

law, or a promise to do something at a future time, or a statement of motive or of opinion, is not in general a sufficient ground to vitiate an agreement.—The law in general is equally within the knowledge of all; and therefore a representation or statement of a mere matter of law made to a person who has equal means of knowing what the law is, though erroneous, is not a sufficient ground for avoiding an agreement (*k*). Thus where an agent in a recognised legal position (as the director of a railway company) represents that he has authority by virtue of his office to bind the company, which is a matter of general law, the party to whom such representation is made must accept it at his own risk (*l*). And where the extent of an agent's powers is known to the other contracting party, misconception as to the extent of the agent's authority will not give a cause of action (*m*). So where a person, competent to read, and apprised of the nature of a written document, executes it upon a misrepresentation respecting its contents, it is nevertheless binding upon him (*n*). But where a person in a position of trust or authority or duty relative to another exerts an undue influence to impose upon him an erroneous view of the law, it may be a ground in equity, equivalent to fraud, for avoiding the transaction (*o*).—Matters of private right, though depending upon rules of law and legal rules of construction, are in general to be considered as matters of fact, in reference to the doctrines of mistake and fraud (*p*). Thus the directors of a company incorporated by a private Act of Parliament are responsible for the untruth of representations respecting their statutory powers (*q*). "A statement of fact which involves, as most facts do, a conclusion of law, is still a statement of fact and not a statement of law": such are statements concerning personal status, the possession of property and other matters of private right (*r*).

Private rights.

Misrepresentation of intention.

A representation of intention as to some future act which is not performed, though it may have induced the agreement, is not in general a sufficient ground for avoiding it; for a representation that something will be done in the future is equivalent to a pro-

l. Horse v. Earl Life Assce. (1904), 73 L. J. K. B. 373; (1904) 1 K. B. 558.

(p) Beattie v. Ebery (Lord) (1874), 44 L. J. C. 29; L. R. 7 H. L. 102.

(m) Beattie v. Ebery (Lord) (1872), 41 L. J. C. 804; L. R. 7 Ch. 777.

(n) Howatson v. Webb (1907), 77 L. J. C. 32; (1908) 1 Ch. 1. See *Carlisle &*

Cumberland Bk. v. Bragg, (1911) 1 K. B. 485.

(o) See post, p. 285.

(p) See ante, p. 230.

(q) West London Bk. v. Kitson (1884), 53 L. J. Q. B. 345; 13 Q. B. D. 360.

(r) Jessel, M. R., Eaglesfield v. Londonderry (Marq.) (1875), 4 Ch. D. 702.

mise, and the promisee may take the security of a valid contract for the performance. Therefore "it is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact which is untrue, and a promise to do something in future, and to consider what the bargain is" (s). But a representation may be made of an intention of a party at the time of contracting as of an existing matter of fact, and as a material inducement to the other party to make the contract; and if such representation is false, it may be sufficient ground for avoiding the contract t. Where a borrowing company induced a loan by a prospectus stating the object of the loan to be for improving the buildings and extending the business of the company, whereas it was in fact intended to apply the money to the discharge of previous liabilities; the company having failed, the directors who issued the prospectus were held liable for the misrepresentation as fraudulent (u).—Upon this principle a person offering to buy goods must be taken impliedly to represent that he intends to pay for them, and if he buys with the preconceived intention of fraudulently obtaining the goods by means of the sale without paying for them, the seller may avoid the sale (x); but the omission of a buyer of goods at an auction to disclose the fact that bankruptcy proceedings were then pending against him, upon which he is adjudicated a bankrupt, is not sufficient evidence of a fraudulent intention not to pay for the goods; and consequently the property in the goods vests in his trustee in bankruptcy (y).—Upon the same principle where a vendor or lessor induces a sale or lease by representation of his intention to make improvements, such as roads and buildings, affecting the property and its value, the court will not give him specific performance unless he makes good his representation (z). And plans produced at the time of contracting showing the improvements may operate as representations of the intention (a). On the other hand the purchaser or

Effect on
specific
performance.

(s) Mellish, L. J., *Ex p. Burrell* (1876), 45 L. J. Bk. 70; 34 D. 552. See *ante*, p. 4.

(t) Bowen, L. J., *Edgington v. Fitzmaurice* (1885), 55 L. J. C. 650; 29 Ch. D. 483.

(u) *Edgington v. Fitzmaurice* (1885), 55 L. J. C. 650; 29 Ch. D. 459.

(x) *Kingsford v. Merry* (1856), 26 L. J. Ex. 83; 1 H. & N. 583; *Cleugh v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17;

L. R. 7 Ex. 26. See *Henderson & Co. v. Williams* (1895), 64 L. J. Q. B. 308; (1895) 1 Q. B. 521.

(y) *Ex p. Whittaker* (1875), 44 L. J. Bk. 91; L. R. 10 Ch. 446.

(z) *Beaumont v. Dolox* (1822), Jacob, 422; *Myers v. Watson* (1851), 1 Sim. N. S. 523; *Lumare v. Dixon* (1873), 43 L. J. C. 203; L. R. 6 H. L. 414.

(a) *Randall v. Holt* (1851), 4 De G. &

PART I.

Misrepresentation of motive.

lessee may claim specific performance with compensation for the intended improvements (*b*).

A misrepresentation of the motive or object in making a contract affords no ground for avoiding it; the motive in making a contract being in general immaterial (*c*). Thus a false statement by a purchaser that an intended partner of his would not consent to give a higher price, was held not to affect the sale (the purchaser failing to show damage), though the buyer afterwards charged the property to his partner at a larger price (*d*). So where a lessee contracting for a lease stated that he intended to use the premises for a purpose which was lawful, and afterwards used them for a different and unlawful purpose, the lessor was not entitled to avoid the lease and recover the possession (*e*); but the lessee might be restrained by injunction from doing acts in breach of his representations (*f*).

Representation of opinion.

Matters of opinion, stated merely as such, though erroneous, afford no ground for avoiding an agreement: as in the case of an insurance of a ship made upon a letter from the master expressing his opinion of the safety of a port (*g*). So the statement in the prospectus of a railway company, that there was no probability of any rival line being carried out, was held to be a mere conclusion of general opinion, and not such a misrepresentation of fact as would avoid a contract to take shares made upon the faith of it (*h*). The liability of the seller for statements respecting the value of the property sold depends upon the same principle: as where it was stated in particulars of sale that the property was "of estimated annual value of 400*l*., " and such an estimate was in fact made, though evidence was given of the value being only 200*l*., it was held that there was no such misstatement as would give a claim for compensation (*i*). But a false statement by the vendor of the price that he gave for the property would be misrepresentation of a fact *k*; as would a false statement that

Representation of value.

S. 313; *Re Chiffreuil* (1888), 58 L. J. C. 263; 40 Ch. D. 45.

(*b*) *Peacock v. Penon* 1848, 18 L. J. C. 57; 11 Beav. 355.

(*c*) *Williams v. Carwardine* (1833), 2 L. J. K. B. 101; 4 B. & Ad. 621.

(*d*) *Vernon v. Keys* (1810), 12 East, 632; (1812), 4 Taunt. 488.

(*e*) *Evett v. Hill* 1851, 23 L. J. C. P. 185; 15 C. B. 207.

(*f*) *Bonnett v. Sadler* (1808), 14 Ves. 526.

(*g*) *Anderson v. Pacific Fire & Marine Insce.* (1872), L. R. 7 C. P. 65.

(*h*) *New Brunswick Ry. v. Conybeare* (1862), 31 L. J. C. 297; 9 H. L. C. 297.

(*i*) *Re Hurlbalt and Chaytor* (1888), 57 L. J. C. 421.

(*k*) *Kent v. Freehold Land & Brick-making Co.* (1867), L. R. 4 Eq. 588; reversed on other grounds (1868), 37 L. J. C. 653; L. R. 3 Ch. 493; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221.

a third party had offered a certain price with a view to get the purchaser to give a higher price (*l*); and so a false statement of the rent at which the property had been let (*m*). On the other hand, a buyer is not liable for misrepresenting the seller's chance of sale, or the probability of his getting a higher price for his commodity than that offered (*n*).

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Representations in vague and general terms in commendation of the subject of agreement, not importing definite statements of fact, are not sufficient ground for avoiding the agreement; nor in general for refusing specific performance: as the representation by a vendor that land was "uncommonly rich water meadow" (*o*); or upon the sale of an advowson, that "a voidance was likely to occur soon" (*p*). - But a representation upon a sale of growing timber that the trees were of an average size approaching fifty feet of timber, it appearing in fact that they averaged less than thirty-five, was held to be a sufficiently definite misrepresentation of fact to disentitle the vendor to specific performance (*q*). And a description of property as "well supplied with water," where the only supply was from waterworks upon payment of a rate, was held to be a representation of fact and not of opinion, and sufficient to avoid the sale (*r*). So a description of his tenant as "most desirable" imports that the vendor knows of no facts leading to the conclusion that he is not (*s*).

Expressions of general commendation.

The prospectus of a company generally contains representations made on behalf of the company for the inducement of the public to take shares; and if it misrepresents any material fact, or conceals any fact material to be known, there is sufficient ground upon which a shareholder may avoid his contract to take shares or may apply to have the list of shareholders rectified by the removal of his name (*t*). "It is essential that there should be *uberrima fides*, a most complete disclosure of the facts on the part of those

Prospectus of company.

(*l*) *Mallins v. Moller* (1882), 52 L. J. C. 380; 22 Ch. D. 194.

(*m*) *Dimmock v. Hallett* (1866), 36 L. J. C. 146; L. R. 2 Ch. 21.

(*n*) *Per cur. Vernon v. Keys* (1810), 12 East, 638.

(*o*) *Scott v. Hanson* (1826), 5 L. J. O. S. C. 67; 1 Sim. 13; (1829), 1 R. & M. 128.

(*p*) *Trower v. Newcombe* (1813), 3 Mer. 704.

(*q*) *Brooke (Lord) v. Roundwaite*

(1846), 15 L. J. C. 332; 5 Hare, 298.

(*r*) *Leyland v. Illingworth* (1860), 29 L. J. C. 611; 2 De G. F. & J. 248.

(*s*) *Smith v. Land and House Prop. Corp.* (1882), 28 Ch. D. 7.

(*t*) *Central Ry. of Venezuela v. Kisch* (1867), 36 L. J. C. 849; L. R. 2 H. L. 99; *Reese River Co. v. Smith* (1870), 39 L. J. C. 849; L. R. 4 H. L. 61; *Peck v. Gurney* (1873), 43 L. J. C. 19; L. R. 6 H. L. 377. See the Directors' Liability Act, 1893, *post*, p. 249.

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who induce the public to invest their money" (*u*). But a merely exaggerated statement of the prospects and advantages of the company, resting in opinion only and not misrepresenting any precise or definite fact, will not entitle a shareholder to avoid his contract (*x*). The construction of a prospectus is for the court and not for the jury; and a shareholder cannot claim relief for his own mistakes in reading the meaning (*y*). And where a prospectus is ambiguous in its terms, the plaintiff, although probably entitled to put upon the prospectus any interpretation which it may reasonably bear, must prove in what sense he understood the expressions complained of (*z*). Upon these principles a statement in a prospectus that more than half the proposed capital had been subscribed, when in fact it had been merely subscribed by an agent under an arrangement for allotment to future applicants without any liability on his part, was held to be materially fraudulent (*a*); so a prospectus stating, contrary to the fact, that certain persons named were directors (*b*); or that the directors had taken a large amount of shares (*c*); but the omission in a prospectus to state the fact that the directors had taken a large amount of shares held to be immaterial (*d*). A prospectus of a company for constructing a foreign railway was held to be fraudulent in omitting to state that the concession was in fact to be purchased for a large sum, and in stating that they had made a contract for the required works "at a price considerably within the available capital" while the price in fact exhausted the capital (*e*). So a false statement respecting the purchase price to be paid, or its appropriation among the vendors or promoters, entitles an investor to repudiate his contract to take shares (*f*): as is also the case

(*u*) *Wood, V.-C., Ross v. Estates Investment Soc.* (1867), 36 L. J. C. 56; L. R. 3 Eq. 136; *Chelmsford, L. C., Central Ry. of Venezuela v. Kisch* (1867), 36 L. J. C. 852; L. R. 2 H. L. 113.

(*x*) *Denton v. Macneil* (1866), 35 Beav. 652; L. R. 2 Eq. 35; *Bellairs v. Tucker* (1884), 13 Q. B. D. 562.

(*y*) *Moore v. Explosives Co.* 1886, 56 L. J. Q. B. 235.

(*z*) *Smith v. Chadwick* (1884), 53 L. J. C. 873; 9 Ap. Ca. 187. See *Irland v. Livingston* (1871), 41 L. J. Q. B. 201; L. R. 5 H. L. 395.

(*a*) *Ross v. Estates Investment Soc.* (1868), 37 L. J. C. 873; L. R. 3 Ch. 682; *S. P. Arnison v. Smith* (1889), 41 Ch. D. 318.

(*b*) *Wallace's case* (1883), 23 Ch. D. 413; *Karberg's case* (1892), 61 L. J. C. 711; (1892) 3 Ch. 1.

(*c*) *Henderson v. Lacon* (1867), L. R. 5 Eq. 249.

(*d*) *Fulford v. Richards* (1853), 22 L. J. C. 559; 17 Beav. 87.

(*e*) *Central Ry. of Venezuela v. Kisch* (1867), 36 L. J. C. 849; L. R. 2 H. L. 99.

(*f*) *Langham v. East Wheel Mining Co.* (1868), 37 L. J. C. 253; *Kent v. Freehold Land and Brickmaking Co.* (1867), L. R. 4 Eq. 588; reversed on other grounds (1868), 37 L. J. C. 653; L. R. 3 Ch. 493; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221.

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where a prospectus represents that a business or property about to be purchased by the company is in a flourishing condition, whereas in fact it is insolvent or worthless (*g*). By the Companies (Consolidation) Act, 1908, s. 81, every prospectus must contain particulars respecting the memorandum of association, the shares, the directors, the subscribers to the memorandum of association, the vendors to the company, payments in respect of preliminary expenses and disbursements, and the dates and parties to material contracts; and parties cannot contract themselves out of the Act (*h*). Non-compliance with the terms of this section does not entitle the applicant to repudiate his shares, and have his name removed from the register of shareholders (*i*). Where directors go to allotment upon the applications for shares short of the number fixed as a minimum, an allottee may rescind within one month after the holding of the statutory meeting (*k*).

The active concealment of a material fact has the same effect as an express misrepresentation in avoiding an agreement induced by it: as where a person sold a vessel with all faults, and before the sale had placed her afloat in a dock for the purpose of preventing an examination of the bottom, which he knew to be unsound, the sale was held to be voidable (*l*).

The non-disclosure of a material fact of which the other party is known to be ignorant may, under the circumstances of the case, be equivalent to an active concealment; for it may have the effect of impliedly representing that the fact does not exist, or of rendering the facts disclosed absolutely false (*m*). The general principle has been thus stated: "Good faith forbids either party, by concealing what he privately knows, to draw the other party into a bargain from his ignorance of that fact and believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon. This definition of concealment, restrained to the efficient motives and precise subject of any

(*g*) *Oakes v. Turquand* (1867), 36 L. J. C. 949; L. R. 2 H. L. 325; *Rease River Co. v. Smith* (1870), 39 L. J. C. 819; L. R. 4 H. L. 61.

(*h*) *Brookes v. Hansen* (1906), 75 L. J. C. 450; (1906) 2 Ch. 129.

(*i*) *Re Wimbledon Olympia, Ltd.* (1910), 79 L. J. C. 481; (1910) 1 Ch. 630.

(*k*) Companies (Consolidation) Act, 1908, ss. 85, 86. See *Anstett & McLean's*

Claims (1908), 77 L. J. C. 796; (1908) 2 Ch. 228.

(*l*) *Schneider v. Heath* (1813), 3 Camp. 506.

(*m*) *Pendred v. Griffith* (1744), 1 Bro. P. C. 314; *Phillips v. Farall* (1872), 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; *Barwick v. English Joint Stock Bank* (1867), 36 L. J. Ex. 147; L. R. 2 Ex. 259; *Gordon v. Street* (1899), 69 L. J. Q. B. 45; (1899) 2 Q. B. 611.

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contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed" (*n*).—Mere non-disclosure, apart from circumstances importing a duty of informing the other party or rendering the fact material for him to know, is not sufficient ground for avoiding a contract. Where a governess had been engaged under a written agreement in which she was described as "spinster," it was held on demurrer that the mere non-disclosure of the fact that she had been married and divorced, was not material, as there was no allegation that there was a fraudulent concealment (*o*). So with a promise to marry, it was held to be no ground for avoiding the contract that it had not been disclosed that the promisee was at the time of the promise under a pre-contract to marry another person, there being no express allegation of fraud (*p*); or that the promisee had at one time been insane and confined in a lunatic asylum (*q*). But a promise to marry a woman is impliedly conditional upon the fact of her being chaste, and therefore the non-disclosure of immoral conduct would render the contract voidable (*r*). In contracts of insurance generally, it is a duty of the insured to disclose all facts material to the risk insured: and non-disclosure, without further evidence of fraudulent intention, vitiates the contract (*s*). And a similar general rule applies between members of a partnership (*t*).

Selling
chattel with
latent defect.

Selling "with
all faults."

A person knowingly selling a chattel with a material *latent* defect, without disclosing it to the buyer, entitles the buyer to avoid the sale; though upon the sale of a specific chattel there is in general no implied warranty against latent defects (*u*). The seller may expressly stipulate that he sells "with all faults"; it is then immaterial what faults exist, even to the knowledge of the seller, unless he fraudulently conceals the faults (*x*). But the chattel must answer to the description by which it is sold (*y*). Thus on the sale of a vessel described as "copperfastened," to

(*n*) *Per cur.* *Carter v. Boehm* (1766), 3 Burr. 1910; *Knight-Bruce, V.-C.*, *Nelthorpe v. Holgate* (1814), 1 Coll. C. C. 221.

(*o*) *Fletcher v. Krell* (1872), 42 L. J. Q. B. 55.

(*p*) *Bereby v. Brown* (1860), 29 L. J. Q. B. 105; E. B. & E. 796.

(*q*) *Baker v. Cartwright* (1861), 30 L. J. C. P. 364; 10 C. B. N. S. 121.

(*r*) *Cockburn, C. J.*, *Bereby v. Brown* (1860), 29 L. J. Q. B. 105; E. B. & E. 976.

(*s*) See *post*, p. 271.

(*t*) Partnership Act, 1890, s. 28; *Law v. Law* (1904), 74 L. J. C. 169; (1905) 1 Ch. 140.

(*u*) Sale of Goods Act, 1893, ss. 14, 61, sub-g. (2); *Emmerton v. Matthews* (1862), 31 L. J. Ex. 139; 7 H. & N. 584. See as to warranties, *post*, p. 265.

(*x*) *Bagchale v. Walters* (1811), 3 Camp. 151; *Schneider v. Heath* (1813), 3 Camp. 506.

(*y*) Sale of Goods Act, 1893, ss. 13, 14.

be taken "with all faults, without allowance for any defects whatsoever," which was construed to mean only such defects as were consistent with the description, and not to exclude a misdescription in the vessel not being "copperfastened" (2). Where a vessel was sold under the description of "teak built, A 1, &c." to be taken "with all faults and without any allowance for any defect or error," the additional stipulation against "error" was held to extend to errors of description, and the seller was not responsible for the ship not being as described (a). The sale of a chattel with a *patent* defect, where the buyer has an opportunity of inspecting it and relies upon his own judgment, is valid, and the passive acquiescence of the seller in the erroneous judgment or self-deception of the buyer does not entitle the latter to avoid the sale (b). Even an express warranty does not in general include patent defects, which should be obvious to the buyer at the time of the sale (c).—But if the seller knows the buyer to be acting under a mistake concerning the subject of sale, and does not undeceive him, the silence of the seller, as a means of misleading him, may amount to a fraudulent concealment and entitle the buyer to avoid the sale (d). Where a person employed to sell a picture had refused to state the name of the owner, and after becoming aware that the buyer was under a delusion as to the ownership which enhanced the price, did not remove the delusion, but took advantage of it to effect the sale, it was held that the buyer might avoid the sale as induced by fraud (e).

CH. VI.
SECT. II.

Patent defect.

Mistake of
buyer known
to seller.

Upon the same principles applied to a sale of land or real estate, the non-disclosure by the vendor of a material defect known to him in the title, or in the subject of sale, or of any other material fact, would in general entitle the purchaser to avoid the sale; and notwithstanding conditions of sale expressly providing that errors and omissions should not affect the validity of the sale (f); or

Non-disclosure by
vendor of
real estate.

2) *Shepherd v. Korn* (1821), 5 B. & Ald. 240.

(a) *Taylor v. Ballou* (1850), 20 L. J. Ex. 21; 5 Ex. 779.

(b) *Horsfall v. Thomas* 1862, 31 L. J. Ex. 322; 1 H. & C. 90; *Smith v. Hughes* (1871), 40 L. J. Q. B. 221; L. R. 6 Q. B. 597.

(c) Sale of Goods Act, 1893, s. 11, sub-s. 2. *Marples v. Wright* (1831), 7 Bing. 604; 1832, 1 L. J. C. P. 125; 8 Bur. 451; *Holmes v. Marples* (1838), 28 L. J. Q. B. 9; 1 E. & E. L.

d) *Cockburn, C. J., Smith v. Hughes*

(1871), 40 L. J. Q. B. 221; L. R. 6 Q. B. 597.

Ellenborough, C. J. (1816), *Hill v. Goss*, 1 Stark. 131; as explained by *Jervis, C.* *Kates v. Colquhoun* (1851), 20 L. J. C. P. 78; 10 C. B. 600; and *Ld. Chelmsford, Park v. Gibson* (1872), 43 L. J. C. 34; L. R. 6 H. L. 390.

f) *Nottingham Brick Co. v. Butler* (1886), 55 L. J. Q. B. 280; 16 Q. B. D. 775; *Goodrich v. Sir* (1905), 75 L. J. C. 175; 1906, 1 Ch. 335.

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Defect in title.

expressly requiring facts to be assumed which the vendor knows to be false (*g*). Thus, where a vendor did not disclose that he had no title to part of the land sold, which he knew to be an encroachment upon a common, the sale was annulled and vendor ordered to repay the purchase-money and all costs and expenses (*h*). And where the lessor of a mine did not disclose the fact that a material portion of the mine was under land between high and low water mark to which he had no title, the lease was set aside at the suit of the lessee, who had no means of knowing the defect (*i*). But in the absence of fraud the purchaser must accept the title and property at his own risk, and after taking the conveyance his only remedy is upon the covenants for title contained in the deed; or upon special stipulations against defects of title or errors of description, if any, contained in the contract of sale (*k*).—

Charges and incumbrances.

Mortgages, charges, or incumbrances upon the property sold, are generally matters of conveyance if capable of being redeemed, but if there be fraudulent concealment, whether capable of redemption or not, the purchaser is entitled to avoid the sale or recover the amount of any damage he may suffer (*l*): as where the vendor represented the property to be subject to an annuity, without disclosing the fact that it was granted for four lives (*m*); or concealed the fact that the property was subject to a large annual charge for the maintenance of a river wall (*n*). But a vendor was held excused from disclosing a claim which had been made against the property and not pursued: though afterwards prosecuted against the buyer (*o*).—Upon the same principle a vendor is bound to inform the purchaser of special rights and equities of tenants in possession of the property sold, the constructive notice arising from the state of the possession having no application between vendor and purchaser; as in the case of a vendor of a public-house, who described it as in the occupation of

Rights and equities of tenants.

(*g*) *Re Banister* (1879), 48 L. J. C. 87; 12 Ch. D. 131; *Blinberg v. Kewes* 1906, 75 L. J. C. 464; (1906) 2 Ch. 175.

(*h*) *Edwards v. M'Leay* (1815), 6 G. 308; (1818), 2 Swanst. 287; *S. P. Hart v. Soraine* (1877), 47 L. J. C. 6; 7 Ch. D. 42.

(*i*) *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 45 L. J. C. P. 401; 1 C. P. D. 145.

(*k*) *Earby v. Garrett* 1829, 5 L. J. O. S. K. B. 76; 9 B. & C. 928; *Hume*

v. Pocock (1866), 35 L. J. C. 731; L. R. 1 Ch. 379. See *ante*, pp. 69, 227.

(*l*) *Townsend v. Champenourne* (1827), 1 Y. & J. 419; *Sterry v. Combs* (1871), 40 L. J. C. 595; *Torrance v. Bolton* (1872), 42 L. J. C. 177; L. R. 8 Ch. 118.

(*m*) *Drysdale v. Maer* (1854), 23 L. J. C. 518; 2 Sm. & G. 225.

(*n*) *Shirley v. Stratton* 1783, 1 Bro. C. C. 440.

(*o*) *Brownlie v. Campbell* 1880, 5 Ap. Ca. 925.

a tenant without stating that it was under lease to a brewer for an unexpired period of eight years, and therefore was refused specific performance against a purchaser who bought it for his business of a brewer without notice of such lease (*p*).—Upon the letting of a

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SECT. II.

Defects in
premises.

land, there is no implied condition or warranty that it is fit for habitation or for any other purpose for which it is taken (*q*), or that it will continue so during the term (*r*), except in the cases falling within sect. 75 of the Housing of the Working Classes Act, 1890 (*s*). But in the letting of a furnished house for immediate habitation, it is held to be an implied condition that the house, including the drains and furniture, are then in a habitable state (*t*). The fact of a purchaser buying in ignorance of a material defect may be a defence to a bill for specific performance; though the circumstances may not entitle him to avoid the contract (*u*). And a positive representation made as to the state of repairs upon the sale or lease of a house may be a ground in equity for requiring the vendor to make good the representation or to allow compensation for defects (*x*), and may in law amount to a warranty giving rise to a claim for damages (*y*). In the case of a demise of a mill, with a contract to supply power to work machinery in the mill, there are two subject matters, and damage caused by an improper supply of power will give rise to a right of action (*z*). A vendor is in general under no obligation to disclose anything affecting the value of the property (*a*); the price at which he has himself purchased or contracted to purchase the subject of sale (*b*); but if he misrepresents the price given, it is a fraud upon the purchaser (*c*); and if he stands in a fiduciary

Value of
property sold.

p *Caballero v. Bonty* (1874), 43 L. J. C. 635; L. R. 9 Ch. 447. See *Hunt v. Luck* (1902, 71 L. J. C. 239; (1902, 1 Ch. 428).

q *Sutton v. Temple* (1843), 13 L. J. Ex. 17; 12 M. & W. 52; *Hart v. Windsor* (1811), 13 L. J. Ex. 129; 12 M. & W. 68; *Kates v. Calogian* (Lord, 1851), 20 L. J. C. P. 76; 10 C. B. 591; *Manchester Warehouse Co. v. Carr* (1880), 19 L. J. C. P. 809; 5 C. P. D. 507.

r *Arden v. Pullen* (1842), 11 L. J. Ex. 359; 10 M. & W. 321.

s *Walker v. Hobbs* (1889), 50 L. J. Q. B. 93; 23 Q. B. D. 458.

t *Smith v. Mervell* (1843), 11 M. & W. 5; *Wilson v. Finch-Hatton* (1877), 16 L. J. Q. B. 489; 2 Ex. D. 336.

u See *ante*, p. 223.

x *Grant v. Munt* (1815, G. Coop.

173; *Lanier v. Dixon* (1873), 13 L. J. C. 203; L. R. 6 H. L. 111.

y *De Lussall v. Guildford* (1901), 70 L. J. K. B. 533; 1901, 2 K. B. 215.

z *Bentley Bros. v. Micallef & Co.* (1906), 75 L. J. K. B. 891; (1906, 2 K. B. 548. Cp. *Wood v. Copper Miners' Co.* (1854, 23 L. J. C. P. 209; 11 C. B. 128).

a *Abbott v. Smeother* (1852), 22 L. J. C. 235; affg. 1851, 3 De G. & Sm. 448.

b *Giner's case* (1875, 45 L. J. C. 83; 1 Ch. D. 182; *Craig v. Phillips* (1876, 16 L. J. C. 49; 3 Ch. D. 722).

c *Kent v. Freehold Land and Brick-making Co.* (1867), L. R. 4 Eq. 588; reversed on other grounds (1868), 37 L. J. C. 653; L. R. 3 Ch. 493; *London Petroleum Co. v. Hurd* (1874, L. R. 5 P. C. 221).

PART I.

Non-disclosure by purchaser.

Purchaser in fiduciary relation.

relation to the purchaser, as trustee or agent, he is bound to the fullest disclosure (*d*). Nor does a vendor in general incur any liability by inserting a mere opinion of the value of the property not amounting to an intentional misstatement (*e*). But where a vendor put up for sale by auction property described as an interest in a partnership, knowing that it was worth nothing, and it was bought by a purchaser in ignorance of the circumstances that rendered it of no value, the sale was set aside (*f*).

A purchaser is not bound to give the vendor information of facts which may influence his own conduct or judgment when bargaining for his own interest, unless he undertakes or professes to communicate them (*g*). Thus where a first mortgagee with power of sale purchased the interest of a second mortgagee at a reduced sum without disclosing that he had arranged for a sale of the property at a price sufficient to cover both mortgages, the transaction was upheld (*h*). On the other hand, where the purchaser, while communicating facts affecting the value, misrepresented or concealed facts of which he knew the vendor to be ignorant (*i*); or where colliery owners purchased the adjoining land without disclosing that they had already wrongfully worked coal from it through their own colliery (*k*); the transaction was either set aside or specific performance refused.—If the purchaser stands in a fiduciary relation to the vendor, he is in general unable to retain the benefit of his purchase, if the same be challenged by the vendor (*l*). And in those cases in which he might be entitled to dispute the application of the rule, he is bound to show that he communicated all information which was material for the seller to know concerning the value of the property: as where a person, being consulted by another as to the payment of his debts, purchased his property, having first obtained a valuation which he did not disclose (*m*); where the solicitor of a bankrupt purchased from the trustee in bankruptcy

(*d*) *Bagnall v. Carlton* (1877), 47 L. J. C. 30; 6 Ch. D. 371.

(*e*) See *ante*, p. 236.

(*f*) *Smith v. Harrison* (1857), 26 L. J. C. 412.

(*g*) *Per cur.*, *Conks v. Roswell* (1886), 55 L. J. C. 761; 11 App. Ca. 232.

(*h*) *Dolan v. Nokes* (1855), 22 Beav. 402; *affd.* (1856), 27 L. T. O. S. 178.

(*i*) *Turner v. Harvey* (1821), Jac. 169; *Haygarth v. Wearing* (1871), 40 L. J. C.

577; L. R. 12 Eq. 320.

(*k*) *Phillips v. Hanfray* (1871), L. R. 6 Ch. 770.

(*l*) *For v. Mackreth* (1788), 2 Bro. C. C. 400; 2 Wh. & T. L. C. Eq. 709; *Huqwin v. Bascley* (1807), 11 Ves. 273; 1 Wh. & T. L. C. Eq. 247; *Nugent v. Nugent* (1908), 77 L. J. C. 271; (1908) 1 Ch. 516.

(*m*) *Tate v. Williamson* 1866, L. R. 2 Ch. 55.

without disclosing the information he had acquired of the title and value of the property (*n*); but a solicitor to a party to a suit who obtains leave to bid at a sale under order of court, is in the position of a stranger, and is not bound to any fuller disclosure (*o*).—A purchaser is not in general bound to disclose the state of his pecuniary credit: thus, a purchaser buying goods in the way of his trade is not bound to disclose the fact that proceedings in bankruptcy are then pending against him upon a debtor's summons (*p*). But if a debtor compounds with his creditors, knowing them to be under a false impression as to the value of his property, and without disclosing the true state, the composition may be avoided, and the creditors remitted to their original claims (*q*).

CH. VI.
SECT. II.

Credit of
purchaser.

In sales by auction, before the Sale of Land by Auction Act, 1867, upon the condition that "the highest bidder shall be the purchaser," courts of law held that the employment by the vendor of a "puffer," or agent to bid for the vendor, without disclosing the fact, was a fraud which entitled the purchaser to avoid the sale (*r*). Courts of equity followed the common law as to bidding merely to enhance the price, but seem to have allowed the employment of a bidder for the purpose of protecting the property, without disclosing it; though the employment of more persons than one for this purpose, being unnecessary, was deemed to be fraudulent (*s*). In order to remove any conflict between the courts of law and equity upon the matter the Sale of Land by Auction Act, 1867, s. 4, enacted "that from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by means of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." The provisions of this statute have since been extended to sales of "goods" by sect. 58 of the Sale of Goods Act, 1893. The announcement that property is to be sold by auction "without reserve," imports

Employment
by vendor of
bidder at
auction.

Sale of Land
by Auction
Act.

Sale "without
reserve."

n *Luddy's Trustee v. Boyd* (1886), 55 L. J. C. 881; 33 Ch. D. 500.
o *Cocks v. Roswell* (1886), 55 L. J. C. 761; 11 Ap. Ca. 232.
p *Ex p. Whitaker* (1875), 41 L. J. 131; 11 L. R. 10 Ch. 446.
q *Tindal, C. J., Finn v. Mitchell* (1831), 1 M. & Rob. 337; S. P. *Gilbert*

v. Fyfe (1878), 9 Ch. D. 250.
r *Thornell v. Himes* (1846), 15 L. J. Ex. 230; 15 M. & W. 397; *Green v. Baverstock* (1865), 32 L. J. C. P. 181; 11 C. B. N. S. 204.
s *Auction v. Bell* (1865), 35 L. J. C. 35; L. R. 1 Ch. 10.

PART I.

Reserved
price.Reserved
right to bid.Purchaser
detering
bidders.

that there shall be no bidding directly or indirectly on the part of the vendor; and the employment by him of any bidder at a sale under such conditions without notice is fraudulent (*t*). The Act of 1867 requires, by sect. 5, "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." A distinction is thus made between a reserved price and a reserved right to bid; and under conditions stating the former only, it is not competent for the vendor to employ a person to bid up to the reserved price (*u*). But under a sale by order of court "without reserve, but with liberty to the parties interested to bid," it was held that the mortgagee in possession, who conducted the sale, might bid up to the amount of his charge without affecting the validity of the sale (*x*).—By sect. 6, "where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid: it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper." The auctioneer bidding for the seller, besides the seller who has reserved a right to bid, will render the sale voidable (*y*).—Sect. 7 abrogates the practice of opening the biddings on any sale under the direction of the court, unless on the ground of fraud or improper conduct in the management of the sale. In order to entitle the court to open biddings it is necessary to show fraud, or such misconduct as borders on fraud (*z*). And the section has been extended to sales by private treaty requiring the sanction of the court (*a*).—On the other hand, if a purchaser procure a sale to himself by fraudulently or wrongfully deterring other persons from bidding, the vendor may avoid the sale (*b*). Where the purchaser employed the vendor's agent to bid for him, which deterred other persons from bidding who supposed him to be

(*t*) *Robinson v. Wall* (1817), 16 L. J. C. 401; 2 Phill. 372.

(*u*) *Gillat v. Gilhat* (1869), 39 L. J. C. 142; L. R. 9 Eq. 60.

(*x*) *Drummock v. Hallett* (1866), 36 L. J. C. 146; L. R. 2 Ch. 21.

(*y*) *Payitt v. Jephson* (1877), 46 L. J. C. P. 529.

(*z*) *Brown v. Dalshott* (1869), 38 L. J. C. 717; *Delves v. Delves* (1875), L. R. 20 Eq. 77.

(*a*) *Re Barthett* (1880), 50 L. J. C. 205; 16 Ch. D. 561.

(*b*) *Fuller v. Abrahams* (1821), 3 Br. & B. 116.

bidding for the vendor, it was held sufficient ground for refusing specific performance (e).—The employment of a bidder at a sale by auction by a third party without the knowledge of the vendor is immaterial to the validity of the sale; and in the case of a sale by a mortgagee, at which the mortgagor without his knowledge employed a bidder to enhance the price, the mortgagee was held entitled to enforce the sale (d).

Ch. VI.
Sect. II.

Where a person makes a representation to another for the purpose of inducing a contract, if it is proved to be untrue to his knowledge, an intention to deceive is presumed to exist, and the contract is voidable (e). Any inquiry into the belief of the person is then excluded (f); and the ulterior motive for making such representation is immaterial, though it be made with the motive and in the expectation of benefiting the person to whom it is made (g).—And for the purpose of inducing a contract “if persons take upon themselves to make assertions as to which they are ignorant whether they are true or false, they must, in a civil point of view, be held as responsible as if they asserted that which they knew to be untrue”; and the contract thereby induced is voidable (h). Where two partners in a bank joined in inducing another to become a partner by presenting to him a statement of the affairs of the bank which was false to the knowledge of one of them, but not to the knowledge of the other: it was held that the incoming partner was entitled to rescind the contract and to claim restitution against both; as regards the innocent partner it was held to be “at least a representation of a fact of which he knew nothing whatever, whether it was true or not, and if on the treaty for a purchase, one party makes a representation, he cannot be afterwards heard to say that he knew nothing about the matter: nor can he be allowed to retain any benefit which he might have acquired from the representation which he has made” (i). Upon this principle where a vendor without inquiry sold land under a

Misrepresentation with knowledge of the fact.

Misrepresentation in ignorance of fact.

(e) *Twining v. Morris* (1788), 2 Bro. C. C. 326.

(d) *Union Bank of London v. Munster* (1887), 57 L. J. C. 124; 57 Ch. D. 51.

(e) Ld. Blackburn, *Beaumont v. Campbell* (1880), 5 Ap. Ca. 950; Halsbury, L. C., *Atkinson v. Smith* (1889), 11 Ch. D. 368.

(f) *Hunt v. Campbell* (1877), 7 Ch. D. 341.

(g) See *ante*, p. 243.
(h) Ld. Cairns, *Rose River Mining Co. v. Smith* (1870), 39 L. J. C. 849; L. R. 4 H. L. 79; Maule, J., *Evans v. Edmonds* (1853), 22 L. J. C. P. 211; 13 C. B. 786.

(i) *Ravell v. Wickham* (1858), 28 L. J. C. 188; 3 De G. & J. 301.

PART I.

Representa-
tion in belief
of its truth.

Action for
fraud.

representation that it was freehold, which was in fact copyhold, the purchaser was held entitled to have the conveyance set aside, and the purchase-money and his expenses returned (*k*). So, a representation made in a prospectus of a company being untrue in fact, it is immaterial, as regards the right of a shareholder who was thereby induced to take shares to have his name removed from the register, whether the directors when they issued the prospectus believed it to be true or not; though that might be material in proceedings against the directors (*l*).

But an untrue representation made with belief of its truth, though it may be sufficient ground for avoiding a contract obtained upon the faith of it, is insufficient to support a substantive action of deceit for damages against the party making it; because in order to support such action at common law it is held necessary that the false statement should be made fraudulently, that is, at least without an honest belief in its truth (*m*). "The authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made knowingly; or without belief in its truth; or recklessly, careless whether it be true or false, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial" (*n*). The burden of proving fraud in an action of deceit lies upon the plaintiff; and it is not sufficient to prove that there existed no reasonable grounds for belief in the truth of a false representation; unless the absence of belief, as the ingredient of fraud, is found as a distinct fact resulting therefrom (*o*). But it is said that the question to be determined upon the evidence of the grounds of belief, as the test of the representation being fraudulent, is "whether a reasonable man would be likely under the circumstances so to believe" (*p*). Proof of actual knowledge excludes all

(*k*) *Hart v. Steam* 1877, 17 L. J. C. 61; 7 Ch. D. 43.

(*l*) *Ross River Mining Co. v. South* 1870, 39 L. J. C. 849; 1 L. R. 4 H. L. 61; *Angus v. Clifford* (1891), 60 L. J. C. 413; 1891, 2 Ch. 119; *S. P. Adam v. Newbington* 1888, 57 L. J. C. 1066; 13 Ap. Ca. 308.

(*m*) *Derry v. Peek* 1889, 58 L. J. C. 861; 14 Ap. Ca. 337; *Glasier v. Rolls*

1889, 58 L. J. C. 820; 42 Ch. D. 436; *Thoburn v. Fendall* (1891), 60 L. J. Q. B. 526.

(*n*) *Ld. Herschell, Derry v. Peek* 1889, 58 L. J. C. 886; 14 Ap. Ca. 371.

(*o*) *Derry v. Peek* (1889), 58 L. J. C. 861; 14 Ap. Ca. 337; *Glasier v. Rolls* (1889), 58 L. J. C. 820; 42 Ch. D. 436; *Angus v. Clifford* (1891), 60 L. J. C. 413; 1891, 2 Ch. 119.

(*p*) *Ld. Herschell, Derry v. Peek*

question of belief (*q*); but constructive knowledge of the truth is not sufficient ground for presuming a fraudulent intention, the means of knowledge for this purpose not being deemed the same as knowledge (*r*).

CH. VI.
SECT. II.

The liability of directors of a company for the statements in a prospectus is now expressly defined by the Directors Liability Act, 1890, which enacts (sect. 3) to the effect that every director and promoter of a company, and every person who has authority in the issue of a prospectus inviting subscriptions for shares or debentures, "shall be liable to pay compensation to all persons who shall subscribe for any shares or debentures on the faith of such prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus"; unless it is proved "that he had reasonable ground to believe, and did believe, that the statement was true." Sect. 4 provides indemnity to any person whose name is used in the prospectus as a director without his authority. And sect. 5 gives a right of contribution between co-directors who are equally liable for the untrue statement (*s*).

Directors
Liability Act.

A representation made by a person in forgetfulness of the truth may make him responsible as if he made it with knowledge of the truth, so far as to avoid a contract induced by it. "The mere fact of forgetfulness by a man who has known a certain fact, who is asked whether that fact has happened or not and says positively that it did or did not, cannot possibly be an excuse: because if he had spoken the simple truth he would have said, 'I do not recollect whether it is so or not'; he takes upon himself the responsibility of a positive statement, upon the faith of which he knows that the other man is going to deal for valuable consideration" (*t*). Upon this principle where the trustee of a fund represented to a proposed assignee that the assignor was entitled to the fund and could make the assignment, forgetting that he had received notice of a prior incumbrance, it was held that he was estopped from asserting the prior incumbrance against the claim of the assignee (*u*).

Misrepresentation in
forgetfulness
of the truth.

(1888), 58 L. J. C. 890; 41 Ap. Ch. 380.
(*q*) *Hare v. Campbell* (1877), 7 C. D. 341.

(*r*) *Wilde v. Gibson* (1818), 1 H. L. C. 605; 1d. Blackburn, *Baundel v. Campbell* (1880), 5 Ap. Ch. 352.

(*s*) *Shepherd v. Bray* (1906), 75 L. J. C. 633; (1906) 2 Ch. 235.

(*t*) Selborne, L. C., *Branda v. Campbell* (1880), 5 Ap. Ch. 936; Romilly, M. R., *Fulford v. Richards* (1853), 22 L. J. C. 562; 17 Beav. 91.

(*u*) *Burrows v. Lock* (1803), 10 Ves. 170, as explained in *Loe v. Burgeois* (1891), 60 L. J. C. 591; 1891, 3 Ch. 82.

PART I.

Representa-
tion becoming
untrue by
change of
circum-
stances.

A representation true in fact, or believed to be true, at the time of making it, may by a change of circumstances become untrue to the knowledge of the maker; in such case the continuation of such representation without disclosure of the truth renders voidable a contract induced by it (*x*); as where a person proposed to insure his life upon a declaration that he was then in good health, and before the insurance was effected suffered a material change in the state of his health which he did not communicate (*y*); and where an insurance office proposed a re-insurance on a life, representing, as was then the fact, that they retained a large share of the risk, but before the re-insurance was accepted they got rid of the whole of their risk by re-insurance with another office (*z*). So where the prospectus of a company was issued with the names of certain persons as directors, upon the faith of which names a person applied for shares, and before allotment the directors named retired and others were appointed without notice to the applicant (*a*).

Misrepresenta-
tion becoming
true.

—On the other hand, a representation untrue at the time it was made, may by a change of circumstances become true at the time it is acted upon; as a prospectus of a company representing that more than half the capital had been subscribed, which was not true at the time it was issued, but had become true at the time of an application for shares (*b*). So where property was sold under a representation that it produced a certain amount of rent which was not then true in fact, but became so before completion of the sale, by the rents being raised in consideration of repairs (*c*). A misrepresentation may be corrected at any time before it is acted upon by clearly pointing out the previous error; but a subsequent correction is ineffectual in support of the contract (*d*).

Materiality
of representa-
tion in
inducing the
contract.

The misrepresentation must have in fact materially induced the contract in order to give the right of avoidance. "It must be a representation *dans locum contractui*, that is, a representation giving occasion to the contract, the proper interpretation of which

(*x*) *Reynell v. Sprye* (1852), 21 L. J. C. 633; 1 De G. M. & G. 660; *Daries v. London & Prov. Insce.* (1878), 47 L. J. C. 511; 8 Ch. D. 469.

(*y*) *British Equitable Insce. v. G. W. Ry.* (1869), 38 L. J. C. 314; *Canning v. Farquhar* (1886), 55 L. J. Q. B. 225; 16 Q. B. D. 727.

(*z*) *Truill v. Baring* (1864), 33 L. J. C. 521; 4 De G. J. & S. 318.

(*a*) *Anderson's case* (1881), 50 L. J. C. 269; 17 Ch. D. 373; *Karberg's case* (1892), 61 L. J. C. 711; (1892) 3 Ch. 1.

(*b*) *Ship v. Crosskill* (1870), 39 L. J. C. 550; L. R. 10 Eq. 73.

(*c*) *Goddard v. Jeffreys* (1881), 51 L. J. C. 57.

(*d*) *Arnison v. Smith* (1889), 41 Ch. D. 348.

appears to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether" (e). "If the statement is of such a nature as would be likely to induce a person to enter into a contract, and it is proved that he did enter into the contract, it is an inference of fact that he was induced to do so by the statement" (f). But the inference may be rebutted by evidence to the contrary; as by proving that he knew the truth at the time of contracting, or that he avowedly took the risk of it upon himself (g). If the statement is ambiguous the party seeking to avoid the contract must prove that he accepted the statement in a sense that was untrue, and was thereby induced to contract (h); but he is entitled to put upon an ambiguous statement any construction that the words will reasonably bear (i). —The materiality of a representation depends upon the circumstances: as in the case of an insurance office effecting a re-insurance of a risk with another office, the representation that they retain themselves a substantial share in the risk, is material (k); in a representation respecting a person's credit that he was possessed of a certain amount of capital, the disclosure that it was borrowed is material (l). On the other hand, upon a sale of land subject to a lease, a misstatement of the length of the term of years for which it was under lease, in the absence of evidence whether to the damage of the purchaser or not, was held immaterial (m). A representation by a person, as the reason for the limited amount of his offer, that a larger offer would not consent to his giving more, was held immaterial (n). —A representation in the prospectus of a company that the directors had

Materiality
of prospectus
of company.

e. Romilly, M. R., *Palsford v. Ruckards* (1853), 22 L. J. C. 563; 17 Beav. 96; Ld. Brougham, *Attwood v. Small* (1838), 6 Cl. & F. 144; Ld. Cranworth, *National Exchange Co. of Glasgow v. Dyce* (1855), 2 Macqueen, 120.

f. Ld. Blackburn, *Smith v. Chadwick* (1884), 53 L. J. C. 873; 9 Ap. Ca. 196; *Hughes v. Twissden* (1886), 55 L. J. C. 481; *Ex p. Curling* (1887), 56 L. J. C. 321.

g. Jessel, M. R., *Smith v. Chadwick* (1882), 51 L. J. C. 597; 20 Ch. D. 44; Halsbury, L. C., *Arnison v. Smith* (1889), 41 Ch. D. 369.

h. *Smith v. Chadwick* 1882, 51 L. J. C. 597; 20 Ch. D. 27; *Bellous v. Taylor* (1884), 13 Q. B. D. 562.

i. See *Webster v. Essay* (1818), 7 Ha. 159; *Irland v. Livingston* (1872), 41 L. J. Q. B. 201; L. R. 5 H. L. 395.

k. *Tyrell v. Baring* (1864), 33 L. J. C. 521; 4 De G. & S. 318.

l. *Carbett v. Brown* (1831), 1 L. J. C. P. 13; 8 Biog. 33.

m. *Goddard v. Jeffreys* (1881), 51 L. J. C. 57.

n. *Fernon v. Keys* (1810), 12 East, 632; (1812), 4 Taunt. 188.

PART I.

taken a large amount of shares, or that a certain number had been subscribed, contrary to the fact, is material and entitles an allottee of shares to rescind his contract (*b*). But the non-disclosure of the fact that the directors had taken a large amount of the shares was held immaterial *p*. And the non-disclosure of the fact that directors of the company had received paid-up shares from the contractor for their qualification was held immaterial *q*; as qualification shares need not be held beneficially *r*. But a representation in a prospectus that certain persons named would act as directors is material *s*. The contracts entered into by the company or the promoters are made material to be stated in the prospectus by statute; and an applicant for shares or debentures cannot be required to waive compliance with this condition *t*.

Partial misrepresentation.

A representation as to one of several matters which is material, or a representation which is untrue in a material part may vitiate the whole agreement: "for where a party has induced another to act on the faith of several representations, any one of which he has made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made" (*u*); without further proving that the agreement was induced by those only, to the entire exclusion of that which is fraudulent (*x*). It is sufficient to avoid an agreement that a misrepresentation has contributed to induce it, though it was not the sole inducement (*y*). And though the misrepresentation is partial only in its effect, the party so obtaining a contract is not entitled to conform the terms to the true state of facts and so enforce it against the will of the other party; for that would be equivalent to making a new contract (*z*).

Misrepresentation to

A misrepresentation made to a person which is contradicted by

(a) *Henderson v. Lucas* (1867), L. R. 5 Eq. 219; *Armitson v. Smith* 1889, 11 Ch. D. 318.

(p) *Palstford v. Richards* (1853), 22 L. J. C. 559; 17 Beav. 87.

(q) *Hermann v. European Central Ry.* (1868), L. R. 7 Eq. 154.

(r) *Cooper v. Griffin* 1892, 61 L. J. Q. B. 563; 1892 1 Q. B. 719; *Howard v. Sadler*, 1893 1 Q. B. 1.

(s) *Karlberg's case* 1892, 61 L. J. C. 741; 1892 3 Ch. 1.

(t) See *ante*, p. 239.

(u) *Cranworth, L. J., Repull v. Sprye* (1852), 21 L. J. C. 635; 1 De G. M. & G. 698; *Wood, V. C., Hallows v. Fernie* 1867, 36 L. J. C. 273; L. R. 3 Eq. 539; *Halsbury, L. C., Armitson v. Smith* (1889), 11 Ch. D. 369.

(v) *Turner, L. J., Neol's case* (1859), 28 L. J. C. 257; 3 De G. & J. 387.

(y) *Edlington v. Fitzmaurice* 1886, 55 L. J. C. 650; 29 Ch. D. 459.

(z) *Chermont v. Tasburgh* 1819, 1 Jac. & W. 112.

his own knowledge cannot in fact have induced the contract, and therefore cannot be ground for avoiding it; and where the means of knowledge are at hand and the attention of the party is called to them, the circumstances of the case may be such as to require that a knowledge should be imputed to him which he ought to have obtained (*a*): as where a farm was sold under the description of being in a "ring fence," and the purchaser, who lived in the neighbourhood, must have known that it did not lie in a ring fence (*b*); and where a meadow was sold without stating that there was a public footpath across it, which the purchaser who occupied the adjoining house and land must have known (*c*); so where the purchaser of property has made a full inspection and examination himself (*d*). But it is no defence that the party to whom the representation was made had the means of discovering, and might with reasonable diligence have discovered, what the truth was (*e*); nor will it extend to those matters which would not be revealed upon a cursory examination (*f*). And the knowledge of a party as to the truth of a matter is quite immaterial, if the other party has expressly guaranteed it in the contract (*g*).

CH. VI.
SECT. II.

person having
knowledge of
the fact.

On the other hand, where a party in fact relies upon the representation as intended by the party making it, he is in general entitled to avoid the agreement, notwithstanding there were means of information (*h*). He is presumed to have acted upon the representation, as against the party who made it; and the burden of proof lies upon the latter to show, not only that he had the means of information, but that he relied upon his own information or judgment, and was not in fact misled by the representation (*i*). Where a party relies upon concealment or non-disclosure to avoid his agreement he must prove his own ignorance of the matter, and that it is not imputable to his own fault or negligence (*k*).—Upon the above principles the contract has been held voidable: where the purchaser of a reversionary estate relied upon the false state-

Reliance
upon repre-
sentation.

(a) *Langdale, M. R., Clapham v. Shillito* (1841), 7 Beav. 119.

(b) *Dyce v. Hargrave* 1805, 10 Ves. 505.

(c) *Oldfield v. Round* (1800), 5 Ves. 508.

(d) *Attwood v. Small* (1838), 6 Cl. & F. 232; *Jennings v. Broughton* (1851), 23 L. J. C. 993; 5 De G. M. & G. 126.

(e) *Rodgrave v. Hurd* (1881), 51 L. J. C. 113; 20 Ch. D. 1.

(f) *Grant v. Munt* (1815), G. Coop. 173; *Higgins v. Samels* 1862, 2 J. &

H. 160; *Thorp v. Hancock* (1870), 10 L. J. C. 193; L. R. 6 Ch. 1.

(g) *Cutov, Thompson* (1882), 9 Q. B. D. 616.

(h) *Rodgrave v. Hurd* (1881), 51 L. J. C. 113; 20 Ch. D. 1.

(i) *Towers v. Bolton* (1873), 42 L. J. C. 177; L. R. 8 Ch. 118; *Rodgrave v. Hurd* (1881), 51 L. J. C. 113; 20 Ch. D. 1.

(k) *Silverman v. Dawson* (1817), 16 L. J. C. 205, 1 De G. & Sm. 90.

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ment of the vendor of the rents, without himself inquiring of the tenants (*l*); where a lessee agreed for the lease of a house upon a representation of the lessor that it was substantial and well-built, without himself inspecting it (*m*); where a purchaser relied upon maps and plans of the property produced by the vendor, in which there was a material error (*n*); where the sale of a business was effected by misrepresentation of the value, though the purchaser had access to the books and accounts (*o*). So an underwriter is entitled to rely upon the representations of the shipowner, though he has the means of correct information in Lloyd's Shipping List; for there is no presumption of his knowledge of the contents in favour of the insurer (*p*). And a shareholder in a company may repudiate his shares upon the ground of fraudulent statements in the prospectus, though it refers to reports and information to be obtained at the office which disclose the truth (*q*). The prospectus of a company, referring to the articles of association as open to inspection, may be construed as explaining and correcting a doubtful or ambiguous statement by the articles (*r*); but it cannot thereby counteract a positive misstatement (*s*).

Constructive notice.

The doctrine of constructive notice, which operates against a purchaser for the protection of the rights and equities of third parties, does not apply between vendor and purchaser, to correct a misrepresentation or non-disclosure of a material fact (*t*). Upon the sale of a lease a misrepresentation of the contents by the vendor is not obviated by constructive notice of the contents in the purchaser (*u*). In contracts for an underlease the proposed lessee is affected with constructive notice of the covenants of the original

l, *Hobell v. Stearns* 1825, 3 L. J. O. S. K. B. 89; 3 B. & C. 623.

m, *Cox v. Middleton* (1851), 23 L. J. C. 618; 2 Drew. 209.

n, *Re Arnold* 1880, 14 Ch. D. 270.

o, *Kearns v. Wickham* (1858, 28 L. J. C. 188; 3 De G. & J. 304; *Redgrave v. Hart* (1881), 51 L. J. C. 113; 20 Ch. D. 1.

p, *Morrison v. Universal Marine Insce.* 1872, 42 L. J. Ex. 17; L. R. 8 Ex. 40; unaffected by the reversal in Ex. Ch. (1873), 42 L. J. Ex. 115; L. R. 8 Ex. 197.

q, *Central Ry. of Venezuela v. Kisch*

(1867, 36 L. J. C. 849; L. R. 2 H. L. 99.

r, *Hallows v. Firme* (1868, L. R. 3 Ch. 467.

s, *Dornes v. Ship* (1868), 37 L. J. C. 642; L. R. 3 H. L. 343.

t, *Jessel, M. R., Jones v. Rimmer* (1880, 49 L. J. C. 775; 14 Ch. D. 590; *Caballero v. Henty* (1871, 43 L. J. C. 635; L. R. 9 Ch. 447. See *Hunt v. Luck* 1902, 71 L. J. C. 239; (1902) 1 Ch. 428.

u, *Jones v. Rimmer* 1880, 49 L. J. C. 775; 14 Ch. D. 590; *Mulgrave v. Hawtrey* (1903), 72 L. J. K. B. 873; (1903) 2 K. B. 487.

lease, but as against the proposed lessor he may rely upon a positive representation made as to such covenants (x).

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A contract obtained for a principal by an agent by means of fraud or misrepresentation is voidable against the principal, as if he had obtained it himself by the same means, although the agent, to this extent, was acting in the matter without the authority or knowledge of the principal (y). An action will lie against the principal to recover damages caused by the fraud of the agent committed in the course of the agency or employment, although the fraud was not known to the principal (z). And an action will lie to recover money received by the principal under a contract obtained by fraud of his agent, committed under such circumstances (a). But in the converse case, namely, of money paid away in the ordinary course of business for a valuable consideration but in fraud of the employer entrusting him with the possession and apparent ownership of the money, the employer has no remedy against a recipient acting in good faith (b).—The principal is not responsible for representations of his agent made without his authority and beyond the scope of the agency (c). But where a contract provided that a party must verify all representations made by an agent, the principal was only exonerated in the case of honest mistakes of the agent (d), upon a principle, of general application to contracts, "*constructio legis non facit injuriam*" (e). And the agent is personally liable for his own fraud, whether acting for and by the authority of his principal or not (f).

Contract obtained by fraud of agent.

Limits of authority.

Upon the above principles a company or corporate body is generally responsible for the misrepresentations of directors and agents made in the exercise of their offices: a person induced to

Directors of company.

(x) *Van v. Corp.* (1831), 3 M. & K. 269; *Hyl v. Warden* (1877), 47 L. J. Ex. 121; 3 Ex. D. 72.

(y) *Murray v. Mann* (1848), 17 L. J. Ex. 256; 2 Ex. 540; *Brockwell's case* (1857), 26 L. J. C. 855; 4 Drew. 205; *Mullins v. Miller* (1882), 52 L. J. C. 380; 22 Ch. D. 191.

(z) *Barnick v. English Joint Stock Bank* (1867), 36 L. J. Ex. 147; L. R. 2 Ex. 259; *Mackay v. Commercial Bank* (1874), 13 L. J. P. C. 31; L. R. 5 P. C. 394.

(a) *Swire v. Francis* (1877), 47 L. J. P. C. 18; 3 Ap. Ca. 106; *Refuge Asse. v. Kitchinall* (1909), 78 L. J. K. B. 519; 1909 A. C. 243.

(b) *Thomson v. Clydebank Bank* (1893), 62 L. J. P. C. 21; 1893 A. C. 282.

(c) *Columan v. Riches* (1885), 21 L. J. C. P. 125; 16 C. B. 104; *British Mutual Bank v. Charnwood Forest Ry.* (1887), 56 L. J. Q. B. 449; 18 Q. B. D. 714; *Thorne v. Hoard* (1895), 61 L. J. C. 652; (1895) A. C. 495.

(d) *S. Pearson & Son, Ltd. v. Dublin Corp.* (1907), 77 L. J. P. C. 1; 1907 A. C. 351.

(e) *Rodger v. Comptoir d'Escompte de Paris* (1869), 38 L. J. P. C. 30; L. R. 2 P. C. 394.

(f) *Arnat v. Biscour* (1748), 1 Ves. sen. 25; *Cullen v. Thomson's Trustees* (1862), 4 Macq. H. L. 424.

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apply for shares by such misrepresentations may avoid his contract with the company (*g*); and may recover back money received by the company under such contracts (*h*); but so long as he retains the shares, or if he cannot by reason of a winding up or by any other means repudiate them, he has no remedy in damages against the company (*i*). But the circumstances under which a false statement is made are of importance in fixing liability upon a company for the false statements of its agents. Thus the force of a prospectus is spent upon the allotment of shares, and a transferee from an original allottee must make a special ground of liability to enable him to repudiate the shares for fraudulent statements contained in it (*k*); and an allottee of shares cannot repudiate shares which he has been induced to take by false statements in a speech of the chairman to a meeting of shareholders, which is not addressed to the public as an inducement to take shares, but is a confidential statement to the company (*l*).—The directors and agents who issue fraudulent misrepresentations are themselves personally liable to the persons to whom they are addressed and who are deceived by them; and the remedy against the directors and that against the company, if any, may be prosecuted concurrently (*m*). But directors are not liable for representations made by co-directors or other officers, which they have not themselves expressly or tacitly authorised or adopted (*n*).

Contract induced by fraud of a third party

An agreement cannot be avoided by a party upon the ground that he was induced to agree by the fraud of a third party in which the other party to the agreement was not implicated (*o*); and a director or other agent acting in a matter which is beyond the scope of his employment or authority is for the purpose of liability of the company treated as a stranger in respect of unauthorised statements (*p*). Upon this principle where a mort-

g. *Apple's case* 1858, 27 L. J. C. 579;

h. *Bevy* 513; *New Brunswick and Canada*

r. v. Campbell (1862), 31 L. J. C. 297;

i. 14 L. J. C. 711.

k. *Apple v. Sons Compositions Co.*

1888, 3, 7 J. C. 713.

l. *Henderson v. Glasgow Bank* (1886),

5 App. 317; *Purpass's case* 1880, 49

L. J. C. 311; 15 Ch. D. 597. And see

Bevon's case 1857, 37 L. J. C. 249; 37

Ch. D. 191.

(k) *Peel v. Gregory* 1873, 43 L. J. C.

19; L. R. 6 H. L. 377; *Adams v.*

Markland (1866), 65 L. J. Q. B. 302.

1890, 1 Q. B. 372.

(l) *Re Dorset Gold Mining Co.* (1885),

52 L. J. C. 434; 22 Ch. D. 593.

(m) *Henderson v. Latou* (1867), L. R.

5 Eq. 249; *Capel v. Sims Compositions*

Co. 1888, 57 L. J. C. 713. And see

the Directors Liability Act, 1890, *infra*,

p. 249.

(n) *Wiley v. Bell* (1878), 47 L. J. Ex.

704; 3 Ex. D. 238; *Cargill v. Baxter*

(1878), 47 L. J. C. 619; 16 Ch. D. 502;

Re Benham (1883), 25 Ch. D. 752.

(o) *Masters v. Jibson* (1819), 18 L. J.

C. P. 348; 8 C. B. 100; *Fulford v.*

Richards (1853), 22 L. J. C. 550; 17

Bevy 87.

(p) *Burton v. Powell* 1850, 2 H. L. C.

42; *British Mutual Bk. Co. v. Charn-*

gagee sold the mortgaged property by auction, and the mortgagor without his knowledge employed a bidder at the auction to enhance the price, it was held that the buyer could not take advantage of the fraud to avoid the sale (*q*).

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A party who has been induced to make a contract by the fraud or misrepresentation of the other party, under the above conditions, acquires the right, on discovering the truth, to elect whether he will affirm or avoid it; but the contract continues valid until he determines his election (*r*).—He may determine his election by express words or by some unequivocal act, under circumstances which render such words or act binding (*s*). He may also bring an action claiming to have the contract rescinded and restitution; in which case the rescission by order of the court relates back to the commencement of the action which determines his election (*t*). But he cannot assert any other contract than that in fact made; he cannot disaffirm that contract and charge an implied contract as arising upon the executed consideration (*u*).—He may also claim to avoid the contract by way of defence to any action or legal proceeding brought upon it; for “the mere fact that the party to the fraud has issued a writ and commenced an action before the rescission is not such a change of position as would preclude the defrauded party from exercising his election to rescind” (*r*); but where such a defence is raised it is necessary to prove some act of avoidance in support of it, as the return of goods sold or such other unequivocal act as the case may require (*y*).—Where the contract results in investing the party with property to which liabilities are incident, as an allotment of shares in a company, it is necessary in order to discharge himself from liability, not only to rescind the contract, but also to disclaim the property. Accordingly, in an action against a shareholder in a company for calls, it is necessary to prove that as far as possible he has disclaimed the

Election to
avoid
contract.

Mode of
election.

Plea of fraud.

Disclaimer of
property.

Wood Forest Ry. (1887), 56 L. J. Q. B. 448; 18 Q. B. D. 714; *Barrett, Hovres & Co. v. S. London Tramways* (1887), 56 L. J. Q. B. 452; 18 Q. B. D. 815.
(*q*) *Union Bank of London v. Munster* (1887), 57 L. J. C. 124; 37 Ch. D. 51.
(*r*) *Stevenson v. Nornham* (1853), 22 L. J. C. P. 110; 13 C. B. 285; *Oakes v. Turquand* (1867), 36 L. J. C. 949; L. R. 2 H. L. 325.
(*s*) *Clough v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17; L. R. 7 Ex. 26; *Morrison v. Universal Marine Insce.* 1873,

42 L. J. Ex. 115; L. R. 8 Ex. 197.
(*t*) *Riese River Silver Mining Co. v. Smith* (1870), 39 L. J. C. 849; L. R. 4 H. L. 64.
(*u*) *Strutt v. Smith* (1834), 3 L. J. Ex. 357; 1 Cr. M. & R. 312.
(*r*) *Clough v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17; L. R. 7 Ex. 26; *Morrison v. Universal Marine Insce.* (1873), 42 L. J. Ex. 115; L. R. 8 Ex. 197.
(*y*) *Dance v. Harness* (1875), 44 L. J. C. P. 194; L. R. 10 C. P. 166.

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shares (z). The effect of disclaiming the shares upon the ground of a fraudulent allotment is to discharge the liability *ab initio*; and a shareholder is entitled to the full benefit of such discharge, though, in ignorance of the fraud, he has accepted a cancellation of the shares upon other grounds, or they have been forfeited for non-payment of calls (a).

Affirmance
of contract.

If the party, upon discovering the fraud, affirms the contract by some unequivocal act, he cannot afterwards revoke his election, according to the maxim, "*quod semel placuit in electionibus amplius displicere non potest*"; and as he cannot approbate and reprobate he cannot elect to affirm the contract in part, and avoid it in other part, unless the two parts are so severable as to form independent contracts (b). Where a person was induced to undertake work for another for a certain sum upon a fraudulent misrepresentation of the quantities, and after discovering the fraud continued and completed the work; it was held that he could claim payment only according to the contract price (c). Where a person had been induced by fraudulent misrepresentations to take a lease of a mine, and had continued to work the mine after discovery of the truth, he was held to have lost the right of disclaiming the lease (d). Where the party defrauded, after full knowledge of the fraud, gave notice that he insisted on the performance of the contract by a certain time, otherwise he should consider it at an end on the ground of the delay, he was held to have affirmed the contract, though it was not afterwards performed within the time stated (e).—Upon this principle a person who has been induced to take shares in a company by misrepresentations in the prospectus, and after discovering the truth exercises the rights of a shareholder, cannot disclaim the shares and get his name removed from the register: as where he has contracted to sell the shares (f); or has accepted dividends (g); or has done any other unequivocal act of ownership (h).—And the party who has once determined his election to

(z) *Deposit Life Assur. v. Ayscough* (1856), 26 L. J. Q. B. 29; 6 E. & B. 761; *Beech-g-Plum Co. v. Baggis* (1867), 36 L. J. Ex. 183; L. R. 2 Ex. 321.

(a) *Wright's case* 1871, 41 L. J. C. 1; L. R. 7 Ch. 55; *Auton's Refs., Ltd. v. Twist* (1896), 65 L. J. P. C. 54; 1896 A. C. 273.

(b) *Clough v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17; L. R. 7 Ex. 26; *United Shoe Manufacturing Co. v. Round* (1909), 78 L. J. P. C. 101; 1909 A. C. 330.

(c) *Schwab v. Fogg* (1839), 8 L. J. Ex. 199; 5 M. & W. 83.

(d) *Vigers v. Pike* (1812), 8 Cl. & F. 562.

(e) *Machryde v. Wickes* (1856), 22 Beav. 533.

(f) *Brigg's case* 1866, L. R. 1 Eq. 183.

(g) *Clark v. Dickson* (1858), 27 L. J. Q. B. 223; E. B. & E. 118; *Sheffield's case* (1859), 28 L. J. C. 325; 1 Johns. 451.

(h) *Cargill v. Bower* (1878), 47 L. J.

affirm a fraudulent contract cannot afterwards avoid it upon the discovery of additional incidents of fraud; the effects of such discovery being only to corroborate the fraud which has been waived, and not to revive the right of avoidance (*i*). But the disaffirmance of a contract in fact may be supported by any grounds of fraud subsequently discovered (*k*).

Delay in determining his election may operate presumptively in affirmance. "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined" (*l*). But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy" (*m*). Where a contract of insurance is voidable for concealment, if the insurer by delaying his election prevented the assured from insuring elsewhere, he would be held bound by the insurance (*n*). Upon this principle a shareholder who, having been induced to take shares by the fraud of the company, applies to the court to have his name removed from the register, should do so promptly, and in case of delay his application will in general be refused (*o*). But "it is difficult to lay down any general rule as to the time within which objections of this character should be made the ground of repudiation of shares after they have once been discovered; in every case attention must be paid to the circumstances" (*p*). A delay pending the hearing and decision of

Delay in election.

C. 649; 10 Ch. D. 502; *York Tramways Co. v. Willows* (1882), 51 L. J. Q. B. 409; 8 Q. B. D. 685; *Reed v. London and Stafford Inscr.* (1881), 53 L. J. C. 351.

(*i*) *Campbell v. Fleming* (1831), 3 L. J. K. B. 126; 1 A. & E. 40; *Law v. Law* (1904), 74 L. J. C. 169; (1905) 1 Ch. 140.

(*k*) *Wright's case* (1871), 41 L. J. C. 1; L. R. 7 Ch. 55.

(*l*) *Per cur. Chough v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17; L. R. 7 Ex. 26; *Martin v. Pipecroft* (1871), 22 L. J. C. 99; 2 De G. M. & G. 785; *Morrison v. Universal Inscr.* (1873), 42 L. J. Ex. 115; L. R. 8 Ex. 197; *Sharpley v.*

Louth Ry. (1876), 46 L. J. C. 259; 2 Ch. D. 663.

(*m*) *Per cur. Lindsay Petroleum Co. v. Hurd* (1871), L. R. 5 P. C. 210; *Erdinger v. New Southwicks Phosphate Co.* (1878), 3 Ap. Ch. 1218.

(*n*) See *Morrison v. Universal Marine Inscr.* (1873), 42 L. J. Ex. 115; L. R. 8 Ex. 197.

(*o*) *Central Ry. of Venezuela v. Kisch* (1867), 36 L. J. C. 849; L. R. 2 H. L. 99.

(*p*) *Carrus, L. C., Ogilvie v. Currie* (1868), 37 L. J. C. 511; *Turner, L. J., Jennings v. Broughton* (1854), 23 L. J. C. 999; 5 De G. M. & G. 140.

PART I. the case of another shareholder in the same position, which is agreed to be taken as a representative case, does not prejudice the party, although a winding up order has intervened (*q*).—Delay is not imputable against the party defrauded until he has knowledge of the fraud, or at least such means of knowledge as he was bound to avail himself of (*r*). And it lies upon the party against whom the fraud is established and who charges the delay, to prove the knowledge in the other party, and the time of acquiring it (*s*). Delay is no answer to a substantive action for damages caused by fraud, at law or in equity, except under the Statute of Limitations (*t*).

Restitution of rights upon avoidance of contract.

Avoidance of the agreement involves a restitution of the parties to their original rights and property; it can be effected only upon this condition, and therefore only so long as such restitution is possible (*u*). "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages" (*x*). Where the contract has been completely executed there cannot be rescission for misrepresentation unless fraudulently made (*y*).

Return of goods sold.

Thus if a person induced by fraud to buy goods can return the goods, he may recover back the price paid, or if he bought on credit he may refuse payment; but if he cannot or does not return the goods he must pay the price or their value (*z*). And if a bill is given for goods sold and delivered the buyer cannot avoid the bill on the ground of the sale being fraudulent so long as he retains the goods (*a*).—So a shareholder who has been

Repudiation of shares.

q) *Pawle's case* (1869), 38 L. J. C. 318; L. R. 4 Ch. 497; *McNiell's case* (1870), 39 L. J. C. 822; L. R. 10 Eq. 503; *Re Scottish Petroleum Co.* (1882), 51 L. J. C. 841; 23 Ch. D. 413.

r) *Broune v. McIntock* (1873), L. R. 6 H. L. 456; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 Ap. Ca. 1218.

s) *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Halsbury, L. C., Anson v. Smith* (1889), 41 Ch. D. 370.

t) *Perk v. Gurney* (1873), 43 L. J. C. 19; L. R. 6 H. L. 377.

u) *Ld. Cranworth, Western Bank v. Addie* (1867), L. R. 1 Sc. Ap. 161; *Bramwell, L. J., Chynoweth's case* 1880, 15 Ch. D. 20.

x) *Per cur. Sheffield Nickel Co. v. Union* (1877), 46 L. J. Q. B. 299; 2 Q. B. D. 211.

y) *Seddon v. North Eastern Salt Co.* (1901), 74 L. J. C. 199; (1905) 1 Ch. 326.

z) *Sale of Goods Act*, 1893, ss. 8, 49; *Clarke v. Dickson* (1858), 27 F. J. Q. B. 223; E. B. & E. 148.

a) *Sully v. Fyfe* (1854), 10 Ex. 535.

induced to take shares by fraud of the company must disclaim the shares and get his name removed from the register (*b*). If the shares have been converted into new shares or otherwise materially changed so that they cannot be restored in the same state, he cannot avoid his original contract (*c*).—But if the subject of fraudulent sale be practically valueless, as a concession from a foreign government that had become forfeited before sale, there is nothing to return, and the sale may be avoided (*d*). And upon the sale of a business which is insolvent and which afterwards fails, so that there is nothing to restore, the contract may be avoided, and the money paid as the price recovered back (*e*). Where the purchaser of land or other real estate had taken possession, he could not, at common law, afterwards avoid the contract and reclaim the purchase-money or his deposit, because "the intermediate occupation was a part execution of the agreement, which was incapable of being rescinded;" and "where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*" (*f*). But in equity, and the equitable rule must now prevail, the mere possession of the property taken under a contract of sale, which is vitiated by fraud or other sufficient cause, does not prevent the court ordering a rescission of the sale and a reconveyance of the property upon equitable terms if the situation of the parties has not been altered in any substantial way (*g*). And the court can give compensation for the possession had by ordering, if necessary, an account of the rents and profits taken, or the payment of an occupation rent (*h*). And in the converse case where the vendor is entitled to set aside a conveyance, the court will decree the land to stand security only for what has been paid with interest (*i*).

CH. VI.
SECT. II.

Possession of
land under
the contract.

Although from the causes above-mentioned it is no longer open to the party defrauded to avoid the agreement, he may have a remedy for the fraud by action for damages or compensation for the loss occasioned by it, provided the fraud amounts to a substantive cause of action against the party who committed it (*k*).

Action for
fraud.

(*b*) See *ante*, p. 257.
(*c*) *Clarke v. Dickson* (1858), 27 L. J. Q. B. 223; E. B. & E. 148.
(*d*) *Phosphate Sewage Co. v. Hartmont* (1877), 46 L. J. C. 661; 5 Ch. D. 394.
(*e*) *Adam v. Newbigging* (1888), 57 L. J. C. 1066; 13 Ap. Ca. 508.
(*f*) *Hunt v. Silk* (1804), 5 East, 449; *Blackburn v. Smith* (1849), 18 L. J. Ex.

187; 2 Ex. 783.
(*g*) *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221.
(*h*) *King v. King* 1833, 1 M. & K. 442.
(*i*) *Addison v. Dawson* (1711), 2 Vern. 678; *Aylesford (Earl) v. Morris* (1873), 42 L. J. C. 546; L. R. 8 Ch. 484.
(*k*) *Campbell, C. J., Clarke v. Dickson*

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But in such action he cannot recover any damages which might have been prevented by avoiding the contract when he had the opportunity, if any, of which he did not avail himself; as the loss upon shares which he might have repudiated before they fell in value, or the deterioration of goods which he might have returned (*l*).

Rights of third parties under voidable contract.

Sub-purchaser of goods.

Trustee in bankruptcy.

Proprietary rights which have been acquired by third parties for value and without notice of the fraud cannot be displaced, upon the party defrauded electing to avoid the contract (*m*). Thus if a person, having obtained goods by means of a fraud upon the seller, transfers them to a third party, who takes them *bonâ fide* and without notice of the fraud, the latter acquires a good title to the goods which cannot afterwards be defeated by the original seller (*n*). The same rule applies in favour of a third party to whom the goods have been pledged, or who has taken a lien or equitable charge upon the goods from the fraudulent buyer, without notice of the fraud (*o*). But a person taking the goods or any interest in them from the fraudulent buyer with notice of the fraud, can acquire no better title than the latter can give, and the seller may avoid the contract and recover back the goods from him at any time (*p*).—In the case of the bankruptcy of the fraudulent buyer, vesting the property of the bankrupt in the trustee, the latter acquires no better title than the bankrupt, and the seller may avoid the sale and recover back the goods from the trustee who has taken possession under the bankruptcy (*q*); nor can the trustee claim to retain the goods under the reputed ownership clause, for the possession of the bankrupt is in reference to his proprietary right which exists until disaffirmance of the sale (*r*). And where the trustee in bankruptcy successfully impeaches a conveyance as a fraud upon creditors, a party to the fraud cannot

(1858), 27 L. J. Q. B. 223; E. B. & E. 148; Blackburn, J., *Reg. v. Sadlers' Co.* (1863), 32 L. J. Q. B. 337; 10 H. L. C. 404.

(*l*) *Ogilvie v. Currie* (1868), 37 L. J. C. 511; *Waddell v. Blockey* (1879), 48 L. J. Q. B. 517; 4 Q. B. D. 678. See *Arnison v. Smith* (1889), 41 Ch. D. 348.

(*m*) Sale of Goods Act, 1893, s. 23; *Stearns v. Newman* (1853), 22 L. J. C. P. 110; 13 C. B. 285; *Prase v. Gloucester* (1866), L. R. 1 P. C. 219.

(*n*) *White v. Garden* (1851), 20 L. J. C. P. 166; 10 C. B. 919; *Babeock v.*

Lawson (1880), 49 L. J. Q. B. 408; 5 Q. B. D. 284.

(*o*) *Attenborough v. St. Katharine Docks* (1878), 47 L. J. C. P. 763; 3 C. P. D. 450.

(*p*) *Clough v. L. & N. W. Ry.* (1871), 41 L. J. Ex. 17; L. R. 7 Ex. 26.

(*q*) *Ex p. Barnett* (1876), 45 L. J. Bk. 120; 3 Ch. D. 123; *Ex p. Ward* (1905), 74 L. J. K. B. 324; (1905) 1 K. B. 465; *Tilley v. Bauman* (1910), 79 L. J. K. B. 517; (1910) 1 K. B. 745.

(*r*) *Lord v. Green* (1846), 15 L. J. Ex. 113; 15 M. & W. 216.

prove in the bankruptcy for the consideration money which he has paid (s).—Upon the same principle of saving the intervening rights of third parties, a shareholder who has been induced to take shares by a fraudulent prospectus or representations of the company, cannot repudiate the shares and claim the removal of his name as a shareholder, after creditors have acquired rights against the existing shareholders as appearing on the register (t). Therefore, a shareholder cannot claim to have his name removed after a petition for winding up, or after the passing of a resolution for a voluntary winding up (u); or after the company have declared themselves insolvent and stopped payment, though no petition for winding up has been presented (x). But an action commenced by a shareholder for the removal of his name is not barred by a petition for winding up afterwards presented and an order made upon it pending the action (y). Such shareholder has no remedy for the fraud against the assets of the company, or against the other shareholders and contributories, in the course of the winding up (z).

CH. VI.
SECT. II.
Creditors of
company.

Where the possession of goods is obtained from the owner by a mere fraud without any contract to give a title, the fraudulent possessor can transfer no title to another, and the owner may recover back the goods from a third party, though he bought them without notice of the fraud (a): as where a person obtained possession of goods under the fraudulent misrepresentation that he was authorised to buy them for a principal, to whom the sale purported to be made, it was held that there was in fact no contract to support the possession, and the owner might recover the goods from a transferee to whom the fraudulent possessor had sold or pledged them without notice of the fraud (b): so where a person by misrepresenting himself to be a member of a firm to whom the owner of goods intended to sell them obtained delivery to him—

Goods
obtained
by false
pretences.

(s) *Ex p. Myers* 1908, 77 L. J. K. B. 386; 1908, 1 K. B. 941.

(t) Cairns, L. C., *Timent v. Glasgow Bank* (1879), 4 Ap. Ca. 621.

(u) *Oakes v. Turquand* (1867), 36 L. J. C. 919; L. R. 2 H. L. 325; *Kent v. Frechall Ltd Co.* (1868), 37 L. J. C. 653; L. R. 3 Ch. 493; *Ston v. City and County Bank* (1877), 47 L. J. C. P. 681; 3 C. P. D. 282; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 113.

(x) *Timent v. Glasgow Bank* (1879), 4 Ap. Ca. 621. See *Carling v. London and*

Leeds Bank (1887), 56 L. J. C. 321.

(y) *Reese, River & Silver Mining Co. v. Smith* (1869), 39 L. J. C. 849; L. R. 4 H. L. 64.

(z) *Burgess's case* (1880), 49 L. J. C. 541; 15 Ch. D. 507; *Hoodsworth v. Glasgow Bank* 1880, 5 Ap. Ca. 547.

(a) *Kingsford v. Merry* (1856), 26 L. J. Ex. 83; 1 H. & N. 503.

(b) *Higgins v. Burton* (1857), 26 L. J. Ex. 342; *Hollins v. Fowler* (1855), 44 L. J. Q. B. 369; L. R. 7 H. L. 757.

PART I.Restitution
of property.

self, and then pledged them with a third party (c); so where a person obtained the possession of goods by taking advantage of a similarity of name and address to misrepresent himself to be a person known to the seller, and supposed by him to order the goods and to whom he intended to deliver them (d); for it is generally true that mere possession without ownership does not entitle the possessor to confer a better title than he himself has (e).

—In the case of the owner of goods prosecuting and obtaining a conviction of the person obtaining the goods by fraud or other wrongful means amounting to larceny, the owner may recover the property even against a buyer from the fraudulent purchaser, who bought without notice of the fraud; but unless the means amount to larceny, not without an order of the court for restitution of the property (f). There is also jurisdiction under sect. 30 of the Pawnbrokers Act, 1872, to order restitution. This provision only applies to the case where the goods are in the possession of a pawnbroker, and does not affect the right of the owner to pursue his common law remedy (g).

(c) *Hardman v. Booth* (1863), 32 L. J. Ex. 105; 1 H. & C. 803.

(d) *Cundy v. Lindsay* (1878), 47 L. J. Q. B. 481; 3 Ap. Ca. 459.

(e) Sale of Goods Act, 1893, s. 21; *Helby v. Matthews* (1895), 64 L. J. Q. B. 465; (1895) A. C. 471.

(f) Larceny Act, 1861, s. 100; Sale

of Goods Act, 1893, s. 24; *Bentley v. Tilmont* (1887), 57 L. J. Q. B. 18; 12 Ap. Ca. 471; *Payne v. Wilson* (1895), 65 L. J. Q. B. 150; (1895) 2 Q. B. 537.

(g) *Leicester & Co. v. Cherryman* (1907), 76 L. J. K. B. 678; (1907) 2 K. B. 101.

§ 2. WARRANTIES AND CONTRACTS OF INSURANCE.

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Contracts may in terms or impliedly provide against misrepresentation, or failure of a representation upon which they are founded, by means of a warranty or condition; thereby superseding by agreement the general principles of fraud and misrepresentation previously stated. The Sale of Goods Act, 1893, draws a distinction between a condition and a warranty, defining the latter (as regards England and Ireland) as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated" (*a*). In the decided cases the word "warranty" is frequently used in a much less restricted sense (*b*), and the popular language will be followed unless it tend to obscure the meaning. Some contracts, as insurance and guarantee, from the nature of the subject impliedly extend the ground and effect of representations beyond those general principles, and are here made the subject of separate treatment.

Contracts of sale may expressly or impliedly warrant the truth of representations made concerning the subject of sale: as by warranty of the title of the seller or of the quality of the thing sold; for breach of which the remedy is by action upon the con-

Sales with
warranty.

(*a*) Sale of Goods Act, 1893, s. 62.

(*b*) Anson, Contracts, p. 323, n.

PART I.

traet independent of any question of fraud. The warranty dispenses with inquiry into the intention or knowledge of the warrantor; but it leaves that inquiry open in regard to fraud and its consequences (c). It is not essential that the word "warrant" or any other particular expression should be used in order to make a warranty; "any affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended" (d). It is a question of fact in each case upon the construction of the words used and of the circumstances, whether such an intention is expressed (e). On the other hand even an express warranty in absolute terms may be construed as not applying to a defect which is apparent to the buyer at the time of sale (f).

Sale of
specific
goods.

Warranty of
title.

Unless the circumstances of the contract are such as to show a different intention, there is an implied condition that the seller has a right to sell or agree to sell the goods, and a warranty that the buyer shall have quiet possession free from incumbrances (g). In the case of an ordinary pledge the pledgor impliedly warrants that the property is his own or that he has the authority of the owner to pledge it; and the undertaking of the pledgee to deliver it back to the pledgor is subject to the latter having the title warranted; and if that fails the pledgee may restore the property to the true owner (h). But a pawnbroker selling an article by auction as a forfeited pledge was held only to represent that the article was pledged to him and irredeemable, and his warranty was limited to that effect (i). And a sale of goods seized under an execution is held to import no warranty of title (k).

Warranty of
quality.

Upon a sale of specific goods, there is in general no implied warranty or condition that the article sold is of a particular quality, or will answer a particular purpose (l). Thus upon the

(c) Sale of Goods Act, 1893, s. 61 (2); *Tindal, C. J., Margetson v. Wright* (1831), 7 Bing. 605.

(d) *Carr v. Coleman* (1828), 7 L. J. O. S. K. B. 25; 3 Man. & R. 2.

(e) *Perry v. Barham* (1836), 5 L. J. K. B. 88; 4 A. & E. 173. *Hopkins v. Tanqueray* (1854), 23 L. J. C. P. 162; 15 C. B. 130; *Steeley v. Bailey* (1862), 31 L. J. Ex. 483; 1 H. & C. 405.

(f) *Margetson v. Wright* (1831), 7 Bing. 603; (1832), 1 L. J. C. P. 128; 8 Bing. 454; *Holliday v. Morgan* (1838), 28 L. J. K. B. 9; 1 E. & E. 1.

(g) Sale of Goods Act, 1893, s. 12; *Hall v. Under* (1857), 26 L. J. C. P. 288; 2 C. B. N. S. 52; *Bagueley v. Hawley* (1867), 36 L. J. C. P. 328; L. R. 2 C. P. 625.

(h) *Cheesman v. Exall* (1851), 20 L. J. Ex. 209; 6 Ex. 344; *Singer Manufacturing Co. v. Clark* (1879), 49 L. J. Ex. 224; 5 Ex. D. 37.

(i) *Morley v. Attenborough* (1849), 18 L. J. Ex. 149; 3 Ex. 510.

(j) *Chapman v. Speller* (1859), 19 L. J. Q. B. 239; 14 Q. B. 621.

(l) Sale of Goods Act, 1893, s. 14.

sale of the "patent smoke consuming furnace" of a certain inventor, which turned out in user to be unfit for the purposes of a brewery to which it was supplied, it was held that in the absence of fraud there was no answer to an action for the price, on the footing of an implied warranty (*m*). Also as a general rule if a person contracts for the hire or use of a specific article, there is no implied warranty by the owner that it is fit for the purpose for which it is required; he undertakes to deliver it in the state agreed for, but the hirer, obtaining the thing agreed for, takes the risk of its fitness and efficiency for his purpose: as in the case of a person undertaking to perform a certain voyage with a certain vessel, which, by reason of the state of its engines, unknown to both parties, was unfit for the voyage (*n*). But in the case of a sale of goods potentially dangerous, there is a duty on the seller to warn the buyer of any danger he may incur in dealing with the goods (*o*).

If a contract be made to supply an article for a particular purpose, that purpose being the essential matter of the contract, so that it appears that the buyer relies on the seller's skill or judgment, then if the goods are of a description which it is in the course of the seller's business to supply, the seller is bound (whether he be the manufacturer or not) to supply an article reasonably fit for the purpose, and is considered as warranting that it is so (*p*). A sale for a particular purpose may be inferred from the nature and circumstances of the transaction, as in the case of a sale of a water bottle by a retail chemist to a person not acquainted with the composition of the material of which it was made (*q*); so where the plaintiff's milk account was kept in a pass-book supplied by the defendants which contained an enumeration of the precautions taken by them to ensure a supply of pure milk, the defendants were held liable for the consequences of a latent undiscoverable defect (*r*); and where a person contracted to supply provisions for troops during a voyage he was held to warrant that they were reasonably fit for the purpose intended.

Articles sold
for particular
purpose.

Articles sold
for food.

(*m*) *Chanter v. Hopkins* (1838), 8 L. J. Ex. 14; 4 M. & W. 399; *Pridmore v. Barnett* (1857), 1 C. B. N. S. 613; confirmed by Sale of Goods Act, 1893, s. 14 (1).

(*n*) *Robertson v. Amazon Tea Co.* (1881), 51 L. J. Q. B. 68; 7 Q. B. D. 598.

(*o*) *Clarke v. Army & Navy Co-op. Soc.* (1902), 72 L. J. K. B. 153; (1903)

1 K. B. 155.

(*p*) Sale of Goods Act, 1893, s. 14 (1). See *Clarke v. Army & Navy Co-op. Soc.* (1902), 72 L. J. K. B. 153; 1903 1 K. B. 155.

(*q*) *Preist v. Last* (1903), 72 L. J. K. B. 657; (1903) 2 K. B. 118.

(*r*) *Frost v. Aylesbury Dairy Co.* (1905), 74 L. J. K. B. 386; (1905) 1 K. B. 608.

PART I.

and the warranty was not excluded by an express provision that they should pass a survey by an officer (*s*); so a carriage builder who supplied to a customer a carriage pole which broke in use, was held liable for the result, although it did not appear that he had been negligent in making it, or that there was any particular defect (*t*). And upon this principle a person who supplied a stand at a racecourse for the use of persons who paid for admission was held impliedly to warrant to them that the stand was reasonably fit for their use (*u*). But in the case of a person not being a retailer or dealer in the goods casually selling an article there is not any similar implied warranty (*x*); as a meat salesman, who sells carcases of meat in a market on commission (*y*). A person who sent animals to market to be sold "with all faults" was held to be exempt from any warranty or liability to the buyer, although the animals were affected with a contagious disease to his knowledge, of which they afterwards died; and although the seller was subject to a statutory penalty for sending them to market in that state (*z*).

Breach of
warranty.

The buyer is entitled to avoid the contract, and to refuse or return the goods, upon breach of a condition; but he is not entitled to do so for breach of a warranty, or where he has elected to treat the breach of a condition as a breach of warranty (*a*). So if specific goods are sold with a warranty that they are equal to sample, the buyer cannot avoid the contract merely on the ground that they do not correspond with the sample without an express condition enabling him to do so; but in the absence of fraud he must resort to the remedies for breach of warranty (*b*). But upon a sale by sample there is an implied condition that the bulk shall correspond with the sample in quality (*c*).—But the contract may expressly provide in terms that upon a breach of warranty the sale may be rescinded, and the goods and the money returned; in which case a breach of warranty renders the contract voidable according

Rescission
upon breach
of warranty.

(*s*) *Bigge v. Parkinson* (1862), 31 L. J. Ex. 301; 7 H. & N. 955.

(*t*) *Randall v. Newson* (1877), 46 L. J. Q. B. 239; 2 Q. B. D. 102.

(*u*) *Francis v. Cockrell* (1870), 39 L. J. Q. B. 291; L. R. 5 Q. B. 501.

(*v*) *Burnby v. Bollett* (1847), 17 L. J. Ex. 190; 16 M. & W. 644.

(*y*) *Emmerton v. Matthews* (1862), 31 L. J. Ex. 139; 7 H. & N. 584.

(*z*) *Ward v. Hobbs* (1878), 48 L. J. Q. B. 281; 4 Ap. Ca. 13.

(*a*) Sale of Goods Act, 1893, ss. 11 (1), 53, 62; *Street v. Blay* (1831), 2 B. & Ad. 456; *Gompertz v. Denton* (1832), 2 L. J. Ex. 82; 1 Cr. & M. 207; *per cur. Heilbutt v. Hickson* (1872), 41 L. J. C. P. 228; L. R. 7 C. P. 438.

(*b*) *Dawson v. Collis* (1850), 20 L. J. C. P. 116; 10 C. B. 523; *Heyworth v. Hutchinson* (1867), 36 L. J. Q. B. 270; L. R. 2 Q. B. 447.

(*c*) Sale of Goods Act, 1893, s. 15.

to its terms, independently of fraud (*d*). The warranty of a horse at a public sale is usually given with the condition that the horse must be returned within a stated time, if the warranty is broken (*e*); the time so fixed is essential, and if the horse is not returned within the stated time the right to do so ceases (*f*). Where a horse was sold "warranted sound for one month," it was construed to mean, not that the horse would remain sound for a month, but that the complaint of unsoundness must be made within the month, otherwise the warranty ceased; and though the unsoundness was latent and not discovered until afterwards (*g*).

Ch. VI.
Sect. II.

Upon a sale of goods to be delivered according to a description or sample of kind and quality, but which are not specifically ascertained at the time of the contract, the seller is bound to deliver goods answering to the description contracted for; if the seller make default in this respect the buyer may refuse to accept them, because the delivery of such goods is not a performance of the contract (*h*). Thus where certain hops were sold by sample upon an affirmation by the seller that no sulphur had been used in the growth, the buyer was held entitled to avoid the sale and return the hops, as the affirmation was untrue, although not wilfully made (*i*). Hence it appears that the clause in a contract of sale of goods, "guaranteed equal to sample, or other warranty of description to the like effect, varies in operation according as the contract is for specific goods, or for the delivery of any goods answering the description. When the contract is as to any goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross action or matter in reduction of damages" (*k*).

Sale of
goods by
description.

Upon a sale of goods by description, not only must the seller supply goods answering to the description, but also, in the absence of express stipulation as to the quality, it is an implied condition that the goods must be such as are merchantable or saleable under

Warranty
that goods
merchantable.

(*d*) *Adams v. Richards* (1795), 2 H. Bl. 573.

(*e*) *Head v. Tattersall* (1871), 41 L. J. Ex. 4; L. R. 7 Ex. 7.

(*f*) *Hinchcliff v. Barwick* (1880), 49 L. J. Ex. 495; 5 Ex. D. 177.

(*g*) *Chapman v. Greytho* (1866), 35 L. J. Q. B. 142; L. R. 1 Q. B. 463.

(*h*) Sale of Goods Act, 1893, ss. 13,

15; *Nichol v. Godts* (1855), 23 L. J. Ex. 314; 10 Ex. 191; *Bristol Trams v. Fiat Motors, Ltd.* (1910), 79 L. J. K. B. 1107; (1910) 2 K. B. 831.

(*i*) *Bannerman v. White* (1861), 31 L. J. C. P. 28; 10 C. B. N. S. 841.

(*k*) *Blackburn, J.*, in *Heworth v. Hutchinson* (1867), 36 L. J. Q. B. 270; L. R. 2 Q. B. 451.

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the description, and in a merchantable state (*l*). And where the delivery is to be by instalments, each instalment must be of merchantable quality (*m*). Thus it was held that a dealer contracting to send a weekly supply of dead rabbits to a tradesman at a distance impliedly warrants that they shall be in a state saleable for food on arrival and until sold in the usual course of business (*p*). And a covenant by a brewer to supply beer to a publican impliedly warrants that the beer shall be good and saleable (*o*).—And further, upon a sale of goods to answer a particular purpose, as copper sheathing for ships, by a person whose business it is to supply them, the seller is understood to warrant them to be reasonably fit and proper for that purpose (*p*). And on a contract by a manufacturer to supply a special kind of goods, in which he did not otherwise deal than as manufacturer, he was taken impliedly to warrant that the goods were of his own manufacture (*q*). The principle is stated to be in all such cases, "that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. If the subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose" (*r*).

Express
warranty of
quality.

The Sale of Goods Act, 1893, s. 14, sub-s. 4, provides that an express warranty or condition does not negative a warranty or condition implied by the Act, unless inconsistent therewith. Apart from the statute an express warranty of quality cannot be extended by implication beyond the express terms (*s*). But a warranty upon a sale by sample applies only to such matters as can be judged of

(*l*) Sale of Goods Act, 1893, s. 14 (2); *Jones v. Jost* (1867), 37 L. J. Q. B. 89; L. R. 3 Q. B. 197; *Drummond v. Van Ingen* (1887), 56 L. J. Q. B. 563; 12 App. Ca. 284; *Wren v. Holt* (1903), 72 L. J. K. B. 346; (1903) 1 K. B. 610; *Bristol Trams v. Fiat Motors, Ltd.* (1910), 79 L. J. K. B. 1107; (1910) 2 K. B. 831.

(*m*) *Jackson v. Rotax Motor and Cycle Co.* (1910), 80 L. J. K. B. 38; (1910) 2 K. B. 937.

(*n*) *Beer v. Walker* (1877), 46 L. J. C. P. 677.

(*o*) *Luker v. Dennis* (1877), 47 L. J. C. 174; 7 Ch. D. 229.

(*p*) Sale of Goods Act, 1893, s. 14 (1); *Gray v. Cor* (1825), 4 B. & C. 108; *Jones v. Bright* (1829), 7 L. J. O. S. C. P. 213; 5 Bing. 533.

(*q*) *Johnson v. Raylton* (1881), 50 L. J. Q. B. 753; 7 Q. B. D. 438.

(*r*) *Per cur. Randall v. Newson* (1877), 46 L. J. Q. B. 263; 2 Q. B. D. 109.

(*s*) *Parkson v. Zizina* (1851), 29 L. J. C. P. 73; 10 C. B. 602. See *Bigge v. Parkinson* (1862), 31 L. J. Ex. 301; 7 H. & N. 955.

by sample; and upon a contract to sell and deliver goods of a certain description and warranted equal to sample, the seller is bound to deliver goods answering to the stated description as well as to the sample (*t*); and upon such a sale a further warranty may be implied in the description, that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on a reasonable examination of the sample (*u*); but not that they shall be fit for some special use unless known to be bought for such use (*x*).

CH. VI.
SECT. 11.

The buyer may keep the goods a reasonable time after delivery for the purpose of doing whatever is reasonably necessary for an efficient examination and comparison; and if they do not agree with the description and warranty, he may then refuse to accept them (*y*); and it is not incumbent upon the buyer, refusing the goods, to return them; it is sufficient if he gives notice that the goods are not accepted, and are at the risk of the seller (*z*). But after acceptance the description then ceases to be available as a condition and becomes a warranty in the narrower sense of the word, for breach of which a compensation must be sought in damages (*a*). The criteria of acceptance are intimating to the seller that the buyer accepts the goods, or when the goods are delivered to the buyer he does any act in relation to them which is inconsistent with the ownership of the seller, as by reselling them, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them (*b*).

Acceptance
of goods
delivered.

Contracts of insurance are made upon the basis of representa-
Contracts of
insurance.

(*t*) Sale of Goods Act, 1893, s. 13; *Nichol v. Godts* (1854), 23 L. J. Ex. 314; 10 Ex. 191; *Azmar v. Casella* (1867), 36 L. J. C. P. 263; L. R. 2 C. P. 679; *Baumeister v. White* (1861), 31 L. J. C. P. 28; 10 C. B. N. S. 844. See *Re Walkers' & Shaw's Arb.* (1901), 73 L. J. K. B. 325; (1904) 2 K. B. 152.

(*u*) Sale of Goods Act, 1893, s. 15, sub-s. 2 (*c*); *Moly v. Gregson* (1868), 38 L. J. Ex. 12; L. R. 4 Ex. 19; *Drummond v. Van Ingen* (1887), 56 L. J. Q. B. 563; 12 Ap. Ca. 284.

(*c*) Sale of Goods Act, 1893, s. 14; *Jones v. Pugh* (1890), 59 L. J. Q. B. 261; 21 Q. B. D. 650. See *ante*, p. 267.

(*y*) Sale of Goods Act, 1893, s. 15, sub-s. (2) *b*, ss. 34, 35; *Heilbutt v. Hickson* (1872), 41 L. J. C. P. 228; L. R. 7 C. P. 438.

(*z*) Sale of Goods Act, 1893, s. 36; *Heilbutt v. Hickson* (1871), 41 L. J. C. P. 228; L. R. 7 C. P. 438; *Grondithy v. Wells* (1875), 41 L. J. C. P. 203; L. R. 10 C. P. 391.

(*a*) Sale of Goods Act, ss. 11, 53; *Wallis, Son and Wells v. Pratt and Haynes* (1910), 79 L. J. K. B. 1013; (1910) 2 K. B. 1003. See *per cur.* *Heilbutt v. Hickson* (1871), 41 L. J. C. P. 235; L. R. 7 C. P. 450; *Portage v. Cole* (1669), 1 Wms. Saund. 551, n. (*f*).

(*b*) Sale of Goods Act, 1893, s. 35; *Parker v. Palmer* (1821), 4 B. & Ald. 387; *Perkins v. Bell* (1892), 62 L. J. Q. B. 91; 1893 1 Q. B. 193; *Wallis, Son and Wells v. Pratt and Haynes* (1910), 79 L. J. K. B. 1013; (1910) 2 K. B. 1003.

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tions upon the truth and fulness of which the validity of the contract depends, so that a misrepresentation or non-disclosure of any material circumstance, however unintentional, has the same effect as fraud in vitiating the contract. Hence insurance is distinguished as a contract *uberrimæ fidei*, that is, a contract founded upon confidence in the disclosure of every material circumstance (c).

Marine insurance.

In policies of marine insurance, the risk, which must be specified in the policy, is taken as described by the assured and accepted by the underwriter or insurer upon his description; and the accuracy and completeness of the description of the risk becomes an essential condition of the contract (d). The assured is bound to disclose and truly represent all the facts within his knowledge concerning the risk which are material for the underwriter to know; and the non-disclosure or misrepresentation of any such fact gives the underwriter an election to avoid the contract, as in the case of fraud, although not accompanied with any fraudulent intention (e). The cause or motive of the party effecting the insurance in not disclosing a material fact, whether it be design, or mistake or forgetfulness, or disbelief in its importance, is immaterial (f).—The principle is not limited to facts concerning the risk insured; it applies to any circumstance "which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk" (g): as an under-valuation of the amount outstanding on the earlier of a series of open policies (h); or over-valuation of goods insured (i); or that the insured had debarred himself from a remedy against other parties upon a loss, to which the insurer would become entitled (k). And the insurer is entitled to discovery and inspection of all documents relating to the insurance, or to the loss charged (l).—It lies upon the insurer to prove the misrepresentation (m).

Non-disclosure of material fact.

(c) Marine Insurance Act, 1906, ss. 17—21.

(d) Marine Insurance Act, 1906, ss. 22, 23, 26.

(e) Marine Insurance Act, 1906, ss. 18, 20; Ld. Mansfield, C. J., *Carter v. Boehm* (1763), 3 Burr. 1905; 1 Sm. L. C. 474.

(f) Marine Insurance Act, 1906, s. 18, Cockburn, C. J., *Bates v. Hewitt* (1867), L. R. 2 Q. B. 607; 36 L. J. Q. B. 282.

(g) Marine Insurance Act, 1906, s. 18, sub-s. 2; *Sibbald v. Hill*, 2 Dow, 263.

(h) *Rivaz v. Gerussi* (1880), 50 L. J. Q. B. 176; 6 Q. B. D. 222.

(i) *Ionides v. Pender* (1874), 43 L. J. Q. B. 227; L. R. 9 Q. B. 531.

(k) *Tite v. Hyslop* (1885), 54 L. J. Q. B. 592; 15 Q. B. D. 376.

(l) *Rayner v. Rison* (1865), 35 L. J. Q. B. 69; 6 B. & S. 888; *China Steamship Co. v. Commercial Assoc.* (1881), 51 L. J. Q. B. 132; 8 Q. B. D. 112; *Boulton v. Houlder Bros.* (1904), 73 L. J. K. B. 493; (1904) 1 K. B. 784.

(m) *Barrie v. National Insce.* (1891), 60 L. J. C. P. 73; (1891) A. C. 485.

The assured is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him"; and must disclose all material information which he ought to have received from agents, at the risk of having the contract avoided (*n*). Where an agent for the buying and shipping of goods forwarded the shipping documents to a buyer, but failed to inform him of the subsequent loss of the ship, a policy effected by the buyer in ignorance of it was held void (*o*). So if the master of a ship fails to notify to the owner the loss of the ship, a policy subsequently taken out by the owner, though in ignorance of the loss, is void (*p*). And the agent must use the quickest available mode of communication (*q*).—Where an insurance broker, while employed to effect a re-insurance on a ship then overdue, became informed respecting the probable loss, and his employer in ignorance effected a policy through another broker, that policy was held good; because the duty of the former broker was limited to disclosing his information to the underwriters with whom he dealt (*r*). An insurance made through an agent is vitiated by non-disclosure by the agent to the underwriter of material facts known to the agent, whether known to the principal or not, even where the information is incorrect (*s*).

CH. VI.
SECT. II.

Non-disclosure by agent.

"The following circumstances need not be disclosed, namely, (a) any circumstance which diminishes the risk; (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) any circumstance as to which information is waived by the insurer; (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty" (*t*). Of this character would be the existence of a state of war (*u*); the nature and perils of the voyage, the existence and geographical character of the usual ports (*x*); and the practice of the trade to which the policy

Matters known to underwriter.

(*n*) Marine Insurance Act, 1906, s. 18 (1); *Stribley v. Imp. Marine Insee.* (1876), 45 L. J. Q. B. 396; 1 Q. B. D. 513.
(*o*) *Proudfoot v. Montefiore* (1867), 36 L. J. Q. B. 225; L. R. 2 Q. B. 511.
(*p*) *Blackburn v. Iaslam* (1888), 57 L. J. Q. B. 479; 21 Q. B. D. 144.
(*q*) *Proudfoot v. Montefiore* (1867), 36 L. J. Q. B. 225; L. R. 2 Q. B. 211.
(*r*) *Blackburn v. Vigors* (1887), 57 L. J. Q. B. 114; 12 Ap. Ca. 531.

(*s*) Marine Insurance Act, 1906, s. 19; *Lynch v. Dunsford* (1811), 14 East, 494.
(*t*) Marine Insurance Act, 1906, s. 18 (3).
(*u*) *Planché v. Fletcher* (1779), 1 Dougl. 251.
(*x*) See *Harrover v. Hutchinson* (1872), 39 L. J. Q. B. 229; L. R. 5 Q. B. 584; *Anderson v. Pacific Fire and Marine Insee.* (1872), L. R. 7 C. P. 65.

PART I.

relates (*y*). So an underwriter who subscribes to and receives Lloyd's register, is presumed to know the rules and practice of that association as to the classification of ships (*z*). But an underwriter who subscribes to "Lloyd's Shipping List," which is a daily gazette of ship news, is not therefore presumed to know all the contents of the list (*a*). Nor can the underwriter avoid the policy for the non-disclosure of any other matters which he in fact knew at the time of accepting the risk; but it is not sufficient that he had the means of information, if he had not actual knowledge (*b*). But the non-communication of a fact of which the assessor must have had notice in the form of the slip is immaterial (*c*). A disclosure to the solicitor of an underwriter was held not available, because he is not a general agent to receive notices respecting mercantile business (*d*).

Materiality
of informa-
tion.

The materiality of the information required upon which the matter "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk" (*e*); as is held to be the case with the name of the ship, where it is used for identifying the risk intended (*f*); whatever forms an ingredient in seaworthiness, as the age of the ship (*g*), or her construction and state of repair (*h*); an excessive overvaluation of the goods or ship insured (*i*); special instructions to the master of the ship, which deprive him of his ordinary discretion (*k*), statements as to the safety of a port, unless given merely as a matter of opinion (*l*); information as to when the ship was last heard of (*m*); and a report of a loss was held to be material, though it turned out to be untrue (*n*).—The particular

Interest of
assured.

(*y*) *Noble v. Kennaway* (1780), 2 Dougl. 510; *Fallance v. Dewar* (1808), 1 Camp. 503; *Trenant v. Henderson* (1813), 1 Fow, 324.

(*z*) *Gundy v. Adelaide Marine Insce.* (1871), 40 L. J. Q. B. 236; L. R. 6 Q. B. 746.

(*a*) *Morrison v. Universal Marine Insce.* (1872), 42 L. J. Ex. 17; L. R. 8 Ex. 40.

(*b*) *Bates v. Hewitt* (1867), 36 L. J. Q. B. 282; L. R. 2 Q. B. 595.

(*c*) *The Bedouin* (1893), 63 L. J. Adm. 30; (1894) P. 1.

(*d*) *Tate v. Hyslop* (1885), 54 L. J. Q. B. 592; 15 Q. B. D. 368.

(*e*) Marine Insurance Act, 1906, s. 18 (2).

(*f*) *Le Meurier v. Vaughan* (1805), 6 East, 382; *Ionides v. Pacific Fire and*

Marine Insce. (1872), 41 L. J. Q. B. 190; L. R. 7 Q. B. 517.

(*g*) *Ionides v. Pacific Fire and Marine Insce.* (1872), 41 L. J. Q. B. 33; L. R. 6 Q. B. 674.

(*h*) *Alexander v. Campbell* (1872), 41 L. J. C. 478.

(*i*) *Ionides v. Pender* (1874), 43 L. J. Q. B. 227; L. R. 9 Q. B. 531. See Marine Insurance Act, 1906, s. 16.

(*k*) *Middlewood v. Blakes* (1797), 7 T. R. 162.

(*l*) *Anderson v. Pacific Fire and Marine Insce.* (1872), L. R. 7 C. P. 65.

(*m*) See *Stribley v. Imperial Marine Insce.* (1876), 45 L. J. Q. B. 396; 1 Q. B. D. 507.

(*n*) *Lynch v. Dunsford* (1811), 14 East, 494.

interest of the assured is not material unless it affects the risk (*o*). The fact of re-insurance is not in general material (*p*); but the representation that the re-insurer retains a part of the risk, when in fact he does not, is material (*q*).

CH. VI.
SECT. II.

According to the usual practice of insurance a "slip" or memorandum of proposed terms is presented to the underwriter for signature, which is afterwards drawn up in the form of a policy; and the signed slip would form a valid contract at common law (*r*); but by sects. 22 and 23 of the Marine Insurance Act, 1906, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with the Act, which policy must specify the assured, the particular risk or adventure, the duration of the risk, the amount assured and the name of the insurer. Hence no action will lie upon the slip alone; nor will an action lie upon the slip to compel the execution of a policy (*s*). The contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not, and the policy presumptively carries into effect the contract contained in the slip, and is considered as if executed at the same time (*t*). The assured need not disclose a material alteration in the risk occurring after the date of the slip, though before the formal execution of the policy (*u*). If the insurer became aware of a material concealment at the date of the slip, the subsequent merely formal delivery of the policy would not preclude him from taking the objection, unless an intention was proved of thereby affirming the contract (*x*). And it is immaterial that the risk becomes determined to the knowledge of both parties between the signing of the slip and the making of the policy (*y*). The form of the slip may

Insurance by
"slip."

(*o*) Marine Insurance Act, 1906, ss. 23, 86; *Cochey v. Cohen* (1832), 1 L. J. K. B. 158; 3 B. & Ad. 178.

(*p*) *MacKenzie v. Whitworth* (1875), 45 L. J. Ex. 233; 1 Ex. D. 36. See Marine Insurance Act, 1906, s. 9.

(*q*) *Trotell v. Baring* (1864), 33 L. J. C. 521; 1 D. G. J. & S. 318.

(*r*) *Thompson v. Adams* (1889), 23 Q. B. D. 361. See as to a contract for insurance by "open cover," *Bhugwandass v. Netherlands India Sea and Fire Insce.* (1888), 14 Ap. Ca. 83; *Davies v. National Insce.* (1891), 60 L. J. P. C. 73; (1891) A. C. 485.

(*s*) *Fisher v. Liverpool Marine Insce.*

(1874), 43 L. J. Q. B. 114; L. R. 9 Q. B. 418.

(*t*) Marine Insurance Act, 1906, ss. 21, 22.

(*u*) Marine Insurance Act, 1906, s. 18 (*r*); *Cory v. Patton* 1874, 43 L. J. Q. B. 181; L. R. 9 Q. B. 577; *Lishman v. Northern Maritime Insce.* (1875), 41 L. J. C. P. 185; L. R. 10 C. P. 179.

(*x*) *Morrison v. Universal Marine Insce.* (1872), 42 L. J. Ex. 115; L. R. 8 Ex. 197. See Marine Insurance Act, 1906, s. 18 (*r*).

(*y*) See Marine Insurance Act, 1906, ss. 21, 22, 86; *Bradford v. Symondson* (1881), 50 L. J. Q. B. 583; 7 Q. B. D. 456.

PART I.

justify the non-communication of facts which should otherwise be disclosed (z).

Warranty of seaworthiness.

In voyage policies, insuring the ship during a specified voyage, there is further an implied warranty, or more properly speaking a condition of the contract, that the ship is seaworthy at the time of the commencement of the voyage or risk insured, in default of which the policy is void; and whether the subject of insurance be ship, cargo, freight, profits, commission, or any other matter connected with the ship (a). And if the voyage be so long as to require to be divided into stages for the purpose of preparing or renewing the equipment of the ship, the shipowner impliedly warrants to the underwriter, that the ship shall be seaworthy at the commencement of each stage, by being properly equipped for that stage (b). The seaworthiness required to satisfy this condition is taken in relation to the subject of insurance and the particular risk or voyage insured, and according to the various stages of the voyage (c). The implied warranty of seaworthiness that a cattle ship shall be properly ventilated and have a sufficient cattle crew, is not excluded by a stipulation in a policy, "the fittings and condition of the cattle to be approved by Lloyd's Agent's surveyor" (d). The burden of proving the unseaworthiness rests upon the underwriter; but a loss soon after sailing which is not attributable to any other cause, is presumptive evidence of unseaworthiness (e).—A warranty or condition of seaworthiness is also implied in the contract of the shipowner for the carriage of goods; also that the cargo shall be packed in a seaworthy manner (f). The warranty of seaworthiness is not complied with unless the ship is seaworthy when the perils of the intended voyage commence (g); but in the case of the warranty of fitness to re-

(z) *The Bedouin* (1893), 63 L. J. Adm. 30; (1894) P. 1.

(a) Marine Insurance Act, 1906, s. 39 (1); *Mills v. Roebuck*, 1 Park. Insec. 460; *Oliver v. Cowley* (1765), 1 Park. Insec. 470.

(b) Marine Insurance Act, 1906, s. 39 (3); *Greenock S.S. Co. v. Maritime Insec.* (1903), 72 L. J. K. B. 868; (1903) 2 K. B. 657.

(c) Marine Insurance Act, 1906, s. 39 (4); *Quebec Marine Insec. v. Commercial Bk. of Canada* (1870), 39 L. J. P. C. 53; L. R. 3 P. C. 234; *Daniels v. Harris* (1874), 11 L. J. C. P. 1; L. R. 10 C. P. 1. See *Clapham v. Langton*

(1864), 34 L. J. Q. B. 46; 5 B. & S. 729.

(d) *Sleigh v. Tyser* (1900), 69 L. J. Q. B. 626; (1900) 2 Q. B. 333.

(e) *Pickup v. Thames Marine Insec.* (1878), 47 L. J. Q. B. 749; 3 Q. B. D. 594.

(f) *Steel v. State Line S.S. Co.* (1877), 3 Ap. Ca. 72; *The Schwan* (1909), 78 L. J. P. 112; (1909) A. C. 450. See *The Europa* (1907), 77 L. J. P. 26; (1908) P. 81.

(g) *Cohn v. Davidson* (1877), 46 L. J. Q. B. 305; 2 Q. B. D. 455; *City of Lincoln v. Smith* (190), 73 L. J. P. C. 45; (1904) A. C. 250; *The Schwan*

ceive the cargo, the critical time is fixed by reference to the time of loading (*h*). The warranty of seaworthiness implied in a bill of lading is absolute, unless qualified in express terms (*i*).—There is no similar warranty or condition of seaworthiness implied by law in a time policy, by which the ship is insured during a specified interval of time; and it makes no difference in this respect whether at the time of effecting the policy the ship is at sea, or whether the ship is then in port and undergoing repairs in preparation for the intended voyage (*k*). But the insurer is not liable for loss or damage attributable in fact to the unseaworthiness or other inherent vice of the ship or subject of insurance, and not to the perils insured against (*l*); nor for loss happening by perils insured against, if caused by the owner knowingly sending the ship to sea in an unseaworthy condition (*m*). But he is liable for a loss caused by a peril insured against, though consequent upon unseaworthy condition, if it was not known to the assured (*n*).

CH. VI.
SECT. II.

In time
policies.

Upon the same principles in effecting insurances upon property against fire, it is the duty of the assured to communicate to the insurer all material facts within his knowledge concerning the risk; and it is an implied condition of the contract that the description of the property given by the insured is true and complete. This condition is usually expressly declared in the policy to be the basis of the contract (*o*).—The test of materiality is whether the error or omission of description is such as would vary the premium required (*p*). But if a particular description or representation is expressly made the basis of the contract, that condition must be satisfied, whether the deviation be in fact material or not (*q*). And in such case it is sufficient if that condition be satisfied; for an express condition excludes any implication beyond its terms (*r*).

Insurance
against fire.

(1909), 78 L. J. P. 112; (1909) A. C. 460.

(*h*) Marine Insurance Act, 1906, s. 39 (2); *McFadden v. Blue Star Line* (1905), 74 L. J. K. B. 423; (1905) 1 K. B. 697.

(*i*) *Cargo ex Laertes* (1887), 56 L. J. P. 108; 12 P. D. 187; *Gibroy v. Price*, (1893) A. C. 56.

(*k*) Marine Insurance Act, 1906, s. 39 (5); *Gibson v. Small* (1853), 4 H. L. C. 353; *Dudgeon v. Pembroke* (1877), 46 L. J. Q. B. 409; 2 Ap. Ca. 284.

(*l*) *Fawcus v. Sarisfield* (1856), 25 L. J. Q. B. 249; 6 E. & B. 192; *Dudgeon v. Pembroke* (1877), 46 L. J. Q. B. 409; 2 Ap. Ca. 284.

(*m*) Marine Insurance Act, 1906, s. 39 (5); *Thompson v. Hopper* (1858), 27 L. J. Q. B. 441; E. B. & E. 1033.

(*n*) *Sadler v. Dixon* (1841), 11 L. J. Ex. 435; 8 M. & W. 895.

(*o*) *Bufo v. Turner* (1815), 6 Taunt. 338.

(*p*) *Forbes' claim* (1875), 44 L. J. C. 761; L. R. 19 Eq. 485.

(*q*) *Newcastle Fire Inscc. v. Macmorran* (1815), 3 Dow, 255; *Barnard v. Faber* (1892), 62 L. J. Q. B. 159; (1893) 1 Q. B. 340.

(*r*) *Baxendale v. Harvey* (1859), 28 L. J. Ex. 236; 4 H. & N. 450.

PART I.

Alteration in
property
insured;

Upon a re-insurance it was held material to disclose that the owner of the property insured had before had several fires, in all of which he was insured to a large amount (s).

An alteration in the subject of insurance during the currency of a policy does not affect the policy if the loss is occasioned by some cause insured against but independent of the change in the risk; but if the alteration increases the risk and occasions the loss, the policy does not apply, for the loss is then due to a risk not insured (t). But it is usually made an express condition of the policy that if any alteration be made in the risk, the same must be notified to and allowed by the insurer, otherwise the policy will be void; in which case any alteration of the kind stipulated, not duly notified and allowed, would avoid the policy, whether in the event it caused a loss or not; and any implied condition respecting alterations is excluded by the express terms (u).

Life
insurance.

Declaration
as basis of
insurance.

In life insurance, as in marine and fire insurance, the principle applies, that all material facts must be disclosed and represented truly to the underwriter (x). But according to the ordinary practice of life insurance the assured is required to make and sign a written declaration giving certain specified information concerning the life insured, and it is expressly stipulated that such declaration is true and is to be taken as the basis of the contract; the effect of which is that if there is anything untrue in that declaration, whether to the knowledge of the assured or not, and whether material or not, it avoids the contract (y). The general rule of law in favour of the validity of a contract casts upon the insurer the burden of proving what declarations are in fact incorporated, and the non-disclosure of a material fact (z). The declaration expressly defines and limits by agreement the rights of the insurer as to the communication and materiality of facts; and

(s) *New York Bowery Insee. v. New York Insee.*, 17 Wend. 359, cited by the Court in *Ionides v. Pender*, L. R. 9 Q. B. 538.

(t) *Sillen v. Thornton* (1854), 23 L. J. Q. B. 362; 3 E. & B. 866; *Stokes v. Cox* (1856), 26 L. J. Ex. 113; 1 H. & N. 533.

(u) *Ghu v. Lewis* (1855), 22 L. J. Ex. 228; 8 Ex. 617; *Stokes v. Cox* (1856), 26 L. J. Ex. 113; 1 H. & N. 533; *Equitable Fire & Accident Office v. The Ching Wo Hung* (1906), 76 L. J. P. C.

31; (1907) A. C. 96.

(x) *Wainwright v. Bland* (1836), 5 L. J. Ex. 147; 1 M. & W. 32; *London Assoc. v. Mansel* (1879), 48 L. J. C. 331; 11 Ch. D. 363.

(y) *Anderson v. Fitzgerald* (1853), 4 H. L. C. 484; *Thomson v. Weems* (1884), 9 Ap. Ca. 671. See *Biggar v. Rock Life Assoc.* (1901), 71 L. J. K. B. 79; (1902) 1 K. B. 516.

(z) *Jarl v. Law Union & Crown Insee.* (1908), 77 L. J. K. B. 1108; (1908) 2 K. B. 863.

excludes any effect upon the contract from misrepresentation or non-disclosure of a matter not specified in the declaration, unless fraudulent (a). Thus where the policy was construed to provide only against intentional misstatements, the effect as a condition was limited accordingly, and the policy was not voidable for untrue statements, unless wilful and designed (b).—Policies are sometimes applied for upon the footing of a written offer (or prospectus) that they should be indisputable except in case of fraud, the company cannot in that case dispute the policy upon the ground of a merely untrue representation in the declaration upon which it was based, though the policy was expressly made conditional upon the truth of the declaration and does not in terms incorporate the prospectus (c). Fraud would vitiate it notwithstanding the declaration is satisfied, upon the principles applicable to contracts induced by fraud (d).—The declaration agreed upon as basis of the contract is taken as continuing up to the time of executing the policy, so that any intermediate change of circumstances rendering it untrue must be communicated: as where the declaration gave the name of the latest medical attendant of the insured, and before completing the policy he consulted another medical attendant whose name was not given, it was held that the declaration had become untrue and avoided the contract (e). And where the declaration stated that the insured was in good health, and before payment of the premium, when the insurance was to commence, he fell into bad health, it was held that the insurer might refuse to accept the premium or to issue a policy (f).—Where a person, proposing to insure the life of another, refers the insurer to that person or to others for the declaration required, the persons thus referred to are not thereby constituted his agents in making the declaration; and he is not affected by false or fraudulent statements therein made without his knowledge (g): unless the policy is expressly made conditional upon the truth of the declaration (h).

CH. VI.
SECT. II.

Indisputable
policies.

Continuing
effect of
declaration.

Declaration
by referees.

(a) *Jones v. Provincial Insce* (1857), 26 L. J. C. P. 27; 3 C. B. N. S. 65.

(b) *Fowkes v. Manchester Assec.* (1863), 32 L. J. Q. B. 153; 3 B. & S. 917; *Hemmings v. Seaport Life Assec.* (1905), 74 L. J. C. 231; (1905) 1 Ch. 365.

(c) *Wood v. Dicarris* (1856), 25 L. J. Ex. 129; 11 Ex. 495; *Whelton v. Hardisty* (1857), 27 L. J. Q. B. 241; 8 E. & B. 232.

(d) *Wainwright v. Bland* (1836), 5 L. J. Ex. 147; 1 M. & W. 32.

(e) *British Equitable Insce. v. G. W. Ry.* (1869), 38 L. J. C. 314.

(f) *Canning v. Farquhar* (1886), 55 L. J. Q. B. 225; 16 Q. B. D. 727.

(g) *Whelton v. Hardisty* (1857), 26 L. J. Q. B. 265; 8 E. & B. 232. See ante, p. 273.

(h) *Everett v. Deaborough* (1829), 7

PART I.

Guarantees.

Guarantees are contracts of insurance of the capacity, or honesty, or solvency of a person, either generally or with reference to some particular employment, debt or transaction. But it is "an incorrect proposition that the same rule prevails in case of guarantees as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment" (i).

Non-disclosure of material fact.

The avoidance of a contract of guarantee by the non-disclosure of a material fact depends in each case upon whether, having regard to the nature of the transaction and the relation of the parties, the fact not disclosed is impliedly represented not to exist (k).—

Guarantee of honesty.

The employment of a person in a position of trust under a guarantee of his honesty imports a representation to the surety that the person is honest, so far as the employer knows, and the non-disclosure of a fact materially affecting his honesty would avoid the guarantee; as in taking a guarantee of an agent whose duties are to receive and account for money, without disclosing the fact that he was then in arrear in his accounting to a large amount (l).

And in the case of a continuing guarantee, if the employer after discovering that the servant or agent is guilty of dishonesty continues the employment, without the knowledge and consent of the surety, the latter would be discharged of subsequent liability; for the surety upon learning the dishonesty would be entitled to put a stop to the guarantee (m).

Guarantee of debt.

Where a person is asked to guarantee the personal solvency of another, it is a natural inference that it is in consequence of the unsatisfactory financial condition of the debtor. Accordingly the fact that a current account is overdrawn, is not a material circumstance to be disclosed by a bank to surety about to guarantee that account (n); so where a surety was not told that the debt had been previously guaranteed, and that the previous surety was withdrawing from his suretyship, he was held bound (o). On the other

L. J. O. S. C. P. 223; 5 Bing. 503; S. P. *Towle v. National Guardian Assoc.* (1861), 30 L. J. C. 900.

(i) *Per cur. North British Insee. v. Lloyd* (1854), 24 L. J. Ex. 14; 10 Ex. 523.

(k) *Railton v. Mathews* (1844), 10 Cl. & F. 934; *Davies v. London and Provincial Insee.* (1878), 47 L. J. C. 511; 8 Ch. D. 469.

(l) *Smith v. Bank of Scotland* (1813), 1 Dow, 272; *Lee v. Jones* (1864), 34 L. J.

C. P. 131; 17 C. B. N. S. 482.

(m) *Phillips v. Foxall* (1872), 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; *Sander-son v. Aston* (1873), 42 L. J. Ex. 64; L. R. 8 Ex. 73; *Durham (Corp.) v. Fowler* (1889), 58 L. J. Q. B. 246; 22 Q. B. D. 394.

(n) *Hamilton v. Watson* (1845), 12 Cl. & F. 109.

(o) *North British Insee. v. Lloyd* (1854), 24 L. J. Ex. 14; 10 Ex. 523.

hand, where the surety guaranteed payments in consideration of a conveyance to his principal of property free from incumbrances except such as were set forth in a list, and owing to forgetfulness on the part of the obligee, a mortgage upon the property was not included, and was unknown to the surety, he was held discharged although the mortgage debt was in fact paid off by the principal debtor (*p*). Fraudulent practices will vitiate the contract of suretyship, as where a guarantee was given upon the representation that the whole sum was then advanced, when in fact a large part of it was retained by the creditor in payment of a prior debt; this was held to be a fraud upon the surety entitling him to avoid the guarantee (*q*). So where a guarantee was given for the price of goods sold, and it was agreed between the buyer and seller that the sum stated in the guarantee should be sufficient to cover a prior debt besides the price of the goods (*r*).

CH. VI.
SECT. II

A guarantee may be given upon the express condition that a full and true declaration is made of all the circumstances required to be known as the basis of the contract (as is the general practice in policies of life insurance), in which case a misrepresentation or non-disclosure within the condition avoids the guarantee independently of fraud (*s*). Under a guarantee upon such condition, it was stated in the required declaration that the person whose honesty was guaranteed, would render accounts weekly, such being then in fact his duty; and it was held that this did not amount to a warranty that this condition of service would be observed, but only to an expression of intention respecting future conduct (*t*).

Guarantee
upon basis of
declaration.

(*p*) *Willis v. Willis* (1850), 17 Sim. 218.

(*q*) *Stone v. Compton* (1838), 5 Bing. N. C. 142.

(*r*) *Pidcock v. Bishop* (1825), 3 L. J. O. S. K. B. 109; 3 B. & C. 605.

(*s*) *Toule v. National Insce.* (1861), 30 L. J. C. 900; 3 Giff. 42.

(*t*) *Benham v. United Guarantee and Life Assoce.* (1852), 21 L. J. Ex. 317; 7 Ex. 744.

CHAPTER VI.

CAUSES VITIATING AGREEMENT.

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PART I.
Agreements induced by duress.

An agreement apparently complete and sufficient to create a contract may be vitiated by duress, that is, where one party has been induced to consent by fear imposed by the violence or threats of the other party.

An agreement induced by duress, like an agreement induced by fraud, is not absolutely void, but voidable only at the election of the party intimidated (*a*). If the latter after the duress is removed voluntarily acts upon the agreement, he thereby confirms it and precludes himself from afterwards avoiding it (*b*). All contracts being *primâ facie* valid, the burden of proving duress rests upon the plaintiff, unless the parties stand in a fiduciary relation, in which case the burden of supporting the contract is cast upon the defendant (*c*); and in an action upon a contract the defence that it was procured by duress must be specially pleaded (*d*).

Duress of the person.

The duress recognised in law, as producing a sufficient degree of fear to vitiate an agreement, may consist in actual violence to the person, or in threats thereof (*e*).—Illegal imprisonment constitutes

(*a*) 2 Inst. 482; as to election, see L. T. 691.

ante, p. 257.

(*b*) *Ormes v. Beadel* (1860), 30 L. J. C. 1; 2 De G. F. & J. 333.

(*c*) *McClatchie v. Haslam* (1892), 65

(*d*) *Whepledale's case* (1605), 5 Co. 119 a; Order XIX. r. 15.

(*e*) 1 Blackst. Com. 131.

duress of the former kind; and "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison." But legal imprisonment will not constitute duress. "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in the prison or at large is tortious and unlawful, for '*executio juris non habet injuriam*'" (f). The abuse of legal imprisonment is for this purpose equivalent to illegal imprisonment; as where a writ of *capias* for a debt was used to compel the defendant by duress of the imprisonment to give up certain goods, it was held that the taking of the goods was wrongful and the owner might recover them back in an action without demand (g).

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Duress may also consist of threats of personal violence. But the fear "must concern the safety of the person of a man, and not his houses or goods; because he may recover the same, or damages to the value, without any corporal hurt. Again, if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man. Fear of imprisonment is sufficient, for the law hath a special regard to the safety and liberty of a man" (h). But it seems that the fear must be estimated with regard to the age, sex and condition of the person threatened, so far as known to the party using the threats (i).

Duress by
threats.

"An agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and with regard to the former the law is laid down, and the distinction pointed out between duress of, or menace to the person and duress of goods. The former is a constraining force which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man therefore is not bound by the agreement which he enters into

Duress of
goods.

(f) 2 Inst. 482; *Brinkley v. Hann* (1813), Drury, 175.

(g) *Gruinger v. Hill* (1838), 7 L. J. C. P. 85; 4 Bing. N. C. 212.

(h) Co. Lit. 253 b; 2 Inst. 483; see *Rex v. Southerton* (1805), 6 East, 126;

Powell v. Heyland (1851), 20 L. J. Ex. 82; 6 Ex. 67; *Latter v. Braddell* (1881), 50 L. J. C. P. 448.

(i) *Scott v. Shright* (1886), 56 L. J. P. 12; 12 P. D. 21. See *Cooper v. Crane*, (1891) P. 369.

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under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert" (*k*). In the case of a distress taken for rent, upon which the tenant agreed in consideration of a withdrawal of the distress to pay the sum claimed; it was held that he could not avoid the agreement upon the ground that the claim was in excess of the rent due and that he was induced to agree in order to prevent the sale of his goods (*l*).

Money
obtained by
duress of
goods.

But where money is paid to release goods or property from duress without any other consideration, it may be recovered back as a debt, as having been obtained by compulsion (*m*). "There is no doubt that if goods are wrongfully taken, and a sum of money is paid simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being under a species of duress or constraint may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money and to receive them back, that cannot be avoided on the ground of duress" (*n*). Thus where the Commissioners of Exchequer had seized goods for the purpose of condemnation, and the owner, in consideration of a return of the goods and the relinquishment of the proceedings for condemnation, paid the appraised value of the goods; it was held that the money was paid under a valid agreement made upon good consideration, and the duress of the goods formed no ground for avoiding the agreement (*o*).—Money paid to redeem goods from legal restraint, as where they have been seized by legal process and are in the custody of the law, is not recoverable as a payment under duress (*p*); also bills or

Legal
restraint of
goods.

(*k*) *Per cur. Skeate v. Beale* (1840), 9 L. J. Q. B. 233; 11 A. & E. 983.

(*l*) *Skeate v. Beale* (1840), 9 L. J. Q. B. 233; 11 A. & E. 982.

(*m*) See *ante*, p. 59.

(*n*) *Parke, B., Atlee v. Backhouse* (1838),

7 L. J. Ex. 234; 3 M. & W. 633; *per cur. Ashmole v. Wainwright* (1842), 11 L. J. Q. B. 79; 2 Q. B. 837.

(*o*) *Atlee v. Backhouse* (1838), 7 L. J. Ex. 234; 3 M. & W. 633.

(*p*) See *ante*, p. 62.

securities given to redeem the goods under such circumstances are valid (q).

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The duress must be the act of the party himself, or imposed with his knowledge and taken advantage of by him, for the purpose of obtaining the agreement; duress by a third person would not avoid a contract made with a party who is not cognizant of it (r).—It seems that a person may avoid his deed if obtained by duress imposed on his parent, or wife, or child, as well as if the duress had been on his own person (s). But in general a contract cannot be avoided on the ground that it was obtained by duress imposed on a third party. Thus a bond given by a surety for the debt of another, in order to obtain his release from imprisonment, is valid, although the imprisonment was illegal; "for none shall avoid his own bond for the improvement or danger of any other than of himself only" (t). But a bond given in consideration of discharging a person illegally arrested, where the obligee had no authority to release, is void for the want of such consideration as can be recognised in law (u).

Duress by third party.

Duress on third party.

A contract made by an agent of the party suffering the duress in order to remove the duress from his principal is voidable. Thus where in the course of proceedings in lunacy against a person who was confined in an asylum, her counsel made an agreement that in consideration of her release from restraint she would give up certain deeds; it was held that she might repudiate the agreement as induced by duress; the court saying, "If her counsel acted for her, believing her of sound mind, from the same fear of inconvenience and disease as likely to arise from confinement which affected the mind of their principal, their proceeding ought to be considered as enforced by the same duress" (x).

Contract by agent induced by duress on principal.

The Court of Chancery, besides a concurrent jurisdiction in cases of legal duress, exercised and extended jurisdiction to grant relief in various cases of pressure which did not amount to duress

Undue influence.

(q) *Liverpool Credit Co. v. Hunter* (1868), L. R. 3 Ch. 479; 37 L. J. C. 386.

(r) 1 Rolle, Abr. 688.

(s) 1 Rolle, Abr. 687; Bacon's Maxims, Tracts. 86; see *Williams v. Gayley* (1866), 35 L. J. C. 717; L. R. 1 Ch. L. 200.

(t) *Huscombe v. Standing* (1607), Cro. Jac. 187; S. P. as to an agreement, *Smith v. Monteith* (1844), 14 L. J. Ex. 22; 13 M. & W. 427.

(u) *Pole v. Harrobin* (1783), 9 East, 416, n. (a).

(x) *Cumming v. Ince* (1847), 17 L. J. Q. B. 105; 11 Q. B. 112.

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at common law. Agreements between persons in certain relative positions are treated in equity as presumptively made under an undue influence of one party upon the will of the other; "and when the relative position of the parties is such as *primâ facie* to raise this presumption the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (y). There is also a new jurisdiction conferred by the Moneylenders Act, 1900, upon all courts to relieve against bargains made with moneylenders. The statute is referred to hereafter (z).

Agreement
with
expectant
heir.

An agreement with a person in the position of an expectant heir, upon the credit of his expectancy, whether the property be actually charged or not, raises a presumption of undue influence and advantage, which the party claiming the benefit must be prepared to rebut (a). And "the phrase 'expectant heir' (with reference to the doctrine in question) is used as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversionsers and remaindermen" (b). Thus, where a person entitled to settled estates in remainder upon the death of his father, but having no present property, borrowed money upon bills at a rate of interest and discount exceeding sixty *per cent.* from a moneylender who knew his circumstances; the court, holding that the transaction was *primâ facie* induced by the necessity of his position and the credit of his expectations, required the lender to prove that it was fair and reasonable; and on failure of such proof decreed the bills to be delivered up on payment of the sums advanced with interest (c).

(y) Selborne, L. C., *Aylesford (Earl) v. Morris* (1873), 42 L. J. C. 548; L. R. 8 Ch. 489.

(z) See post, p. 538.

(a) *Thetford v. Jansen* (1761), 2 Ves. sen. 125; 1 Wh. & T. L. C. 303; *Aylesford (Earl) v. Morris* (1873), 42

L. J. C. 546; L. R. 8 Ch. 484.

(b) Jessel, M. R., *Beynon v. Cook* (1875), L. R. 10 Ch. 391, n.; *Miller v. Cook* (1870), 40 L. J. C. 11; L. R. 10 Eq. 611.

(c) *Aylesford (Earl) v. Morris* (1873), 42 L. J. C. 546; L. R. 8 Ch. 484;

In the case of contracts for the sale or charge of reversionary interests courts of equity applied the above doctrine by means of a strict rule, imposing upon the purchaser the burden of proving that he gave full value; upon failure of which they held the property to be redeemable by the reversioner upon repayment of the consideration with interest (*d*). The burden of proof was shifted in the case of a sale by auction, because the price at an auction sale was taken as *prima facie* evidence of the full market value (*e*).—This rule was altered by statute 31 Vict. c. 4, the "Act to amend the law relating to Sales of Reversion," enacting, by sect. 1, that "No purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue"; and by sect. 2, "The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired."—The statute is restricted to the ground of undervalue, and has not altered the general doctrine of the court as to granting relief on other grounds; as to which undervalue still remains an important consideration though no longer in itself sufficient (*f*).—A similar consideration applies to the repeal of the usury laws; "one effect of such repeal was to bring into operation to a greater extent than formerly that principle of the court which prevented any oppressive bargain" (*g*).

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Sale of
reversion.

Fraud except as a presumption from the use of influence, is not a necessary condition of relief (*h*). But agreements may also be void upon the ground that they operate in fraud of those persons from whom the expectations are derived. The transaction being concealed from the ancestor or other present owner of the property, he may thereby be misled and induced to dispose of it in a manner resulting for the benefit of a stranger, instead of the person intended; and the agreement would then be

Agreement
in fraud of
ancestor.

Beynon v. Cook (1875), L. R. 10 Ch. 389. As to the rate at which interest is allowed, see *Re Rowles* (1900), 69 L. J. C. 562; (1900) 2 Ch. 107.

(*d*) *Aldborough (Earl) v. Trye* (1840), 7 Cl. & F. 436; *Edwards v. Burt* (1852), 22 L. J. C. 215; 2 De G. M. & G. 55; *Re Slater's Trust* (1879), 48 L. J. C. 473; 11 Ch. D. 227.

(*e*) *Shelley v. Nash* (1818), 3 Madd. 232; *For v. Wright* (1821), 6 Madd. 111.

(*f*) *Tyler v. Yates* (1871), 40 L. J. C.

768; L. R. 6 Ch. 669; *Judd v. Green* (1875), 45 L. J. C. 108; *O'Korke v. Bolingbroke* (1877), 2 Ap. Ca. 814; *Fry v. Lane* (1888), 58 L. J. C. 113; 40 Ch. D. 312.

(*g*) *Stuart, V.-C., Barrett v. Hartley* (1868), L. R. 2 Eq. 795; *Miller v. Cook* (1870), 40 L. J. C. 11; L. R. 10 Eq. 641; *James v. Kerr* (1889), 58 L. J. C. 355; 40 Ch. D. 449.

(*h*) *Bouces v. Heaps* (1814), 3 V. & B. 117; *Fry v. Lane* (1888), 58 L. J. C. 113; 40 Ch. D. 312.

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void as operating in fraud of a third party (i). Upon this principle contracts of marriage involving the disposal of expected property and concealed from the parents or others having the disposal of it may be set aside (k). So with a loan advanced upon extortionate interest to a person having no property of his own, upon the sole credit and with the object that his parents or relations would be compelled to pay it to avoid exposure and bankruptcy (l). But if the transaction was in fact known to the ancestor or parent, it cannot be avoided as being a fraud upon him (m).

Confirmation of agreement.

The expectant heir or reversioner, after coming into possession and after the pressure has been removed and with full knowledge of his rights, may confirm the contract and bar the claim to relief. Where a person gave a *post obit* bond contingent upon his expectations under the will of a relation, and after acquiring the property gave another bond in absolute terms upon the cancellation of the former, he was held to have affirmed the original transaction and barred all claim to relief (n). But in the case of transactions falling within the Moneylenders Act, 1900, relief may be given "notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation" (o). Delay in seeking relief cannot be imputed as an objection so long as the property remains in expectancy only, and the consequent state of pressure continues (p). But after the property has come into possession, delay imports acquiescence and operates in confirmation of the transaction and in bar of relief (q).

Agreement with persons in fiduciary relation.

The principle applies in all cases of persons dealing with others to whom they stand in a recognised fiduciary relation; as trustees with beneficiaries, solicitors with clients, parents with children, guardians with wards, and the like; in which cases the presump-

(i) *Osmond v. Fitzroy* (1731), 3 P. Wms. 129.

(k) *Cock v. Richards* (1805), 10 Ves. 429. See *Turton v. Benson* (1718), 1 P. Wms. 496.

(l) *Nevill v. Snelling* (1880), 49 L. J. C. 777; 15 C. D. 679.

(m) *King v. Hamlet* (1834), 2 M. & K. 456; (1835), 3 Cl. & F. 218; dissented from *Aylesford (Earl) v. Morris* (1873), 42 L. J. C. 546; L. R. 8 Ch. 484.

(n) *Chesterfield (Earl) v. Janssen* (1751),

2 Ves. sen. 125; 1 Wh. & T. L. C. 289.

(o) Sect. 1. See *Saunders v. Newbold* (1904), 74 L. J. C. 120; (1905) 1 Ch. 260; *affd. nom. Samuel v. Newbold* (1906), 75 L. J. C. 705; (1906) A. C. 461.

(p) *Gowland v. De Faria* (1810), 3 V. & B. 25; *Salter v. Bradshaw* (1859), 28 L. J. C. 426; 26 Beav. 161; *Beynon v. Cook* (1875), L. R. 10 Ch. 389.

(q) *Sibbering v. Balcarras (Earl)* (1850), 19 L. J. C. 252; 3 De G. & S. 735.

tion of undue influence arises in law, and it lies upon such a person to prove that he took no advantage of his position or influence (r).—"There is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*; but it is a well-known doctrine of equity, that if a transaction of that kind is challenged in proper time, a court of equity will examine into it, and will throw upon the trustee the *onus* of proving that he gave full value and that all information was laid before the *cestui que trust* when it was sold" (s). Accordingly, a bargain between the trustee of a legacy and the legatee for payment of a less sum than the legacy in composition of an unfounded dispute as to his right, was held wholly void (t). And where a trustee for sale took the property to himself at a certain price, and sold it again at an advanced price, he was held trustee of the profit obtained at the second sale (u). The same principle applies to an executor purchasing the assets of his testator or the interest of a legatee (x). But a trustee who disclaims the trust, or an executor who disclaims the executorship, is under no disability as to subsequent transactions (y).—"There is no rule that a solicitor may not purchase his client's property even while the relation subsists between them; but the *onus* is thrown upon the solicitor to show that everything is perfectly fair; and that the vendor knew what he was doing, and that the full price was given, and that no advantage was taken of the character of solicitor" (z). The same principle applies to a solicitor taking a mortgage from his client, which he must take in the usual form and subject to the usual mode of accounting; and where in such mortgage the power of sale was made exercisable without notice, he was held liable for the loss and expenses caused by a sale (a).—The director

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Trustee.

Solicitor.

Director of
company.

(r) *For v. Mackreth* (1788), 2 Bro. C. C. 400; 2 Cox, 329; 2 Wh. & T. L. C. 709; *Huguenin v. Bas ley* (1808), 14 Ves. 273; 1 Wh. & T. L. C. 239; *Dungan v. Macpherson* (1902), 71 L. J. P. C. 62; (1902) A. C. 197. See *Delves v. Gray* (1902), 71 L. J. C. 808; (1902) 2 Ch. 606.

(s) Cairns, L. C., *Thomson v. Eastwood* (1877), 2 Ap. Ca. 236; *Cole v. Trecothick* (1804), 9 Ves. 234.

(t) *Thomson v. Eastwood* (1877), 2 Ap. Ca. 215; *Ellis v. Barker* (1871), 41 L. J. C. 64; L. R. 7 Ch. 104.

(u) *For v. Mackreth* (1788), 2 Bro. C. C. 400; 2 Cox, 329; 2 Wh. & T. L. C. 709.

(x) *Beningfield v. Baxter* (1886), 56 L. J. P. C. 13; 12 Ap. Ca. 167; *Re Worsam* (1882), 51 L. J. C. 669.

(y) *Clark v. Clark* (1884), 53 L. J. P. C. 99; 11 Ap. Ca. 733.

(z) *Eldon, L. C., Gibson v. Jeyes* (1801), 6 Ves. 271; *Montesquieu v. Sandys* (1811), 18 Ves. 302; *Farrar v. Farrars, Ltd.* (1888), 58 L. J. C. 185; 40 Ch. D. 395; *Wright v. Carter* (1902), 72 L. J. C. 138; (1903) 1 Ch. 27.

(a) *Cockburn v. Edwards* (1881), 51 L. J. C. 46; 18 Ch. D. 449; see *Footley v. Whetham* (1886), 55 L. J. C. 899; 33 Ch. D. 111.

PART I. of a company is in a fiduciary position in relation to the company, and a sale or transaction between them may be avoided upon the above principles and the director held liable to refund all benefits and profits obtained under it; the burden being upon the director to prove that the transaction was fair and that no advantage was taken of his position (*b*). But the company with full knowledge may ratify the transaction; and the director, being a shareholder, may vote upon the question of ratification (*c*). The promoter of a company, for the purpose of selling property to it, stands in a similar fiduciary position, although not bound to create a board of independent directors, must communicate to them all material information regarding the property and its value (*d*). "The term 'promoter' is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence" (*e*).

Promoter.

Agreement with parent or guardian.

Agreements between a child and parent or person *in loco parentis*, or ward and guardian, are presumptively affected by undue influence and therefore voidable; and the burden is thrown upon the parent, and any person claiming under him, to show that the child acted freely and with independent advice; and the same rule applies with persons of full age, so long as they are not emancipated from parental control (*f*). A security given by a person under age for a loan to her stepfather, with whom she was living, was held presumptively void as obtained by undue influence; and a subsequent renewal of the security when of age, but under the same influence and without full information of its invalidity, was held to be no confirmation and invalid (*g*). The court will not set aside a proper and a reasonable settlement

(*b*) *Imperial Mercantile Credit v. Coleman* (1873), 12 L. J. C. 644; L. R. 6 H. L. 189; *Cavendish Bentinck v. Fenn* (1887), 57 L. J. C. 552; 12 Ap. Ca. 652; *Archer's case* (1890), 61 L. J. C. 129; 1892) 1 Ch. 322; *Re G. Newman & Co.* (1895), 64 L. J. C. 407; (1895) 1 Ch. 674.

(*c*) *North West Transport Co. v. Beatty* (1887), 56 L. J. P. C. 102; 12 Ap. Ca. 589.

(*d*) *Erlanger v. New Sombrero Co.* (1878), 48 L. J. C. 73; 3 Ap. Ca. 1218; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Lagunas Nitrate Co. v. Lagunas Syndicate* (1889), 68 L. J. C. 699; (1899) 2

Ch. 392; see *Re Lady Forrest Mining Co.* (1901), 70 L. J. C. 275; (1901) 1 Ch. 582.

(*e*) *Bowen, J., Whaley Bridge Co. v. Green* (1879), 49 L. J. Q. B. 326; 5 Q. B. D. 111; and see *Emma Mining Co. v. Lewis* (1879), 48 L. J. C. P. 257; 1 C. P. D. 396; *Re Great Wheel Polishing Co.* (1883), 53 L. J. C. 42; *Lydney Iron Co. v. Bird* (1886), 55 L. J. C. 875; 33 Ch. D. 85.

(*f*) *Bainbrigge v. Brown* (1881), 50 L. J. C. 522; 18 Ch. D. 188; *Tucker v. Bennett* (1888), 57 L. J. C. 507; 38 Ch. D. 1.

(*g*) *Kenyon v. Ashbee* (1874), 44 L. J. C. 195; L. R. 10 Ch. 15.

of family property upon the mere ground that parental authority was exerted to induce its execution (*h*); but the court may rectify it by depriving the parent of any undue benefit to be taken under it (*i*). The relationship of husband and wife does not give rise to this presumption of undue influence, which must be proved affirmatively to set aside the wife's contract (*k*).

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The same general principle applies "to all the variety of relations in which dominion may be exercised by one person over another" (*l*): as in the case of dealing with a person who is illiterate and ignorant of business, and who has no independent adviser (*m*); or with a person who is under such pecuniary necessity as not to be a free agent (*n*); and where a son had forged his father's name to bills, and security for the amount was taken from the father under threat of a prosecution (*o*); also in the case of transactions between a medical adviser and his patient (*p*); and in any case of a confidential adviser taking a benefit from the person dependent upon his advice (*q*). The fact that a person standing in a fiduciary relation purchased the property at a sale under the direction of the court affords no circumstance of defence if its propriety is challenged, unless he has obtained leave to bid (*r*).—The transactions in such cases are in general voidable only, and not absolutely void; and they may be confirmed after the relation of influence has ceased (*s*). And the party seeking to set aside the contract must be in a position to restore the other party to his original position; otherwise the court will not set it aside (*t*). But a party may retain gifts unconnected with the transactions which he seeks to impeach on the ground of undue influence (*u*).

Special
relations of
influence.

(*h*) *Dimsdale v. Dimsdale* (1856), 25 L. J. C. 806; 3 Drew. 556; *Hoblyn v. Hoblyn* (1884), 41 Ch. D. 200.

(*i*) *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200.

(*k*) *Howes v. Bishop* (1909), 78 L. J. K. B. 796; (1909) 2 K. B. 390.

(*l*) *Cuthberton, L. C. v. Dent v. Bennett* (1838), 8 L. J. C. 25; 4 M. & Cr. 277.

(*m*) *Evans v. Leavelle* (1787), 1 C. c. 334; 2 Bro. C. C. 150; *Fry v. Lane* (1888), 58 L. J. C. 113; 40 Ch. D. 312.

(*n*) *Wood v. Avey* (1818), 3 Mudd. 417; *James v. Kerr* (1884), 58 L. J. C. 355; 40 Ch. D. 449.

(*o*) *Williams v. Barker* (1886), 35 L. J. C. 717; L. R. 11 L. 200.

(*p*) *Dent v. Bennett* (1838), 8 L. J. C. 125; 1 M. & Cr. 269.

(*q*) *Tate v. Williamson* (1866), L. R. 2 Ch. 55; *Moran v. Pague* (1873), 43 L. J. C. 210; L. R. 8 Ch. 881.

(*r*) *Tinnant v. Trenchard* (1869), 38 L. J. C. 661; L. R. 1 Ch. 537; *Nogent v. Nogent* (1908), 77 L. J. C. 271; (1908) 1 Ch. 546.

(*s*) *Mitchell v. Homfray* (1881), 50 L. J. Q. B. 160; 8 Q. B. D. 587.

(*t*) *Hilberrough (Earl) v. Trye* (1840), 7 Cl. & F. 436; *Dimsdale v. Dimsdale* (1856), 25 L. J. C. 806; 3 Drew. 556; *Re Wincam* (1882), 51 L. J. C. 669.

(*u*) *Loring v. Smith* 1880, 49 L. J. C. 809; 15 Ch. D. 655; *Wright v. Carter* (1902), 72 L. J. C. 138; (1903) 1 Ch. 27.

CANADIAN NOTES.

Mistake.

In *Murry vs. Jenkins*, 28 S. C. R., 565, it was held that where the owner of land was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was not binding upon her, and it was set aside by the Court on the ground of error, as the parties were not *ad idem* as to the subject-matter of the contract and there was no actual consent by the owner to the agreement so made for the sale of her land.

In *Hobbs vs. The Esquimalt and Nanaimo Railway Company*, 29 S. C. R., 450, the company executed an agreement to sell certain lands to the plaintiff, who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land while the agreement was for an unconditional sale. The company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. Per King, J.: "Here the parties were *ad idem* as to the terms of the contract. It was expressed in perfectly unambiguous language in the offer of the plaintiff and in the acceptance of the defendant, and the alleged difference is in the wholly esoteric meaning which one of them gives to the plain words." It was accordingly held that the contract could not be rescinded on the ground of mistake, and must be specifically performed.

The Canadian cases in reference to the refusal of the remedy by way of specific performance on the ground of mistake will be found collected in Canadian Notes to Fry on Specific Performance at page 402a and following pages.

In *Knox vs. Muir*, 13 Man., 16, plaintiff claimed under a hiring at seventeen dollars by the month, but defendant's evidence shewed that the hiring was for a definite period of eight months for one hundred and twenty dollars, no time having been fixed for payment. Plaintiff left after four months' service without leave and without any valid reason or excuse. It

was held that the plaintiff was bound by his bargain, even if he misunderstood its legal effect, and could not recover anything for his services without completing his contract.

Misrepresentation and Non-disclosure.

In *Norwich Fire Insurance Company vs. Labelle*, 29 S. C. R., 470, a condition endorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property or any omission to make known the facts material to the risk would avoid the policy. In the application for the policy the insured stated that he was sole owner of the property to be insured and of the land on which it stood, whereas it was to his knowledge and that of the sub-agent who secured the application, situated upon the public highway. It was held that, as the application was more than once referred to in the policy, it was part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above conditions.

In *Jordan vs. Provincial Provident Institution*, 28 S. C. R., 554, it was held that the provision of sub-section 2 of section 33 of the Insurance Corporations Act, 1892, Ontario, limiting conditions and warranties endorsed on policies providing for the avoidance of the contract by reason of untrue statements in the application to cases where such statements are material to the contract do not require the materiality of the statement to appear by the endorsement, but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by sub-section 3. Misrepresentations in an application for life insurance so found to be material will avoid the policy, notwithstanding that they may have been made in good faith and in the conscientious belief that they were true.

This case follows *Venner vs. Sun Life Assurance Company*, 17 S. C. R., 394.

In *London and Liverpool and Globe Insurance Company vs. Agricultural Savings and Loan Company*, 33 S. C. R., 94, by

section 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year, and may be renewed by a renewal receipt instead of a new policy. It was held, reversing the judgment of the Ontario Court of Appeal, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval. Girouard, J., dissenting, held that the renewal was a new contract, but it was avoided by the non-disclosure or the concealment in the application for the original policy.

In *Crooks vs. Davis*, 6 Grant's Ch., 318, the advertisement of an intended sale stated that the soil was well adapted for gardening purposes, and a considerable portion of the property was covered with a fine growth of pine and oak, etc., etc. In a suit for specific performance defendant set up that the soil was not as represented, that the soil was not fit for gardening purposes, and the trees were not such as set forth in the advertisement. It was held that these representations, having been made in respect to matters which were objects of sense and as to which an intending purchaser ought in prudence to have examined for himself, formed no defence to the action.

In *Hannah vs. Graham*, 17 Man., 532, the defendant also resisted the plaintiff's claim for specific performance, alleging reliance on plaintiff's representation that the farm consisted of a black, sandy loam, eighteen or twenty inches deep, with clay bottom, etc., all of which representations were untrue. The trial Judge held that apart altogether from conflict of testimony the plaintiff could not succeed in having the contract rescinded on the grounds set up, as public policy required that persons should be expected to exercise ordinary prudence in their business dealings instead of calling on the courts to relieve them of the consequences of their own inattention and negligence. The defendant had not inspected the land. The Court, while expressing doubt as to whether they would have found the same way, held that the finding of the Judge could not properly be reversed, but Phippin, J. A., dissented, following *Redgrave vs. Hurd*, 20 C. D. 1, and *Smith vs. Land Corporation*, 28 C. D., 7.

Remedy for Misrepresentation.

In *Ross vs. Barry*, 19 S. C. R., 360, a contractor who was led into error by verbal misrepresentations as to the quality of work expected to be done upon a contract was held entitled to recover the increased price of completing the work according to specification.

Rescission Because of Misrepresentation.

In *Cole vs. Pope*, 29 S. C. R., 291, the appellant, with others, had taken up a gold mining claim in British Columbia, designated as the Eldorado, of which he claimed and represented himself to be the owner of one half. The respondent, believing the representations to be true, and relying entirely upon them, became the purchaser of the undivided half. It afterwards turned out that the greater part of the Eldorado plot was included within the limits of a prior claim called the Mascot, and that the strip which remained was included in another claim. The respondent, therefore, got nothing for the money he paid. There was no doubt that the appellant had made the sale in perfect good faith and that his representation which turned out to be untrue was innocently made and that the transaction was free from fraud. Both parties had proceeded on the mistaken belief that the Eldorado was an actually existing mining right, whereas, in truth, owing to other claims which were entitled to priority having been previously made the whole of the Eldorado was included in pre-existing claims.

The learned Chief Justice, Sir Henry Strong, C. J., refers to the judgment of the trial Judge, who considered the respondent's right to rescission to be dependent entirely upon the misrepresentation, and had held that, in the present state of the law, an executed contract, especially an executed contract for the sale of an interest in land, would not be rescinded for mere innocent misrepresentation. He proceeds to say "that this was a correct view of the law as administered by courts of equity up to the date of the amalgamation of jurisdictions effected by the Judicature Acts, and as it has existed down to the present time I am not upon the authorities able positively to controvert. Strange as it may seem that there should be dearth of authority upon such a point, I find that, with the exception of one case, that of *Legge vs. Croker*, 1 Ball and B., 506, there is no direct

authority upon the point. That case of *Legge vs. Croker* supports the judgment of the Chief Justice" (the trial Judge), "as Lord Manners there held that to entitle the party to have rescission of an executed contract for the sale of land upon the ground of misrepresentation there must be fraud. There are no doubt dicta the other way emanating from judges, some of great authority, for we find Sir Edward Sugden, Lord Justice Turner and Sir George Jessel all stating the law to be that such a contract would be rescinded for innocent misrepresentation, provided, of course, that it forms the basis of the contract. It would not, however, be safe to rest on these dicta." The learned Chief Justice then cites from *Dart on Vendors and Purchasers* and Sir Edward Fry's treatise on *Specific Performance*, and concludes in favour of the proposition that mere innocent misrepresentation will not warrant the rescission of a contract for the sale of an interest in land. He, however, invokes the principle that where, by the mutual mistake of the parties to a contract of sale, the subject of the sale turns out to be non-existent, or is already the property of the purchaser, both parties having fallen into error merely and there being no fraud or deceit in the case, the purchaser who has paid the purchase money and taken a conveyance will be relieved and the contract rescinded by a court of equity. "In such a case, where there is a complete failure of consideration, as in the present case, it would be unjust and unconscionable that the vendor should retain money paid to him for a supposed consideration which has utterly failed."

In *Morehouse vs. Hewish*, 22 O. A. R., 172, a city building lot was described in an agreement for exchange as having a depth of one hundred and thirty feet more or less, while the actual depth was only one hundred and seventeen feet, with a lane in the rear twelve feet wide. Specific performance of the agreement was refused, and Hagarty, C. J. O., stated the rule as established in *Flight vs. Booth*, that where the misdescription, although not proceeding from fraud, was in a material and substantial point, so far affecting the subject-matter of the contract that but for such misdescription the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation.

In *Spurr vs. Albert Mining Company*, Stevens, N. B., Dig. 181, defendants agreed to furnish the plaintiff with a quantity of coal from their mines. Coal from these mines, known as Albert coal, was used almost exclusively for the manufacture of oil and gas. The defendants knew that the plaintiff required the coal for the purpose of manufacturing it into oil, and they could have supplied an article fit for that purpose. It was held that the plaintiff was entitled to receive Albert coal of a fair merchantable quality and fit for the purposes for which he required it, and that the contract was broken by the delivery of coal from the mine so mixed with shale as to be comparatively valueless for the purpose for which the plaintiff required it. In contracts of this nature it is not so much a question whether there has been a warranty as whether the article delivered by the defendant fairly answers the description of that which he agreed to sell.

Construction of Warranty.

In *Higgins et al. vs. Ulish et al.*, 31 N. S., 451, in an action by plaintiff claiming the return of money paid to defendant as the price of an engine and boiler and damages for alleged false representation, it appeared that the first complaint as to the insufficiency of the boiler was made five months after it was first used, and that neither defendants nor any person on their behalf categorically used or agreed to terms warranting each and all of the qualities and capacities of the engine and boiler as alleged, but that, during a conversation as to the character of the engine and boiler and the purposes for which they were required, preliminary to the purchase, the question was asked whether defendants would warrant them, and the answer was made that they would. It was held that these words would only mean that the engine and boiler were good and sound and reasonably fit for the purposes of an engine and boiler of the character and power stated, and not that defendants would warrant them to operate mills that they had never seen.

Warranty of Quality.

In *Stewart vs. Atkinson*, 22 S. C. R., 315, in a contract for the purchase of deals by merchants in London it was stipulated, among other things, that the sellers guaranteed quality to be

equal to the usual Etchemin stock and to be marked with the Beaver brand and the mode of delivery was f.o.b. vessels at Quebec and payment by drafts payable in London, 120 days' sight from date of shipment. It was held that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being evidence that the deals were not of the agreed quality.

PART II.

PARTIES TO CONTRACTS.

CHAPTER I.

PRINCIPLES OF THE LAW OF PARTIES.

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EVERY contract necessarily requires two independent parties, a promiser and a promisee, at the time of making it (a); where, however, a party to a deed is one of several covenantors and also one of several covenantees, upon his death, if there be no further objection founded upon a party being both covenantor and covenantee, the surviving covenantees may maintain an action against the surviving covenantors (b). But this result would not follow if the liability were a personal debt, which if once suspended was gone for ever at common law (c), whereas an action upon a

Contract
requires two
parties.

(a) *Bosanquet v. Wray* (1816), 6 Taunt. 597; *De Tastet v. Shaw* (1818), 1 B. & Ald. 664; *Sharman v. Brandt* (1871), 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; *Ellis v. Kerr* (1910), 79 L. J. C. 291; (1910) 1 Ch. 529.

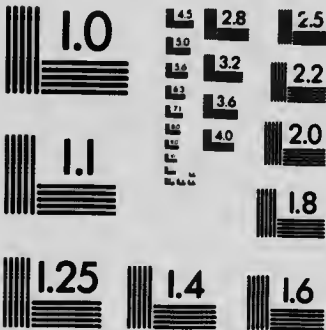
(b) *Rose v. Poulton* (1831), 1 L. J. K. B. 5; 2 B. & Ad. 822.

(c) *Holdipp v. Ottway* (1670), 2 Wms. Saund. p. 352, n. (c). See Bills of Exchange Act, 1882, s. 37.



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PART II. specialty had its own peculiar remedy (*d*). A contract cannot be made with a non-existent person, as the future owner of an estate (*e*); or a company that has not yet come into existence (*f*); but the offer of a contract may be such as to leave it open for acceptance by any person who satisfies the conditions of the offer and accepts the terms: as in the case of an advertisement offering a reward, which is accepted by the person performing the services for which the reward is offered (*g*); or a letter of credit which is in effect an offer to honour the bills drawn under it, and accepted by any person who takes the bills upon the credit of it (*h*).—A negotiable instrument, as a bill of exchange or a promissory note, may be made payable to bearer, who becomes party to the contract by holding the instrument; but “where a bill is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty” (*i*). “A bill may also be made payable to the holder of an office for the time being” (*k*); and “where the payee is a fictitious or non-existent person the bill may be treated as payable to bearer” (*l*). A promissory note drawn payable to the maker’s own order is an incomplete instrument, until indorsement: it then becomes a valid note payable to the indorsee or his order: or if indorsed in blank and delivered, it is payable to the bearer (*m*). And an instrument in the form of a bill of exchange, addressed to and accepted by a person, but not containing the name of either a drawer or payee, is an incomplete instrument until the name of a payee is supplied by the person authorised to do so (*n*).—It sometimes happens that a man fills two capacities: it then becomes a question upon the consideration of all the facts whether he acted in one or other or both capacities (*o*).

(*d*) *Schlucker v. Mossy* (1825), 3 B. & C. 789; *Baber v. Harris* (1839), 8 L. J. Q. B. 153; 9 A. & E. 532.

(*e*) *Jessel, M. R., Kelsey v. Dodd* (1882), 52 L. J. C. 39.

(*f*) *Re Empress Engineering Co.* 1880, 16 Ch. D. 125.

(*g*) *Williams v. Carwardine* (1833), 2 L. J. K. B. 101; 4 B. & Ad. 621.

(*h*) *Re Agra and Masterman’s Bk.* (1867), 36 L. J. C. 222; L. R. 2 Ch. 391; *Maitland v. Chartered Bk. of India* (1869), 38 L. J. C. 363.

(*i*) Bills of Exchange Act, 1882, s. 7 (1).

(*k*) Bills of Exchange Act, 1882, s. 7 (2); overriding *Cowie v. Stirling* (1856), 25 L. J. Q. B. 335; 6 E. & B. 335.

Vales v. Nash (1860), 29 L. J. C. P. 306; 8 C. B. N. S. 581.

(*l*) Bills of Exchange Act, 1882, s. 7 (3); *Bank of England v. Vagliano* (1890), 60 L. J. Q. B. 145; (1891) A. C. 107; *N. & S. Wales Bk. v. Macbeth* (1908), 77 L. J. K. B. 464; (1908) A. C. 137.

(*m*) Bills of Exchange Act, 1882, s. 83; *Brown v. De Winton* (1848), 17 L. J. C. P. 281; 6 C. B. 336; *Chamberlain v. Young* (1893), 63 L. J. Q. B. 28; (1893) 2 Q. B. 206.

(*n*) Bills of Exchange Act, 1882, s. 3; *McCall v. Taylor* (1865), 34 L. J. C. P. 365; 19 C. B. N. S. 301. See *Carter v. White* (1884), 54 L. J. C. 138; 25 Ch. D. 666.

(*o*) *Drew v. Norbury (Earl)* (1846), 3

The same person cannot be both debtor and creditor; and generally where the characters of debtor and creditor become united in the same person in his own right the debt is extinguished. Formerly, where a company paid off its debentures, the debt was extinguished, and the debentures could not be issued again whether there had been a formal transfer to the company or not, but this has now been remedied by statute, and the debentures may now be re-issued where the contract so provides (*p*). Where a company having two departments, one for loans and the other for insurance, effected an insurance by the one department with the other to secure a loan, it was held to be a mere formality without legal effect; and the company could not charge the borrower as for an insurance which he had agreed to pay (*q*). So an architect, or trustee, or agent having authority to insure, who acts as his own insurer, cannot charge for premiums as if an insurance had been legally effected (*r*). In bankruptcy, however, in the case of partnership firms having common members, rights were adjusted according to the equity of the case from the point of view of the creditors of the respective firms (*s*).

CH. I.
Same person
as debtor
and creditor.

Upon the same principle where a shipowner carries his own goods there is no "freight" properly so called, and the increased value (if any) in the goods is due to the carriage. Therefore a purchaser, or mortgagee, or underwriter, taking possession of the ship during the voyage, cannot claim accruing freight in respect of such goods, as being a claim incident to the ship; they can only claim for subsequent freight, if the goods are carried to their destination (*t*). And if the shipowner, selling his goods during the voyage, delivers to the buyer bills of lading expressed to be for delivery on payment of freight at a certain rate, the so-called freight is only part of the price deferred until delivery, for which the owner retains a lien: but to which a mortgagee in possession of the ship can make no claim (*u*). An indorsee of such

Shipowner
carrying his
own goods

Jo. & L. 267; *Brown v. Gordon* (1852), 22 L. J. C. 65; 16 Beav. 302; *Re Capper* (1882), 51 L. J. C. 862; 20 Ch. D. 611.

(*p*) *Re Russian Petroleum & Liquid Fuel Co.* (1907), 77 L. J. C. 21; (1907) 2 Ch. 540. See now Companies (Consolidation) Act, 1908, s. 104; *Re New London & Suburban Omnibus Co.* (1908), 77 L. J. C. 358; (1908) 1 Ch. 621.

(*q*) *Greg v. Ellison* 1856, 25 L. J. C. 666; 1 Giff. 438.

(*r*) *Hutchinson v. Wilson* (1793), 4 Bro.

C. C. 488.

(*s*) *Ex p. Maerle* 1873, 42 L. J. Bk. 90; L. R. 8 Ch. 535; *Ex p. Canna* (1874), 43 L. J. C. 683; L. R. 9 Ch. 689; *Ex p. Gliddon* (1884), 13 Q. B. D. 43.

(*t*) *Miller v. Woodfall* 1857, 27 L. J. Q. B. 120; 8 E. & B. 493.

(*u*) *Keith v. Burrows* (1877), 46 L. J. C. P. 801; 2 Ap. Ca. 636; *Swan v. Barber* (1880), 49 L. J. Ex. 253; 5 Ex. D. 130.

PART II.

Same person
as buyer
and seller.

bill of lading takes it subject to the freight expressed in it as the condition of claiming delivery of the goods (*x*). And under an insurance on "freight," the shipowner or his assignee may recover the profit or increased value due to carriage of his own goods (*y*).

Upon the same principle a transaction in which the same persons appear as buyers and sellers is void: a trustee or mortgagee acting under a power of sale (*z*), or a landlord exercising his statutory power to sell a distress (*a*), cannot be both buy and seller; and the sale is void, though he fixes the price at the full value. And where the sellers formed themselves into a company to act as buyers at an enhanced price, the transaction was held void; and they were held not accountable *inter se* for the nominal price (*b*). But "a sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as in law"; and such a sale is warranted by an ordinary power of sale (*c*). And a director of a company may sell in his own right to the company; and he may vote as a shareholder at a meeting held to ratify the sale (*d*).—Upon a similar principle the donee of a power to lease cannot grant a lease to himself (*e*).

Effect of
contract as
to third
parties.

Contracts affect the parties only; a contract can create no right or liability in a person who is not a party to it; unless he can claim or be charged through a party, as in the case of a *cestui que trust* claiming through a trustee; or a principal claiming or being charged through an agent (*f*). A contract between two persons that one shall pay a debt of the other gives no right to the creditor, unless he is a party to the contract (*g*). Where the fathers of the spouses, by way of post-nuptial settlement, agreed together that each should pay a sum of money to the husband: and further, that the husband should have "full power

(*x*) *Wequelin v. Cellier* (1873), 42 L. J. C. 758; L. R. 6 H. L. 286.

(*y*) *Flint v. Fleming* (1830), 8 L. J. O. S. K. B. 350; 1 B. & Ad. 45.

(*z*) *Dornes v. Grazebrook* (1817), 3 Mer. 200; *Martinson v. Cloves* (1882), 51 L. J. C. 594; 21 Ch. D. 857; *Henderson v. Astwood*, (1894) A. C. 150.

(*a*) *Moore, Nettlefold & Co. v. Singer Manufacturing Co.* (1904), 73 L. J. K. B. 457; (1904) 2 K. B. 820.

(*b*) *Re Ambrose Lake Co.* (1880), 49 L. J. C. 457; 14 Ch. D. 390.

(*c*) *Farrar v. Farrars* (1888), 58 L. J. C. 185; 40 Ch. D. 395.

(*d*) *North West Transport Co. v. Beatty* (1887), 56 L. J. P. C. 102; 12 Ap. Ca. 589.

(*e*) *Boyce v. Edbrooke* (1903), 72 L. J. C. 547; (1903) 1 Ch. 836.

(*f*) *Asprey v. Levy* (1847), 16 M. & W. 851; *Gandy v. Gandy* (1885), 54 L. J. C. 1154; 30 Ch. D. 57; *McGruther v. Pitcher* (1904), 73 L. J. C. 653; (1904) 2 Ch. 306; *Malone v. Laskey* (1907), 76 L. J. K. B. 1134; (1907) 2 K. B. 141. See *ante*, p. 18; *post*, pp. 298, 339.

(*g*) *Price v. Easton* (1833), 2 L. J. K. B. 51; 4 B. & Ad. 433.

to sue the said parties in any court of law or equity for the aforesaid sums," it was held that the husband, being no party to the contract, could not sue in his own right (*h*).—Upon this principle it was held that the articles of association of a company appointing a certain person to be solicitor of the company, not removable except for misconduct, operated by way of contract between the shareholders only, and gave no right for the solicitor to sue for wrongful dismissal (*i*); and that articles of association providing for the payment of the preliminary expenses by the directors gave no right of action to the promoter who incurred the expenses; unless a fund was appropriated in trust against which he could claim (*k*).

CH. I.

Articles of association of company.

Upon the same principle, although one of several parties to a contract may be thereby appointed to take proceedings on behalf of some against other parties to the contract (*l*), it is not competent for the parties to a contract to nominate a person not being a party to bring actions in his own name on behalf of parties (*m*). This rule has in some instances been modified by statute; thus, the Statutes Act, 1869, s. 13, enables the purser for the time being of the company to sue a shareholder for calls as the nominal plaintiff for the company (*n*). Banks to which the Joint Stock Banking Companies Act (7 Geo. 4, c. 46) applies, must prosecute all proceedings at law or in equity in the name of one of the public officers of the company appointed for that purpose, even in those cases in which the contract is made with other parties than the public officer (*o*).

Person appointed to sue.

The same principle applies in equity, and "generally to a bill for a specific performance of a contract the parties to the contract only are the proper parties"; and "persons, strangers to the contract, and therefore neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a pro-

Parties in equity.

(*h*) *Tweddle v. Atkinson* (1861), 30 L. J. Q. B. 265; 1 B. & S. 393.

(*i*) *Eley v. Positive Security Assn.* (1876), 45 L. J. Ex. 451; 1 Ex. D. 88. See *Re English and Colonial Produce Co.* (1906), 75 L. J. C. 831; 1906 2 Ch. 435.

(*k*) *Melhado v. Porto Alegre Ry.* (1874), 43 L. J. C. P. 253; L. R. 9 C. P. 503; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Re Rotherham Alkali Co.*

1884, 53 L. J. C. 290; 25 Ch. D. 103. (*l*) *Radenhorst v. Bates* 1826, 4 L. J. O. S. C. P. 169; 3 Bing. 463.

(*m*) *Evans v. Hooper* 1875, 45 L. J. Q. B. 206; 1 Q. B. D. 45.

(*n*) See *Escott v. Gray* (1878), 47 L. J. C. P. 606; *Ex p. Ashmead* (1893), 62 L. J. Q. B. 500; (1903) 1 Q. B. 590.

(*o*) *Chapman v. Miteain* (1850), 19 L. J. Ex. 228; 5 Ex. 61.

Part II. ceeding to recover damages for the breach of it" (*p*). Accordingly the purchaser from a mortgagor of a mortgaged estate may sue the vendor for specific performance without joining the mortgagee as a party, though his concurrence may be necessary to the conveyance (*q*), and a mortgagee selling under a power of sale may sue the purchaser for specific performance without joining the mortgagor (*r*).—In equitable proceedings, if a contract with a named person is intended to secure a benefit to another as *cestui que trust*, the latter may sue in his own right to enforce the contract. Thus in a separation deed between husband and wife, in which covenants are made by the husband with a trustee for the benefit of the wife, the wife is entitled to sue; but a covenant by the husband with the trustee to provide for the maintenance of the children does not give the children any right to sue, or to compel the trustee to sue on their behalf (*s*). Children are entitled to claim in their own right the benefits contracted for them in the marriage settlement of the parents; and in the settlement upon the second marriage of the wife (*t*). An agreement to pay a sum of money in trust for a third party may be enforced by the beneficiary in equity in his own name (*u*). And a trustee suing upon a contract on behalf of his *cestui que trust* may recover all damages sustained by the latter, as if he had sued in his own person (*x*).

**Trustee and
cestui que
trust.**

**Liability of
third party.** Although a person cannot be charged with any liability upon a contract to which he is not a party, he is bound so far to respect the rights of the parties that he may become liable to an action for an injurious interference with the contractual relations created between them: as for enticing away and harbouring another person's wife (*y*); or for inducing a person to break a contract of

^p *Cottenham, L. C., Tasker v. Small* (1837), 5 L. J. C. 321; 3 M. & Cr. 63; *De Houghton v. Money* (1826), L. R. 2 Ch. 161; *Markham v. Paget* (1908), 77 L. J. C. 451; 1908 1 Ch. 697. See *Re Pagott and G. W. Ry.* (1881), 50 L. J. C. 679; 18 Ch. D. 146.

^q *Tasker v. Small* (1837), 5 L. J. C. 321; 3 M. & Cr. 63.

^r *Corder v. Morgan* (1811), 18 Ves. 344; *Hare v. Davey* (1876), 45 L. J. C. 697; 2 Ch. D. 721. See *Order XVI.* r. 11.

^s *Cotton, L. J., Gandy v. Gandy* (1885), 54 L. J. C. 11; 30 Ch. D. 57.

And see *Judkins v. Judkins* (1897), 66 L. J. P. 76; (1897) P. 138.

^t *Gale v. Gale* (1877), 46 L. J. C. 809; 6 Ch. D. 144; *Re Cameron and Wells* (1887), 57 L. J. C. 69; 37 Ch. D. 32.

^u *Fletcher v. Fletcher* (1844), 14 L. J. C. 60; 4 Hn. 67; *Re Patrick* (1890), 60 L. J. C. 111; (1891) 1 Ch. 82.

^x *Lloyd's v. Harper* (1880), 50 L. J. C. 140; 16 Ch. D. 290.

^y *Winsmore v. Greenbank* (1745), Willes, 577. See *Philp v. Square* (1791), Peake, 115.

personal service to another (2); or to break a contract not to supply goods to the defendant (a).

CH. I.

In an indenture or deed made *inter partes*, the formal statement of the parties by name or description impliedly excludes any other parties; and those persons only who are so named or described can acquire a right or incur a liability, or can sue or be sued under the deed (b). In an indenture of lease at common law a person not named as a party could not sue upon the covenants, though expressly made to him (c); nor could such person join with parties in suing upon the covenants, though expressly made to all of them jointly (d).—Where a composition deed described the parties of the one part as “the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents,” it was held that creditors who did not execute the deed were not parties and could not sue upon the covenants, though they were expressed to be made with all the creditors; and consequently the deed was not valid under the Bankruptcy Act, then in force against non-executing creditors, who were not upon equality with the others (e). But where such deed was expressly made with “all the creditors,” or in terms including all creditors as parties, it was valid, for all the creditors could sue upon the covenants (f).—An exception was made to the above rule by sect. 5 of the Real Property Amendment Act, 1845, enacting “that under an indenture, executed after the 1st October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture.” But he must be a person existent at the time and capable of taking

Indenture
inter partes.

Composition
deed.

Covenants
respecting
realty.

(2) *Lamb v. Gye* (1853), 22 L. J. Q. B. 463; 2 E. & B. 216; *Quinn v. Leatham* (1901), 70 L. J. P. C. 76; (1901) A. C. 495; *S. Wales Miners' Fed. v. Glamorgan Coal Co.* (1905), 74 L. J. K. B. 525; (1905) A. C. 239. See Trade Disputes Act, 1906.

(a) *National Phonograph Co. v. Edison-Bell Cons. Phonograph Co.* (1907), 77 L. J. C. 218; (1908) 1 Ch. 335.

(b) *Per cur. Storer v. Gordon* 1814, 3 M. & S. 322; *Chesterfield and Midland Silkstone Colliery v. Hawkins* (1865), 34 L. J. Ex. 121; 3 H. & C. 677; *Ex p.*

Perry (1873), 43 L. J. Bk. 9; L. R. 9 Ch. 33.

(c) *Berkely v. Harda* 1826, 4 L. J. O. S. K. B. 184; 5 B. & C. 355.

(d) *Southampton Lord v. Brown* 1826, 5 L. J. O. S. K. B. 252; 6 B. & C. 718.

(e) *Brigham v. Broadhurst* 1864, 34 L. J. C. 61; 3 H. & C. 472. And see *Wood v. Slack* (1868), 37 L. J. Q. B. 130; L. R. 3 Q. B. 379.

(f) *M'Laren v. Baxter* (1867), 36 L. J. C. P. 247; L. R. 2 C. P. 559; *Isaacs v. Green* 1867, 36 L. J. Ex. 253; L. R. 2 Ex. 352. See *Ex p. Milne* (1889), 58 L. J. Q. B. 333; 22 Q. B. D. 685.

PART II. the benefit (*g*). The statute only applies to covenants which from their nature are capable of running with the land (*h*).

Deed poll. Where a covenant is made in the form of a deed poll, which does not contain any formal statement of parties, the covenantee appears as a party merely from the name or description of him in the covenant; and it is sufficient if he is ascertained in that manner (*i*). Policies of insurance are commonly made in the form of a deed poll, in which the insurers covenant to pay the loss to the assured without specifying the covenantee by name; and the persons in fact interested in the insurance and on behalf of whom it is made are entitled to sue upon the covenant (*k*). But in the case of a deed poll, as with an indenture, the covenantee or obligee, accepting the contract, must take it subject to all the conditions and provisos expressed in the deed respecting it (*l*).

Simple contract under partes.

A simple contract in writing expressed to be made *inter partes* also presumptively excludes other parties than those named or described as such: and parol evidence is not in general admissible to alter the effect of the written instrument (*m*). But with simple contracts, whether in writing or not, except bills of exchange and promissory notes, if the actual parties are agents for others whose names do not appear, extrinsic evidence is admissible in order to entitle the principal to the benefit of the contract on the one hand, or to charge him with the liability on the other (*n*).

Designation and identification of parties.

The parties to a deed or other written contract may be designated by their proper names; or by the name of a firm or of a company, or of a class, or by other sufficient description, and it is then a question of fact to identify the person by the description (*o*). As in a deed purporting to be made with a corporation, which in fact consists of one or more persons carrying on business under that name (*p*): or a contract made with "the C. Rifle Corps," consist-

(*g*) *Jessel, M. R., Kelsey v. Dudd* (1883), 52 L. J. C. 39.

(*h*) *Forster v. Elvet Colliery* (1908), 77 L. J. K. B. 521; (1908) 1 K. B. 629; affd. on other grounds, *nom. Dyson v. Forster* (1908), 78 L. J. K. B. 246; (1909) A. C. 98.

(*i*) See *ante*, p. 96.

(*k*) Marine Insurance Act, 1906, s. 6 (1), 1st. Sched.; *Sunderland Marine Insce. v. Kearney* (1851), 20 L. J. Q. B. 417; 16 Q. B. 925. See Marine Insurance Act, 1906, s. 85; *Great Britain Steamship Insce. v. Wyllie* (1889), 58

L. J. Q. B. 614; 22 Q. B. D. 710.

(*l*) *Macdonald v. Law Union Fire and Life Insce.* (1874), 43 L. J. Q. B. 131; L. R. 9 Q. B. 328.

(*m*) *Robinson v. Radkins* (1856), 26 L. J. Ex. 56.

(*n*) *Breckham v. Drake* (1843), 12 L. J. Ex. 486; 11 M. & W. 315. And see *S. C.* (1849), 2 H. L. C. 579. See *post*, p. 339.

(*o*) See *ante*, p. 137.

(*p*) *Simmons v. Woodward* (1892), 61 L. J. C. 252; (1892) A. C. 100.

ing of all the members of a company of volunteers (*q*). So where a person uses the name of a nominal partner, or where he trades in the name of himself and son (*r*); or where two or more persons use the name of one of them, or the name of a single person (*s*); it becomes a question of fact who is the person described in the contract. The same person may trade under two different names, and he is then equally chargeable with contracts made under each; and there can be no preference against his assets between them (*t*). A person may be bound by a contract made in a mistaken or assumed name; and may be charged with it in an action upon sufficient allegation and proof of identity (*u*). Where a person purchased shares in a company and executed the transfer deed and registered the shares in an assumed name, he was held to be the contracting party and liable to be placed upon the list of contributories in his own name (*x*); but not in a case where it appeared to be a term that the subscriber was not to be under any liability in respect of the shares (*y*).—The parties to a contract may be sufficiently described as “the creditors” of a person (*z*); or as “the executors” of a person; and then all the executors who prove become parties (*a*). In a contract of sale the vendors may be sufficiently described within the Statute of Frauds as “the proprietors” of the property sold, because they may be identified by that description (*b*); or as “the trustee under a trust for sale” (*c*); but the description of “vendors” was held not to be a sufficient description, because it left it quite open to parol evidence to show who was the party selling (*d*).

CH. I.

Several persons may join as party to a contract on the one part **Joint parties.**

(*q*) *Cross v. Williams* (1862), 31 L. J. Ex. 145; 7 H. & N. 675.

(*r*) *Trad v. Edworthy* (1811), 11 East, 210; *Spurr v. Cuss* (1870), 39 L. J. Q. B. 249; L. R. 5 Q. B. 656.

(*s*) *Coke v. Seely* (1848), 17 L. J. Ex. 286; 2 Ex. 746; *Wray v. Wray* (1905), 74 L. J. Ch. 687; (1905) 2 Ch. 349.

(*t*) *Banco de Portugal v. Waddell* (1880), 49 L. J. Bk. 33; 5 Ap. Ca. 161.

(*u*) *Williams v. Bryant* (1839), 9 L. J. Ex. 47; 5 M. & W. 447; *James v. Whitbread*, 20 L. J. C. P. 217; 11 C. B. 406.

(*x*) *Richardson's case* (1875), 44 L. J. C. 252; L. R. 19 Eq. 588.

(*y*) *Williams' case* (1875), 45 L. J. C. 48; 1 Ch. D. 3; *Re London & Bombay*

Bank (1881), 50 L. J. C. 557; 18 Ch. D. 581; *Coventry's case* (1890), 60 L. J. C. 186; 1891, 1 Ch. 202.

(*z*) See ante, p. 299.

(*a*) *Hood v. Barrington* (Lord (1868), L. R. 6 Eq. 218; *McLean v. Kennard* (1874), 43 L. J. C. 323; L. R. 9 Ch. 336.

(*b*) *Rossiter v. Miller* (1878), 48 L. J. C. 10; 3 Ap. Ca. 1124.

(*c*) *Catling v. King* (1877), 46 L. J. C. 384; 5 Ch. D. 660.

(*d*) *Potter v. Duffield* (1874), 43 L. J. C. 472; L. R. 18 Eq. 4. See *Jarrett v. Hunter* (1886), 56 L. J. C. 141; 34 Ch. D. 182.

PART II. or on the other; that is to say, in respect of the same debt or liability several persons may join in the character of *debtor*, or in the character of *creditor*. In such cases the persons who are jointly party to the contract, whether as joint debtors or as joint creditors, though they may have several interests relatively to one another, are united in interest relatively to the other party.

Joint debtors. — "Where several persons make a joint contract, each is liable for the whole, although the contract be joint." For if one of the joint contractors be charged separately in an action, whether upon a joint bond or covenant or upon a simple contract, "proof of the joint contract is sufficient to sustain the allegation that one contracted, and therefore there is no variance" (e). So where several of joint contractors are sued jointly omitting others; and accordingly, "if the obligee proceed upon a joint bond, there is no difference between suing *two* only of *three* joint obligors, and *one* only of *two* joint obligors" (f). And an action on a bill of exchange against three defendants charging them as acceptors is supported by proof of a bill drawn upon and accepted by them jointly with another person (g).

Non-joinder of joint debtor.

But "it is the right of persons jointly liable to pay a debt to insist upon being sued together" (h). At common law if one of joint contractors was sued alone he might plead in abatement of the writ the non-joinder of the other parties jointly liable with him. This was the only mode of taking the objection, and by pleading to the merits of the action the objection of non-joinder was waived (i). Now under the Judicature Acts, by the joint effect of Order XXI. r. 20. and Order XVI. r. 11, no objection can be taken by way of plea in abatement, but the names of improper parties may be struck out, and of necessary parties added, by way of amendment. A defendant has now the same right to have an alleged joint contractor joined as he had at common law under a plea in abatement (k). The judgment and writ of execution charge all the defendants jointly, and the whole amount may be levied against one separately: consequently each joint contractor

Execution against joint contractor.

(e) *Abbott, J., Richards v. Heather* (1817, 1 B. & Ald. 35; *per cur.* *King v. Hoare* (1844), 14 L. J. Ex. 29; 13 M. & W. 505.

(f) *Cabell v. Vaughan* (1669), 1 Wms. Saund. 475, n. (4).

(g) *Mountstphen v. Brooke* (1818, 1 B. & Ald. 224.

(h) *Cairns, L. C., Kendall v. Hamilton* (1879), 48 L. J. C. P. 705; 4 Ap. Ca. 515.

(i) *Cabell v. Vaughan* (1669), 1 Wms. Saund. 461.

(k) *Pilley v. Robinson* (1887), 57 L. J. Q. B. 54; 20 Q. B. D. 155.

becomes ultimately liable to the creditor for the whole, and not only for his proportionate part, though the contract be joint (*l*). But he is presumptively entitled to contribution from the joint contractors, and therefore it is material for him to have them joined in the same action and bound by the same judgment (*m*). Upon this principle joint shareholders in a company, upon a winding up, become liable as contributories, each for the whole amount of calls, and not proportionally according to their number; though they may be liable for contribution *inter se* (*n*).

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Upon the death of one of several joint contractors, the legal liability under the contract devolves on the survivors; and the representative of the deceased cannot be sued at law either alone or jointly with the survivors. Consequently the whole legal liability ultimately devolves upon the last surviving contractor, and after his death upon his representatives (*o*). So the liability of joint shareholders in a company upon the death of one survives to the other; and the representative of the deceased cannot be charged (*p*). And upon this principle a release made to the executor of a deceased joint obligor is inoperative, because upon his death the debt survived against the others (*q*).—The liability in equity presumptively follows the legal form of the contract in this respect, and devolves exclusively upon the survivors or survivor; "where the obligation exists only by virtue of the contract, its extent can be measured only by the words in which it is conceived" (*r*). But there may be equitable grounds for treating the liability as several as well as joint, if that was the agreement of the parties, and the writing expressed the liability to be joint by mistake; or where there were antecedent several liabilities which could be enforced in equity independent of the joint instrument (*s*). The contracts of partners, which are presumptively joint in law, are joint and several in equity, in that creditors are

Surviving liability upon death of joint debtor.

Liability of survivor in equity.

Mansfield, C. J., *Bird v. Randall* (1763), 1 W. Bl. 388; S. P. *Land Credit Co. v. Ferning (Lord)* (1870), 39 L. J. C. 477; L. R. 5 Ch. 323.

(*m*) *Edger v. Knapp* (1813), 5 Man. & G. 753. *Ramskill v. Edwards* (1885), 55 L. J. C. 41; 31 Ch. D. 100.

Cunninghame v. Glasgow Bank (1879), 4 Ap. Ca. 607; *Gillespie v. Glasgow Bank* (1879), 4 Ap. Ca. 632.

Richards v. Heather (1817), 1 B. & Ald. 29; *Culder v. Weatherford* (1822), 3 Br. & B. 302.

(*p*) *Hill's case* (1876), 44 L. J. C. 423; L. R. 20 Eq. 535.

(*q*) *Ashbur v. Padduck* (1836), 5 L. J. Ex. 251; 1 M. & W. 561.

(*r*) *Richardson v. Horton* (1843), 12 L. J. C. 333; 6 Beav. 185; *Wilmer v. Carey* (1878), 2 De G. & Sm. 347; *Kendall v. Hamilton* (1879), 48 L. J. Q. B. 70; 4 Ap. Ca. 504.

(*s*) *Simpson v. Vaughan* (1739), 2 Atk. 31. See *Rawstone v. Parr* (1827), 3 Russ. 539.

PART II. allowed to prove against the estate of a deceased partner, and it is necessary to take proceedings for the administration of his estate, as a consequence of the equitable principle that between partners there is no survivorship of the partnership estate (*t*). Whilst the partners are living and the partnership continues a joint contract is treated in equity as at law, as joint according to its terms; so that a judgment recovered in an action against one of the partners discharges the liability of the others as against the creditor (*u*). And a lease to joint lessees with joint covenants by them, will not be treated as several in equity after the death of one, merely because they were partners and used the premises for partnership purposes (*x*).

**Joint
creditors.**

Where the contract is made with several persons as joint creditors, they must all join in suing as joint plaintiffs. Joint covenantees may join in suing, though they have not all or any of them in fact executed the deed; for their acceptance of it is presumed if nothing appear to the contrary (*y*). But if the contract purports and is intended to be made with certain covenantees jointly, the disagreement or disclaimer of one or more of them, to which the covenantor is not also a party, does not convert it into a contract with the others or entitle them to sue (*z*). Where a contract of sale purported to be made with certain named persons as vendors, some only of whom signed it, it was held that those who signed could not sue alone for specific performance (*a*).— If one of joint creditors is omitted as plaintiff and the action proceeds to trial, there is a variance between the contract charged and that appearing in fact, which, unless amended, is ground for an adverse verdict (*b*). At common law the objection of the non-joinder of a co-plaintiff might be taken by demurrer or by a plea in abatement. Now under the Judicature Acts, the court or a judge may amend the misjoinder or non-joinder of parties at any stage of the proceedings, but no person can be added as plaintiff without his own consent in writing thereto (*c*).

**Non-joinder
of joint
creditor.**

(*t*) Partnership Act, 1890, s. 9; *Re Hodgson* (1885), 55 L. J. C. 241; 31 Ch. D. 177.

(*u*) Partnership Act, 1890, s. 9; *Kendall v. Hamilton* (1879), 45 L. J. C. 705; 4 Ap. Ca. 501.

(*x*) *Clarke v. Bickers* (1845), 14 Sim. 639.

(*y*) *Cabell v. Vaughan* (1659), 1 Wms. Saund. 477, n. (4).

(*z*) *Wetherell v. Langston* (1848), 17 L. J. Ex. 338; 1 Ex. 634.

(*a*) *Hornaby v. Bird* (1869), 38 L. J. C. 244.

(*b*) *Cabell v. Vaughan* (1659), 1 Wms. Saund. 477, n. (4); *Chanter v. Leese* (1839), 9 L. J. Ex. 327; 5 M. & W. 698.

(*c*) Order XVI. rr. 11, 12; *Frieker v. Van Gatten* (1896), 65 L. J. C. 823; (1896) 2 Ch. 649.

Upon the death of one of several joint creditors the legal right of action remains in the survivors, who must plead the joint contract according to the fact, with an averment of the death; and upon the death of the last survivor, it devolves upon his personal representative (*d*). By the Conveyancing Act, 1881, s. 60, a contract or obligation under seal made with two or more persons jointly to pay money or to do any act for them or for their benefit shall imply an obligation to do the act to or for the benefit of the survivors of them, and to any other person to whom the right of action devolves; but only so far as a contrary intention is not expressed.—In equity the survivor having obtained payment may be accountable to the executor of the deceased, as is in general the case with mortgages made to several persons jointly, though the right to the debt survives at law, yet in equity they may be presumptively entitled in equal shares (*e*), accordingly the representative of a deceased mortgagee is a necessary party to a foreclosure or redemption action (*f*); but if the money is expressed to be advanced upon a joint account, the presumption is rebutted as between the mortgagees and the mortgagor, and the right of suit is vested in the survivor (*g*).

CH. I.
Death of
joint creditor.

Survivor
accountable
in equity.

Several persons may bind themselves concurrently for the same debt or matter, so that the creditor can claim the whole debt or performance against each debtor separately; or one person may bind himself to each of several persons for the same debt or matter, so that each can separately claim the whole debt or performance. The special character of such contracts is the identity of the debt or matter; so that the payment or performance by one of the several debtors, or to one of the several creditors, discharges all the contracts. Such contracts occur in guarantees, where a principal debtor and sureties become severally bound to the creditor for the debt or matter guaranteed, and payment by one discharges all as against the creditor; though, as between themselves, the sureties who are compelled to pay may recover the amount from the principal debtor, or a proportionate part of it from the other sureties (*h*).

Joint and
several
contracts.

(*d*) *Anderson v. Martindale* (1801), 1 East 37; *Jell v. Douglas* (1821), 1 Q. B. 374.

(*e*) *Re Jackson* (1887), 56 L. J. C. 3; 34 Ch. D. 732; *Steeds v. Steeds* (1898), 58 L. J. Q. B. 302; 22 Q. B. D. 537.

(*f*) *Pickers v. Conwell* (1839), 8 L. J.

C. 371; 1 Beav. 529.

(*g*) Conveyancing Act, 1881, s. 61; *Re Harman and Exchequer Ry.* (1883), 52 L. J. C. 808; 24 Ch. D. 720; *Powell v. Brodhurst* (1901), 70 L. J. C. 587; (1901) 2 Ch. 160.

(*h*) See *ante*, p. 48; *post*, p. 311.

PART II.

Joint and
several
debtors.

Joint and
several
creditors.

Several persons may also enter into concurrent contracts respecting the same matter, binding themselves *jointly* as one party, and also *severally* as separate parties; in which case, besides the one joint contract, there are also as many several contracts as there are separate parties; the debt or matter of the contract being one and the same in all the contracts thus made. Thus a joint and several promissory note by several makers is equivalent to a joint note, and as many distinct separate notes as there are makers; upon which the holder may sue separately (*i*). And upon bankruptcy of joint and several debtors the creditor is entitled to prove against their joint estate and the separate estate of each (*k*). Consequently where several persons covenanted by deed jointly and severally to several persons jointly, and one of the persons appeared as party on both sides; it was held that, though the joint covenant was void on that account, and the several covenant of that party was also void, yet the several covenants of the other parties were distinct covenants and not thereby affected (*l*).—But it is a rule of law, which is incapable of modification by the terms of the instrument, that a contract cannot be made joint and several on the part of the covenantees or promisees, in respect of one and the same matter, so as to entitle them to sue both jointly and severally; because “an interest could not be granted jointly and severally.” Hence the same covenant cannot be treated as joint or several at the option of the creditors; they must be entitled either jointly only or severally only (*m*).—Under the Judicature Acts, Order XVI. r. 1, “All persons may be joined as plaintiffs in whom the right to any relief claimed is said to exist, whether jointly, severally or in the alternative.” And by r. 6, “the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange and promissory notes.” Misjoinder or non-joinder of parties is matter of amendment (*n*).

(*i*) *Beecham v. Smith* (1858), 27 L. J. Q. B. 257; *E. B. & F.* 442; *Owen v. Wilkinson* (1858), 28 L. J. C. P. 3; 5 C. B. N. S. 526. See Bills of Exchange Act, 1882, s. 85.

(*k*) Bankruptcy Act, 1893, sched. 2, par. 18; *Ex p. Honey* (1871), 41 L. J. Bk. 9; L. R. 7 Ch. 178; *Ex p. Stone* (1873), 42 L. J. Bk. 73; L. R. 8 Ch. 914; *Ex p. Vizianagaram Mining Co.* (1908), 77 L. J. K. B. 1027; (1908) 2 K. B. 817. See *Ex p. Corbett* (1880),

49 L. J. Bk. 74; 14 Ch. D. 122.

(*l*) *Rose v. Poulton* (1831), 1 L. J. K. B. 5; 2 B. & Ad. 822.

(*m*) *Eccleston v. Clipsham* (1668), 1 Wms. Saund. 167 n. 2; *Bradburne v. Batfield* (1845), 14 L. J. Ex. 330; 14 M. & W. 573; *Keightley v. Watson* (1849), 18 L. J. Ex. 339; 3 Ex. 716.

(*n*) *Re Jackson* (1887), 56 L. J. C. 593; 34 Ch. D. 732; *Steads v. Steeds* (1889), 58 L. J. Q. B. 302; 22 Q. B. D. 537.

Where two or more persons join in contracting, the question whether they do so *jointly*, or *severally*, or, in the case of debtors, *jointly and severally*, depends upon the intention expressed in the contract; and some rules have been laid down for the construction of contracts in this respect:—With respect to the liability of two or more persons, a written contract is construed according to the primary meaning of the words used. If the writing purports simply that the parties bind themselves or covenant, without more, the obligation or covenant is joint only and not several (*o*). If it purports that they bind themselves or covenant *severally*, the liability is several only (*p*). If it purports that they bind themselves jointly and severally, or bind themselves and each of them, or covenant for themselves and each of them, using both joint and several words, the liability is both joint and several (*q*). Covenantors will be bound jointly and severally if they are expressed to covenant “for themselves and each of them” (*r*). Where a document, as a guarantee or promissory note, is signed in the name of a firm, and also in the names of the several individual members of the firm, it presumptively creates a joint liability of all, and a several liability of each; otherwise the signatures of the individual members would have no effect (*s*). A contract for the sale of property by two joint owners with a provision that the assignment should contain a covenant for title by “the vendors, imports that the covenant shall be joint and several (*t*).—If the language of the contract is ambiguous, so that it is doubtful whether the parties intended the covenant to be joint, or several, or both joint and several, the interests and relations of the parties may be referred to for the purpose of determining the proper construction of instrument (*u*). Thus where a bond was executed in the terms “we bind ourselves and each of us for himself for the whole sum of 1,000*l.* each,” it was construed according to the object and context of the bond to constitute a several bond of

CH. I.

Construction of contracts as to joint and several liability.

Construction according to interest.

(*o*) *Copland v. Laporte* (1835), 3 A. & E. 517; *White v. Tyndall* (1838), 57 L. J. P. C. 114; 13 Ap. Ca. 23.

(*p*) *Matthewson's case* (1597), 5 Co. 22 b; *Lee v. Nixon* (1831), 3 L. J. K. B. 160; 1 A. & E. 201.

(*q*) *Burns v. Bryan* (1887), 12 Ap. Ca. 184.

(*r*) See *Eccleston v. Clipsham* (1668), 1 Wms. Saund. 164, n. (*b*); *Conveyancing*

Act, 1881, s. 53.

(*s*) *Ex p. Honey* (1871), 41 L. J. Bk. 9; L. R. 7 Ch. 178; *Ex p. Harding* (1879), 48 L. J. Bk. 116; 12 Ch. D. 564.

(*t*) *National Soc. for the Distribution of Electricity v. Gibbs* (1900), 79 L. J. C. 457; (1900) 2 Ch. 250.

(*u*) *Eccleston v. Clipsham* (1668), 1 Wms. Saund. 165, n. (*c*).

PART II.

Condition of
joint parties
all signing.

Implied
contracts.

Construction
as to joint
and several
rights.

each and not a joint bond (*x*). A covenant in a lease by the lessee and a surety that they would pay the rent, and further that the lessee would repair, the covenant was held to be joint according to the words both as to the rent and as to the repair (*y*). In a lease to two as tenants in common, at a single rent, the covenant by the lessees "for themselves, their executors, administrators and assigns, that they or one of them would pay the rent," was taken to be joint according to the words and not to be severed by the several interests (*z*).—Where a contract purports and is intended to be the joint contract of several persons, of whom one or some only execute it, the execution is presumptively conditional upon all the persons executing it as intended, and it is not binding until all have executed (*a*). And where a party to a guarantee, *bonâ fide* made a material alteration in the suretyship bond whereby executing parties were discharged, he was held also to be discharged upon the ground that his execution was conditional upon the right of proportional contribution in the case of liability (*b*). A joint and several continuing guarantee, after the death of one of the sureties, continues as a several guarantee of the survivor for advances subsequently made under it (*c*).—In debts implied in law for money paid or obtained by wrong or fraud there is no division of liability between the wrongdoers; every person participating in the wrong is liable to make good the whole. They may be sued jointly or severally; and in the case of a partnership matter or joint estate benefited by the transaction, recovery may be had against the joint estate, though all the partners or joint owners did not participate in the wrong (*d*). A similar rule applies to the liability of trustees arising from a breach of trust (*e*).

As to the rights of two or more persons as creditors, a contract with several persons, in respect of the same matter, cannot by any words be made so as to entitle them both jointly and

(*x*) *Collins v. Prosser* (1823), 1 L. J. O. S. K. B. 212; 1 B. & C. 682.

(*y*) *Copland v. Laporte* (1835), 3 A. & E. 517.

(*z*) *White v. Tyndall* (1888), 57 L. J. P. C. 114; 13 Ap. Ca. 263.

(*a*) *Letch v. Wedlake* (1840), 9 L. J. Q. B. 201; 11 A. & E. 959; *Evans v. Brenridge* (1856), 25 L. J. C. 334; 8 De G. M. & G. 100. See *McClellan v. Kenward* (1870), 43 L. J. C. 323; L. R. 9 Ch. 336.

(*b*) *Ellesmere Brewery Co. v. Cooper* (1895), 65 L. J. Q. B. 173; (1896) 1 Q. B. 75.

(*c*) *Beckett v. Addyman* (1882), 51 L. J. Q. B. 597; 9 Q. B. D. 783.

(*d*) *Ex p. Jackson*, 17 L. J. Bk. 103; 8 Ch. D. 807; see ante, p. 49.

(*e*) *Re Oxford Building Soc.* (1886), 56 L. J. C. 106; 35 Ch. D. 502; *Lords Estate Co. v. Shepherd* (1887), 57 L. J. C. 46; 36 Ch. D. 787; *Blyth v. Fladgate* (1890), 60 L. J. C. 66; (1891) 1 Ch. 337.

CH. I.

severally (*f*); and the general rule is that the contract will be construed to be joint or several according to the interests of the parties, if the words are capable of that construction, or even if they are not inconsistent with it; the contract will be joint if the interest be joint, and it will be several if the interest be several (*g*).—Accordingly in a conveyance of an estate to several persons jointly, the covenants for title, though expressed to be made with the grantees and with each of them, follow the interest and are joint and not several, the words "with each of them" being taken as surplusage; and in a conveyance of several estates to several persons, covenants for title expressed in similar terms follow the interest and are several and not joint (*h*). In a grant of two annuities to two persons severally, a covenant with them to pay the annuities, though expressed as a joint covenant, was construed to be several according to the interests; and the executor of one who had died was entitled to sue (*i*). Where money was advanced by a trustee upon a mortgage, to which the *cestui que trust* was made a party, and the covenant to repay the money was expressed to be made with the trustee, "and also as a distinct covenant" with the *cestui que trust*; it was held that the covenant was joint, because the trustee had no separate beneficial interest (*k*). And it seems, generally, that if any of the parties named as covenantees have no separate interest, the covenant must be taken as joint in order to include them; because it cannot be taken as separate in some only to the exclusion of others (*l*). So a bond or covenant or agreement made with two or more persons to pay a sum of money to one of them is joint; and upon the death of the person in whom only the beneficial interest is, it survives to the other obligees (*m*). If tenants in common join in making a lease for years reserving an entire rent, they must join in suing for the rent and upon the covenant to pay the rent; but if they lease their respective shares with separate

Covenants
with tenants
in common.

(*f*) *Eccleston v. Cliphsham* (1668), 1 Wms. Saund. 167, n. (2); *Bradburne v. Botfield* (1845), 14 L. J. Ex. 330; 14 M. & W. 573; *Keightley v. Watson* (1819), 18 L. J. Ex. 339; 3 Ex. 716.

(*g*) *Eccleston v. Cliphsham* (1668), 1 Wms. Saund. 162; *Haddon v. Ayers* (1858), 28 L. J. Q. B. 105; 1 E. & E. 118.

(*h*) *Slingsby's case* (1558), 5 Co. 18 b; *Mills v. Ladbroke* (1814), 13 L. J. C. P.

122; 7 Man. & G. 218.

(*i*) *Waltham v. Bircham* (1824), 3 L. J. O. S. K. B. 30; 3 B. & C. 254.

(*k*) *Hopkinson v. Lee* (1845), 14 L. J. Q. B. 101; 6 Q. B. 964.

(*l*) *Bradburne v. Botfield* (1845), 14 L. J. Ex. 330; 14 M. & W. 559.

(*m*) *Anderson v. Martindale* (.801, 1 East, 497; *Southcote v. Hoare* (1810), 3 Taunt. 87. And see *Conveyancing and Law of Property Act*, 1881, s. 60.

PART II. reservations of rent, they must sue separately (*n*). Upon covenants to repair or for other matters concerning the entire reversion of the premises, they must join in suing in respect of their common interest; and upon the death of one of the tenants in common his representative must join with the survivors in suing for breaches of such covenants subsequent to the death (*o*). If tenants in common join in selling their respective shares, the contract to pay them the purchase-money is several in interest, and each may sue for his own share (*p*). But if persons having several interests in a subject of sale join in selling without apportionment of their interests in the price they must all join in suing upon the contract of sale (*q*).—**Contracts with partners.**—Contracts with partners are, in general, joint by reason of their joint legal interest in the partnership assets, and all the partners must join in suing at law; upon the death of one the right survives with the joint interest, and the survivor alone can sue; but he is accountable in equity to the representative of the deceased partner (*r*). Upon the sale of a partnership business, upon the terms of paying to each partner the amount of his separate share, each partner may sue alone (*s*). Where partners in a business engaged an assistant upon the terms that he would not at any time carry on the same business at the same place, it was held that the partners had a joint interest in the restrictive agreement during the partnership, and several interests after dissolution of the partnership, with several rights of action for a subsequent breach (*t*).—**Joint employment of agent, &c.**—Upon a joint employment of an agent all the principals, or the survivors of them, must join in suing (*u*). And “if two tenants in common make a bailiff, and one of them dieth, the survivor shall have the action of account, for the action was joint” (*x*). Where the owners of a ship in several shares jointly employed a broker to sell it, it was held that they must all join to sue the broker for the purchase-money (*y*). Where a master of a

(*n*) Litt. s. 316; *Powis v. Smith* (1822), 5 B. & Ald. 850; *Maynag v. Edwards* (1853), 22 L. J. C. P. 179; 13 C. B. 479.

(*o*) *Foley v. Addenbrooke* (1843), 12 L. J. Q. B. 163; 4 Q. B. 197; *Thompson v. Hakewill* (1865), 35 L. J. C. P. 18; 19 C. B. N. S. 713.

(*p*) *James v. Emery* (1818), 8 Taunt. 245; 5 Price, 533.

(*q*) *Chanter v. Leese* (1846), 9 L. J. Ex. 327; 5 M. & W. 698; *Jung v. Phosphate of Lime Co.* (1868), 37 L. J.

C. P. 73; L. R. 3 C. P. 139.

(*r*) Partnership Act, 1890, ss. 9, 24; *Martin v. Crompe* (1693), 1 Ld. Raym. 340.

(*s*) *Jon. Robinson* (1847), 17 L. J. Ex. 36; 1 454.

(*t*) *Palmer v. Mallet* (1887), 57 L. J. C. 226; 36 Ch. D. 411.

(*u*) *Martin v. Crompe* (1698), 1 Ld. Raym. 340.

(*x*) Co. Lit. 198.

(*y*) *Hatsall v. Griffith* (1834), 3 L. J. Ex. 191; 2 Cr. & M. 679.

ship, or a ship's husband, contracts with the owners to make an account of the profits and divide the amount amongst the several owners, the interest and right of action of each owner is several (*z*). But here, as in partnership transactions, there is an equitable right to an account (*a*).

Ch. I

The rights and liabilities of persons who have contracted jointly or severally, as between themselves, depend upon the relation in which they stand, and the agreement upon which they have joined in the contract. Where two or more persons join in contracting debts for the benefit of all, as for goods supplied or for work done, though each may be liable for the whole to their creditor, yet as between themselves they would presumptively be bound to contribute rateably, and upon the death of one his representative would remain liable to the others (*b*). Thus partners who have jointly contracted for the benefit of the firm, as between themselves, are liable and entitled according to their agreed shares in the partnership (*c*).

Rights of
joint parties
inter se.

In contracts of suretyship, the principal debtor and the sureties are usually all made debtors, jointly and severally, in equal degree to the creditor, who may recover the whole debt against all or any of them. But as between themselves, the principal is solely liable; and if a surety is called upon by the creditor to pay any part of the debt, he becomes entitled to an indemnity in full from the principal debtor (*d*). As between the sureties, if one of them is called upon to pay more than his share of the debt, he becomes entitled to claim a rateable contribution from the others (*e*). Under the Judicature Acts, Order XVI. r. 48, in an action by the creditor against a surety the defendant may bring in as third party the principal debtor or a co-surety for the purpose of claiming indemnity or contribution: the added party may then defend the action, and is bound by the judgment (*f*). Unless brought

Principal
and surety.

(*z*) *Owston v. Ogle* (1811), 13 East, 538; *Syrrante v. James* (1829), 8 L. J. O. S. K. B. C.; 10 B. & C. 410.

(*a*) *Fanner v. Frost* (1870), 39 L. J. C. 626.

(*b*) *Per cur. Prior v. Hembrow* (1841), 10 L. J. Ex. 371; 8 M. & W. 889. See *ante*, p. 47.

(*c*) Partnership Act, 1890, ss. 9, 24.

(*d*) *Huntley v. Sanderson* (1833), 2 L. J. Ex. 204; 1 Cr. & M. 467. See *Aitchison v. Tredgar Dry Dock Co.*

(1909) 78 L. J. C. 697; (1909) 2 Ch. 401.

(*e*) *Dering v. Winchelsea (Earl)* (1787), 1 Cox, 318; 2 Wh. & T. L. C. 535; *Kemp v. Finden* (1844), 13 L. J. Ex. 137; 12 M. & W. 421. See *Ward v. Nat. Bank of New Zealand* (1883), 52 L. J. P. C. 65; 8 Ap. Ca. 755.

(*f*) *Witham v. Vane* (1880), 49 L. J. C. 242; *Callender v. Wallingford* (1884), 53 L. J. Q. B. 569.

PART II.

Right of
surety to
securities.

in as a party he is not bound by the proceedings, and may afterwards dispute the debt (*g*).

A surety who is compelled to pay the debt, becomes entitled to the benefit of all the remedies and securities which the creditor has against the principal debtor, whether the surety knew of them or not at the time of contracting (*h*); including all securities which the creditor may have acquired since the time of contracting (*i*); and all securities which the creditor may have against a co-surety (*k*). A surety is also entitled to all securities which any co-surety may have acquired from the principal debtor (*l*). But the principal creditor is not entitled to the benefit of all counter-bonds, or collateral security given by the principal debtor to a surety (*m*). A surety has also the right, as soon as the debt is due, to compel payment by the principal debtor, and to enforce all securities against him, and he may sue in the name of the creditor upon giving him an indemnity against the liability for costs (*n*). Upon the above principle a surety for the price of goods sold, on paying the price to the seller, becomes entitled to his lien upon the goods for the price; and it seems also to his right of stoppage *in transitu* (*o*). The indorser of a bill as surety for payment by the acceptor is entitled to securities deposited by the acceptor with the holder (*p*). A surety having paid a judgment obtained against himself and co-sureties may enforce it against the co-sureties for contribution in the name of the creditor without an actual assignment; and he is entitled to all the priorities which the creditor would have had (*q*). And upon the same principle, in the case of the bankruptcy of the principal debtor the surety becomes entitled to stand in the place of the creditor to claim a

(*g*) *Ex p. Young* (1881), 50 L. J. C. 824; 17 Ch. D. 668.

(*h*) *Dering v. Winchelsea* (Earl) (1787), 1 Cox, 318; 2 Wh. & T. L. C. 535; and see the Mercantile Law Amendment Act, 1856, s. 5.

(*i*) *Pearl v. Beacon* 1857, 26 L. J. C. 761; 1 De G. & J. 461; *Campbell v. Rothwell* (1877), 47 L. J. C. P. 141; *Forbes v. Jackson* (1882), 51 L. J. C. 690; 19 Ch. D. 615.

(*k*) See *Ward v. Nat. Bk. of New Zealand* (1883), 52 L. J. P. C. 65; 8 Ap. Ca. 765.

(*l*) *Stiel v. Dixon* (1881), 50 L. J. C. 591; 17 Ch. D. 825; *Re Arcedrechne* (1883), 53 L. J. C. 102; 24 Ch. D. 709; *Berridge v. Berridge* (1890), 59 L. J. C.

533; 44 Ch. D. 168.

(*m*) *Re Walker* (1892), 61 L. J. C. 234; (1892) 1 Ch. 621.

(*n*) *Woodridge v. Norris* (1868), 37 L. J. C. 640; L. R. 6 Eq. 410; *Swire v. Redman* (1876), 1 Q. B. D. at p. 541; *Ascherson v. Tradegar Dry Dock* (1909), 78 L. J. C. 697; (1908) 2 Ch. 401.

(*o*) *Imperial Bank v. London and St. Katherine Docks* (1877), 46 L. J. C. 335; 5 Ch. D. 195.

(*p*) *Duncan, Fox & Co. v. North and South Wales Bank* (1880), 50 L. J. C. 355; 6 Ap. Ca. 1.

(*q*) *Re McMyn* (1886), 55 L. J. C. 845; 33 Ch. D. 575; *Re Churchill* (Lord) (1888), 58 L. J. C. 135; 39 Ch. D. 174.

dividend upon so much of the debt as he is liable for, and has been called upon to discharge (*r*); unless, being surety to a limited amount only, he has expressly agreed to allow the creditor to keep the dividend upon the whole of his debt (*s*). If the creditor releases or loses or depreciates any remedies or securities to which the surety would become entitled upon payment of the debt, the surety is discharged from liability to the amount by which such securities are lost or depreciated (*t*). But if the creditor deals with the security in a manner warranted by the terms of the contract, or if the security becomes valueless without default of the creditor, as a policy of insurance which the debtor allows to lapse, the surety is not discharged (*u*). Mere forbearance of the creditor to sue the debtor is immaterial, though the Statute of Limitations has run against it, because the surety himself might have paid off the debt and sued in name of the creditor (*x*). And the creditor is entitled to give up his securities to the trustee in bankruptcy of the debtor, in order to prove for his whole debt, without discharging the sureties (*y*).

CH. I.

Loss of securities.

If the creditor has notice, at the time of contracting or afterwards, that persons who join as co-debtors to him stand in the relation of principal and surety to one another, he is bound in equity to regard the rights of the surety so far as to abstain from any dealing with the principal debtor which might prejudicially affect the position of the surety. And if the creditor under such circumstances agrees with the debtor for any material alteration of the debt or duty guaranteed, as by extending the time of payment, varying the mode of accounting or the like, without the consent (which may be implied) of the surety, or without reserving his rights, the surety is discharged (*z*); and this rule applies whether the obligation arises upon a judgment, or upon any other security (*a*). In such cases "if it is not self-evident that the alteration

Creditor affected by rights of surety.

Surety discharged by alteration of liability.

(*r*) *Hobson v. Bass* (1871), L. R. 6 Ch. 792; *Gray v. Seckham* (1872), 42 L. J. C. 127; L. R. 7 Ch. 680.

(*s*) *Ellis v. Emmanuel* (1876), 46 F. J. Ex. 25; 1 Ex. D. 157; *Ex p. National Provincial Bank* (1881), 17 Ch. D. 98.

(*t*) *Pearl v. Deacon* (1837), 26 L. J. C. 761; 1 De G. & J. 461; *Wulff v. Jay* (1872), 41 L. J. Q. B. 322; L. R. 7 Q. B. 756; *Perry v. Nat. Prov. Bk. of England* (1910), 79 L. J. C. 509; (1910) 1 Ch. 464.

(*u*) *Rainbow v. Jiggins* (1830), 49 L. J.

Q. B. 718; 5 Q. B. D. 422; *Taylor v. New S. Wales Bk.* (1886), 55 L. J. P. C. 17; 11 Ap. Ca. 596.

(*x*) *Carter v. White* (1883), 54 L. J. C. 138; 25 Ch. D. 666.

(*y*) *Rainbow v. Jiggins* (1880), 49 L. J. Q. B. 718; 5 Q. B. D. 422.

(*z*) *Rees v. Berrington* (1795), 2 Ves. jun. 540; 2 Wh. & T. L. C. 560; *Woodcock v. Oxford & Worcester Ry.* (1853), 1 Drew. 521.

(*a*) *Re E. W. A.* (1901), 70 L. J. K. B. 810; (1901) 2 K. B. 642.

PART II. is unsubstantial, or one that cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry into the effect of the alteration"; the surety being the sole judge whether he will remain liable (*b*). And where co-debtors agree between themselves that their future liability shall be that of principal and surety, the creditor must give effect to that agreement after it has been brought to his notice (*c*).

(*b*) Cotton, L. J., *Holme v. Brunskill* (1878), 47 L. J. Q. B. 610; 3 Q. B. D. 496.

(*c*) *Rouse v. Bradford Banking Co.* (1894), 63 L. J. C. 890; (1894) A. C. 586.

CANADIAN NOTES.

Parties to Contract.

In *Ferris vs. The Township of Kingston*, 12 U. C. Q. B., 436, one O'Rielly contracted with defendants to do certain work, and the plaintiff entered into a bond as surety. It appeared that plaintiff was, in fact, the principal, and did the work, and that O'Rielly had tendered and taken the contract for him and had executed a writing assigning to him all his interest in the proceeds. It was held that plaintiff would have no right of action against the defendant. "It is out of the question that after one man has taken a job of work upon a regular contract putting forward another person as his surety for the due performance of it, the surety can by any arrangement between these two be intruded upon the other party as the principal in the transaction. He may do the work, no doubt, if the principal will employ him, and he may even be in fact the principal and the other the hired man according to any understanding between themselves, but such understanding can give him no legal claim upon the other party as if he had been originally employed to do the work for such party."

In *Vanderlip vs. Stevenson*, 16 Man., 341, it was held that if the holder of an option to purchase land, instead of accepting the offer himself within the time limited, tenders another person as purchaser and asks the vendor to sign the contract of sale to such other person, the vendor is not bound to sell to such other person, and the holder of the option if he has delayed accepting it on his own behalf until after the time limited cannot have specific performance against the vendor.

In *Campbell vs. Elliott*, 3 U. C. Q. B., 241, it was held that a county superintendent of common schools, signing together with trustees a contract with a teacher, would be considered to have signed the same only as approving of the appointment, and in pursuance of the direction of the statute and not as a party contracting with the teacher.

It was held in *Sheriff vs. Patterson*, 5 U. C. R., 620, that school trustees acting under 9 Viet., Ch. 20, could not be sued as individuals upon any contract made by them under the statute as trustees.

In *re MacMillan*, 17 O. R., 344, in consideration of a conveyance to the petitioner of a certain farm by his father, the petitioner agreed that he would support his mother during her life, provide her with a house on the farm and with necessaries and support his brothers and sisters thereon until they reached sixteen years of age, so long as they remained at home on the farm and assisted him so far as they were able in the management of it. It was held that the mother had no right or power to release the petitioner from the obligations undertaken by him with reference to his brothers and sisters under the agreement, and if the children did their part they could hold the brother to his promise though the agreement was not in terms made with them as parties.

The cases on the subject are said to be collected and commented on in *Mitchell vs. City of London Ass. Co.*, 15 O. A. R., 271.

In *Carry vs. Wallace*, 12 U. C. C. P., 372, plaintiff sued defendant, a churchwarden, for his stipend as minister of the church. It appeared that several resolutions were adopted in the vestry as to the salary of the clergyman, but only one subsequent to defendant's acceptance of office, which related to an old balance. It was held that as the plaintiff's claim rested on a voluntary undertaking of the vestry, not founded upon a consideration moving from plaintiff, or upon an executed consideration of services rendered, and the evidence shewed no contract between plaintiff and defendant founded upon a consideration between them, plaintiff could not recover.

The decision was put upon the ground that the plaintiff did not accept his appointment from nor under any agreement with the defendant, but was appointed by the Lord Bishop. The appointment was, moreover, to a mission where he had duties to do at several churches, this particular church being one of the number. "So far as the evidence goes, he was sent to this mission by this Bishop to do duty at this and other churches. Most probably there was an expectation that the different congregations would contribute to raise his salary, but there was no proof that any such contract was made."

In *Thomas vs. Wilson*, 20 U. C. Q. B., 331, defendants were a committee of the city council to superintend the building of a jail. It was determined that there should be a ceremony and

luncheon on the laying of the corner-stone, and one of the defendants, the chairman, gave an order to plaintiff for the supply of certain wines specified, directing him to render his account to the board of jail inspectors. The council refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given. It was held that they were personally liable. The mayor, one of the defendants, was present at that meeting and at first objected to the expense, but did not persevere in his opposition, having been told that the expense would be less than he had heard. He afterwards wrote to the chairman to say that he would attend the ceremony, but he would not be at the luncheon because he was obliged to leave town on business, and disapproved the expenditure. It was held that he was nevertheless along with the rest.

In *S. Martin, 1871, C. Q. B., 477*, a plaintiff sued five defendants describing them as the "Committee of the Presbyterian Church" for its salary. It was proved by oral evidence that the committee usually consisted of eight persons chosen annually, and that, at a meeting of the congregation, it was agreed to give the plaintiff a call, and afterwards, at another meeting, that he should receive £100 a year to be paid to him from the pew rents which it was customary for the committee to collect half-yearly. It was not shewn who composed the committee when the call was given or that all the defendants were members of it in the year for which the salary was claimed. It was held that under these circumstances the action could not be maintained.

Plaintiff Cannot Maintain Action.

In *Abingdon v. The Western M. L. Insurance Company*, 21 N. B., 216 by policy of life insurance on the life of a husband effected by him for the plaintiff, his wife, the defendant company agreed to pay the sum assured to the plaintiff or her executors, administrators or assigns, and in the case of her death in his life time to his executors, administrators or assigns. It was held that the plaintiff widow of the insured could not maintain an action on the policy in her own name.

Whether Contract Joint or Several.

In *Stevenson vs. MacLean*, 11 U. C. C. P., 208, one MacLean, the defendant, agreed to become surety for his son for all such advances as should be made to him by the plaintiff during a limited period. The plaintiff made no individual advances to MacLean at all, but during the period plaintiff, with another, a stranger to the defendant, made advances to the defendant's son. It was held that the plaintiff individually could not recover from defendant the amount of the advances so made. Per Draper, C. J.: "The defendant was liable only to the plaintiff for advances made by him, not by him and another jointly. * * The present case discloses no dealings to which the guarantee is applicable."

In *Pugh vs. The Lake Huron R. W. Company*, 17 U. C. Q. B., 282, the declaration alleged that plaintiff was seized for life of certain land and another owner the reversion. It then alleged an agreement with a railway company for granting to the company certain ridges of gravel next the lake, stipulating as to the depth to be left of surface above the level of the lake, and that afterwards the company delivered over their area to defendants, who removed the gravel but dug pits below the stipulated depth. The reversioner brought a separate action for the same injury. When the agreement was produced it appeared that it was made by both plaintiffs jointly. It was held that the plaintiffs could not maintain separate actions, and, further, that the defendants were not bound by the agreement.

Robinson, C.J., dissented, but his dissenting opinion turns on a question of pleading. He held that the defendants could not plead not guilty by statute and therefore the objections could not be taken.

In *Haris et al. vs. Dunn*, 18 U. C. Q. B., 352, plaintiff sued one of two joint contractors, the other being out of the jurisdiction. It was held that under the statutes and procedure in 1859, having recovered judgment against the one sued, the plaintiff could not afterwards sue the other.

In *Herbert vs. Park & Cuff*, 25 U. C. C. P., 57, where plaintiff contracted for the construction of two wholesale stores for the

defendants, the agreement having been drawn up between the plaintiff of the one part and the two defendants of the other part, was signed by the plaintiff, but not by the defendant, and the architect's certificates for progress estimates were addressed to the defendants jointly. On the completion of the contract, however, plaintiff obtained from the architect separate statements of the amounts due from each defendant, and took their several notes for the balance due from each. The plaintiff swore that he thought it was a joint contract, while the architects stated that they had no instructions to draw a joint contract and did not consider this to be one. It was held that the contract was a joint and not a several contract, and that the fact of plaintiff's dealings with the defendants under it could not alter its legal effect.

In *Lee vs. Bothwell*, 24 F. C. C. P., 109, a contract based upon separate tenders by different tradesmen was as follows: "We, the undersigned, hereby agree to build, erect, complete and finish the dwelling house, etc., mentioned in the foregoing specifications for the respective sums hereinafter specified, etc., and according to the following trades." The trades, with the contract price for each, were then set out, a space being left after each for the respective contractors to sign their names. This was held a several contract between each tradesman and the proprietor, not a joint contract with all.

In *Elliott vs. Stanley*, 7 O. R., 350, a firm selling out business entered into a written agreement binding themselves under a penalty to the purchaser that they would not do business in Chesley in hardware for the term of five years. Within five years one of the members of the firm commenced a hardware business in Chesley in connection with another person not a party to the agreement. It was held that this did not amount to a breach of the agreement, though it is stated in the head-note that the matter is not free from doubt. Boyd, Ch., putting the case shortly, says: "The dilemma of the plaintiff strikes me thus: As regards the one defendant who committed the wrong there is no sole or separate contract which binds him: as regards both defendants there is no joint breach of the contract to justify a joint recovery."

CHAPTER II.

PRINCIPAL AND AGENT.

SECT. I.—PRINCIPLES OF THE LAW OF AGENCY.

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A PERSON capable of contracting may in general appoint an agent to contract for him. It is not necessary that the agent should be capable of binding himself by a contract in order to bind the principal; but a person under disability—as is an infant—cannot become responsible to his principal for the proper execution of the agency, so far as such responsibility depends upon contract (a). — “The burden of proof is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had

CH. II.
SECT. I.

Appointment
of agent.

(a) Co. Lit. 52 a; *Jones v. Jones*, cited *King v. Bellord* (1863), 32 L. J. C. 646; 1 H. & M. 343; *James, L. J., Re*

D'Appashan (1880), 49 L. J. C. 756; 15 Ck. D. 246. See *Watkins v. Vince* (1818), 2 Stark. 368.

PART II.

Contracts
under seal.

the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it" (b).

In contracts under seal, the authority to execute for a party to the deed must be given by an instrument also under seal; which is commonly called a power or letter of attorney (c); and if the deed is disputed, the authority must be proved as well as the execution under it; but an admission of the principal that it is his deed dispenses with further evidence (d). The memorandum of association of a company is not a deed, though it has a statutory effect as a deed, and it may be executed by an agent without authority under seal (e).

Contracts
not under
seal.Statute of
Frauds.

In contracts not under seal, no particular form of appointment is generally necessary. By the Statute of Frauds, sects. 1 and 3, relating to the creation, assignment, and surrender of leases and estates and interests in land, it is required that agents shall be "thereunto lawfully authorised by writing." By sect. 4 of the same statute, and sect. 4 of the Sale of Goods Act, 1893, though there is required a memorandum in writing signed by the party or his agent, it is sufficient that the agent be "thereunto lawfully authorised" (f).

Presumptive
agency.

An agency may be created in express terms, by writing or by parol: or it may be presumed from the circumstances and conduct of the parties; and "where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent and knows that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed" (g). Thus, if a person sends goods to an auction room, or to a repository for sale, or to a factor or broker whose business it is to sell such goods, he is presumed to authorise a sale without any limitation as to price (h): but where the sale

(b) *Ld. Cranworth, Polk v. Leask* (1863), 33 L. J. C. 162; *Dickinson v. Walpy* (1829), 8 L. J. O. S. K. B. 51; 10 B. & C. 128; *Thomas v. Edwards* (1836), 2 M. & W. 215; *Cooper v. Langdon* (1841), 11 L. J. Ex. 222; 9 M. & W. 60.

(c) *Berkeley v. Hardy* (1826), 4 L. J. O. S. K. B. 184; 5 B. & C. 355.

(d) *Tupper v. Foulkes* (1861), 30 L. J. C. P. 214; 9 C. B. N. S. 797.

(e) *Re Whitley* (1886), 55 L. J. C. 540; 32 Ch. D. 337.

(f) See *ante*, p. 187.

(g) *Ld. Cranworth, Polk v. Leask* (1863), 33 L. J. C. 162; see *Farguharson v. King* (1902), 71 L. J. K. B. 667; (1902) A. C. 325; *Rimmer v. Webster* (1902), 71 L. J. C. 561; 1902) 2 Ch. 163.

(h) *Ellenborough, C. J., Pickering v. Busk* (1812), 15 East, 43; *Rainbow v.*

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SECT. I.

is expressed to be subject to a reserve price being reached or exceeded, the seller is not bound by the fall of the hammer before the reserve is reached (*i*). A wharfinger or warehouseman whose business is the custody of goods only has no apparent authority to sell goods deposited with him (*k*); but the deposit of goods at a warehouse in the name of a person as apparent owner would raise a presumption of authority to sell *l*. The delivery of a blank acceptance or bill or note incomplete as regards amount is a *prima facie* authority to the holder to fill it up to an amount covered by the stamp; if the issue of the note is unauthorised, the alleged principal is not liable, but if the agent merely exceeds his authority as to the amount for which it may be filled up, the principal is liable (*m*). So an authority or agency may be presumed from previous dealings of the principal; as the paying of bills or cheques which purported to be signed by an agent on his behalf (*n*); or buying and selling goods through a person professedly acting as his agent; and in such cases the agency is presumed to continue until notice is given to the contrary (*o*).

From
previous
dealings.

An agency may be presumed or implied from the relation of the parties: as in the case of a wife who has a presumptive authority during cohabitation to act as agent for the husband in domestic matters; and when separated under certain circumstances is invested by law with an authority to pledge his credit for her maintenance (*p*). So the relation of partners imports a general agency in each partner with reference to the partnership business (*q*).—In the mere relation of master and servant there is no general authority in the servant to bind the master by contracts on his behalf; so that if a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master

Agency of
wife, partner,
or servant.

Hawkins (1904), 73 L. J. K. B. 641; (1904) 2 K. B. 322. See *Weiner v. Harris* (1909), 79 L. J. K. B. 342; (1910) 1 K. B. 285.

(i) *McManus v. Fortescue* (1907), 76 L. J. K. B. 393; (1907) 2 K. B. 1.

(k) *Cole v. North-Western Bank* (1875), 44 L. J. C. P. 233; L. R. 10 C. P. 354.

(l) *Henderson & Co. v. Williams* (1895), 64 L. J. Q. B. 308; (1895) 1 Q. B. 521.

(m) Bills of Exchange Act, 1852, s. 20; *Lloyd's Bk. v. Cooke* (1907), 76 L. J. K. B. 666; (1907) 1 K. B. 794; *Smith v. Prosser* (1907), 7 L. J. K. B. 71; (1907) 2 K. B. 735. See *Glenie v. Smith*

(1907), 77 L. J. K. B. 193; (1908) 1 K. B. 263.

(o) *Prescott v. Flynn* (1832), 1 L. J. C. 2, 145; 9 Bing. 19; *Llewellyn v. Blackworth* (1845), 11 L. J. Ex. 329; 13 M. & W. 598. See Bills of Exchange Act, 1884, s. 91.

(p) *Truman v. Loder* (1810), 9 L. J. Q. B. 165; 11 A. & E. 589; *Pole v. Leask* (1863), 33 L. J. C. 155.

(q) See *post*, Pt. II., Chap. III., Sect. III.

(r) See *post*, p. 373.

PART II. is not chargeable. But the master is bound by his usual mode of dealing with others through his servant; so if a servant usually buy for his master upon credit, and takes up things for his own use in his master's name, the master is liable (*r*). And the master would be bound by receiving goods bought for him on credit, with notice of the credit (*s*).

Agency
implied from
necessity.

In some exceptional cases an authority is implied in law from the necessity of the occasion to contract on behalf of the person whose interest is concerned. The master of a ship, upon a necessity arising during the voyage, becomes authorised to pledge the credit of the owner for repairs, and for such supplies and services as are necessary for the prosecution of the voyage; and even to sell the ship or the cargo (*t*). And a common carrier by land, upon an emergency happening, becomes agent by necessity for the owner to take care of the goods, and to pledge his credit for that purpose (*u*). The exigency of a railway accident was held not to authorise a stationmaster of the company to engage a surgeon to attend wounded passengers; and the surgeon having attended under such circumstances could not recover his charges from the company (*x*). But the general manager of a railway company, or sub-inspector for the district in which the accident happened, has authority to engage a medical man on behalf of the company, or sub-inspector for the district in which the accident happened, railway (*y*).—By the law merchant, upon the necessity of the case any person may accept or pay a bill of exchange *supra protest*, for the honour of the drawer, and may charge him with indemnity as if he had given authority to do so (*z*).

Ratification
of assumed
agency.

Where a person professes to contract as agent for a principal without having authority, the alleged principal is not bound; but by a subsequent ratification of the authority he may become bound, to the same extent and with the same consequences as if the contract had been originally made with his authority, according to the maxim, "*omnis ratihabitio retrotrahitur et mandato æquiparatur*"; and the ratification will date back to the making of the

(*r*) *Summers v. Solomon* (1857), 26 L. J. Q. B. 301; 7 E. & B. 879; *Wright v. Glynn* (1902), 71 L. J. K. B. 197; (1902) 1 K. B. 745.

(*s*) *Boulton v. Hildesden* (1697), 1 Ld. Raym. 224.

(*t*) See *post*, Pt. II., Chap. II., Sect. III.

(*u*) *G. N. Ry. v. Snafield* (1874), 43 L. J. Ex. 89; L. R. 9 Ex. 132.

(*x*) *Cox v. Moulton Counties Ry.* (1849), 18 L. J. Ex. 65; 3 Ex. 268.

(*y*) *Wether v. G. W. Ry.* (1867), 36 L. J. Ex. 122; L. R. 2 Ex. 228; *Langan v. G. W. Ry.* (1872), 30 L. T. 173.

(*z*) Bills of Exchange Act, 1882, ss. 65–68.

contract (a). By acting upon the contract, and in some cases by mere acquiescence or not disavowing it within a reasonable time after knowing that it has been entered into in exercise of a professed agency, he is taken to ratify it (b); but ratification must be based upon a full knowledge of the facts, or upon evidence of a clear intention to adopt the act of the agent in any event (c).—The principal may also claim the benefit of a contract professedly made on his behalf, although it was made without his knowledge (d). And in the case of a policy of insurance made without authority on behalf of another, and a loss supervening, the principal may claim the benefit of the policy after notice of the loss (e).—The subsequent ratification of the agency is sufficient to satisfy the Statute of Frauds, which requires signature by the party or "by his agent thereunto lawfully authorised" (f). Subsequent ratification is sufficient and dispenses with proof of prior authority, though the prior authority is required to be given in writing, or under seal (g). It has been held that the doctrine of ratification does not apply where the act alleged to be adopted amounts to a crime (h). But where the alleged principal has by his words or conduct induced a third person to change his position, he may become liable, although the agent has been guilty of a crime (i).

CH. II.
SECT. I.

Ratification
under Statute
of Frauds.

Ratification
of a crime.

The principle of ratification only applies where the agent has professed to contract for the person who afterwards ratifies, but a mere intention to contract on behalf of a third party, but without his authority, is not sufficient (k).

Profession
of agency.

It is also necessary that the principal should be in existence and ascertained at the time of the contract made, in order that the

Existence
and capacity
of principal.

(a) Broom, *Legal Maxims*, 7th ed., 586, 656; *Re Tiedemann and Ledermann* (1899), 68 L. J. Q. B. 352; (1899) 2 Q. B. 66.

(b) *Monteashell (Earl) v. Barber* (1853), 23 L. J. C. P. 43; 15 Q. B. 53; *Bigg v. Strong* (1857), 3 Sm. & G. 592; *affd.* (1858), 4 Jur. N. S. 983; 6 W. R. 636.

(c) *Banque Jacques Cartier v. Banque d'Epargne de Montreal* (1887), 57 L. J. P. C. 46; 13 Ap. Ca. 111; *Marsh v. Joseph* (1896), 66 L. J. C. 128; (1897) 1 Ch. 213. See *Powell v. Smith* (1872), 41 L. J. C. 734; L. R. 14 Eq. 85.

(d) *Ancon v. Marks* (1862), 31 L. J. Ex. 163; 7 H. & N. 686.

(e) *Marine Insurance Act*, 1906. ss. 5, 6, 86; *Hagedorn v. Oliverson* (1814), 2

M. & S. 485; *Williams v. North China Insce.* (1876), 1 C. P. D. 757.

(f) *Ante*, p. 190.

(g) *Tupper v. Foulkes* (1861), 30 L. J. C. P. 214; 9 C. B. N. S. 797.

(h) *Brook v. Hook* (1871), 40 L. J. Ex. 50; L. R. 6 Ex. 89; *Bills of Exchange Act*, 1882, s. 24. See *Bank of Ireland v. Evans' Charities (Trustees)* (1855), 5 H. L. C. 389; *Williams v. Bayley* (1866), 35 L. J. C. 717; L. R. 1 H. L. 220.

(i) *McKenzie v. British Linen Co.* (1880), 6 Ap. Ca. 82.

(k) *Krighley v. Durant* (1901), 70 L. J. K. B. 662; (1901) A. C. 240; *Boston Fruit Co. v. British and Foreign Marine Insce.* (1906), 75 L. J. K. B. 535; (1906) A. C. 336.

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Principal
ascertained
by interest.

Insurance
on behalf of
person
interested.

ratification of a then existing agency may be possible; a contract purporting to be made on behalf of a proposed company not then in existence is void and incapable of ratification by the company as afterwards incorporated (*l*). And the contracts of promoters on behalf of a proposed company, to pay the preliminary expenses of formation, cannot be made binding by the company when formed by mere ratification, without a new contract to that effect (*m*). But the special Act of the company may authorise the payment of such expenses, and may render the payment obligatory (*n*).—The principal must also be capable of making the contract in order to be able to ratify it; and the contract must be one within his capacity at the time it is made (*o*).—But in some cases it is sufficient if the agent professes to act for some existing capacity or interest, which is recognised in law, though the person to fill it is not ascertained until afterwards; as in the case of the administrator of an intestate's estate, whose title upon appointment relates back to the death, and who therefore can ratify a contract made professedly on behalf of the estate before his appointment; but he is not bound to do so (*p*). And the agency of a property continued after the death of the owner professedly on behalf of the heir, may be ratified by the heir upon becoming ascertained, so as to entitle him to claim rents previously collected (*q*). An executor may ratify an act done professedly on behalf of the estate, as having title by the will from the death of the testator. And the trustee of a bankrupt, whose title when appointed vests by relation from the adjudication of bankruptcy, is enabled to ratify an act done on behalf of the estate before his appointment (*r*).—Upon the same principle, a policy of insurance may be made on behalf of persons interested, who are not named at the time of effecting the insurance, but who are ascertained through the interest insured (*s*). But the parties must be inter-

(*l*) *Kelner v. Baxter* (1866), 36 L. J. C. P. 94; L. R. 2 C. P. 174; *Re Northumberland Hotel Co.* (1886), 33 Ch. D. 16; *Lurgan's (Lord) case* (1902), 71 L. J. C. 323; (1902) 1 Ch. 707.

(*m*) *Re Empress Engineering Co.* (1881), 16 Ch. D. 125; *Howard v. Patent Ivory Co.* (1888), 57 L. J. C. 878; 38 Ch. D. 156; *Clinton's claim* (1908), 77 L. J. C. 790; (1908) 2 Ch. 515.

(*n*) *Melhado v. Porto Alegre Ry.* (1874), 43 L. J. C. P. 253; L. R. 9 C. P. 503.

(*o*) *Ex p. Badman and Bosanquet* (1889),

58 L. J. C. 813; 45 Ch. D. 16.

(*p*) *Foster v. Bates* (1843), 13 L. J. Ex. 88; 12 M. & W. 226; *Morgan v. Thomas* (1853), 22 L. J. Ex. 152; 8 Ex. 302; *Ex p. Phillips* (1887), 56 L. J. Q. B. 619; 19 Q. B. D. 234.

(*q*) *Lyell v. Kennedy* (1880), 59 L. J. Q. B. 268; 14 Ap. Ca. 437.

(*r*) *Willes. J., Kelner v. Baxter* (1876), 36 L. J. C. P. 98; L. R. 2 C. P. 184.

(*s*) Marine Insurance Act, 1906, s. 5 (2) ss. 7, 86; *Lucena v. Crawford* (1806), 2 B. & P. N. R. 269.

ested within the meaning of the policy and at the time when it was made (*t*).

CH. II.
SECT. I.

The ratification relates back to the original making of the contract and confirms it from that time; and though the other contracting party before the ratification has withdrawn his consent (*u*). And the ratification will support an action previously brought upon the contract in the name of the principal, though without his knowledge; as where bills were indorsed to a person and delivered to an agent who received them on his behalf and commenced an action upon them in his name as indorsee, which he adopted and ratified pending the action (*x*). But before ratification takes place, the unauthorised contract may be rescinded by mutual agreement of the agent and the other contracting party, leaving nothing for a subsequent ratification to operate upon (*y*).—The principal in ratifying the contract must accept it in its integrity, he cannot ratify part and repudiate the rest (*z*). And by affirming the agency he becomes liable to the agent for his commission and for his charges in carrying out the contract (*a*).

Ratification
relates back
to contract.

The nature and extent of authority of an agent is defined either by the express terms in which it is given, or by the circumstances or conduct from which it is implied.—The construction of a power of attorney and of all written authorities is for the court; and where the original document has been lost and secondary evidence given of the contents, the construction of the contents so proved is for the court (*b*). An authority given in writing is presumptively contained exclusively in the writing; and the general rule applies that no extrinsic evidence is admissible to vary the writing (*c*). Powers of attorney are construed with reference to the special purpose for which they are expressed to be given; and accordingly terms of general authority are taken as restricted to that purpose (*d*). A power of attorney in general terms, without limitation

Extent of
authority.

Construction
of written
authority.

Powers of
attorney.

t Marine Insurance Act, 1906, s. 6; *Watson v. Swan* (1862), 31 L. J. C. P. 210; 11 C. B. N. S. 756; *Boston Fruit Co. v. British & Foreign Marine Insur.* (1906), 75 L. J. K. B. 535; 1903, A. C. 336.

u *Ballou v. Landolt* (1889), 58 L. J. C. 125; 11 Ch. D. 295; *Re Teummann & Lehmann* (1899), 68 L. J. Q. B. 852; (1899) 2 Q. B. 66.

x *Amory v. Marks* 1862, 31 L. J. Ex. 167; 7 H. & N. 686.

y *Walter v. James* (1871), 40 L. J. Ex. 101; L. R. 6 Ex. 121.

z *Brown v. Sparrow* (1827), 6 L. J. O. S. K. B. 1; 7 B. & C. 510.

a *Bristol v. Whitmore* (1861), 31 L. J. C. 467; 9 H. L. C. 391; *Kay v. Farnick* 1876, 1 C. P. D. 715.

b *Beauchamp v. Horsfall* 1858, 27 L. J. C. 193; 1 C. B. N. S. 150.

c *Hart v. Smith* (1808), 1 Taunt. 347; see *ante*, p. 119.

d *Attwood v. Munnings* (1827), 6 L. J.

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of time, was construed as limited by the recital that the principal was going abroad and desirous of appointing an attorney during his absence (*e*). A power of attorney given abroad to contract in England must be construed, as to the authority given, according to English law (*f*). A power of attorney to manage the principal's affairs in his absence, accompanied by the deposit of two unstamped (*g*) forms of an incomplete promissory note signed by him, does not entitle the attorney to fill up and issue the notes in breach of his authority, and a holder for value acting in good faith acquires no right as against the principal (*h*). A general power to receive all payments for the principal does not authorise the indorsing and negotiating on his behalf of bills received in payment (*i*). A power of attorney given by an executor in general terms to act in the administration of the testator's estate does not authorise the accepting of bills for debts due from the testator, so as to make the executor personally liable (*k*). But "authority given by a power of attorney necessarily includes medium powers, though they are not expressed, that is, all the means necessary to be used in order to obtain the accomplishment of the principal power" (*l*). A power of attorney authorising the agent "to charter a ship, and generally to act for and represent the owners" was held to authorise making a charter party with a warranty of the ship's class (*m*); and a power given to a land agent to "manage and superintend" landed estates was held to confer an incidental power to grant leases in a form customary in the district (*n*).

General and particular agents.

Agents are distinguished in respect of authority as general and particular or special agents. The former expression includes brokers, factors, partners, and all persons employed in a business or filling a position of a generally recognised character, the extent of authority being apparent from the nature of the employment or position; the latter denotes an agent appointed for a particular

O. S. K. B. 9; 7 B. & C. 278; *Harper v. Godsell* (1870), 39 L. J. Q. B. 185; L. R. 5 Q. B. 422; *Jacobs v. Morris* (1902), 71 L. J. C. 363; (1902) 1 Ch. 816.

(*e*) *Darby v. Chatts* (1880), 54 L. J. C. 577; 29 Ch. D. 590.

(*f*) *Chatenay v. Brazilian Tel. Co.* (1890), 60 L. J. Q. B. 295; (1891) 1 Q. B. 79; *Risdon Iron Works v. Furness* (1903), 74 L. J. K. B. 243; (1905) 1 K. B. 304.

(*g*) Bills of Exchange Act, 1882, s. 20; *Lloyds Bk. v. Cooke* (1907), 76 L. J.

K. B. 666; (1907) 1 K. B. 791.

(*h*) *Smith v. Prosser* (1907), 77 L. J. K. B. 71; (1907) 2 K. B. 735.

(*i*) *Hogg v. Smith* (1808), 1 Taunt. 347; *Murray v. East India Co.* (1821), 5 B. & Ald. 204.

(*k*) *Gardner v. Baillie* (1795), 6 T. R. 591.

(*l*) *Howard v. Baillie* (1796), 2 H. Bl. 618.

(*m*) *Routh v. Mcmillan* (1863), 33 L. J. Ex. 38; 2 H. & C. 750.

(*n*) *Pears v. Sneyd* (1853), 17 Beav. 151.

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occasion or purpose, limited by the appointment. A general agent has, in relation to the party contracting with him, the full apparent authority due to his employment or position; and the principal is bound by his acts within that authority, notwithstanding he has imposed special restrictive limits which are not known to the other contracting party. A particular or special agent is agent for the occasion only, and has no apparent authority beyond the limits of his appointment; and the principal is not bound by his acts in excess of those limits, whether the other contracting party knew of them or not (*o*). For example, the servant or agent of a horse dealer employed in the ordinary conduct of the business of horse dealing, may bind his principal by a sale with a warranty, by reason of his apparent general authority to act in the business; and though he has express orders, unknown to the buyer, not to warrant (*p*). But the servant or agent of a person who does not carry on the business of horse dealing, employed on a particular occasion to sell a horse, cannot bind his principal by a warranty without a special authority: the buyer would take a warranty subject to the risk of proving that the principal had in fact given authority to warrant: and if the seller should repudiate the warranty of his agent the sale would be void (*q*). So if a person sends an agent to buy a horse on the terms of receiving a warranty, and the agent accepts the horse without a warranty, or with an imperfect warranty, there is no sale to bind the principal, and the horse may be returned (*r*). An auctioneer employed to sell goods has an implied authority to sell without reserve, and a buyer is not bound by any limitation of that authority not made known to him (*s*); but where the sale is expressed to be made subject to a reserve price, the buyer is bound by the actual authority possessed by the auctioneer in this respect (*t*).—Upon the same principle, an agent employed to manage a business, to the carrying on of which it is incidental to draw and accept bills, binds the principal by signing bills in his name although he is privately in-

(*o*) *Whitehead v. Tuckett* (1812), 15 East, 400; *Ex p. Dixon* (1876), 46 L. J. Bk. 20; 4 Ch. D. 133; *Pickersstaff v. Rowatt's Wharf* (1895), 65 L. J. C. 536; 1896 2 Ch. 93; *Jacobs v. Morris* (1902), 71 L. J. C. 363; 1902 1 Ch. 816.

(*p*) *Howard v. Sheppard* (1866), 36 L. J. C. P. 12; L. R. 2 C. P. 148; *P. Bulby v. Bates* (1885), 52 L. T.

(*q*) *Brady v. Todd* (1861), 30 L. J. C. P. 223; 9 C. B. N. S. 592; *Payne v. Leconfield (Lord)* (1882), 51 L. J. Q. B. 612.

(*r*) *Jordan v. Norton* (1838), 7 L. J. Ex. 281; 1 M. & W. 155.

(*s*) *Rainbow v. Hawkins* 1901, 73 L. J. K. B. 641; (1904) 2 K. B. 322.

(*t*) *McManus v. Fortescue* (1907), 76 L. J. K. B. 393; (1907) 2 K. B. 1.

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structed not to do so (*u*). So a receiver of a business appointed by debenture holders may be, by the terms of his appointment, the agent of the debenture holders, and entitled to pledge their personal credit (*x*).—A signature purporting to be "by procuration," is notice of a special authority, and the holder of such a bill must prove the authority and the proper exercise of it, in order to recover against the principal (*y*). But where an agent having authority to borrow money, exceeds that authority, or having no authority pledges his principal's credit, the principal is liable to the person advancing the money to the extent to which the money has been applied in discharge of the principal's legal liability (*z*).

Execution of agency.

In the execution of an agency the authority must in general be strictly followed; and the principal is not bound by acts of his agent beyond the scope of his authority (*a*). The master of a ship, who has a general authority to receive goods and sign bills of lading for goods received, cannot bind the shipowner by signing bills of lading for goods not received (*b*); nor by statements in the bill of lading respecting the quality of goods received; such acts being beyond the general and apparent authority of a master of a ship (*c*). For the same reason the charterer's agent for providing cargo at the port of loading cannot bind his principal by contracting with the master of the ship to take a different cargo or for a different voyage than that stipulated in the charter party (*d*). So, a wharfinger is not bound by a receipt for goods given by his agent, where no goods were in fact delivered into his custody (*e*).

Substantial execution.

But it is sufficient if the execution of the agency is substantially within the authority given: as a purchase of 91 bales of cotton by a commission agent in execution of an order to buy 100 bales: the state of the market at the place and time not admitting of a

(*a*) *Edmunds v. Bushell* (1865), 35 L. J. Q. B. 20; L. R. 1 Q. B. 97.

(*b*) *Robinson Printing Co. v. Chic Ltd.* (1905), 74 L. J. C. 399; (1905) 2 Ch. 123.

(*y*) Bills of Exchange Act, 1882, s. 25; *Stagg v. Elliott* (1862), 31 L. J. C. P. 260; 12 C. B. N. S. 373; *Reed v. Ragby* (1891), 63 L. J. Q. B. 451; (1891) 2 Q. B. 19.

(*z*) *Reed v. Ragby* (1891), 63 L. J. Q. B. 451; (1891) 2 Q. B. 19; *Bainbridge v. McIvor* (1905), 75 L. J. K. B. 120;

(1906) 1 K. B. 103.

(*a*) *Pyles, J., Pockes v. Prescott* (1869), 38 L. J. Ex. 105; L. R. 4 Ex. 169.

(*b*) *Grant v. Norway* (1851), 20 L. J. C. P. 93; 10 C. B. 665; *Habbersty v. Ward* (1853), 22 L. J. Ex. 113; 8 Ex. 330.

(*c*) *Cox v. Bruce* (1886), 56 L. J. Q. B. 121; 18 Q. B. D. 117. See post, p. 881.

(*d*) *Saleen v. Irving* (1859), 29 L. J. C. P. 25; 7 C. B. N. S. 165.

(*e*) *Coleman v. Riches* (1855), 24 L. J. C. P. 125; 16 C. B. 101.

purchase of the whole quantity required at once, nor of completing the quantity (*f*). And it is sufficient if the contract made by the agent be in effect the same as if made in the precise words of the authority, where the omissions or variations can be supplied and reconciled by the incidents annexed to the contract by the usages of the trade (*g*). If an authority is given in such ambiguous terms as to admit of different meanings, and the agent *bona fide* acts upon it in one meaning, the principal cannot repudiate the act as unauthorised because he intended the order to be taken in another meaning (*h*). "A broker with an undisclosed principal may vary the terms of payment after the sale is completed. The principal may intervene at any time before payment, but not to rescind what was done before. But if a man sells goods acting as a broker, the moment the sale is completed he is *functus officio*. The terms of the contract cannot then be altered except by the authority of the principal" (*i*). And an agent professing to act for a principal, but without authority, may rescind or vary the contract at any time before the principal intervenes to ratify the contract (*k*).—An agency must be executed within the time limited, if any, for the exercise of the authority. A general authority given to a broker in a particular trade may be limited by the usage of the trade—the day on which it is given; and a contract afterwards made is not binding upon the principal (*l*).

If a power of attorney, or other authority to contract, be given to several persons jointly, they must all join in the execution; if it be given to them jointly and severally, they must either all act jointly, or each act severally, but some only cannot join in acting (*m*). And therefore an authority which is exclusively joint will not survive upon the death of one of the persons to whom it is given: unless it is also given to the survivors; and unless it is a power incident to a joint interest which survives with the interest (*n*). Where two persons were appointed to fill the office of clerk to the trustees of a turnpike road with power to sign contracts for letting the tolls; it was held that they must both join in

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Ambiguous
authority.

Varying
execution.

Time of
execution.

Joint and
several
agents.

(*f*) *Johnston v. Kershaw*, 36 L. J. Ex. 41; L. R. 2 Ex. 82.
(*g*) *Hegworth v. Knight* (1864), 33 L. J. C. P. 298; 17 C. B. N. S. 298. See *ante*, p. 131.
(*h*) *Irland v. Livingston* (1872), 41 L. J. Q. B. 201; L. R. 5 H. L. 395.
(*i*) *Ellenborough, C. J., Blackburn v. Scholes* 1810, 2 Camp. 343.

(*k*) *Weller v. James* (1871), 40 L. J. Ex. 124.
Amson v. Lilwall (1815), 4 Camp. 279.
(*m*) Co. Lit. 511 b; Hargrave's note (2) to Co. Lit. 52 b. See *Re Liverpool Stores* (1890), 59 L. J. C. 616.
(*n*) Co. Lit. 113 a, 181 b; *Townsend v. Wilson* (1818), 1 B. & Ald. 608.

PART II. executing such a contract (*o*). Where the provisional committee of a projected railway company appointed eight persons as a managing committee with authority to carry out the scheme, without giving authority to any less number, it was held that a contract made by six only of the managing committee was not binding upon the principals (*p*). Where a statutory board delegated their powers to a committee under their Act, it was held that the committee must act jointly and could not apportion the powers between them, nor act validly by less than their whole number (*q*). But a power of attorney given to fifteen persons, jointly and severally, to execute such policies as they, *or any of them*, should think proper, was construed to be co-extensive with the discretion, so that an execution by four only was valid (*r*).—

Directors of
companies.

Directors are appointed and empowered according to the constitution of the company, and all must attend board meetings: unless a less number is expressly authorised and required to act for the company (*s*). Where the constitution of a company requires that there shall be a certain number of directors at least, any less number, though the whole number then existing, cannot bind the company by allotting shares or executing contracts on their behalf (*t*): unless it is expressly provided that in case of vacancies the continuing directors shall have power to act (*u*). Where directors are required to act jointly, they cannot validate a contract by executing it some on one occasion, and some on another occasion (*x*).—By sect. 149, sub-sect. 4 of the Companies (Consolidation) Act, 1908, where more than one liquidator is appointed, the court is to declare which (if any) powers are to be exercised jointly, and which (if any) individually. Liquidators in whom property is vested must all join in conveying the legal title (*y*).

(*o*) *Bell v. Nyon* (1832), 2 L. J. M. C. 44; 9 Bing. 393.

(*p*) *Brown v. Andrew* (1819), 18 L. J. Q. B. 153.

(*q*) *Cook v. Ward* 1877, 16 L. J. C. P. 551; 2 C. P. D. 255.

(*r*) *Guthrie v. Armstrong* (1822), 5 B. & Ald. 628.

(*s*) *Stech's case* (1889), 58 L. J. C. 813; 42 Ch. D. 160; *Premier Industrial Bk. v. Carlton Manufacturing Co.* (1908), 78 L. J. K. B. 103; (1909) 1 K. B. 100. See now Companies (Consolidation) Act, 1908.

(*t*) *Kirk v. Bell* (1851), 16 Q. B. 290;

Bottomley's case (1881), 50 L. J. C. 167; 16 Ch. D. 681.

(*u*) *Tork Tramway Co. v. Willows* (1882), 8 Q. B. D. 685; *Re Scottish Petroleum Co.* (1882), 51 L. J. C. 811; 23 Ch. D. 413; *Owen and Ashworth's claim* 1900, 70 L. J. C. 82; (1901) 1 Ch. 115.

(*v*) *D'Arey v. Tamay Ry.* (1866), 36 L. J. Ex. 37; L. R. 2 Ex. 158; *Re Haycraft Gold Co.* (1900), 69 L. J. C. 497; (1900) 2 Ch. 250.

(*y*) *Re Ebsworth & Tuly's Contract* (1889), 58 L. J. C. 665; 42 Ch. D. 23.

Where an agent has authority to do any act he ought to do it in the name of the principal who gave the authority (*s*).—In contracts made by indenture *inter partes* under a power of attorney, the principal must be named as a party to the deed, otherwise he could not sue or be sued upon it; and the deed must be signed and executed in the name of the principal (*a*). The proper and usual form of executing such deed is by signing "A. B. (the principal by C. D. (the attorney)"; but the form, "C. D. for A. B." is sufficient, or any equivalent form in which the name of the principal is signed as such (*b*), and the name of the principal only may be signed without referring to the agency (*c*). A person who is named as party to a deed and executes it in his own name is personally bound, though he is described in the deed as acting and covenanting on behalf of another named person (*d*). By the Conveyancing Act, 1881, s. 46, "the donee of a power of attorney may execute or do any assurance instrument or thing in or with his own name or signature and his own seal, where sealing is required, by the authority of the donor of the power," as effectually "as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof." But it must appear on the face of the instrument that he executes as attorney (*e*). A pure donee cannot accept a conveyance executed by attorney unless he is authorized to do so (*f*).

In simple contracts the agent may contract in the name of his principal and is then himself no party to the contract; as by signing the name of the principal only, or by signing his own name "by procuration," or as agent for the named principal (*g*). Where both names are mentioned in the contract it may be a question whether the one or the other or both are parties to the contract; and the question depends upon the construction of the terms with reference to the circumstances (*h*).—Also in simple contracts an agent may contract in his own name, without disclosing his principal, in which case no question arises as to the party on the

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Form of
execution.

Contracts
under seal.

Simple
contracts

Non-dis-
closure of
principal.

(*s*) *White v. Carter* (1795), 6 T. R. 176.
(*a*) *Post*, Part II., Chap. II., Sect. II.
(*b*) *Wills v. Buck* (1802), 2 East, 142.
(*c*) *Re Whitley* (1886), 55 L. J. C. 540; 32 Ch. D. 337.
(*d*) *Appleton v. Banks* (1804), 5 East, 148.
(*e*) *Cotton, L. J., Re Whitley* (1886), 55 L. J. C. 540; 32 Ch. D. 338.
(*f*) *Hardwicke, L. C., Mitchell v.*

Newb. 1755), 2 Ves. sen. 679; *Saul v. Weston* 1821, 6 Madd. 50.
(*g*) *Mahony v. Kekulé* 1851, 23 L. J. C. P. 54; 14 C. B. 390; *Stagg v. Elliott* (1862), 31 L. J. C. P. 260; 12 C. B. N. S. 373.
(*h*) *Thaddeus v. Mader* 1851, 21 L. J. C. 876; 9 Ita. 188; *Mahony v. Kekulé* (1854), 23 L. J. C. P. 51; 10 C. B. 390. See *post*, p. 340.

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Misrepresentation of principal.

face of the contract; but the principal may be entitled to intervene to claim the rights of the contract, and may be charged with the liabilities; except with bills of exchange and promissory notes, which by the law merchant, now confirmed by statute, are restricted in their effect to the persons appearing to be parties on the face of the instrument (*i*). The non-disclosure of a principal is in general immaterial to the validity of the contract; but it may become material by the special circumstances of the case; as where it is known to the contracting agent that the other party has a personal objection to dealing with his principal, or that he has special intention of dealing with himself as the apparent principal (*k*).—A misrepresentation by a person that he is contracting for a principal, when in fact he is acting for himself, may be material: as where the other contracting party has a set-off against the supposed principal which induces the contract (*l*); or where a solicitor purchases from his own client under a representation that he is acting for a third party (*m*). But where the personality of the contracting party, is not a material element in inducing the contract, such a misrepresentation would not affect its validity (*n*).

Delegation of authority.

It is a general rule that an agent cannot delegate his authority to another without a special authority to do so, as expressed in the maxim "*delegata potestas non potest delegari*"; and this rule applies strictly wherever the agency involves a trust or discretion in the agent, for the exercise of which he is personally selected (*o*). A factor or broker employed to sell goods for his principal cannot delegate his commission to another; and a sale by a sub-agent would be wrongful and void against the principal, who might recover the goods or their value, without regard to any dealings between him and the original agent (*p*); or he might affirm the transaction and claim any profit made by the sub-agent, beyond his proper remuneration and charges (*q*).

(*i*) See *post*, Pt. II., Chap. II., Sect. II.

(*k*) *Smith v. Wheatecroft* (1878), 47 L. J. C. 745; 9 Ch. D. 223.

(*l*) *Boulton v. Jones* (1857), 27 L. J. Ex. 117; 2 H. & N. 564.

(*m*) *Luddy's Trustee v. Pard* (1886), 55 L. J. C. 884; 33 Ch. D. 500.

(*n*) *Fellows v. Gwydyr* (Lord) (1829), 1 Russ. & M. 83; *Smith v. Wheatecroft* (1878), 47 L. J. C. 745; 9 Ch. D. 223.

See *ante*, p. 19.

(*o*) *Ess v. Tuscott* (1837), 6 L. J. Ex. 114; 2 M. & W. 385; *Bell v. Balls* (1897), 66 L. J. C. 397; (1897, 1 Ch. 663).

(*p*) *Cochran v. Irlam* 1813, 3 M. & S. 301, n.; *Henderson v. Burnwall* (1827), 1 Y. & J. 387.

(*q*) *De Bussche v. Alt* (1878, 17 L. J. C. 387; 8 Ch. D. 286).

But if the agency involves no exercise of discretion and it is immaterial whether it be done by one person or another, or if the discretionary part of the agency is exercised by the party to whom it is entrusted, a mere act, as the signing of a name, may in general be delegated to and performed by the hand of another; as where a creditor under a composition deed telegraphed to his agent to sign the deed, who in turn required his clerk to sign it, the signature was held to be that of the principal (*r*). And an agent having authority to draw bills or notes may direct another person to sign the name of the principal upon a particular instrument of that kind (*s*).—A statute may require a personal signature by the hand of the party himself; as the Statute of Frauds Amendment Act, 1828, s. 6, which requires that any representation made concerning the character of another shall be "made in writing signed by the party to be charged therewith" (*t*). But unless restricted by statute a party may sign by an agent by the general rule of common law (*u*).

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SECT. I.

Agency not involving discretion.

Act of signing.

Statutory acts.

An agent employed for a particular business is impliedly authorised to employ such qualified sub-agents as are generally required in that business; as the brokers or auctioneers required in selling different kinds of property, stock brokers, insurance brokers, valuers and the like; and in such case "the sub-agent becomes as responsible to the principal for the due discharge of the duties of his employment as if he had been appointed agent by the principal himself" (*r*). But the principal cannot charge a sub-agent with money received to his use merely by reason of his having received it to the use of his employer, whose duty it was to account for it as agent of the principal (*y*). The sub-agent, after notice of the principal, can acquire no rights against the agent in derogation of the rights of the principal; as a right of set-off against the agent (*z*). But the sub-agent retains the rights incident to his employment as against the principal not-

Employment of sub-agent.

(*r*) *Johnson v. Ascuton* (1869), 38 L. J. Ex. 76; L. R. 4 Ex. 107. See *Brown v. Tombs* (1890), 60 L. J. Q. B. 38; (1891) 1 Q. B. 253.

(*s*) *Lord v. Hall* (1849), 19 L. J. C. P. 47; 8 C. B. 627.

(*t*) *Swift v. Jewsbury* (1874), 43 L. J. Q. B. 56; L. R. 9 Q. B. 301; *Hirst v. W. Riding Union Bk.* (1901), 70 L. J. K. B. 828; (1901) 2 K. B. 560.

(*u*) *Re Whitley* (1886), 55 L. J. C. 540; 32 Ch. D. 337.

(*r*) *Per cur. De Bussche v. Alt* (1878), 47 L. J. C. 387; 8 Ch. D. 310; *Powell v. Evans Jones & Co.* (1901), 74 L. J. K. B. 115; (1905) 1 K. B. 11.

(*y*) *Stephens v. Badcock* (1832), 1 L. J. K. B. 75; 3 B. & Ad. 354. See *New Zealand Land Co. v. Watson* (1881), 50 L. J. Q. B. 433; 7 Q. B. D. 374.

(*z*) *Cahill v. Dawson* (1857), 26 L. J. C. P. 253; 3 C. B. N. S. 106; *Mildred v. Maspons* (1883), 53 L. J. Q. B. 33; 8 Ap. Ca. 874.

- PART II. withstanding the dealings between the latter and his agent; as the lien of an insurance broker for premiums and commissions upon policies effected by him, which cannot be defeated by payment of the principal to his agent (*a*).—Upon the above principle trustees, executors, and persons filling similar offices may employ professional or skilled agents to do all such business as requires such agency; they are allowed to charge payment of such agents in account, and are not responsible for their defaults if properly employed (*b*).—The same principle applies to directors of companies. They may execute the ordinary business of the company by properly qualified sub-agents; but they cannot delegate matters entrusted to their own discretion, as the allotment of shares (*c*); or the buying of shares in the company (*d*); or the making of calls and enforcing forfeiture for non-payment (*e*).
- Trustees and executors.
- Directors of company.
- Revocation of agency.
Factor. The authority of an agent is in general revocable by the principal at any time before it is executed (*f*).—The authority of a factor intrusted with goods for sale may be revoked at any time before the goods are sold, and though the factor has made advances to his principal; such advances entitle him to a lien, but do not render his authority irrevocable, so as to justify a sale against the orders of the principal upon his default in payment; unless the advances were made upon an express agreement to that effect (*g*). And a factor, after revocation of his authority, ceases to be an agent intrusted with goods for sale, so as to be enabled to make a valid pledge of the goods under the Factors Act (*h*).—It has been said that where an auctioneer, acting under the authority of an undisclosed principal, advertises land or houses for sale “without reserve,” he impliedly undertakes that he will knock down the lot to the highest *bonâ fide* bidder, and will reject any bid made, to his knowledge, by or on behalf of the owner, and that if the principal withdraws the auctioneer’s
- Auctioneer

(*a*) *Fisher v. Smith* (1879), 48 L. J. Ex. 411; 4 Ap. Ca. 1.

(*b*) *Speight v. Gaunt* (1881), 53 L. J. C. 419; 9 Ap. Ca. 1; *Re Brer* (1884), 26 Ch. D. 238; *Re Blundell* (1888), 57 L. J. C. 730; 40 Ch. D. 370; *Re Wall* (1889), 58 L. J. C. 713; 42 Ch. D. 674.

(*c*) *Howard’s case* (1866), L. R. 1 Ch. 561.

(*d*) *Cartmell’s case* (1874), 43 L. J. C. 588; L. R. 9 Ch. 691.

(*e*) *Bottinley’s case* (1880), 50 L. J. C. 167; 16 Ch. D. 681.

(*f*) *Pyrior’s case* (1610), 8 Co. 82 a.

(*g*) *Swart v. Sanders* (1848), 17 L. J. C. P. 258; 5 C. B. 895; *De Comas v. Pyat* (1865), 3 Moo. P. C. N. S. 158. See *Chinnock v. Sainsbury* (1861), 30 L. J. C. 409.

(*h*) *Fuentes v. Montis* (1869), 38 L. J. C. P. 95; L. R. 4 C. P. 93. See *post*, p. 360.

authority he is bound to indemnify the auctioneer against any liability for damages to a bidder who has incurred expenses by reason of the advertisement (*i*); but the revocation is valid against a person buying without notice of it (*k*). It has been doubted whether a person can, after a lot has been knocked down to a buyer, revoke the authority of the auctioneer to sign a contract within the Statute of Frauds (*l*); but this doubt seems to rest upon insecure foundations, for the sale is complete by the fall of the hammer (*m*), and the auctioneer is as much the agent of the purchaser as of the vendor for the purpose of signing the contract (*n*). It would be possible, and in one view more equitable, to hold that from the fall of the hammer there was a joint authority by seller and buyer to comply with the statutory requirement of signature, which is only a question of procedure (*o*), and that this authority could be revoked only by a joint ^{act}.

But a vendor who offers land for sale by public auction under conditions which provide that the highest bidder shall be the purchaser, is liable in damages to a member of the public to whom the property has been knocked down as the highest bidder, if he refuses to allow that person to sign the contract (*q*). An agency is also revoked by the principal selling the goods or subject of agency, or otherwise disposing of the business in which the agent is employed (*r*).

Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable. But this doctrine applies only to cases where the authority is given for the purpose of being a security, or as a part of the security; not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards,

Authority coupled with interest.

⁽ⁱ⁾ *Warburton v. Harrison* (1859), 29 L. J. Q. B. 14; 1 E. & E. 295; *Mair-price v. Westley* (1865), 34 L. J. Q. B. 225; 6 B. & S. 420.

^(k) *Manser v. Back* (1848), 6 Hare, 443; *Warburton v. Harrison* (1859), 29 L. J. Q. B. 420; 1 E. & E. 295.

^(l) *Don v. Wells* (1861), 30 Beav. 220; *Bell v. Bulls* (1897), 66 L. J. C. 397; (1897) 1 Ch. 662.

^(m) *Payne v. Cave* (1789), 3 T. R. 148; Sale of Goods Act, 1893, s. 58.

⁽ⁿ⁾ *Hinde v. Hitchhouse* (1806), 7 East, 558; *Emmerson v. Hollis* (1809), 2 Taunt. 38.

^(o) *Lucas v. Dixon* (1889), 58 L. J. Q. B. 161; 22 Q. B. D. 357.

^(p) See *ante*, p. 319.

^(q) *Johnston v. Boyes* (1899), 68 L. J. C. 125; (1899) 2 Ch. 73.

^(r) *Rhodes v. Forewood* (1876), 17 L. J. Ex. 390; 1 Ap. Ca. 256. See *Opdens, Ltd. v. Nelson* (1905), 74 L. J. K. B. 433; (1905) A. C. 109.

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and incidentally only. As for instance in the case of goods consigned to a factor for sale. That confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest; but an independent authority and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not arise independently of agreement" (s). But "if a principal employs an agent to do a legal act the doing of which may in the ordinary course of things put the agent under an obligation to pay money to another on account of his principal; and the agent before revocation acts upon the authority and incurs the obligation, the authority ceases to be revocable" (t).

Notice of
revocation.

If the principal has represented that a person is his agent with authority to contract on his behalf, as may happen by an habitual course of dealing through such agent, he cannot effectually revoke the agency as against persons with whom he has so dealt without giving them notice of the revocation; and he may be bound by their dealings with the agent continued after revocation of the agency but before receiving notice (u). Upon this principle a retiring partner may be stopped from denying the authority of the continuing partners to bind him by contracts with customers of the firm who have no notice of the dissolution of partnership (x); and a master who has accredited a servant to a tradesman to order goods in his name may be liable for orders given to the tradesman before notice of the revocation of the authority (y). So where a ship is sold during a voyage, the master may bind the new owner by continuing to act under his prior orders, though they are of an exceptional character, until he has notice of the change of ownership (z).

Revocation
by death.

The authority of an agent is revoked by the death of the principal unless he is appointed on terms which extend his right to

(s) *Per cur.* *Smart v. Sanders* (1848), 17 L. J. C. P. 258; 5 C. B. 917. See *Fates v. Hoppe* (1850), 19 L. J. C. P. 180; 9 C. B. 541; *Toplin v. Florence* (1851), 20 L. J. C. P. 137; 10 C. B. 744; *Frith v. Frith* (1906), 75 L. J. P. C. 50; (1906) A. C. 254.

(t) *Hawkins, J., Read v. Anderson* (1882), 52 L. J. Q. B. 214; 10 Q. B. D. 107; *affd.* (1884), 53 L. J. Q. B. 532; 13 Q. B. D. 779; now overridden by Gaming Act, 1892, s. 1.

(u) *Trueman v. Loder* (1840), 9 L. J. Q. B. 165; 11 A. & E. 589; *Drew v. Nunn* (1879), 48 L. J. Q. B. 591; 1 Q. B. D. 661. See *Guillemin's case* (1885), 54 L. J. C. 322; 28 Ch. D. 634.

(x) See *post*, p. 378.

(y) See *ante*, p. 317.

(z) *Mercantile and Exchange Bank v. Gladstone* (1868), 37 L. J. Ex. 130; L. R. 3 Ex. 233.

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act beyond that period (*a*). Thus a surviving partner cannot bind the estate of a deceased partner by a contract taking effect after the death (*b*). The authority which a wife may have in the absence of her husband, to pledge his credit for necessaries is revoked by his death; and the executors of the husband are not liable for necessaries supplied to the wife after his death, though before notice of the death had been received (*c*).—So a contract of employment or service is in general revoked by the death of either of the contracting parties. The retainer of a solicitor is revoked by the death of his client; and he cannot claim items of costs incurred after the death, though in a pending suit and without notice of the death (*d*). An engagement by a firm of two partners of an agent in their business for a term of years was construed to be subject to the condition that the parties should so long live, and was held to be discharged by the death of one of the partners, and the consequent dissolution of the firm (*e*).—Where a person was employed to sell a picture for the owner upon certain terms of remuneration and the owner died before the sale was effected, it was held that the employment was revoked, and that by selling after his death the agent could not entitle himself to claim the stipulated remuneration, though he might make a claim for the value of his services, if the administrator of the deceased owner adopted and confirmed the sale (*f*).—At law an authority coupled with an interest, although irrevocable pending the interest, was revoked by death *g*; but in equity a power of attorney which was given as part of a security for a debt would be irrevocable as long as any money remained due, notwithstanding the death of the debtor (*h*).

The authority of an agent is also revoked by bankruptcy of the principal, vesting all his property in the trustee from the act of bankruptcy; except as to dealings with the agent without notice of an act of bankruptcy (*i*). So the liquidation of a company and

Revocation
by bank-
ruptcy.

a *Macdougall v. Robertson* (1827), 1 Bing. 135; *Kiddell v. Farnell* 1837, 25 L. J. C. 818; 3 Sm. & G. 428. See note (*a*), *Swart v. Sanders* (1848), 5 C. B. 917; *Wilson v. Harper* (1908), 77 L. J. C. 607; 108. 2 Ch. 370.

b *Bogel v. Miller* (1903), 72 L. J. K. B. 495; 1903. 2 K. B. 212.

c *Blades v. Free* (1829), 7 L. J. O. S. K. B. 211; 9 B. & C. 167.

d *Paul v. Paul* (1889), 58 L. J. Prob. 67.

e *Tusker v. Shepherd* (1881), 30 L. J.

Ex. 207; 5 H. & N. 375.

f *Campanari v. Woodburn* (1851), 21 L. J. C. P. 13; 15 C. B. 400.

g *Watson v. King* (1815), 4 Camp. 272; *Heath v. Beinhall* (1834), 4 L. J. K. B. 68; 2 A. & E. 365.

h *Spanner v. Sandilands* (1842), 1 Y. & C. C. 390.

i *Ex p. Sparshall* (1872), 41 L. J. Bk. 49; L. R. 7 Ch. 331; *Mackwick v. Hardingham* (1880), 15 Ch. D. 339. See *Elliott v. Turquand* (1881), 51 L. J. P. C. 1; 7 Ap. Ca. 79.

PART II. the appointment of liquidators revokes the authority of the directors (*k*); and the bankruptcy of a partner dissolves the partnership and revokes the authority of the partner to act for the firm (*l*).

Powers of attorney.

According to the above principles a power of attorney under seal, as being a mere authority, is in general revocable; but where it is part of a security for money or is given to effectuate a security, being then coupled with an interest, it is not revocable (*m*). A power of attorney given by a debtor to his creditor authorising him to sell land in discharge of the debt is not revocable, because an authority coupled with an interest (*n*).—The Conveyancing Act, 1881, s. 47, protects "any person making or doing any payment or act in good faith in pursuance of a power of attorney" from liability by reason of the donor having previously died, or become lunatic, or bankrupt, or revoked the power, unknown to such person; but with a reservation of any right against the payee of any person interested in any money so paid (*o*). And by the Conveyancing Act, 1882, ss. 8, 9, a power of attorney given for valuable consideration "expressed to be irrevocable," and a power of attorney "expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date," in favour of a purchaser, shall not be revoked by the donor, or by the death, marriage, lunacy, or bankruptcy of the donor.

Indemnity of agent.

A principal in employing an agent is impliedly bound to indemnify him against all payments made and liabilities incurred by him in the proper execution of the agency (*p*); but in the case of a solicitor any disbursements included in his bill of costs must have been in fact paid before the delivery of the bill, to entitle him to recover them against his client (*q*). And a principal must indemnify the agent against liability for acts not in themselves necessarily unlawful, and which the principal has apparent

(*k*) *Guillemin's case* (1884), 54 L. J. C. 322; 28 Ch. D. 634. See *Salton v. New Preston Cycle Co.* (1899), 69 L. J. C. 20; (1900) 1 Ch. 43.

(*l*) The Partnership Act, 1890, s. 33.

(*m*) *Oldham v. Oldham* (1867), 36 L. J. C. 205; L. R. 3 Eq. 404.

(*n*) *Gaussen v. Morton* (1850), 8 L. J. O. S. K. B. 313; 10 B. & C. 731; *Car-michael's case* (1896), 65 L. J. C. 902; (1896) 2 Ch. 643.

(*o*) See *Mutual Provident Soc. v. Macmillan* (1889), 59 L. J. P. C. 22; 14 Ap. Ca. 596.

(*p*) See *ante*, p. 31. See *Halbreun v. International Horse Agency* 1902, 72 L. J. K. B. 90; 1903 1 K. B. 270; *Rosdon Iron Works v. Farness* (1905), 75 L. J. K. B. 83; (1906) 1 K. B. 49.

(*q*) *Sadd v. Griffin* (1908), 77 L. J. K. B. 775; (1908) 2 K. B. 510.

authority to authorise; but the agent is not entitled to an indemnity in respect of wrongful acts, where he is a joint wrongdoer with his principal (*r*). So the revocation of an agency imports an implied promise to pay compensation for services under it, as having been rendered at the request of the principal (*s*); and the principal cannot revoke an authority under which a liability has been incurred, in breach of his indemnity (*t*).—If an agent is charged personally in an action for an act done in pursuance of his agency, he may serve upon his principal a notice of claim to indemnity, and thereby make him a party to the proceedings under the Judicature Act, Order XVI. r. 48 (*u*).

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Whenever the act of the agent is authorised by the terms of his appointment, it will bind the principal in favour of all persons dealing in good faith with the agent, although he was acting in his own interests and not in those of his principal (*x*). But "any surreptitious dealing between one principal and the agent of another principal is a fraud on the latter," and entitles him to avoid a contract made through such agency (*y*). Where a company contracted for certain works to be done under the direction and certificate of their own engineer; and the contractors engaged the same engineer without the knowledge of the company to do the works; it was held that the company might recover back money paid under the contract as having been obtained by fraud (*z*). And any contract made with an agent on his own account which tends to influence his execution of the agency is void as being a fraud on his principal (*a*).

Execution of
agency in
fraud of
principal

"An agent cannot be allowed to put himself in a position in which his interest and his duty will be in conflict"; and therefore any profit made by an agent in the execution of his agency must be accounted for to the principal (*b*); and a sub-agent is under a

Profits of
agency.

(*r*) *Merryweather v. Niam* (1799), 8 T. R. 186; 1 Sm. L. C. 383; *Adams v. Jarvis* 1827, 5 L. J. O. S. C. P. 68; 1 Bing. 72.

(*s*) See *ante*, p. 36.

(*t*) *Read v. Anderson* (1881), 53 L. J. Q. B. 534; 13 Q. B. D. 775.

(*u*) *Boncke v. East* (1876), 15 L. J. Q. B. 693; 1 Q. B. D. 419.

(*x*) *Hambro v. Burnand* (1903), 72 L. J. K. B. 662; (1903) 2 K. B. 399; *Lloyd v. Banks* (1907), 76 L. J. K. B. 666; (1907) 1 K. B. 794.

(*y*) *James, L. J., Panama & S. Pacific Tel. Co. v. India Rubber Works* (1875), 45 L. J. C. 121; L. R. 10 Ch. 515.

(*z*) *Panama & S. Pacific Tel. Co. v. India Rubber Works* (1875), 45 L. J. C. 121; L. R. 10 Ch. 515.

(*a*) *Harrington v. Victoria Dock* (1878), 47 L. J. Q. B. 594; 3 Q. B. D. 519.

(*b*) *Cairns, L. C., Parker v. McKenna* (1874), 44 L. J. C. 425; L. R. 10 Ch. 118. See *Re Haslam and Her Exors* (1902), 71 L. J. C. 374; (1902) 1 Ch. 765.

PART II.

similar liability (c). A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence (d); and a gratuity to an agent after the execution of the agency must be accounted for to his principal; as in the case of an agent or servant employed to make payments accepting a discount or present from the creditor (e). And where an agent in breach of his agreement with his principals also acted for trade rivals, he was held liable to account for profits made by him upon the sale of goods belonging to the trade rivals (f). If an agent receives a secret commission from the other contracting party he forfeits his right to commission from his own principal (g); but not for a discount or commission paid to him incidentally and not by way of remuneration, although he must account to his principal for the amount received (h). If an agent stipulates with a contractor for a commission upon the work to be done for his principal, he must account for the commission, and it is good ground for his dismissal (i).—But an agent is entitled to retain for his own use allowances which are customary in the business and known to the principal as a recognised mode of remuneration: as the customary commissions and discount received by an insurance broker in dealing with underwriters (k). But it is for the agent to establish that the charges which he claims under this head were known to his principal and approved by him (l).

Customary allowances.

Commission or profit on sales.

Upon the same principle, where an agent employed to buy or sell for his principal is paid a sum of money or commission by the other party upon effecting a sale, the principal may claim the money from his agent; or he may avoid the sale as fraudulent and recover back money which has been paid under it (m); or he may

(c) *Powell v. Evans Jones & Co.* (1901), 71 L. J. K. B. 115; (1905) 1 K. B. 11.

(d) *Smith v. Sorby* (1875), 3 Q. B. D. 552, n.; *Shipway v. Broadwood* (1899), 68 L. J. Q. B. 360; (1899) 1 Q. B. 369.

(e) *Mellish, L. J., Harri's case* (1875), 44 L. J. C. 721; L. R. 10 Cn. 603.

(f) *Niedels Tiedelstufabrik v. Bruster* (1906), 75 L. J. C. 798; (1906) 2 Ch. 671.

(g) *Andrews v. Ramsay* (1903), 72 L. J. K. B. 865; (1903) 2 K. B. 635.

(h) *Hippesley v. Kne* (1901), 72 L. J. K. B. 68; (1905) 1 K. B. 1.

(i) *Boston Fishing Co. v. Ansell* (1888), 39 Ch. D. 339.

(k) *Great West. Insur. v. Cunliffe* (1874), 43 L. J. C. 741; L. R. 9 Ch. 525; *Baring v. Stanton* (1876), 3 Ch. D. 502; *Williamson v. Hume* (1890), 60 L. J. C. 123; (1891) 1 Ch. 390; *Stubbs v. Slater* (1910), 79 L. J. C. 420; (1910) 1 Ch. 632.

(l) *Johnson v. Kearby* (1908), 77 L. J. K. B. 904; (1908) 2 K. B. 514; *Stubbs v. Slater* (1909), 79 L. J. C. 420; (1910) 1 Ch. 195.

(m) *Morison v. Thompson* (1874), 43

sue the agent and the other party, jointly or severally, to recover damages for the fraud in inducing the sale, or the sum agreed to be paid under the corrupt bargain (*n*). In such cases the agent becomes indebted to his principal for the money received, but he cannot be charged as trustee of the money, or in respect of the investments made with it (*o*). Where an agent for the sale of an estate colludes with a purchaser for the purpose of selling it to a sub-purchaser at an advanced price, the agent may be charged with the excess in the price obtained at the sub-sale (*p*). An agent instructed to sell subject to a reserved price is not justified in taking to the goods himself as buyer, without notice to and consent of his principal; and he may be charged with the profit of a re-sale at an advance (*q*). So where an agent employed to buy for his principal sells his own property to him at an advance of the price at which he bought it, he must account for the profit (*r*): as in the case of promoters and directors of companies buying land or mines or other property for the purpose of selling to the company at an advanced price (*s*).

Where a director or promoter or agent of a company in negotiating a purchase for the company accepts from the vendor part of the price or any other benefit, whether in money or in paid-up shares, he must account for the value to the company (*t*). And in such case the whole transaction is fraudulent and may be repudiated by the company; and the promoter or agent can make no claim for his services (*u*).—Also directors of a company must account to the company for shares given them by promoters to induce them to act as directors (*x*); and for calls upon their

Directors and
promoters of
company.

L. J. Q. B. 215; L. R. 9 Q. B. 480; *per cur.* *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394.

(*n*) *Salford v. Lever* (1890), 60 L. J. Q. B. 39; 1891 1 Q. B. 168; *Grant v. Gold Exploration Syndicate* (1899), 69 L. J. Q. B. 150; 1900 1 Q. B. 223.

(*o*) *Lester v. Stubbs* (1890), 59 L. J. C. 570; 45 Ch. D. 1.

(*p*) *Moogan v. Elford* (1877), 4 Ch. D. 352.

(*q*) *De Bussche v. Alt* (1878), 47 L. J. C. 387; 8 Ch. D. 286.

(*r*) *Kinloch v. Barber* (1873), L. R. 8 Ch. 56.

(*s*) *Re Imperial Land Co.* (1876), 46 L. J. C. 225; 4 Ch. D. 505. See *Ladywell Mining Co. v. Brookes* (1887), 56 L. J. C. 684; 35 Ch. D. 400; *Re G.*

Norman & Co. (1895), 61 L. J. C. 407; (1895) 1 Ch. 674.

(*t*) *Eden v. Rolfs's Lighting Co.* (1889), 58 L. J. Q. B. 579; 23 Q. B. D. 368; *Lynnen Iron Co. v. Bird* (1886), 55 L. J. C. 875; 33 Ch. D. 85.

(*u*) *Re Horford and South Wales Wagon Co.* (1876), 45 L. J. C. 461; 2 Ch. D. 621. See *Phosphate Sewage Co. v. Hartmont* (1877), 46 L. J. C. 661; 5 Ch. D. 394; *Baguall v. Carlton* (1877), 47 L. J. C. 50; 6 Ch. D. 571.

(*x*) *Re Ruggie's case* (1877), 46 L. J. C. 330; 5 Ch. D. 506; *Nant-y-glo Co. v. Grove* 1880, 12 Ch. D. 738; *McLeod's case* (1885), 55 L. J. C. 36. See *Re North Australian Co.* (1891), 61 L. J. C. 129; (1892) 1 Ch. 322.

PART II. shares which have been paid out of money of the company (*y*); and for profits made by them in getting off the shares of the company (*z*); and for profits from contracts made by them with the company (*a*); and for money received from a debtor of the company to induce the director to compromise the debt (*b*). But where a director is a trustee of his qualification shares for a third party, his beneficiary cannot claim the director's fees, or remuneration which the director has received by virtue of his office (*c*).

g) *Re Englefield Coll.* (1878), 8 Ch. D. 388.

z) *Parker v. McKenna* (1874), 44 L. J. C. 425; L. R. 10 Ch. 96; *Re Stapleford Coll. Co.* (1880), 49 L. J. C. 253.

a) *Albion Steel and Wire Co. v. Martin* (1875), 45 L. J. C. 173; 1 Ch. D. 580.

b) *Metrop. Bank v. Heiron* (1881), 5 Ex. D. 319.

c) *Re Dover Coalfield Extension* (1907), 77 L. J. C. 94; (1908) 1 Ch. 65.

CHAPTER II.

PRINCIPAL AND AGENT.

SECT. II.—PARTIES TO CONTRACTS OF AGENTS.

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Where a contract is made by an agent acting for a principal the question arises whether, in relation to the other party, the agent, or the principal, or both are contracting parties, entitled to sue and liable to be sued upon the contract.

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SECT. II.

With contracts by deed *inter partes*, the parties are determined exclusively by the form of instrument; and it is immaterial that the persons named and executing as parties are described to be and act as agents for others who are named as their principals; for the principal can acquire no right, nor incur liability, unless himself named or designated as a party to the deed, and unless it is executed on his behalf with authority under seal (a). Thus where a master of a ship executes a charter party under seal in his own name, the shipowner for whom he acts, not being a party to the deed, cannot sue upon it (b). And upon the same principle a

Contracts
by deed.

(a) See *ante*, pp. 316, 327.

(b) *Schuck v. Anthony* (1813), 1 M. & S. 573; *Gardner v. Luchlan* (1838), 8

L. J. C. 82; 4 M. & Cr. 129; *Chapman v. Smith* (1907), 76 L. J. C. 394; (1907) 2 Ch. 97.

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Deed poll.

Simple contracts.

Principal presumptively the contracting party.

cestui que trust cannot sue or be sued upon a bond or covenant made by and in the name of a trustee on his behalf (c).—In a deed poll only one party is formally named as such, and the covenantee is identified by the name or designation of the person for whose benefit the covenant is expressed to be made (d).

A simple contract in writing expressed to be *inter partes* is subject to the same construction as a deed, as to the effect of naming the parties; though it is not, like a deed, exclusive of the rights and liabilities of principals not named in the contract (e); "to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done" (f).—Where a written contract is not expressly made *inter partes* the question whether the agent or the principal is the contracting party is a question of construction depending upon the forms and terms of the writing; but a person who signs a contract in his own name without qualification, is *prima facie* a contracting party and personally liable (g). And "persons signing a document, if they wish to exclude their own liability, must show that they sign for some other person; and if it is left ambiguous on the instrument, it should be construed against the person signing" (h). Words merely describing a person as "agent," "broker" or the like are not alone sufficient to exempt him from personal liability (i); for this purpose it must clearly appear that he contracts "for" or "on account of" a principal, and not on his own account (k).

In the construction of contracts made by an agent for a disclosed principal, the presumption is that the principal, and not the agent, is the contracting party (l). "It is more consonant to the general

(c) *Pickering's claim* (1871), L. R. 6 Ch. 525.

(d) See *ante*, pp. 96, 300; Marine Insurance Act, 1906, ss. 6, 15, 86; *Sunderland Marine Insce. v. Kearney* (1851), 20 L. J. Q. B. 417; 16 Q. B. 925.

(e) *Beckham v. Drake* (1841), 11 L. J. Ex. 201; 9 M. & W. 79; *affd.* on this point, *non*, *Drake v. Beckham* (1843), 12 L. J. Ex. 486; 11 M. & W. 315. See *post*, p. 347.

(f) *Per cur.* *Higgins v. Senior* (1841), 11 L. J. Ex. 199; 8 M. & W. 811.

(g) *Chadwick v. Maden* (1852), 21 L. J. C. 876; 9 Ha. 188; *Cooke v. Wilson* (1856), 26 L. J. C. P. 15; 1 C. B. N. S.

153; *Paice v. Walker* (1870), 39 L. J. Ex. 109; L. R. 5 Ex. 173; *Weedner v. Hoggott* (1876), 1 C. P. D. 533.

(h) *Crompton J., Desbordes v. Gregory* 1860, 29 L. J. Q. B. 93; 2 E. & E. 602.

(i) *Hough v. Manzanos* (1879), 48 L. J. Ex. 398; 4 Ex. D. 104; *Hutcherson v. Eaton* (1881), 13 Q. B. D. 861; Bills of Exchange Act, 1882, s. 26.

(k) *Southwell v. Boarditch* (1876), 45 L. J. C. P. 630; 1 C. P. D. 374; *Gadd v. Houghton* (1876), 16 L. J. Ex. 71; 1 Ex. D. 357; *Pile v. Ogley* (1887), 56 L. J. Q. B. 373; 18 Q. B. D. 708.

(l) *Littlelake, J., Thomson v. Darnrepp* 1829, 7 L. J. O. S. K. B. 134; 9 B. &

principle of law to refer all transactions of agents to the principal on whose account they were entered into;" and according to this principle it is held that upon contracts with carriage the consignee of the goods, and not the consignor, is presumptively the party entitled to sue and liable to be sued, as being the principal for whom they are carried by the directions of the carrier, acting as agent; but such presumption necessarily varies with the circumstances (*m*). A person appointed under sects. 116, 117, and 124 of the Larceny Act, 1890, to carry on the business of a person who has become of unsound mind is not personally liable for the price of goods ordered (*n*). In the case of a railway company issuing tickets for carrying over the lines of other companies, the issuing company is presumptively agent for the other companies as to the carriage over their lines according to the traffic arrangements; and each company, so far as it undertakes the carrying, is presumptively a principal; while the issuing company may also appear expressly liable on the entire contract (*o*).—Upon this principle an undertaking by a solicitor on behalf of a client, for some act to be done by the latter, is construed presumptively as charging the client and not the solicitor (*p*); but in the exercise of its jurisdiction over solicitors, as officers of the court, the court is not bound strictly by the law applicable to contractual obligations (*q*).

"An agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other; that is, the contract may be such as to make the principal as well as the agent himself a party to the contract" (*r*). Where goods are bought by a broker, charging himself as buyer in the bought and sold notes, both broker and principal are pre-

Principal and agent both contracting parties.

C. 78; 2 Sm. L. C. 368; *Frans v. Evans* (1835), 3 A. & E. 132; *Fisher v. Marsh* (1865), 34 L. J. Q. B. 177; 6 B. & S. 411.

(*m*) Sale of Goods Act, 1893, s. 32; *Davies v. Peck* (1799), 8 T. R. 330. See *G. W. Ry. v. Bagg* (1885), 51 L. J. Q. B. 599; 15 Q. B. D. 625.

(*n*) *Phonphon v. Burkinshaw* (1908), 77 L. J. K. B. 961; (1908) 2 K. B. 572.

(*o*) See *Faulkes v. Met. Dist. Ry.* (1880), 49 L. J. C. P. 361; 5 C. P. D. 157; *Hooper v. L. & N. W. Ry.* (1881), 50 L. J. Q. B. 103.

(*p*) *Downman v. Williams* (1845), 14 L. J. K. B. 226; 7 Q. B. 103; *Leves v. Nicholson* (1852), 21 L. J. Q. B. 311; 18 Q. B. 503. See *Mayberry v. Mansfield* (1846), 16 L. J. Q. B. 102; 9 Q. B. 754. (*q*) *Senior v. Butt* (1827), 5 L. J. O. S. K. B. 136; *Re Hallowell* (1815), 14 L. J. K. B. 225; 2 Dowl. & L. 919; *Ex p. Hales* (1907), 76 L. J. K. B. 931; (1907) 2 K. B. 539.

(*r*) *Per cur. Elbinger Gesellschaft v. Clegg* (1873), 42 L. J. Q. B. 151; L. R. 8 Q. B. 318.

PART II.

sumptively liable, so that the seller may charge either (*s*). And the liability of a broker under the rules of the Stock Exchange does not exclude the liability of his principal (*t*). So where goods are shipped under a bill of lading signed by the master, the shipper may charge either the master who signs the contract or the owner of the ship for whom the master acts (*u*).

Agent liable
by usage of
trade.

Where the contract purports to bind the principal only, as in the case of brokers' notes expressed in the terms bought or sold "for," or "on account" of, a principal, the broker may also be liable to his employer for the due performance of the contract by a usage of the trade; as a usage that if the principal is not named in or at the time of the contract the broker shall be liable (*x*); or a usage that if the principal fail to pay the agent shall be liable (*y*). Evidence of usage of the liability of the agent is not inconsistent with the terms of a contract which purports to bind the principal; but evidence of usage that the agent should become liable instead of the principal would contradict such contract and is inadmissible (*z*). And if an agent has contracted in writing so as to make himself personally liable, evidence of usage in discharge of his liability is inconsistent and inadmissible (*a*).

Election to
charge
principal or
agent.

Where the principal and the agent are both liable, the creditor has the election which to sue. "In general the question of election can only be properly dealt with as a question of fact: but there may be cases in which the act of the contractee in regard to his dealings with or proceedings against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal" (*b*). Where the creditor sued the contracting agent to judgment, he was taken to have made a conclusive election which precluded him from suing the principal, though the judgment failed of satisfaction through the bankruptcy of the agent; but no

(*s*) *Calder v. Dobell* (1871), 40 L. J. C. P. 224; L. R. 6 C. P. 486.

(*t*) *Mortimer v. McCullan* (1840), 9 L. J. Ex. 73; 6 M. & W. 58.

(*u*) *Priestley v. Fernie* (1865), 34 L. J. Ex. 176; 3 H. & C. 977.

(*x*) *Hunfrey v. Dale* (1858), 27 L. J. Q. B. 390; E. B. & E. 1004; *Fleet v. Merton* (1871), 41 L. J. Q. B. 49; L. R. 7 Q. B. 126; *Hutchinson v. Tatham* (1873), 42 L. J. C. P. 260; L. R. 8 C. P. 482.

(*y*) *Imperial Bank v. Lond. & Kath. Docks* (1877), 46 L. J. C. 335; 5 Ch. D. 195.

(*z*) *Trueman v. Loder* (1810), 9 L. J. Q. B. 165; 11 A. & E. 589; *Pike v. Ongley* (1887), 56 L. J. Q. B. 673; 18 Q. B. D. 708.

(*a*) *Mager v. Atkinson* (1837), 6 L. J. Ex. 115; 2 M. & W. 440. See *Johnston v. Ushorne* (1841), 11 A. & E. 519.

(*b*) *Per cur. Curtis v. Williamson* (1874), 41 L. J. Q. B. 29; L. R. 10 Q. B. 59.

legal proceeding short of judgment would have that effect (c). The filing of an affidavit of proof in bankruptcy against the agent, on which no further proceeding was taken or dividend received, was held not to preclude a subsequent action against the principal (d); but where the creditor took an active part at a meeting of the creditors of the agent, and there was considerable delay in proceeding against the principal, it was held that there had been an election to look to the agent (e). Taking the contract in the name of the agent after demanding the name of the principal does not exclude the liability of the latter; nor does a demand of payment made upon the agent operate as an election to charge him only (f). Nor does the taking of bills drawn by the agent in payment, which are afterwards dishonoured (g). But the creditor may by his conduct, such as is delay in charging the principal, reasonably lead him to infer that the creditor looked to the agent only, and thereby authorised him to settle with his agent, and preclude himself from afterwards charging the principal (h).

CH. II.
SECT. II.

The contract may be made with the agent alone, without any recourse against the principal. But an agent does not become liable merely because his principal cannot be sued upon the contract; as in the case of an agent contracting for the government (i).—An agent in this country buying for a foreign principal presumptively has no authority to pledge the credit of the foreign principal, and the credit is to be considered as given exclusively to the agent (k). And where goods were sold and delivered to the order of the agent acting for a foreign principal and invoiced to the agent in his own name, it was held that the seller could not charge the principal, although he had been present and assisted at the selection of the goods (l). Conversely, the

Agent the
sole
contracting
party.

Foreign
principal.

(c) *Priestley v. Firnie* (1865), 34 L. J. Ex. 172; 3 H. & C. 977.

(d) *Curtis v. Williamson* (1871), 44 L. J. Q. B. 27; L. R. 10 Q. B. 57.

(e) *Fell v. Parker* (1882), 52 L. J. Q. B. 99.

(f) *Culder v. Dobell* (1871), 10 L. J. C. P. 221; L. R. 6 C. P. 486.

(g) *Whiteell v. Perrin*, 4 C. B. N. S. 412.

(h) *Macfarlane v. Giannacopulo* (1858), 28 L. J. Ex. 72; 3 H. & N. 860; *Lyvone v. Watson* (1880), 49 L. J. Q. B. 531;

5 Q. B. D. 414; *Davison v. Donaldson* 1882, 9 Q. B. D. 623.

(i) *Aulgy v. Hutchinson* (1848), 17 L. J. C. P. 301; 6 C. B. 266; *Dunn v. Macdonald* (1897), 66 L. J. Q. B. 120; (1897) 1 Q. B. 555.

(k) *Thomson v. Davenport* (1829), 7 L. J. O. S. K. B. 134; 9 B. & C. 78; 2 Sm. L. C. 368; *Hutton v. Bullock* (1874), L. R. 9 Q. B. 572.

(l) *Ferguson v. Gondasqui* (1812), 15 East, 63; 2 Sm. L. C. 355; *Addison v. Gondasqui* (1812), 4 Taunt. 573; 2 Sm. L. C. 361.

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Charter
party with
cesser of
liability.

foreign principal is presumptively not entitled to sue upon the contract made by the agent, for the right to sue and be sued are correlative (*m*); though he may be entitled to sue in respect of his property in goods or money dealt with under the contract (*n*). —But it is competent to the agent to contract for the foreign principal exclusively, without recourse to himself, as by means of a written contract to that effect (*o*). In the case of a partner in a foreign firm resident in this country and buying goods on account of the firm, the contract presumptively binds the firm and may be charged against all the partners according to the general principles of partnership agency (*p*).

In charter parties made by an agent in his own name, it is usual to insert an express clause, that as the charter party is made on behalf of another, the liability of the charterer shall cease upon the shipping of the cargo; thus leaving the shipowner to his remedies against the principal, or against the consignee of the cargo, or to his lien upon the cargo; and the clause may expressly provide for a lien upon the cargo in substitution for the liability of the charterer in whole or in part (*q*). The effect of such clause is to exempt the agent from liability for any breaches occurring after the cargo is shipped; and as to breaches occurring before, it is a question of construction how far he remains liable. The presumption is that the liability continues; but by express unequivocal terms liability may be excluded for all breaches as well before as after the shipping of the cargo (*r*). The lien upon the cargo would be construed as presumptively substituted for and co-extensive with the liabilities excluded by the clause of cesser (*s*). And the rule of construction has been laid down, that "where the words of the absolving part of the clause plainly show that *all* liability is to cease on loading, it is to cease both as to antecedent

(*m*) *Ellinger Gesellschaft v. Clape* (1873), 42 L. J. Q. B. 151; L. R. 8 Q. B. 313; *Milford v. Maspons* (1883), 53 L. J. Q. B. 33; 8 Ap. Ca. 874.

(*n*) *Reiburg v. Bruckner* (1858), 27 L. J. C. P. 90; 3 C. B. N. S. 872; *Kaltenbach v. Lewis* (1885), 55 L. J. C. 58; 10 Ap. Ca. 617.

(*o*) *Green v. Kopke* (1856), 25 L. J. C. P. 297; 18 C. B. 549; *Malcolm v. Hoyle* (1893), 63 L. J. Q. B. 1.

(*p*) *Bottomley v. Nuttall* (1858), 28 L. J. C. P. 110; 5 C. B. N. S. 122.

(*q*) *Bannister v. Breslau* (1867), 36 L. J. C. P. 195; L. R. 2 C. P. 497;

Gray v. Carr (1872), L. R. 6 Q. B. 522; *Kish v. Cory* (1875), 44 L. J. Q. B. 105; L. R. 10 Q. B. 553; *Lister v. "van Haansbergen"* (1876), 45 L. J. Q. B. 435; 1 Q. B. D. 269.

(*r*) *Christofferson v. Hansen* (1872), 41 L. J. Q. B. 217; L. R. 7 Q. B. 509; *Lockhart v. Falk* (1874), 41 L. J. Ex. 105; L. R. 10 Ex. 132; *Waystaff v. Anderson* (1880), 49 L. J. C. P. 485; 5 C. P. D. 171.

(*s*) *Clink v. Radford* (1891), 60 L. J. Q. B. 388; (1891) 1 Q. B. 625; *Hansen v. Harrold* (1894), 63 L. J. Q. B. 744; (1894) 1 Q. B. 612.

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and future liabilities, and without regard to any lien; but, where the words of the absolving part are open to either interpretation, then, without regard to lien, liability as to future transactions is not to accrue; but liability as to antecedent breaches is to cease only so far as an equivalent lien is given" (t). Where the charterer, being the real principal, contracts as agent only, with the above clause of cesser of liability, he may sue or be sued as principal; for the clause does not apply to him in that character (u). And if he claims as consignee under a bill of lading incorporating the conditions of the charter party, the clause of cesser is not included, because inconsistent with the bill of lading (x). The clause receives the same construction in favour of a charterer who contracts in his own name; and a waiver of the lien by the shipowner delivering the goods at his request does not revive the liability as charterer (y).

"If a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may have in the meantime debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal" (z). And the same rule presumptively applies, where the seller knew that he was dealing with an agent, but who did not disclose the name of his principal, so that there was no opportunity of debiting the latter (a). And where the principal is named, taking the contract in the name of the agent as party does not necessarily discharge the principal (b).—Upon the same principle an undisclosed or dormant partner of a firm may be sued jointly with the ostensible partners upon a contract with

Liability of
undisclosed
principal.

(t) *Per cur.* *French v. Gisher* (1876), 1 C. P. D. 741; *affd.* (1877), 46 L. J. C. P. 320; 2 C. P. D. 246.

(u) *Schmidt v. Avery* (1851), 20 L. J. Q. B. 228; 16 Q. B. 655.

(x) *Gallischen v. Stewart* (1883), 53 L. J. Q. B. 173; 13 Q. B. D. 317. See *Timperley S.S. Co. v. Smyth* (1905), 74 L. J. K. B. 876; (1905) 2 K. B. 791.

(y) *Sanguinetti v. Pacific Steam Nav. Co.* (1876), 46 L. J. Q. B. 105; 2 Q. B. D. 238.

(z) *Tenterden, C. J., Thomson v. Davenport* 1829, 7 L. J. O. S. K. B. 134; 9 R. & C. 86; 2 Sm. L. C. 368.

See *per cur.* *Armstrong v. Stokes* (1872), 41 L. J. Q. B. 256; L. R. 7 Q. B. 603.

(a) *Thomson v. Davenport* (1829), 7 L. J. O. S. K. B. 134; 9 R. & C. 78; 2 Sm. L. C. 368; *Irvine v. Watson* (1880), 49 L. J. Q. B. 531; 5 Q. B. D. 414.

(b) *Edler v. Dabell* (1871), 40 L. J. C. P. 221; L. R. 6 C. P. 486.

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Right of
undisclosed
principal.

the firm; or the ostensible partners may be sued alone as being the actual parties to the contract (c).

It is also "a well-established rule of law, that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases" (d). Accordingly where a trustee purported to sell under the trusts and powers of a will, and it appeared from the particulars of sale that he could not show a complete title in himself to sell the property, he was held entitled to enforce specific performance against the purchaser, having been authorised, prior to the sale, by all the parties interested beneficially to sell the property (e). The rule applies to foreign principals and agents; but not to a foreign principal contracting through an English agent, the contract in the latter case being presumptively made with the agent exclusively of the foreign principal (f).—Upon this principle where a loan is made of the money of a firm by one of the partners, all the partners may join in suing for it, upon proof that the money was lent upon a partnership account; but the mere fact of the money being partnership assets is not conclusive, because it may represent a drawing on account by the partner making the loan or another authorised withdrawal of the assets as between himself and his co-partners (g). So it was held that all the partners of a firm might sue upon a guarantee given to one of them to secure a loan of the partnership money (h). So if one partner sells partnership property on behalf of the firm, all the partners may join in suing for the price; but if he sells it

(c) *De Montfort v. Saunders* (1830), 9 L. J. O. S. K. B. 51; 1 B. & Ad. 398; *Davis v. Morris* (1883), 52 L. J. Q. B. 401; 10 Q. B. D. 436. See *Ex p. Blain* (1879), 12 Ch. D. 522.

(d) *Per cur. Sims v. Bond* (1833), 5 B. & Ad. 393; *per cur. Spurr v. Cass* (1870), 39 L. J. Q. B. 250; L. R. 5 Q. B. 627.

(e) *Re Baker and Salmon's Contract* (1906), 76 L. J. C. 235; (1907) 1 Ch. 238.

(f) *Mildred v. Maspoor* (1883), 53 L. J. Q. B. 33; 8 Ap. Ca. 874.

(g) *Alexander v. Barker* (1831), 1 L. J. Ex. 40; 2 Cr. & J. 133; *Crooke v. Sealey* (1848), 17 L. J. Ex. 286; 2 Ex. 746; *Alliance Bank v. Kearsley* (1871), 40 L. J. C. P. 249; L. R. 6 C. P. 433; *Barkhouse v. Charlton* (1878), 8 Ch. D. 444.

(h) *Garrett v. Handley* (1824), 4 B. & C. 664.

as his own they cannot charge the buyer upon the contract of sale (*i*). And where goods are bought by one person in his own name acting on account of several others who are interested in the purchase all may join in suing the seller (*k*). Upon the same principle where a business is carried on by and in the name of two persons for the benefit of one of them only, he may sue alone, as being the principal, upon a contract made with both in the course of the business (*l*). But in all cases the principal must adopt the contract as made by his agent, though it differ in its terms from the authority given (*m*).—Upon a similar principle, where money of the principal has been obtained from an agent by mistake or fraud, either the principal or the agent may in general sue upon the implied contract for repayment (*n*).

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The rule applies in general to contracts in writing, not under seal, so far as is consistent with the writing: "it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal" (*o*). Evidence is not admissible to discharge the person who appears as party upon the written contract, nor to contradict the writing as to the description of the party as principal: unless his name or description is so inserted by mistake, and contrary to the true contract between the parties (*p*). So where the policies of a mutual assurance associa-

Contracts in writing.

(*i*) *Lucas v. De la Cour* (1813), 1 M. & S. 249; *Skinner v. Stocks* (1821), 4 B. & Ald. 437; *Robson v. Drummond* (1831), 9 L. J. O. S. K. B. 187; 2 B. & Ad. 303.

(*k*) *Cothay v. Fennell* (1830), 8 L. J. O. S. K. B. 302; 10 B. & C. 671; *Phelps v. Lyle* (1839), 8 L. J. Q. B. 236; 10 A. & E. 413.

(*l*) *Spurr v. Cass* (1870), 39 L. J. Q. B. 249; L. R. 5 Q. B. 656.

(*m*) *Lucas v. De la Cour* (1813), 1 M. & S. 250; *Smethurst v. Taylor* (1844), 14

L. J. Ex. 86; 15 M. & W. 545.

(*n*) *Holt v. Ely* (1853), 1 E. & B. 795; *Colonial Bank v. Exchange Bank* (1886), 55 L. J. P. C. 14; 14 Ap. Ca. 81.

(*o*) *Perour, Higgins v. Senior* (1811), 1 L. J. Ex. 199; 8 M. & W. 814; *Torrington v. Lowe* (1869), 38 L. J. C. P. 121; L. R. 4 C. P. 26.

(*p*) *Jones v. Littlehale* (1837), 6 L. J. K. B. 169; 6 A. & E. 486; *Humble v. Hunter* (1818), 17 L. J. Q. B. 310; 12 Q. B. 310; *Holding v. Elliott* (1850), 29 L. J. Ex. 134; 5 H. & N. 117; *Wake*

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tion are expressly restricted to members, a party interested as undisclosed principal cannot sue or be sued on a policy made by a member (*q*).—The same principle applies with contracts required to be in writing by the Statute of Frauds; the unnamed principal may sue and be sued upon the written contract signed by the agent in his own name (*r*).

Bills of exchange.

Bills of exchange and promissory notes are exceptions to this rule. According to the law merchant by which bills of exchange were regulated, and which was made applicable to promissory notes by Statute 3 & 4 Anne, c. 8, no person could be sued unless he appeared as party by name or designation on the face of the instrument; nor could any person sue unless he was named therein as payee or promisee, or unless he became entitled as indorsee or bearer (*s*). A bill of exchange cannot be sued upon as such unless it be accepted by the person (or some agent acting for him) named or otherwise indicated with reasonable certainty therein as the drawee to whom it is addressed (*t*); and any other person purporting to accept would not be liable, unless his signature could be construed as binding him to a collateral guarantee (*u*). Therefore, no person can sue or be sued as an undisclosed principal upon these instruments.—Hence a person who signs or accepts a bill or makes a promissory note in his own name, although he describes himself as agent, trustee, or the like, is taken to be personally liable, in favour of the validity of the instrument; unless he expressly on the face of the bill or note excludes all personal liability (*x*). If the parties to a bill or note describing themselves as "directors" or "secretary" of a company, do not expressly state that they are acting on behalf of the company, they are held personally liable (*y*); and if directors sign a bill or note in form

Bills signed by agent.

Bills signed by directors.

v. *Harrop* (1861), 31 L. J. Ex. 151; 1 H. & C. 202.

q *United Kingdom Asser. v. Nevill* (1887), 56 L. J. Q. B. 522; 19 Q. B. D. 110; *Montgomery v. United Kingdom Asser.* 1891, 60 L. J. Q. B. 429; (1891) 1 Q. B. 370. See *Marine Insurance Act*, 1906, s. 85.

(*t*) *Bateman v. Phillips* (1811), 15 East, 272; *Trueman v. Loder* (1840), 9 L. J. Q. B. 165; 11 A. & E. 589.

(*s*) *Emly v. Lye* (1812), 15 East, 7; *Miles' claim* (1871), 43 L. J. C. 732; L. R. 9 Ch. 635; confirmed by *Bills of Exchange Act*, 1882, s. 23.

(*r*) *Bills of Exchange Act*, 1882, ss. 5,

6, 17, 26; *Davis v. Clarke* (1841), 13 L. J. Q. B. 305; 6 Q. B. 16; *Lindas v. Bradwell* (1848), 17 L. J. C. P. 121; 5 C. B. 583; *Fiddler v. Marshall* (1861), 30 L. J. C. P. 158; 9 C. B. N. S. 606.

(*u*) *Steele v. McKinlay* (1881), 5 Ap. Ca. 754; *Re Bernard* (1886), 55 L. J. C. 935; 32 Ch. D. 447.

(*x*) *Bills of Exchange Act*, 1882, s. 26; *Leadbitter v. Farrow* (1816), 5 M. & S. 345; *Mare v. Charles* (1856), 25 L. J. Q. B. 119; 5 E. & B. 978; *Price v. Taylor* (1860), 29 L. J. Ex. 331; 5 H. & N. 510; *Gray v. Raper* (1866), L. R. 1 C. P. 694.

(*y*) *Penkirt v. Cornell* (1850), 19 L. J.

joint and several, they are taken to be personally liable by reason of the several liability (z). Nor in such cases does the affixing the seal of the company exclude their personal liability, where the parties do not use terms to exclude it (a). On the other hand, if they sufficiently express that they sign or accept on behalf of the company they would not be personally liable; and the bill or note may then bind the company, if the parties in fact acted under the authority of the company (b). If the company is incorrectly named in the instrument, as by omitting the word "limited," a director or officer signing it is made personally liable by the Companies (Consolidation) Act, 1908, s. 63, which replaces s. 42 of the Companies Act, 1862 (c).—An agent signing a bill or note may exclude his personal liability by adding the words "per pro," or "by procuration of," or any equivalent expression indicating that he signs for or on behalf of a named principal (d). A person taking the bill with such signature is affected with notice of the agency, and is bound to prove that the authority to sign exists in fact and is properly executed on that occasion (e). But bankers are protected in paying in the ordinary course of business cheques and bills which are drawn upon them as payable to order on demand, though the indorsement is made by an agent without authority (f).

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Bills signed
per pro.

If the creditor contracted with the agent as principal without notice of any agency, his right to charge the undisclosed principal is subject to the allowance in account of all payments made by the principal to the agent on account of the contract before the agency was disclosed and whilst the creditor trusted to the agent only; for in such case the credit of the principal is not in any way pledged (g). If the creditor contracted professedly with an agent, as in the case of dealing with the broker or other recognised

Conditions of
charging
undisclosed
principal.

Ex. 305; 5 Ex. 381; *Bottomley v. Fisher* (1862), 31 L. J. Ex. 417; 1 H. & C. 211.

(z) *Hutley v. Storey* (1848), 18 L. J. Ex. 8; 3 Ex. 3.

(a) *Pearson v. Mark* (1871), 40 L. J. Q. B. 175; L. R. 6 Q. B. 361.

(b) *Chapman v. Southurst* (1909), 78 L. J. Q. B. 654; 1909 1 K. B. 927. See Companies (Consolidation) Act, 1908, s. 77.

(c) *Pearce v. Martyn* (1859), 28 L. J. Q. B. 28; E. B. & E. 499; *Atkins v. Wardle* (1889), 58 L. J. Q. B. 377.

(d) Bills of Exchange Act, 1882, s. 26; *Ex p. Buckley* (1815), 14 L. J. Ex. 341; 14 M. & W. 169.

(e) Bills of Exchange Act, 1882, s. 25; *Dickinson v. Walpy* (1829), 8 L. J. O. S. K. B. 51; 10 B. & C. 128; *Davidson v. Stanley* (1841), 2 Man. & G. 721.

(f) Stamp Act, 1853, s. 19; Bills of Exchange Act, 1882, s. 60; *Charles v. Blackwell* (1877), 16 L. J. C. P. 368; 2 C. P. D. 151.

(g) *Armstrong v. Stokes* (1872), 41 L. J. Q. B. 253; L. R. 7 Q. B. 598.

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Payment by
principal in
account with
agent.

agent, though the principal was not named, he has the security of the principal as well as that of the agent, and he is not affected by payments made by the principal to the agent or by the state of account between them; the principal is bound to see that his agent pays, and the giving of money to the agent for that purpose does not amount to payment unless the money is actually so applied (*h*). But in the latter case, if the creditor by conduct or representations induces the principal debtor to believe that his agent has satisfied the debt and that he may safely settle with his agent upon that footing, the creditor can only charge the principal upon the condition of allowing the state of account between the principal and the agent (*i*). Where goods were sold upon the terms of "cash on or before delivery," delivery of the goods by the seller without requiring payment was held not sufficient to justify the principal in believing that they were paid for by his agent so as to discharge himself by payment to him (*k*). The creditor by merely taking a bill or security in payment from the agent, which is dishonoured, is not precluded from afterwards charging the principal (*l*); but in such case the principal would be justified in putting the agent in funds to meet the bill, and to the extent of his advances would be exonerated against the creditor (*m*). Mere delay of the creditor in enforcing payment does not justify the principal in settling with his agent without ascertaining that he has paid the creditor, and the principal remains chargeable (*n*). And delay of the creditor pending which the principal had re-sold the goods to a buyer who had become insolvent, was held to be no answer to the claim of the creditor (*o*).

Conditions
of claim of
undisclosed
principal.

If the principal intrusted the agent with the possession of goods as the apparent owner with authority to sell in his own name, and the buyer contracted with the agent in the belief that he was the owner without notice of any agency, the principal is identified with the agent to the extent that in an action by the principal for the price, the buyer may plead payment to the agent before

h) Parke, B., *Hald v. Kenworthy* (1855), 21 L. J. Ex. 76; 10 Ex. 739; *per cur.* *Armstrong v. Stokes* (1872), 41 L. J. Q. B. 253; L. R. 7 Q. B. 598.
i) *Irvine v. Watson* (1880), 49 L. J. Q. B. 531; 5 Q. B. D. 414; *Davison v. Donaldson* (1882), 9 Q. B. D. 621.
k) *Irvine v. Watson* (1880), 49 L. J. Q. B. 531; 5 Q. B. D. 414.

l) *Macfarlane v. Giannacopulo* (1858), 28 L. J. Ex. 72; 3 H. & N. 869; *Key v. Fourick* (1876), 1 C. P. D. 715.
m) *Smyth v. Anderson* (1819), 18 L. J. C. P. 109; 7 C. B. 21.
n) *Davison v. Donaldson* (1882), 9 Q. B. D. 621.
o) *Campbell v. Hicks* (1858), 28 L. J. Ex. 70.

notice of the agency, or set-off of a debt of the agent which accrued due before notice (*p*). And private instructions to the agent restrictive of his apparent ownership and authority do not affect the rights of the buyer (*q*). -If the buyer knows that the seller is acting as an agent, a payment to the agent depends for validity against the principal, upon the authority of the agent to receive payment. A factor is presumptively authorised to receive payment by virtue of his employment; a broker is not so (*r*). A factor in advance to his principal acquires a lien upon the price of the goods for the balance of his account, and payment to him discharges the buyer to the extent of the lien, though the principal may have interposed with notice to pay to himself (*s*). The authority in a factor or agent to receive payment is presumptively restricted to payment in cash only, and does not extend to discharging the claim by a set-off of his own debt (*t*); except where the authority is coupled with an interest, as in the case of a factor having a lien for advances who may settle his claim as he thinks proper (*u*); and except where there is a usage in the trade authorising a settlement in account with the agent (*x*).

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Sect. II.

Payment to
agent.

If a factor, who by virtue of his employment is in general intrusted with the possession of goods and authority to sell in his own name, sells them to a buyer who deals with him in the belief that he is the principal, the buyer may set off a debt of the factor against the claim of the undisclosed principal for the price of the goods (*y*). But in the case of a broker, whose regular course of employment is to sell goods as agent without being intrusted with the possession or apparent ownership, the principal is not affected by any dealings between him and the buyer, except those involved in the terms of the contract; and therefore he cannot be met by a set-off of a debt of the agent (*z*). Upon the same principle, if a

Set-off of
debt of agent.

(*p*) *Borries v. Imperial Ottoman Bk.* (1873), 43 L. J. C. P. 3; L. R. 9 C. P. 38; *National Merc. Bk. v. Hampson* (1880), 49 L. J. Q. B. 480; 5 Q. B. D. 177. Cf. *Milbred v. Maspons* (1883), 53 L. J. Q. B. 33; 8 Ap. Ca. 874; *Montagu v. Forwood*, (1855) 2 Q. B. 350.

(*q*) *Ex p. Dixon* (1876), 46 L. J. Bk. 20; 4 Ch. D. 133. See ante, p. 322.

(*r*) See post, Pt. II., Chap. II., Sect. III.

(*s*) *Hudson v. Granger* (1821), 5 B. & Ald. 27; *Warner v. McKay* (1836), 5 L. J. Ex. 276; 1 M. & W. 591.

(*t*) *Kempton* (1849), 18 L. J. C. B. 687; *Prarson v. Scott*

(1878), 47 L. J. C. 705; 9 Ch. D. 198; *Pope v. Westcott* (1893), 63 L. J. Q. B. 222; 1891 1 Q. B. 272.

(*u*) *Warner v. McKay* (1836), 5 L. J. Ex. 276; 1 M. & W. 591; *Barker v. Greenwood* (1837), 6 L. J. Ex. Eq. 54; 2 Y. & C. Ex. 414.

(*x*) *Strong v. Hart* (1827), 5 L. J. O. S. K. B. 82; 6 B. & C. 160; *Cutterall v. Hindle* (1867), L. R. 2 C. P. 368.

(*y*) *Genoue v. Chagett* (1797), 7 T. R. 359; 2 Sm. L. C. 135. As to set-off, see post, p. 740.

(*z*) *Baring v. Corrie* (1818), 2 B. & Ald. 137.

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Notice of
agency.

partner, authorised to deal with the partnership property in his own name, sells to a buyer who contracts with him in the belief that he is the sole owner and without any notice of the partnership, the buyer may set off a debt of the selling partner against the joint claim of the partners for the price (*a*). Where goods were bought of an agent upon the express terms of payment by discharging a debt of the agent, it was held that if the principal had authorised the agent to act as owner, and the buyer had dealt with him in the belief that he was owner, the principal could adopt the sale only according to the terms of payment agreed upon (*b*).

But if the buyer knew the seller to be an agent, though he did not know who the principal was, he would be precluded from setting off the debt of the agent (*c*); as in dealing with a factor, knowing him to be acting in the capacity of an agent (*d*). So if the buyer was in doubt whether the seller was acting as principal or agent, and did not inquire, he cannot claim to set off his debt against the price: for the ground of his right to treat the agent as principal is that the real principal has permitted him to act as such and thereby induced the buyer to believe him to be the owner (*e*). The means of knowledge of the agency, sufficient to discredit a belief that the agent was acting as principal, would be equivalent to knowledge in excluding the set-off (*f*). And if the buyer himself deals through an agent, the knowledge of his agent that the apparent seller was a factor selling on account of a principal is equivalent to knowledge of that fact in the buyer (*g*). The buyer cannot in any case avail himself of any set-off or dealing with the agent which has arisen after receiving notice of the agency (*h*).—The claim to set off the debt of the agent is not under the statute of set-off, which applies only in the case of mutual debts between the plaintiff and the defendant, but it is allowed by an equitable extension of the statute, upon the ground that the principal claiming the

(*a*) *Stracey v. Ince* (1789), 7 T. R. 361, n. (*e*).

(*b*) *Romazotti v. Barring* (1859), 29 L. J. C. P. 30; 7 C. B. N. S. 851.

(*c*) *Gordon v. Ellis* (1816), 15 L. J. C. P. 178; 2 C. B. 821; *Semenza v. Brinsley* (1865), 34 L. J. C. P. 161; 18 C. B. N. S. 467.

(*d*) *Fish v. Kempton* (1849), 18 L. J. C. P. 206; 7 C. B. 687.

(*e*) *Cooke v. Eschby* (1887), 56 L. J. Q. B. 505; 12 Ap. Ca. 271.

(*f*) *Borries v. Imperial Ottoman Bank* (1873), 43 L. J. C. P. 3; L. R. 9 C. P. 38.

(*g*) *Dresser v. Norwood* (1864), 34 L. J. C. P. 48; 17 C. B. N. S. 466.

(*h*) *Moore v. Clementson* (1869), 2 Camp. 22; *Kaltenbach v. Lewis* (1883), 56 L. J. C. 58; 10 Ap. Ca. 615.

benefit of the contract is identified with his agent; and the set-off is a recognised mode of settling a debt with a creditor (*i*). The extension of set-off under the mutual credit clause of the Bankruptcy Act, s. 39, does not apply against the claim of the principal (*k*).

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The intervention of the principal to claim the debt operates as a revocation of the authority of the agent, and discharges the debtor from any further liability at the suit of the agent (*l*). And where a broker having sold goods in his own name referred the buyer to his principal for the completion of the sale, it was held to be equivalent to a disclosure of the principal at the sale, and the broker could not afterwards by paying the principal, though under a *del credere* liability to do so, acquire any further right against the buyer (*m*). But where a broker bought in his own name for an unnamed principal, a repudiation of the contract by the principal with the acquiescence of the broker was held not to determine the contract nor to affect the right of the broker to sue the seller (*n*).—Payment to the principal, or a set-off of debts by agreement with him, is in general a good answer to the suit of the agent, because the principal by his intervention shows his intention to take the benefit of the contract (*o*). But where the agent has a lien upon the debt as against his principal, as in the case of a factor for advances, or of an auctioneer for commission and charges, payment or settlement with the principal cannot be made to the prejudice of the lien, and would be no discharge against the agent until the lien is satisfied (*p*).—In an action at the suit of the agent, a debt due to the debtor from the principal, may be pleaded in reduction of the amount recoverable, but always subject to the agent's priority in respect of his lien (*q*). And the defendant may bring in the principal

Intervention
of principal.

Payment to
principal.

Set-off
against
principal.

(*i*) *Curr v. Hinchcliffe* (1825), 4 L. J. O. S. K. B. 5; 4 B. & C. 547.

(*k*) *Turner v. Thomas* (1871), 40 L. J. C. P. 271; L. R. 6 C. P. 610; *Ex p. Roy* (1877), 47 L. J. Bk. 36; 7 Ch. D. 70.

(*l*) *Atkinson v. Cotesworth* (1825), 3 L. J. O. S. K. B. 104; 3 B. & C. 647; *Rapier v. Grote* (1846), 16 L. J. Ex. 79; 15 M. & W. 359; *Phelps v. Prothero* (1855), 24 L. J. C. P. 225; 16 C. B. 370.

(*m*) *Morris v. Chasby* (1816), 4 M. & S. 566. See *Barton v. Furniss* (1858), 27 L. J. Ex. 139.

(*n*) *Short v. Spackman* (1831), 2 R. & Ad. 962.

(*o*) *Grice v. Kenrick* (1870), 39 L. J. Q. B. 175; L. R. 5 Q. B. 340.

(*p*) *Robinson v. Rutter* (1855), 24 L. J. Q. B. 250; 4 E. & B. 956; *Grice v. Kenrick* (1870), 39 L. J. Q. B. 175; L. R. 5 Q. B. 340; *Webb v. Smith* (1885), 55 L. J. C. 343; 30 Ch. D. 192.

(*q*) *Robinson v. Rutter* (1855), 24 L. J. Q. B. 250; 4 E. & B. 956; *Grice v. Kenrick* (1870), 39 L. J. Q. B. 175; L. R. 5 Q. B. 340; *Webb v. Smith* (1885), 55 L. J. C. 343; 30 Ch. D. 192. See

PART II. by a third-party notice for the purpose of claiming indemnity (*r*)

Principal acting as agent on his own account.

It may be shown that the party who contracts as agent is himself the principal, for the purpose of charging him as such, unless another principal is expressly named in the contract; and any limitation or qualification of liability stipulated for as agent, will not apply to his liability as principal. Where a charter-party purports to be made by a person as agent for another, with the express clause that as the charter-party is made on behalf of another, his liability shall cease upon the shipping of the cargo, evidence is admissible to show that he is himself the principal, and in that character not protected by the clause for the cesser of liability (*s*). And under a like charter-party the party contracting as agent may claim as being himself the principal, provided he can do so consistently with the terms of the contract (*t*).—It is no objection to the specific enforcement of a contract that an agent, such as an auctioneer, offers for sale property of which he is the owner (*u*). If a party is described in a written contract as agent for a named principal he may show that he is the real principal in order to entitle him to sue as such, unless the contract be one in which the skill or solvency of the person who is named as principal may reasonably be considered as a material motive inducing the contract (*x*); or where the party entered into the contract with a view to exercise a right of set-off against the person named as principal (*y*).—But it is not open to a party who contracts in writing as agent for an unnamed principal to show that he is himself the principal (*z*).

Agent dealing with his own principal.

An agent employed to sell cannot himself become the buyer, nor can an agent employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he thinks proper (*a*). Thus a broker instructed to buy stock and

Bankes v. Jarvis (1903), 72 L. J. K. B. 267; (1903) 1 K. B. 549.

Order XVI. r. 48; see *Es p. Smith* (1876), 4 L. J. Bk. 116; 2 Ch. D. 51.

Carr v. Jackson (1852), 21 L. J. Ex. 137; 7 Ex. 382.

(*t*) *Schmalz v. Avery* (1851), 20 L. J. Q. B. 228; 16 Q. B. 555; *Harper v. Fingers* (1855), 75 L. J. K. B. 867; 1909 2 K. B. 549.

(*u*) *Flint v. Woodin* (1852), 22 L. J. C. 92; 9 Ha. 618.

(*x*) *Fillowes v. Gwydyr* (Lord, 1829), 5 L. J. O. S. C. 43; 1 Russ. & M. 83; *Rayner v. Grote* (1846), 16 L. J. Ex. 79; 15 M. & W. 359. See note, p. 18.

(*y*) See *Jarvis v. Chapple* (1815), 2 Chit. 387.

(*z*) *Sharman v. Brandt* (1871), 40 L. J. Q. B. 312; L. R. 6 Q. B. 720.

(*a*) *Rothschilde v. Brookman* (1831), 5 Bligh, N. S. 165; *Tyrrell v. Bank of London* (1862), 31 L. J. C. 369; 10 H. L. C. 26; *Luddy's Trustee v. Peard* (1886),

selling his own is liable to refund the difference between the contract and the market prices (*b*). An agent to buy shares cannot buy them on his own account and sell them to his principal at an advanced price; and would be compelled to account to his principal for the difference (*c*). A broker, having commissions to buy goods, cannot buy in on his own account and resell to his principals as if he had bought for them severally; nor is such course of dealing authorised by the usage of a market, of which the principal has no notice (*d*).

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Sec. 11.

A person contracting professedly as agent for another, but without the authority he professes to have, cannot on that account merely, though he knew that he had not authority, be charged personally with the contract (*e*). And the contract does not bind the principal, unless he subsequently ratifies the authority (*f*). But "a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist" (*g*). And the principle extends further than the case of contracts, to any transaction induced by the assertion of authority, which turns out to be untrue to the injury of the person to whom it is made (*h*). The profession of authority is vital to the establishment of liability upon this footing (*i*); and the right of action of course depends upon the representation actually made (*k*). The liability of an agent upon his implied warranty of authority, to the person acting upon it, exists independently of any fraudulent intention (*l*). And the

Contracting
as agent
without
authority.

Warranty of
authority.

55 L. J. C. 881; 33 Ch. D. 500; *Carroll v. Burtch* (1888), 57 L. J. C. 552; 12 Ap. Ca. 652.

b *Waddell v. Blackey* (1879), 48 L. J. Q. B. 517; 4 Q. B. D. 678.

c *Kimber v. Barber* (1872), L. R. 8 Ch. 56.

d *Robinson v. Mallett* (1875), 44 L. J. C. P. 362; L. R. 7 H. L. 302.

e *Levens v. Nicholson* (1852), 21 L. J. Q. B. 311; 18 Q. B. 503; *Coventry's case* (1890), 60 L. J. C. 186; 1891 1 Ch. 202.

f *Knightley v. Pinner* (1900), 70 L. J. K. B. 51; 1900 A. C. 240; 1900 L. J. K. B. 51.

g *Willes, J., Collett v. Wright* (1857), 27 L. J. Q. B. 215; 8 E. & B. 657.

h *Stacey v. Bank of England* (1903), 72 L. J. C. 402; (1903) A. C. 114; *Bank of England v. Carter* (1908), 77 L. J. K. B. 889; (1908) 2 K. B. 205.

i *Salomon v. Reimer Aktiebolaget Nordstjernan* (1905), 74 L. J. P. C. 104; (1905) A. C. 302.

k *Elkington & Co. v. Hürter* (1892), 61 L. J. Q. B. 514; (1892) 2 Q. B. 452.

l *Ex p. Pannure* (1883), 53 L. J. C. 57; 24 Ch. D. 367; *Hailbol v. Lens* (1900), 70 L. J. C. 125; (1901) 1 Ch. 344; *Stacey v. Bank of England* (1903), 72 L. J. C. 402; (1903) A. C. 114.

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agent may be charged with damages to the full value of the contract which he professes to make, upon the presumption, in the absence of evidence to the contrary, that the supposed principal would have been able and willing to perform it (*m*); and with all the costs and charges of an action against the principal which failed from defect of the authority to bind him (*n*). The action may be brought against both principal and agent, claiming relief against the principal upon the footing that there is a valid contract, with an alternative claim against the agent for breach of warranty of authority (*o*).—Upon the same principle directors of a company assuming to act on behalf of the company are held impliedly to warrant that they have in fact the authority they assume to exercise; as in borrowing money or issuing debentures, they are taken to warrant that the borrowing powers of the company have not been exhausted (*p*).

Notice of authority.

But if the party contracting with the agent has notice of his authority as a matter of fact, and it is merely a question of law how far his authority exists or extends, as in the case of a solicitor or an agent acting for the Crown, or any other agent of recognised legal character, or that the agent's authority is in fact limited, there is no remedy against the agent, unless, perhaps, there be fraud in fact (*q*). So the ordinary powers of the directors of a company are taken to be known to persons contracting with them; and unless they assume an authority depending upon some particular matter of fact, they are not personally liable if the contract fails to bind the company (*r*). It has also been held that a wife whose husband went abroad leaving her with power to pledge his credit for necessities, was not liable to pay for meat supplied after revocation of the authority by her husband's death, upon the ground that the continuance of the professed authority under such circumstances depended upon a fact which was equally

(*m*) *Ex p. Pannure* (1883), 53 L. J. C. 57; 24 Ch. D. 367; *Firbank v. Humphreys* (1886), 56 L. J. Q. B. 57; 18 Q. B. D. 54; *Meek v. Wendt* (1888), 21 Q. B. D. 126.

(*n*) *Hughes v. Graeme* (1864), 33 L. J. Q. B. 335; *Spedding v. Nevell* (1869), 38 L. J. C. P. 133; L. R. 4 C. P. 212.

(*o*) *Honduras Ry. v. Lefevre* (1877), 46 L. J. Ex. 391; 2 Ex. D. 301; *Bennetts v. McIlraith* (1896), 65 L. J. Q. B. 632; (1896) 2 Q. B. 464.

(*p*) *Weeks v. Propert* (1873), 42 L. J. C. P. 129; L. R. 8 C. P. 427; *Firbank v. Humphreys* (1886), 56 L. J. Q. B. 57; 18 Q. B. D. 54.

(*q*) *Saffron Walden Bg. Soc. v. Rayner* (1880), 49 L. J. C. 465; 14 Ch. D. 406; *Dunn v. Macdonald* (1897), 66 L. J. Q. B. 420; (1897) 1 Q. B. 555; *McMann v. Fortescue* (1907), 76 L. J. K. B. 393; (1907) 2 K. B. 1.

(*r*) *Beattie v. Ebury (Lord)* (1874), 44 L. J. C. 20; L. R. 7 H. L. 102.

within the knowledge of both the contracting parties (*s*); and where a solicitor continued to act in legal proceedings for a company, which had, unknown to him, been dissolved, he was held to be free from liability (*t*). These decisions may be supported upon the ground stated, but must certainly be considered of doubtful authority (*u*).

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(*s*) *Smout v. Ilbery* (1842), 12 L. J. Ex. 357; 10 M. & W. 11.

(*t*) *Salton v. New Beeton Co.* (1899), 69 L. J. C. 20; (1900) 1 Ch. 43.

(*u*) See *Collen v. Wright* (1857), 27 L. J. Q. B. 215; 8 E. & B. 649; *Yonge v. Toynbee* (1909), 79 L. J. K. B. 208; (1910) 1 K. B. 215.

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CHAPTER II.

PRINCIPAL AND AGENT.

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General and particular agents.

Agents are distinguished, in respect of authority, as being general agents, that is, agents having a generally recognised authority incident to their employment or profession, as factors, brokers, auctioneers, and the like; and particular agents, that is, agents employed for a particular occasion or purpose, acting under special instructions (*a*). General agents may be employed with special instructions modifying their general authority; but parties dealing with them are not affected by such instructions unless brought to their notice. A person having notice that an agent is acting under a particular authority is bound by the limits of his authority (*b*).

Factor.

"A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods and gives him authority to sell in his own name" (*c*). A factor is

(*a*) See *ante*, p. 322.(*b*) See *ante*, p. 321.(*c*) Abbott, C. J., *Baring v. Corrie* (1818), 2 B. & Ald. 143.

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authorised by virtue of his employment to sell upon usual terms of credit; and to receive payment of the price and to give a discharge to the buyer (*d*). The factor has no general authority to barter the goods intrusted to him for sale in exchange for other goods instead of selling them for money; and his principal may recover goods so bartered from the person to whom they have been delivered (*e*). The undisclosed principal may sue the buyer and may be sued as seller upon the contract of the factor, upon the principles and subject to the conditions already explained (*f*). Private instructions restrictive of the apparent authority due to the character of factor do not affect the contracts made by him in the course of his business, unless communicated to the other party (*g*).

A factor acquires a lien upon goods intrusted to him for sale for advances made to his principal, and for the general balance of account arising out of the employment; but not for debts incurred before the employment (*h*). And he retains the lien, though his instructions are to sell in the name of his principal, and at the price fixed by the principal (*i*). Agents who are in a similar position to factors in being intrusted with goods, as warehousemen and packers, have a similar general lien (*k*). After sale and delivery of the possession of the goods to a buyer, the factor retains a lien to the same extent upon the price and upon the right of action against the buyer, notwithstanding notice by the principal to the buyer not to pay him; and the buyer is protected in paying the factor to the extent of his lien (*l*). So an agent intrusted with goods for sale upon the terms of his accepting bills to the value of the goods, has a lien for the amount of his acceptances (*m*). But the lien of the factor does not give him an irrevocable authority to sell, against the orders of his principal, unless the advances have been made upon a special agreement to that effect (*n*).

Lien of
factor.

d *Per cur.* *Scott v. Sherman* (1743, Willes, 407; *Wiltshire v. Sims* (1808), 1 Camp. 258. See *Boden v. French* (1851), 20 L. J. C. P. 143; 10 C. B. 886.

e *Gervier v. Pile* (1820), 3 B. & Ald. 616.

f See *ante*, p. 349.

g See *ante*, p. 327.

h *Houghton v. Mathews* (1803), 3 B. & P. 485.

i *Ex p. Dixon* (1876), 46 L. J. Bk. 20; 4 Ch. D. 132. *Stevens v. Biller*

(1884), 53 L. J. C. 219; 25 Ch. D. 31.

l *Ex p. Shubbrook* (1876), 45 L. J. Bk. 118; 2 Ch. D. 489. See *Holderness v. Galtson* (1827), 6 L. J. O. S. K. B. 17; 7 B. & C. 212.

m *Hudson v. Granger* (1821), 5 B. & Ald. 27; *Warner v. McKay* (1836), 5 L. J. Ex. 276; 1 M. & W. 591; *Barker v. Greenwood* (1837), 6 L. J. Ex. Eq. 54; 2 Y. & C. Ex. 414.

n *Pacey's Felted Fabric Co.* (1876), 45 L. J. C. 318; 1 Ch. D. 631.

o *De Comas v. Prost* (1865), 3 Moo.

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Pledge by
factor.Factors Act,
1889.

At common law, a person in possession of goods could not in general give to another, by sale or pledge, a better title to the goods than he himself had; and though a factor had a general authority to sell, he had no such authority to pledge goods, even for the amount of his lien (*o*).—Now by the Factors Act, 1889 (which repeals and replaces the previous Factors Acts), it is enacted, s. 2 (1), “where a mercantile agent (*p*) is, with the consent (*q*) of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business (*r*) of a mercantile agent, shall, subject to the provisions of this Act, as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.” Sect. 2 (2) of the above Act protects a sale or pledge of the goods made after the owner has withdrawn his consent, provided the person taking under it has not notice that the consent has been determined (*s*). And by sect. 2 (4), “For the purposes of this Act, the consent of the owner shall be presumed in the absence of evidence to the contrary.”—By sect. 4, where a mercantile agent pledges goods for an antecedent debt, “the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge” (*t*).

Broker.

A broker is an agent employed to buy and sell goods, differing from a factor in not being intrusted with the possession of the goods, and in not having authority to contract in his own name or to receive payment. Hence a broker, signing or expressing himself in bought and sold notes as broker for a principal, whether named or not, is presumptively not a contracting party, and cannot sue or be sued personally (*u*). But he may be made a

P. C. N.S. 158; *Smart v. Saunders* (1848), 17 L. J. C. P. 258; 5 C. B. 895.

(*o*) *M'Combie v. Davies* (1805), 7 East, 5.
(*p*) *Weiner v. Harris* (1909), 79 L. J. K. B. 342; (1910) 1 K. B. 285.

(*q*) See *Oppenheimer v. Fraser* (1907), 76 L. J. K. B. 806; (1907) 2 K. B. 50.

(*r*) *Oppenheimer v. Attenborough* (1907), 77 L. J. K. B. 209; (1908) 1 K. B. 221; *Oppenheimer v. Fraser* (1907), 76 L. J.

K. B. 806; (1907) 2 K. B. 50.

(*s*) See *Fuentes v. Montis* (1869), 38 L. J. C. P. 95; L. R. 4 C. P. 93.

(*t*) *Kaltenbach v. Lewis* (1885), 55 L. J. C. 58; 10 Ap. Ca. 617.

(*u*) *Fowkes v. Lamb* (1861), 31 L. J. Q. B. 98; *Fairlie v. Fenton*, 39 L. J. Ex. 107; L. R. 5 Ex. 169; *Southwell v. Bowditch* (1876), 45 L. J. C. P. 630; 1 C. P. D. 374.

party by the express terms of the contract, though known to be, and described in the contract as, a broker (*x*). And by the express terms of his employment or by the usage of trade he may be personally liable to his principal for the validity and performance of the contracts made by him (*y*). "If the broker's authority be specially limited, the party dealing with the broker has still a right to consider all that is done by the broker within the scope of his general authority as binding on the principal, unless he has notice of the special limitation" (*z*).

The employment of a broker in a particular trade or market authorises him to contract according to the usages of the trade or place, so far as they are not inconsistent with the employment as broker: the principal "gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character" (*a*). And it is immaterial whether the employer is informed in fact of the particular usages, provided they prevail generally in the trade or market, and are consistent with the relation of broker (*b*). The authority of a broker may be thus limited by the usage of the trade to the day on which it is given (*c*). He may be authorised by the usage of trade to sell in his own name, with an indemnity from liability, and with a lien on the price, and a right of set-off against the buyer (*d*); and to sell upon the usual credit (*e*); and to sell with a warranty (*f*); and to receive the notice of the shipment of the goods sold as stipulated for in the contract on behalf of the buyer (*g*). But the usage of a market for the broker to buy goods in his own name without making a separate contract for each of his principals, was held to be so inconsistent with the duties of a broker as not to bind a principal without notice of

Usages of
trade.

x) *Jones v. Littledale* (1837), 6 L. J. K. B. 169; 6 A. & E. 486; *Shorman v. Brandt* (1871), 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; *Hutcheson v. Eaton* (1881), 13 Q. B. D. 861.

y) *Flet v. Martin* (1871), 41 L. J. Q. B. 49; L. R. 7 Q. B. 126.

z) *Byles, J., Heyworth v. Knight* (1861), 33 L. J. C. P. 303; 17 C. B. N. S. 298. See *ante*, p. 322.

a) *Ld. Chelmsford, Robinson v. Mollett* (1875), 44 L. J. C. P. 362; L. R. 7 H. L. 836; *Blackburn v. Mason* (1893), 68 L. T. 510.

b) *Sutton v. Tatham* (1839), 8 L. J.

Q. B. 210; 10 A. & E. 27; *Bayly v. Butterworth* (1847), 17 L. J. Ex. 78; 1 Ex. 425.

c) *Dickinson v. Lilwall* (1815), 4 Camp. 279.

d) *Johnston v. Usher* (1841), 11 A. & E. 549; *Cropper v. Cook* (1868), L. R. 3 C. P. 194.

e) See *per cur.* *Scott v. Suman* (1743), Willes, 407; *Boden v. French* (1851), 20 L. J. C. P. 143; 10 C. B. 886.

f) *Dingle v. Hare* (1859), 29 L. J. C. P. 143; 7 C. B. N. S. 145.

g) *Graves v. Legg* (1857), 26 L. J. Ex. 316; 2 H. & N. 210.

PART II

Stock and
share broker.

Substitution
of nominee
of broker.

it; the effect of such usage being to change the broker from an agent to buy for his employer, into a principal selling to him (*h*).

A person employing a broker on the London Stock Exchange impliedly authorises him to act according and subject to the rules and usages of the Exchange: so far as they are reasonable and according to law (*i*).—It is a rule of the Exchange to treat its own members, in buying and selling for their clients, as the only contracting parties, and to enforce their contracts *inter se*; and therefore the employer is bound to indemnify the broker for all payments which he is compelled to make upon his contracts by the rules of the Exchange (*k*). But the indemnity does not extend to liabilities imposed upon the broker by the rules of the Exchange in consequence of his becoming a defaulter, unless the principal, being apprised of his rights and being given an option, elects to ratify the particular dealing (*l*). And as the above rule applies only between brokers as members of the Stock Exchange, it does not preclude the undisclosed principals from suing or being sued (*m*). The principal is bound by a rule of the Stock Exchange that a broker buying stock or shares, though treated as the principal, may nominate a person as substituted party to whom the right and liability attaches; and upon receiving the certificate and transfer of stock, and paying the price on behalf of his nominee, his liability to the seller is discharged (*n*). But it is an implied condition of the rule that the nominee is willing and competent to undertake the contract, and the seller may refuse him as being unwilling or incompetent at any reasonable time after having notice of the objection; he may also object that the nominee is not a responsible person in respect of means, provided he does so before the time for completing the contract with him (*o*). The seller having accepted the nominee and completed

(*h*) *Robinson v. Mallett* (1875), 44 L. J. C. P. 362; L. R. 7 H. L. 802.

(*i*) *Perry v. Barnett* (1885), 54 L. J. Q. B. 466; 15 Q. B. D. 388; *Harker v. Edwards* (1887), 57 L. J. Q. B. 147; *Davis v. Howard* (1889), 59 L. J. Q. B. 133; 21 Q. B. D. 691; *Blackburn v. Mason* (1893), 68 L. T. 510.

(*k*) *Taylor v. Stray* (1857), 26 L. J. C. P. 287; 2 C. B. N. S. 197; *Chapman v. Shepherd* (1867), 36 L. J. C. P. 113; L. R. 2 C. P. 228.

(*l*) *Duncan v. Hill* (1873), 42 L. J. Ex. 179; L. R. 8 Ex. 242; *Hartas v. Ribbons* (1888), 58 L. J. Q. B. 187; 22 Q. B. D. 254.

(*m*) *Mortimer v. McCallan* (1819), 9 L. J. Ex. 73; 6 M. & W. 58; *Langton v. Waite* (1868), 37 L. J. C. 345; L. R. 6 Eq. 165; *Pearson v. Scott* (1875), 47 L. J. C. 705; 9 Ch. D. 198.

(*n*) *Martel v. Paine* (1871), 40 L. J. Ex. 57; L. R. 6 Ex. 132; *Bowring v. Shepherd* (1871), 40 L. J. Q. B. 129; L. R. 6 Q. B. 309. See *Hardoon v. Betlox* (1900), 70 L. J. P. C. 9; (1901) A. C. 118.

(*o*) *Nickalls v. Merry* (1876), 45 L. J. C. 375; L. R. 7 H. L. 530. See *Heritage v. Paine* (1876), 45 L. J. C. 295; 2 Ch. D. 594.

the contract has no further claim against the broker or against his original principal (*p*).—"A member of the Stock Exchange may be a jobber, the nature of whose business is to sell stock or shares just above the market value, and to buy just below it, and make his profit of the turn of the market": but brokers are treated as principals according to the rules, there is no difference between the contracts of a broker member and of a jobber member (*q*). Mere time bargains in stocks for the payment of differences of price are wagering contracts (*r*).

CH. II.
SECT. III.
Stock jobber.

A commission agent is an agent who buys goods as principal in a foreign market for a correspondent in this country, or buys goods in this country for a correspondent abroad, charging his correspondent with the price of the goods and a commission for his services; "this is the ordinary authority given to a foreign commission merchant, who, on account of the great inconvenience that would result from establishing privity of contract between the foreign producer and the home merchant, is not allowed, far less required, to establish privity of contract between them" (*s*). The distinction between a commission agent and a vendor who consigns goods on his own account is thus pointed out: "If the consignor is a person who has contracted to supply the goods at an agreed price, the amount inserted in the invoice is the agreed price and no commission is charged. But it is also very common for the consignor to be an agent who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature. It would be a positive fraud if having bought the goods at a price including all charges below the maximum limit fixed in the order, he, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit: and in an action brought against him as an agent for not account-

Commission agent.

Distinction between vendor and commission agent.

(*p*) *Torrington (Lord) v. Lowe* (1868), 38 L. J. C. P. 121; L. R. 4 C. P. 26.

(*q*) *Blackburn, J., Maxted v. Paine* (1871), 40 L. J. Ex. 57; L. R. 6 Ex. 132.

(*r*) See post, Pt. II., Chap. IV.

(*s*) *Blackburn, J., Robinson v. Mallett* (1875), 41 L. J. C. P. 362; L. R. 7 H. L. 819. See ante, p. 313.

PART II. ing properly, this extra sum would be disallowed" (t). Accordingly, an agent who has bought upon commission cannot charge his principal for goods sold and delivered as upon a contract of sale (u); nor can the principal claim damages against the agent as upon a contract of sale, but for default in execution of his commission (x). But a commission agent is in the position of a seller as regards the property in the goods; he may retain control of the possession by taking the bill of lading to his own order, and may forward it to his own agent to hold until payment of the price or acceptance of bills for the price (y); and he has the right of stoppage *in transitu* (z). —The authority of a commission agent to buy goods in a foreign market is to be construed with reference to the usages of the place and the condition of the market at the time (a).

***Del credere*
agent.**

A broker or agent with a *del credere* commission guarantees to his principal the performance of the contracts made in execution of his agency. "A *del credere* agent, like any other agent, is to sell according to the instructions of his principal; and is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them" (b). This guarantee, being a condition upon which the agent is employed, is not a promise to answer for the debt of another within the Statute of Frauds, and therefore not required to be proved in writing (c). And in some trades such a guarantee is annexed to the employment of a broker by usage of the trade (d). It is not a primary liability of the agent, and in an action against him the principal must allege and prove a demand on the principal debtor as a condition precedent to the liability (e). A *del credere* commission does not affect the authority of the agent to contract, or the construction of the con-

(t) Blackburn, J., *Ireland v. Livingston* (1872), 41 L. J. Q. B. 205; L. R. 5 H. L. 407; *Williamson v. Barbour* (1877), 50 L. J. C. 147; 9 Ch. D. 529.

(u) *Seymour v. Psychlau* (1817), 1 B. & Ald. 14.

(x) *Cassaboglou v. Gibbs* (1883), 52 L. J. Q. B. 538; 11 Q. B. D. 797; *S. P. Salvesen v. Rederi Aktielaget Nordstjernen* (1905), 74 L. J. P. C. 104; (1905) A. C. 302.

(y) *Shepherd v. Harrison* (1870), 40 L. J. Q. B. 148; L. R. 5 H. L. 116.

(z) *Frost v. Wray* (1302), 3 East, 93.

(a) *Johnston v. Kershaw* (1866), 36 L. J. Ex. 44; L. R. 2 Ex. 82; *Ireland v. Livingston* (1872), 41 L. J. Q. B. 201; L. R. 5 H. L. 395.

(b) Mellish, L. J., *Ex p. White* (1871), 40 L. J. Bk. 73; L. R. 6 Ch. 403; *per cur.* *Morris v. Cleashy* (1816), 4 M. & S. 574.

(c) *Couturier v. Hastie* (1852), 22 L. J. Ex. 97; 8 Ex. 40.

(d) *Fleet v. Hurton* (1871), 41 L. J. Q. B. 49; L. R. 7 Q. B. 126.

(e) *Morris v. Cleashy* (1816), 4 M. & S. 566.

tract as to the parties, or give him any further rights than appear on the contract (*f*). An agent to whom goods are consigned upon the terms of accounting for them at fixed prices, if sold, and who is authorised to sell them at what price he pleases, is not a *del credere* agent as to sales made by him, nor bound to account for the money received on such sales, but is liable only as buyer of the goods at the fixed prices (*g*).

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"An auctioneer has a possession, coupled with an interest, in goods which he is employed to sell; not a bare custody like a servant or shopman. There is no difference, whether the sale be on the premises of the owner, or in a public auction room, for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell" (*h*). Accordingly an auctioneer has a general authority to sell the goods in his own name, and *primâ facie* may sue and be sued upon the contract so made (*i*). If his principal is disclosed the latter is presumptively a contracting party; but the contract may also be made with the auctioneer (*k*).—An auctioneer employed to sell goods has an implied authority to sell without reserve, but if a sale is subject to a reserve price, a bidder is bound by the actual limitation on the auctioneer's authority although the precise sum fixed as a reserve price is not known to him at the time of sale (*l*); and an auctioneer has no general authority to give a warranty of goods sold, beyond the description given by the owner for the purpose of the sale (*m*).—An auction of goods is generally upon the terms of payment upon delivery, and the auctioneer has a general authority to receive payment; but not to sell upon credit, or to receive payment otherwise than in money (*n*). Where the conditions of sale provide that the pur-

Auctioneer.

Payment to
auctioneer.

(*f*) *Morris v. Cleasby* (1816), 4 M. & S. 566; *Hornby v. Lucy* (1817), 6 M. & S. 166.

(*g*) *Ex p. White* (1871), 40 L. J. Bk. 73; L. R. 6 Ch. 397; affirmed by H. L. nom. *Turle v. White* (1873), 23 L. T. 78; 21 W. R. 465.

(*h*) *Loughborough, C. J., Williams v. Millington* (1788), 1 H. Bl. 81; *Consolidated Co. v. Curtis* (1892), 61 L. J. Q. B. 325; (1892) 1 Q. B. 495.

(*i*) *Franklyn v. Lamond* (1847), 16 L. J. C. P. 221; 4 C. B. 637; *Woolfe v. Horne* (1877), 46 L. J. Q. B. 536; 2 Q. B. D. 355.

(*k*) *Evans v. Evans* (1835), 3 Ad. & E. 132; *Fisher v. Marsh* (1865), 34 L. J. Q. B. 177; 6 B. & S. 411.

(*l*) *Rainbow v. Hawkins* (1904), 73 L. J. K. B. 641; (1904) 2 K. B. 322; *McManus v. Fortescue* (1907), 76 L. J. K. B. 393; (1907) 2 K. B. 1.

(*m*) *Payne v. Leconfield (Lord)* (1882), 51 L. J. Q. B. 642.

(*n*) *Williams v. Millington* (1788), 1 H. Bl. 81; *Sykes v. Giles* (1839), 9 L. J. Ex. 106; 5 M. & W. 645; *Williams v. Evans* (1861), 35 L. J. Q. B. 111; L. R. 1 Q. B. 352; *Johnston v. Boyes* (1899), 68 L. J. C. 425; (1899) 2 Ch. 73.

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chaser shall pay down a sum as a deposit in part payment of the purchase-money and the remainder at a future date, the authority of the auctioneer extends to receiving the deposit only (*o*). Where a deposit is paid to an auctioneer to abide the event of the sale, he holds the money as stakeholder and as the agent of both parties (*p*); unless it is paid to him "as agent" for the vendor (*q*).

Lien of auctioneer.

An auctioneer has a lien upon the goods sold, and, where he is entitled to sue, upon the price of the goods sold and delivered, for his charges (including formerly the auction duty which he was bound to pay) and his commission in respect of such goods; but he has not a general lien (*r*). The principal can intervene to claim the price from the buyer only subject to the claim of the auctioneer; and it is no answer to an action by the latter for the price of the goods, that the buyer has made payment to his principal, whilst his own claim remains unsatisfied (*s*).—An auctioneer

Indemnity to auctioneer.

is entitled to indemnity from his employer for the consequences of acting upon his authority, and to be repaid any damages which have been recovered from him by the true owner in respect of a tortious sale (*t*). And if the true owner intervenes before a sale and claims the goods, the auctioneer may set up the *jus tertii* against any claim of his employer (*u*).—The authority of an auctioneer may be revoked at any time before the sale is effected, without notice to the bidders; but it does not appear to be settled whether the presumptive authority of an auctioneer to sign a contract within the Statute of Frauds for both parties may be revoked by either, after the lot has been knocked down to a bidder (*x*). But a partial revocation or a variation of the authority may be interposed (*y*).

House and estate agent.

House and estate agents and other similar agents carry on the business of procuring tenants and purchasers of houses and land

(*o*) *Nykes v. Tiles* (1839), 9 L. J. Ex. 106; 5 M. & W. 645.

(*p*) *Gray v. Gutteridge* (1828), 6 L. J. O. S. K. B. 154; 1 Man. & R. 614.

(*q*) See *Ellis v. Goulton* (1893), 62 L. J. Q. B. 232; (1893) 1 Q. B. 350.

(*r*) *Williams v. Mallington* (1788), 1 H. Bl. 81; *Webb v. Smith* (1835), 55 L. J. C. 348; 30 Ch. D. 192.

(*s*) *Robinson v. Rutter* (1855), 21 L. J. Q. B. 250; 4 E. & B. 956. See *Grice v. Kenwick* (1870), 39 L. J. Q. B. 175; L. R. 5 Q. B. 340.

(*t*) *Adamson v. Jarvis* (1827), 5 L. J. O. S. C. P. 68; 4 Ring. 66. See *Hallbroun v. International Horse Agency* (1902), 72 L. J. K. B. 90; (1903) 1 K. B. 270.

(*u*) *Biddle v. Bond* (1865), 31 L. J. Q. B. 137; 6 B. & S. 225; *Duck v. Artingtall* (1880), 49 L. J. C. 609. See *Rogers v. Lambert* (1890), 60 L. J. Q. B. 187; (1891) 1 Q. B. 318.

(*x*) See *ante*, p. 331.

(*y*) *Manser v. Back* (1848), 6 Harv. 443.

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and other kinds of property; and generally upon the terms of the payment of a commission upon the rent or price obtained, in the event of the transaction being carried out through their services; otherwise no charge to be payable for services rendered unless expressly stipulated for, such as registration fees, advertisements, or special inquiries (c). Such an agency is revocable at any time before complete execution, and, if it is upon the above terms, without compensation for the ineffective services rendered under it (a). But if the agent executes his commission by procuring a tenant or purchaser satisfying all requirements, and the principal refuses or is unable to accept him, the latter is liable for the commission as if he had accepted him (b). And the agent is entitled to his commission upon the sale of an estate, though the negotiations were not completed by him, if he was the cause, through his services rendered for the purpose, of the estate being sold (c). But if his services did not cause the sale, he has no claim (d).—A house agent employed to let a house is liable for the consequences of negligently procuring an insolvent person as tenant (e). His employer also may refuse an improper person; but if he accepts the person offered, with knowledge of his qualifications, he cannot refuse to pay the agent's commission (f). The employment of an estate agent with instructions to procure a purchaser, merely stating particulars and price of the property, gives no authority to the agent to sign a contract of sale (g). But instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, are an authority to the agent to make a binding contract and to sign an agreement for sale (h). And an advertisement offering an estate for sale and referring to an agent for applications "to treat and view," imports no authority to sell but only to receive offers (i).

Authority
to sell.

(c) *Simpson v. Lamb* (1856), 25 L. J. C. P. 113; 17 C. B. 603; *Green v. Mules* (1861), 30 L. J. C. P. 313.

(a) *Simpson v. Lamb* 1856, 25 L. J. C. P. 113; 17 C. B. 603.

(b) *Prickett v. Badger* (1856), 26 L. J. C. P. 33; 1 C. B. N. S. 296; *Fisher v. Drewett* (1878), 48 L. J. Ex. 32.

(c) *Green v. Bartlett* (1863), 32 L. J. C. P. 261; 14 C. B. N. S. 685; *Wilkinson v. Alston* (1879), 48 L. J. Q. B. 733.

(d) *Green v. Mules* (1861), 30 L. J. C. P. 313.

(e) *Heys v. Tindall* (1861), 30 L. J. Q. B. 362; 1 B. & S. 296.

(f) *Horford v. Wilson* (1807), 1 Taunt. 12.

(g) *Humes v. Sharp* (1874), 44 L. J. C. 53; L. R. 19 Eq. 108.

(h) *Rosenbaum v. Belson* (1900), 69 L. J. C. 569; (1900) 2 Ch. 267.

(i) *Godwin v. Brind* (1868), 39 L. J. C. P. 121; L. R. 5 C. P. 299, n.

PART II.
Shipbroker.

Shipbrokers are agents employed to procure charters for ships. Here, too, the right to remuneration, whether commission or compensation for work and labour, may depend upon the completion of the contract (*k*). Commission is in general payable upon the freight stipulated in the charter-party, and is not dependent upon ship in fact earning freight; if no certain freight is stipulated, the broker becomes entitled to the value of his services as estimated by a judge or jury (*l*). The shipbroker is entitled to his commission if the transaction is effected through his services, though the details are not completed by himself (*m*).

Insurance broker.

An insurance broker is generally employed in marine insurance to procure the policy from an insurer or underwriters, to pay the premiums, and to collect the payments for the losses insured against; but he is not authorised to cancel or vary a policy once made (*n*). The broker is liable for not procuring the policy according to his instructions (*o*); and for negligence in collecting losses from underwriters (*p*); but is not bound to bring actions against the underwriters without an indemnity against the costs (*q*).—By the Stamp Act, 1891, s. 97 (2), a broker or agent making any sea insurance cannot charge his employer for commission or premiums, unless the insurance is in writing and duly stamped, and any payment by the employer contrary to this Act is deemed to be paid without consideration and remains the property of the employer.

Form of policy.

Policies are generally made by the insurance broker in his own name, and it is usual to add the clause that he makes it "as well in his name as for and in the name of all other persons to whom the same may appertain, &c."; and the action upon the policy may be brought either in the name of the broker or agent nominally effecting the insurance, or in the name of the undisclosed principal or party interested (*r*). The action may equally be brought in

(*k*) *Read v. Rann* (1830), 8 L. J. O. S. K. B. 144; 10 B. & C. 438; *Broad v. Thomas* (1830), 9 L. J. O. S. C. P. 32; 7 Bing. 99.

(*l*) *Hill v. Kitching* (1816), 15 L. J. C. P. 251; 3 C. B. 306.

(*m*) *Burnett v. Bouch* (1840), 9 C. & P. 624; *Gibson v. Crick* (1862), 31 L. J. Ex. 304; 1 H. & C. 142.

(*n*) *Xenos v. Wickham* (1867), 36 L. J. C. P. 313; L. R. 2 H. L. 296; *Universo Inacc. of Milan v. Merchants' Marine Inacc.* (1897), 66 L. J. Q. B. 564; (1897) 2 Q. B. 93.

(*o*) *Park v. Hancock* (1816), 6 Taunt. 493.

(*p*) *Bousfield v. Creswell* (1810), 2 Camp. 545.

(*q*) *The Lord of the Isles* (1894), 61 L. J. P. 15; (1894) P. 342.

(*r*) Marine Insurance Act, 1906, ss. 5, 14, 23, 85, and Sched.; *Lucena v. Craufurd* (1806), 2 Bos. & P. N. R. 269; (1808), 1 Taunt. 325; *Sutherland v. Pratt* (1843), 13 L. J. Ex. 246; 12 M. & W. 16; *Prov. Ins. of Canada v. Ledue* (1874), 43 L. J. P. C. 49; L. R. 6 P. C. 224.

the name of the undisclosed principal, though the above clause referring to the agency is omitted (*s*); and though the policy is made by a deed poll (*t*). But if the policy is made in the name and on account of the principal, the broker has no right and can neither sue nor be sued upon it (*u*).—A broker in possession of the policy is presumptively authorised to collect losses from the underwriters; but to receive payment in money only, and not by set-off in account with the underwriter, who is not discharged by such settlement as against the insured, unless the broker has in fact paid the latter (*x*). It is the usage of brokers and underwriters at Lloyd's to discharge their claims and liabilities for premiums and losses upon policies by a general settlement of accounts between them; but the assured is not bound by this mode of settlement, nor is the underwriter discharged (*y*), unless the assured knew of the usage and authorised the broker to settle in that manner; because such usage is peculiar to Lloyd's house, and is not a general usage of insurance in the City of London. If the broker pays his principal upon a presumed settlement of the account with the underwriters, he cannot after a considerable lapse of time recover the money back, though he subsequently fails in recovering from the latter (*u*). A broker who has effected a policy in his own name has a lien upon the policy for commission and for premiums paid and payable by him (*b*); and a broker with a *del credere* commission has a lien in respect of his guarantee for the payment of losses, entitling him to sue the underwriter, and if sued by the underwriter, to set off a loss upon the policy (*c*). So a broker who had insured goods for the owners and had accepted bills on account of the goods was held entitled to a lien upon the policy, and to set off losses in an action by the underwriter for premiums (*d*). It is the general practice for underwriters to limit their authority to a fixed sum on each policy; therefore the assured in dealing with an underwriter

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SECT. III.

Payment to
broker.

Lien of
broker.

(*s*) *Brooking v. Prov. Insur. of Canada* (1873), L. R. 5 P. C. 263.

(*t*) *Sunderland Marine Ins. v. Kearney* (1851), 20 L. J. Q. B. 417; 16 Q. B. 925.

(*u*) *Koster v. Eason* (1813), 2 M. & S. 112; *Baker v. Langhorne* (1816), 6 Taunt. 519.

(*x*) *Russell v. Bingley* (1821), 4 B. & Ald. 395.

(*y*) *Sweeting v. Pearce* (1861), 30 L. J. C. P. 109; 9 C. B. N. S. 534.

(*z*) *Gabay v. Lloyd* (1825), 3 L. J. O. S. R. B. 116; 3 B. & C. 793; *Stewart v.*

Aberdeen (1838), 7 L. J. Ex. 292; 4 M. & W. 211.

(*a*) *Jameson v. Stainston* (1809), 2 Camp. 546, n. See *Macfarlane v. Giannacopulo* (1858), 28 L. J. Ex. 72; 3 H. & N. 860.

(*b*) *Fisher v. Smith* (1879), 48 L. J. Ex. 411; 4 Ap. Ca. 1.

(*c*) *Koster v. Eason* (1813), 2 M. & S. 112; *Lee v. Bullen* (1858), 27 L. J. Q. B. 161; 8 E. & B. 632, n.

(*d*) *Parker v. Beasley* (1814), 2 M. & S. 423.

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Master of ship.

The master of a ship is general agent of the shipowner or person by whom he is appointed, for the management and employment of the ship; and his apparent general authority cannot be limited by private orders or conditions not known to the party dealing with him (*f*). The registered owner is presumptively responsible as principal of the person filling the position of master (*g*); but he may rebut such presumption by evidence that the master was in fact appointed by the person having possession and control of the ship under a charter, or as purchaser or mortgagee (*h*).—The master has general authority to receive goods on freight and to sign bills of lading for the carriage and delivery; but he cannot bind his employer by bills of lading for goods not shipped (*i*); nor for a greater quantity of goods than in fact shipped (*k*), unless the charter-party provides that the bill of lading shall be conclusive evidence of the quantity shipped (*l*); nor for the quality of the goods shipped (*m*). The bill of lading affords *prima facie* evidence of the matters therein stated, and it is for the party bound to displace the inference to be drawn therefrom by other evidence (*n*). As between the shipowner and charterer, a bill of lading in variation of the charter-party is, in general, ineffective (*o*). But the master may bind the shipowner by bill of lading, though the ship is under charter, if the owner retains the appointment and control of the master (*p*). The master is personally responsible to his owner for the accuracy of statements in bills of lading as to the goods shipped and time of shipment, by which the owner is bound (*q*). The master of an English ship has general authority.

Repairs and necessities.

(*e*) *Baines v. Faring* (1866), 35 L. J. Ex. 194; L. R. 1 Ex. 320.

(*f*) *Per cur. Grant v. Norway* (1851), 20 L. J. C. P. 93; 10 C. B. 687.

(*g*) *Hibbs v. Ross* (1866), 35 L. J. Q. B. 193; L. R. 1 Q. B. 534.

(*h*) *Matcheson v. Oliver* (1855), 25 L. J. Q. B. 39; 5 F. & B. 119; *Myers v. Willis* (1856), 25 L. J. C. P. 255; 18 C. B. 886; *Baumröll Mannf. von Carl Scheibler v. Furness* (1893), 62 L. J. Q. B. 201; (1893) A. C. 8.

(*i*) *Grant v. Norway* (1851), 20 L. J. C. P. 93; 10 C. B. 688.

(*k*) *Hubberst v. Ward* (1853), 22 L. J. Ex. 113; 8 Ex. 330; *Brown v. Pourll Coal Co.* (1875), 14 L. J. C. P. 289;

L. R. 10 C. P. 562.

(*l*) *Lushman v. Christie* (1887), 56 L. J. Q. B. 538; 19 Q. B. D. 333.

(*m*) *Cox v. Bruee* (1886), 56 L. J. Q. B. 121; 18 Q. B. D. 147. See *Compania Naviera Vascongada v. Churchill* (1905), 75 L. J. K. B. 94; (1906) 1 K. B. 237.

(*n*) *Smith v. Bidonin Co.* (1895), 65 L. J. P. C. 8; (1896) A. C. 70.

(*o*) *Pearson v. Goschen* (1864), 33 L. J. C. P. 265; 17 C. B. N. S. 352.

(*p*) *Sandemann v. Scurr* (1866), 36 L. J. Q. B. 58; L. R. 2 Q. B. 56; *Wehner v. Dene Steam Shipping Co.* (1905), 74 L. J. K. B. 550; (1905) 2 K. B. 92.

(*q*) *Stumore v. Breen* (1887), 56 L. J. Q. B. 401; 12 Ap. Ca. 698.

in the absence of the shipowner or his agent, to contract for whatever is reasonably necessary for maintenance of the ship and prosecution of the voyage, including repairs and borrowing of money required for wages and the use of the ship (*r*).— But he has no authority to borrow money to pay debts incurred for such purposes (*s*). He has also authority to contract for reasonable services for salvage of the ship (*t*). If he makes such contracts in his own name, the shipowner may be charged upon them as his undisclosed principal (*u*). The master had no lien as a seaman for his wages or for disbursements on account of the ship, because his possession of the ship as servant of the owner is the possession of the owner (*x*). But the maritime lien on ship and freight for wages was given to the master by the Merchant Shipping Act, 1854, s. 191, and for disbursements by the Act, 1889, s. 1. These enactments are now repealed but reproduced by the Merchant Shipping Act, 1894, s. 167 (*y*).— For the above purposes and under the same circumstances the master may hypothecate the ship and cargo by bottomry bond if the money be not otherwise obtainable (*z*). According to the laws of other countries the master has a larger authority, and the rights of parties under an hypothecation are determined by the law of the flag (*a*). According to English law, "the bottomry bond gives no remedy to the lender against the owner of the ship, nor against the owner of the cargo, personally; the remedy is *in rem* in both cases; but as between the freighter and shipowner the cargo of the former is pledged to secure the debt of the latter, and when the former has been compelled to pay the debt through the medium of the pledge, he must be reimbursed" (*b*). The master cannot hypothecate the ship or cargo, where it is practicable for him to communicate with the respective

CH. II.
SECT. III.

Lien of
master.

Bottomry
bond.

v. The Riga (1872), 41 L. J. Ad. 39; L. R. 3 A. & E. 516; *Gunn v. Roberts* (1871), 43 L. J. C. P. 233; L. R. 9 C. P. 331; *The Orienta* (1894), 64 L. J. P. 32; (1895) P. 49. See *The Heinrich Björn* (1886), 55 L. J. P. 80, 11 Ap. Ca. 270.

(*s*) *Beldon v. Campbell* (1851), 20 L. J. Ex. 342; 6 Ex. 886.

(*t*) *Anderson v. Ocean Co.* (1885), 51 L. J. Q. B. 196; 10 Ap. Ca. 107; *The Prinz Heinrich* (1877), 57 L. J. Adm. 17. See *The Respor* (1883), 52 L. J. Ad. 49; 8 P. D. 115.

(*u*) *Gordon v. Hare* (1823), 1 L. J. O. S. K. B. 70; *Priestley v. Fernie* (1865), 34 L. J. Ex. 172; 3 H. & C. 977.

(*v*) *Smith v. Plummer* (1818), 1 B. &

All. 575. See *Bristol v. Whitmore* (1861), 31 L. J. C. 467; 9 H. L. C. 391.

(*y*) See *The Sara* (1887), 56 L. J. P. 800; 14 Ap. Ca. 209; *The Castlegate* (1892), 62 L. J. P. C. 17; (1893) A. C. 38; *The Orienta* (1891), 61 L. J. Ad. 42; (1895) P. 49.

(*z*) *The Prince of Saxe-Coburg* (1838), 3 Moo. P. C. 1.

(*a*) *The Karmak* (1869), 38 L. J. A. I. 57; L. R. 2 P. C. 505; *The Gaetano and Maria* (1882), 51 L. J. Ad. 67; 7 P. D. 137.

(*b*) *Per cur. Duncan v. Benson* (1847), 17 L. J. Ex. 238; 1 Ex. 556; *affd. non. Benson v. Duncan* (1849), 18 L. J. Ex. 169; 3 Ex. 644.

PART II.

Sale of ship
or cargo.Agent of
necessity for
cargo.Manager of
ship.

owners, because his authority arises only from the necessity of the case and the impossibility of communication (*c*); and the bottomry bond is limited, as to validity and as to amount, by the necessity (*d*).—The master, under circumstances of stringent necessity, is authorised to sell the ship, and thereby make the insurers responsible as for a loss (*e*). And he may be authorised by necessity to sell cargo for repair of the ship; in which case the owner of cargo is entitled to be indemnified by the owner of ship; or he may treat the proceeds of the sale as a loan, and without any allowance for freight *pro ratâ* (*f*).—The master may also be authorised to sell cargo on behalf of the owner of the cargo, under circumstances of necessity in which he cannot communicate, nor obtain instructions from the owner (*g*). And where a sale is authorised he may receive and give a valid discharge for the proceeds (*h*). "Not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances; and, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing" (*i*); and he has a lien for such expenses upon the cargo saved (*k*). If the ship becomes incapable of completing the voyage, it is the duty of the master to tranship the cargo and forward it by another vessel, provided that it is practicable to send it to its destination in a marketable state; which depends upon its condition and the charges upon it, and the cost of transshipping and forwarding, compared with the value on arrival (*l*). The authority of the master of a foreign ship in the above cases is presumptively regulated by the law of the country to which the ship belongs (*m*).

The manager of a ship, commonly called the ship's husband, is general agent of the owners in the home port for the use and employment of the ship, including repairs and outfit for voyage,

(*c*) *Kleinwort v. Casa Marittima of Genoa* (1877), 2 Ap. Ca. 156.

(*d*) *The Pentida* (1881), 53 L. J. Ad. 78; 9 P. D. 177.

(*e*) *Colequand Marine Ins. v. Bartheaux* (1875), L. R. 6 P. C. 319; *Hall v. Jupp* (1880), 49 L. J. C. P. 721.

(*f*) *Freeman v. East India Co.* (1822), 5 B. & A. 617; *Hopper v. Burgess* (1876), 45 L. J. C. P. 377; 1 C. P. D. 137.

(*g*) *Australian Nav. v. Merse* (1872), L. R. 4 P. C. 222; *Acatus v. Burns* (1878), 47 L. J. Ex. 566; 3 Ex. D. 282;

Atlantic Mutual Ins. v. Huth (1880), 16 Ch. D. 474.

(*h*) *Ireland v. Thomson* (1847), 17 L. J. C. P. 211; 4 C. B. 119.

(*i*) *Per cur. Cargo ex Argos* (1873), L. R. 5 C. P. 165. See *Natara v. Henderson* (1872), 41 L. J. Q. B. 158; L. R. 7 Q. B. 225; *The Saronia* (1900), 69 L. J. Ad. 95; (1900) P. 252.

(*k*) *Hingston v. Wendt* (1876), 45 L. J. Q. B. 440; 1 Q. B. D. 367.

(*l*) *Atlantic Mutual Ins. v. Huth* (1880), 16 Ch. D. 474.

(*m*) *The August* (1891), 60 L. J. Ad. 57; (1891) P. 328.

engagement of master and crew, procuring cargo for freight, or letting it out on charter; but not including insurance, or borrowing money, or cancelling a charter-party (*n*). And in acting as agent he is not allowed to receive any profit by way of commission or otherwise from brokers or others with whom he deals, for matters within the scope of his duty (*o*). By the Merchant Shipping Act, 1894, s. 59, the name and address of the managing owner or of the ship's husband is required to be registered; and such person is presumptive agent of all the registered owners, but evidence is admissible that he is agent only of those persons who in fact appointed him (*p*). And a part-owner is not liable for the contracts of his co-owners or of the managing owner or ship's husband, unless he has expressly or impliedly authorised or sanctioned their agency on his behalf; for the co-owners of a ship are not in the relation of partners having a general authority to bind all within the scope of the partnership business (*q*). A majority of co-owners are entitled to employ and manage the ship, but without the power of charging any liability upon the dissenting minority (*r*).

CH. II.
SECT. III.

"One partner, by virtue of that relation, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged" *s*.—It was formerly held that a person taking a share of the profits of a business became liable, as a partner, for the debts, upon the principle that by taking profits he took the security for the debts (*t*). But subsequently, and the rule is now confirmed by statute, the liability of a person, as partner, to creditors was fixed by reference to the question whether the trade is carried on on behalf of

Partners.
Participation
in profits.

(*n*) Abbott on Shipping, p. 130; *Thomas v. Lewis* (1878), 48 L. J. Ex. 7; 4 Ex. D. 18. See *Baydon v. Gadden* (1878), 3 Ex. D. 263.

(*o*) *Williamson v. Hume* (1890), 60 L. J. C. 123; (1891) 1 Ch. 390.

(*p*) *Fryer v. Cuthbertson* (1881), 50 L. J. Q. B. 277; 6 Q. B. D. 93; see *The England* (1886), 12 P. D. 32; *ante*, p. 370.

(*q*) *Briggs v. Wilkinson* (1827), 5 L. J. O. S. K. B. 349; 7 B. & C. 30; *Robinson v. Glendon* (1835), 2 Bing. N. C. 156;

Preston v. Pamplin (1857), 27 L. J. Ex. 192; 2 H. & N. 684; *Chappell v. Reay* (1860), 30 L. J. Ex. 21; 6 H. & N. 115.

(*r*) *Per cur. Japp v. Campbell* 1887, 57 L. J. Q. B. 81.

(*s*) *Per cur. Hocken v. Bouque* (1841), 10 L. J. Ex. 361; 8 M. & W. 710; *per cur. Brettel v. Williams* (1849), 19 L. J. Ex. 121; 4 Ex. 630; Partnership Act, 1890, ss. 5, 7.

(*t*) *Wagh v. Carter* (1793), 2 H. Bl. 235.

PART II.

Loans upon
share of
profits.

the person sought to be charged as a partner; the participation in the profits being an element in determining that question, but not being in itself decisive; the test being whether the persons sharing the profits have or have not a joint or common interest in the property from the use of which the returns are derived (*u*). And where a written agreement stipulates for a share of profits, it is a question of construction upon the whole agreement, whether a partnership is created (*x*).—Where by a deed of assignment for the benefit of creditors the property and business of the debtor were vested in trustees, upon trust to carry on the business and to divide the profits rateably amongst the creditors until their debts were paid; it was held that the creditors were not liable, as partners, for debts contracted by the trustees by reason merely of their participation in the profits; nor had they by the deed constituted the trustees their agents (*y*).—By the Partnership Act, 1890, s. 2 (repealing and re-enacting 28 & 29 Vict. c. 86), “the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto.” Sect. 3 postpones the lender to other creditors for valuable consideration in case of bankruptcy or insolvency. The document to satisfy the 2nd section must show on the face of it that the transaction is one of loan (*z*). But a creditor is postponed under the 3rd section whether the transaction satisfies the requirements of sect. 2 or not (*a*). If the contract contains terms besides the receiving of a share of profits, which constitute a partnership, the loan is not within the Act (*b*). Where money is advanced upon terms giving the lender a share of the profits, an alteration of those terms making interest payable in lieu of a share of profits will

(*u*) Partnership Act, 1890, ss. 1, 2; *Cox v. Hickman* (1860), 30 L. J. C. P. 125; 8 H. L. C. 268.

(*v*) *Walker v. Hirsch* (1884), 54 L. J. C. 313; 27 Ch. D. 460; *Badeley v. Consul Bank* (1888), 57 L. J. C. 468; 38 Ch. D. 238.

(*y*) *Cox v. Hickman* (1860), 30 L. J.

C. P. 125; 8 H. L. C. 268.

(*z*) *Syers v. Syers* (1876), 1 Ap. Ca 174.

(*a*) *Ex p. Schofield* (1897), 66 L. J. Q. B. 824; 1897 2 Q. B. 195.

(*b*) *Poulton v. Drans* 1877, 16 L. J. C. 466; 5 Ch. D. 458; *Fowles v. Williams* (1886), 56 L. J. Q. B. 62.

not take the case out of the 3rd section, unless the transaction amounts to a repayment of the loan and the making of a fresh advance (c). The Act applies only to loans upon the personal security of the trader, and not to a loan upon the security of the partnership business (d), and it does not affect securities for the loan (e).—Persons may be bound as ostensible partners by apparently so trading, though not partners in fact *inter se* (f). Where a person traded with his own property under the nominal firm of himself "and son," and the son acted in the business of the firm, it was held that there was an ostensible partnership which could be made bankrupt, and that the property became partnership assets and not several assets of the father, though there was in fact no partnership between them (g). On the other hand there may be only one ostensible partner with several dormant partners sharing the partnership property; in which case the property cannot be claimed as the several assets of the acting partner as being the apparent owner to the exclusion of the dormant partners (h).—As between the partners debts and losses of the partnership are presumptively borne in proportion to the shares of profits; and they are entitled to contribution *inter se* in that proportion (i).

The general authority of a partner, even where the general partnership agreement is under seal, does not authorise the partners to execute deeds, unless a particular power be given for that purpose (k). But a partner will be bound by a deed executed on his behalf by a co-partner, with his authority and in his presence (l). In other respects the general authority of a partner is defined by the partnership business; it extends and is restricted to matters necessary and usual in the ordinary conduct of the business (m).—A partner can bind the partners in the case of contracts jointly only, and not severally; and a contract purporting to bind

Ch. 11.
Sect. 111.

Ostensible
and dormant
partners.

General
authority—
Contracts
under seal.

Joint liability
of partners.

^a *Ex p. The Trustee, Re Hillsdown*, 1893 2 Q. B. 357.

^b *Ex p. De launce* 1878, 17 L. J. Bk. 65; 7 Ch. D. 511.

^c *Ex p. Staal* 1877, 46 L. J. Bk. 63; 4 Ch. D. 789; *Baileys v. General Bank* 1888, 57 L. J. C. 408; 8 Ch. D. 238.

^d Partnership Act, 1890, s. 11; *Gurney v. Evans* 1858, 27 L. J. Ex. 166; 3 H. & N. 122; *Reynolds v. Baring* 1860, 29 L. J. C. P. 30; 7

^e B. N. S. 851, *Ex p. General Bk.* 1892 2 Q. B. 633.

^f *Ex p. Hargrave* 1878, 17 L. J. Bk. 41; 8 Ch. D. 41.

^g *Reynolds v. Baring* 1867, 36 L. J. Q. B. 247; L. R. 2 Q. B. 474.

^h Partnership Act, 1890, ss. 21, 44; *Peacock v. Peacock* 1899, 16 Ves. 49; *Tennant v. L.* 1810, 13 East, 7; *Robinson v. Armitson* 1855, 7 De G. M. & G. 239.

ⁱ *Hargrave v. Jackson* 1797, 7 T. R. 207.

^j *Evans v. Jones* 1791, 1 T. R. 715.

^k Partnership Act, 1890, ss. 5—7.

PART II.

them jointly and severally would be void as to the several liability (*n*). But partners are liable jointly and severally for a wrong committed by a co-partner in the conduct of the partnership business (*o*).

Bills and negotiable instruments.

Persons in a non-mercantile business, as in the case of a firm of solicitors, have no general authority to bind the firm by signing bills or notes, because such instruments are not required or usual in the ordinary course of the business (*p*); they may sign cheques for business payments, but not post-dated cheques, which are the same thing as bills of exchange (*q*). For the same reason a partner in a mining company (*r*), or in a farming business (*s*), presumptively could not bind the firm by signing negotiable instruments. In the case of negotiable instruments, the firm and individual partners are bound not only where the correct name or designation of the firm is used, but where the name used, though inaccurate is substantially correct and descriptive of the firm (*t*). The name of the firm may be the name of the signing partner; in which case, if he has no separate business to which it could apply, it presumptively binds the firm (*u*). It seems that the real names of all the partners may be used, though the firm has a distinctive name (*x*). As those persons only can sue or be sued upon bills and notes who appear upon the instruments as parties by their name or designation, a partner cannot bind the firm as undisclosed principals by signing his own name (*y*); unless it is at the same time the name of the firm and so used upon the instrument (*z*). But he may bind the firm by signing his own name expressly as agent on their behalf (*a*). A bill

Form of partnership bills.

Acceptance of partnership bill.

(*n*) Partnership Act, 1890, s. 9; *Macfar v. Sutherland* (1854), 23 L. J. Q. B. 229; 3 E. & B. 1.

(*o*) Partnership Act, 1890, s. 12; *Cabell v. Vaughan* (1681), 1 Wms. Saund. 472, n.; *Blyth v. Fladgate* (1890), 60 L. J. C. 66; (1891, 1 Ch. 337.

(*p*) *Healey v. Bainbridge* (1842), 11 L. J. Q. B. 293; 3 Q. B. 316.

(*q*) *Forster v. Mackreth* (1867), 36 L. J. Ex. 94; L. R. 2 Ex. 163.

(*r*) *Lickinson v. Falpy* (1829), 8 L. J. O. S. K. B. 51; 10 B. & C. 128; *Ricketts v. Bennett* (1847), 17 L. J. C. P. 17; 4 C. B. 686.

(*s*) *Greenlade v. Dover* (1828), 6 L. J. O. S. K. B. 155; 7 B. & C. 635.

(*t*) Bills of Exchange Act, 1882, ss. 6, 7; Partnership Act, 1890, ss. 4, 6, 9; *Windle v. Crouther* (1831), 9 L. J. O. S. Ex. 65; 1 Cr. & J. 316; *Forbes v.*

Marshall (1855), 24 L. J. Ex. 305; *Stephens v. Reynolds* (1860), 29 L. J. Ex. 278; 5 H. & N. 513.

(*u*) *Yorkshire Bank v. Beaton* (1880), 49 L. J. C. P. 380; 5 C. P. D. 109.

(*x*) *Newton v. Seymour* 1817, 16 L. J. C. P. 100; 3 C. B. 792.

(*y*) Bills of Exchange Act, 1882, s. 23; *Emly v. Lye* (1812), 15 East, 7.

(*z*) *South Carolina Bank v. Trice* (1828), 6 L. J. O. S. K. B. 364; 8 B. & C. 427; *Nicholson v. Ricketts* (1859), 29 L. J. Q. B. 55; 2 E. & F. 497; *Miles' claim* (1874), 43 L. J. C. 732; L. R. 9 Ch. 655. See *Yorkshire Bank v. Beaton* (1880), 49 L. J. C. P. 380; 5 C. P. D. 109.

(*a*) Bills of Exchange Act, 1882, s. 85; *Ex p. Buckley* (1845), 14 L. J. Ex. 341; 14 M. & W. 469; *Macfar v. Sutherland* (1855), 23 L. J. Q. B. 229; 3 E. & B. 1.

drawn upon a firm by their name or designation is sufficiently accepted by one of the partners signing the name of the firm or his own name; any form of acceptance being sufficient if signed by a person expressly or impliedly authorised (*b*). If not authorised, his acceptance, though purporting to be on behalf of the firm, may bind him personally (*c*). Signing a bill in blank is not a mercantile transaction within the general authority of a partner; and the holder of such a bill must prove a particular authority for it (*d*).

CH. II.
SECT. III.

A partner in a mercantile firm has general authority to borrow money for the purposes of the business; but this does not imply authority to bind the firm by opening a banking account in his own name (*e*). It is ordinary business of a solicitor to negotiate mortgages and securities for money, and to receive the money for such investments, but not to receive money for investment generally upon such securities at his discretion: and therefore he has general authority to bind his firm by receipts of the former kind, but not of the latter (*f*). It is not a usual incident of a mercantile firm to enter into a contract of guarantee, although given for the purpose of carrying into effect a partnership contract, and a partner, as such, has no general authority to bind the firm by a guarantee; but such authority may appear from a previous course of dealing, or by a subsequent ratification (*g*). A guarantee given by one of a firm of solicitors for the debt and costs of an action, in order to release a client from arrest, was held not binding upon the firm, because not within the usual business of solicitors (*h*). For the same reason a partner has no general authority to bind the firm by a reference to arbitration (*i*); nor by taking a lease of business premises (*k*); nor by joining in

Borrowing
money.

Receiving
money.

Guarantees.

b See Bills of Exchange Act, 1882, s. 17; *Lloyd v. Ashby* (1841), 9 L. J. O. S. K. B. 144; 2 B. & Ad. 23; *Re Barnard* 1886, 55 L. J. C. 935; 32 Ch. D. 417; *Wheatley v. Smithers* (1907), 76 L. J. K. B. 900; 1907, 2 K. B. 681.

c *Queen v. Van Ester* (1850), 20 L. J. C. P. 61; 10 C. B. 318; *Nicholls v. Diamond* 1853, 23 L. J. Ex. 1; 9 Ex. 154.

d *Hogarth v. Latham* (1878), 17 L. J. Q. B. 339; 3 Q. B. D. 613.

e Partnership Act, 1890, s. 7; *Alliance Bank v. Kearsley* (1871), 40 L. J. C. P. 219; L. R. 6 C. P. 433.

f *Harmon v. Johnson* (1853), 22 L. J. Q. B. 297; E. & B. 61; *Rhodes v. Mendes* 1891, 64 L. J. C. 122; 1895

1 Ch. 236; *Tondring Hundred W. Wks. v. Jones* (1903), 73 L. J. C. 11; 1903) 2 Ch. 615. See Partnership Act, 1890, s. 11; *British Homes Assoc. v. Paterson* (1902), 71 L. J. C. 872; 1902) 2 Ch. 401.

g *Sandilands v. Marsh* (1903), 2 B. & Ald. 673; *Beetel v. Williams* 1891, 19 L. J. Ex. 121; 4 Ex. 623.

h *Husham v. Young* 1841, 13 L. J. Q. B. 205; 5 Q. B. 833.

i *Hatton v. Rygh* (1858), 27 L. J. Ex. 486; 3 H. & N. 599; *Thomas v. Atherton* (1879), 48 L. J. C. 370; 10 Ch. D. 185.

k *Clements v. Norris* 1878, 47 L. J. C. 546; 8 Ch. D. 129.

PART II. partnership with another firm (*l*); nor by taking shares in a company (*m*). Nor by a bill of sale of partnership property can he effectually charge more than his own share (*n*).

Restriction
of authority.

"Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses, as a general agent for the other, is operative only between the partners themselves; and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made" (*o*). And an express revocation by a partner of the general authority of his co-partner is inoperative, unless brought to the notice of the party dealing with the latter (*p*).

Dissolution of
partnership.

The authority of a partner is revoked by dissolution of the partnership upon the retirement or death of a partner; but in the former case a retiring party will be liable to persons dealing with the firm upon the credit of his being a partner, until the dissolution is sufficiently brought to their knowledge (*q*); but the estate of a deceased partner will not be so liable (*r*). A distinction is to be drawn between persons who continue to deal, and those who deal for the first time, after the retirement. In former case an advertisement in the *Gazette* is not, and in the latter case is, notice of a dissolution or change of partnership (*s*). The concurrence of a retiring partner may be required for the proper notification of a dissolution or retirement (*t*). Where a change is made in a firm by admission or retirement of a partner, a person continuing to deal with the firm may after notice elect to charge either firm, but he cannot charge both (*u*), the obligation being changed from a primary liability to that of suretyship (*x*). An incoming partner is not liable to the then creditors of the old firm, though he may have agreed with the other partners

(*l*) *Singleton v. Knight* (1888), 57 L. J. P. C. 106; 13 Ap. Ca. 788.

(*m*) *Niemann v. Niemann* (1880), 59 L. J. C. 220; 43 Ch. D. 198.

(*n*) *Ex p. Barnett* (1889), 59 L. J. Q. B. 191.

(*o*) Partnership Act, ss. 5, 8; *per cur.* *Hawken v. Byrne* (1841), 10 L. J. Ex. 361; 8 M. & W. 710.

(*p*) *Gallway (Lord) v. Matthew* (1808), 10 East, 264; *Pole v. Leask* (1863), 33 L. J. C. 155.

(*q*) Partnership Act, 1890, s. 36; *Goode v. Harrison* (1821), 5 B. & Ald. 147; *Carter v. Whalley* 1830, 8 L. J. O. S. K. B. 340; 1 B. & Ad. 11; *Brown v. Wren* (1895), 64 L. J. Q. B. 119; (1895) 1 Q. B. 390.

(*r*) *Bagel v. Miller* (1903), 72 L. J. K. B. 495; (1903) 2 K. B. 212.

(*s*) Partnership Act, 1890, s. 36 (2); *Graham v. Hope* (1792), 1 Peake, 298; *Hart v. Alexander* (1837), 6 L. J. Ex. 129; 2 M. & W. 184; *Ex p. Central Bank*, (1892) 2 Q. B. 633.

(*t*) Partnership Act, 1890, s. 37; *Henry v. Turner* (1886), 55 L. J. C. 562; 32 Ch. D. 355.

(*u*) Partnership Act, 1890, s. 17; *Searf v. Jardine* (1882), 51 L. J. Q. B. 612; 7 Ap. Ca. 345; *British Home Assce. v. Paterson* (1902), 71 L. J. C. 872; (1902) 2 Ch. 404.

(*x*) *Rouse v. Bradford Bank* (1894), 63 L. J. C. 890; (1894) A. C. 586.

to share the debts; and a retiring partner is not discharged from the then existing debts without the consent of the creditors (*y*).

A partner may bind the firm under his apparent general authority, though he act in fraud of the firm, unless the other contracting party has notice of the fraud (*z*); as where a partner receives money in the course of partnership business and misappropriates it (*a*). A person taking a bill with knowledge of a partial misappropriation of the proceeds by a partner may recover against the firm in respect of the residue as to which he has no such knowledge (*b*). But in an action against the partners proof that the bill was negotiated in fraud of the firm casts upon the holder the burden of proving that he took it for value and without notice (*c*). If a partner gives a bill or other joint security of the firm for his own separate debt, it is presumptively fraudulent to the knowledge of the creditor receiving it, who therefore cannot charge the other partners unless he can prove their consent and authority (*d*); and they may recover from the creditor the bill or its amount (*e*). So a partner cannot pay his separate debt with what the creditor knows to be partnership money; nor can he agree to set off his separate debt against a debt due to the firm; and the creditor so dealing with one partner remains liable to the other partners to the extent of their interest in the debt (*f*). But a partner who uses the partnership name or property for his own use in any transaction which is within the scope of the partnership business, or otherwise acts on his own account in competition with his partners, is bound to account to the firm for the profits (*g*).

Ch. II.
SECT. III.

Contracts in
fraud of
partnership.

Paying
separate debt
with partner-
ship assets.

A cost book mining company is a common partnership modified by custom; in which the shareholders are partners, but with the liberty to retire at any time upon receiving or paying their

Cost book
mining
partnership.

y, Partnership Act, 1890, s. 17;
Gough v. Duries (1817), 4 Price, 200;
Beale v. Maudslayi (1847), 16 L. J. Q. B.
410; 10 Q. B. 976; *British Homes Assoc.*
v. Paterson (1902), 71 L. J. C. 872;
(1902) 2 Ch. 404.

(*z*) Partnership Act, 1890, ss. 5, 7, 11;
Fere v. Ashby (1829), 8 L. J. O. S.
K. B. 57; 10 B. & C. 288.

(*a*) *Blyth v. Fladgate* (1890), 60 L. J.
C. 66; (1891) 1 Ch. 337.

(*b*) *Wuttle v. Crouther* (1831), 9 L. J.
O. S. Ex. 65; 1 Cr. & J. 316; *Ellston v.*
Dracon (1866), L. R. 2 C. P. 20.

(*c*) Bills of Exchange Act, 1882,
ss. 29, 30; *Hogg v. Skren* (1895), 34 L. J.

C. P. 153; 18 C. B. N. S. 426.

(*d*) Partnership Act, 1890, s. 7; *Ex p.*
Darlington Baking Co. (1864), 34 L. J.
Bk. 10; 4 De G. J. & S. 581.

(*e*) *Holbut v. Nevill* (1870), 39 L. J.
C. P. 215; L. R. 5 C. P. 178.

(*f*) *Gordon v. Ellis* (1846), 15 L. J.
C. P. 178; 2 C. B. 821; *Kendal v. Wood*
(1870), 39 L. J. Ex. 167; L. R. 6 Ex.
213; *Peece v. Epney* (1871), 10 L. J.
C. 404; L. R. 12 Eq. 69.

(*g*) Partnership Act, 1890, s. 29;
Barton v. Wankry (1822), 6 Madd. 367;
Aas v. Becham, 1891 2 Ch. 244;
Tribble v. Goldberg (1906), 75 L. J. P. C.
92; (1906) A. C. 494.

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proportionate shares of the balance of the then existing assets and liabilities of the partnership (*h*).—The manager or purser of a coal book mine has such general authority as is usual for working the mine; presumptively including the buying of necessaries for the mine upon credit, for which the co-partners become liable (*i*); but not including the borrowing of money for the payment of necessaries or for any other purposes of the mine (*k*). Nor does the manager acquire authority by necessity to borrow money to save the property of the mine; as where it is distrained for wages due (*l*).

Clubs.

In the ordinary clubs for social purposes, managed by a committee of members, the authority of the committee depends upon the rules of the club, and if the rules provide for the payment of entrance fees and annual subscriptions and for all charges for the use of the club by the several members, they do not in general authorise the committee to pledge the credit of the members for work done or goods supplied for use of the club (*m*). And the liability of the member, and the consequent right of indemnity, is limited to the amount of the subscription (*n*). And those members of the committee only are liable who give or sanction the orders for goods; as the general authority of the committee is to buy with ready money only (*o*).—The committee of a charitable institution supported by voluntary contributions is in a similar position (*p*); as is the committee of a volunteer rifle corps (*q*).—In a club for buying coal, the rules required that the secretary should order coal, which should be paid for by the treasurer out of a fund raised by weekly contribution, and delivered to the members severally in proportion to their contributions; it was held that the members became personally liable to the merchant for the price of the coal as ordered by the secretary (*r*).

(*h*) *Ex p. Palmer* 1872, L. R. 7 Ch. 286; *Re Frank Mills Co.* (1883), 52 L. J. C. 457; 23 Ch. D. 52. See the Partnership Act, 1890, s. 1.

(*i*) *Peel v. Thomas* (1855), 24 L. J. C. P. 86; 15 C. B. 714. See *Geake v. Jackson* (1867), 36 L. J. C. P. 108.

(*k*) *Ricketts v. Bennett* (1847), 17 L. J. C. P. 17; 4 C. B. 686. See *ante*, p. 377.

(*l*) *Hawtayne v. Bourne* (1841), 10 L. J. Ex. 244; 7 M. & W. 595.

(*m*) *Fleming v. Hector* (1836), 6 L. J. Ex. 13; 2 M. & W. 172.

(*n*) *Wise v. Perpetual Trustee Co.* (1902), 72 L. J. P. C. 31; (1903) A. C. 139; *Harington v. Sendall* (1903), 72 L. J. C. 396; (1903) 1 Ch. 921.

(*o*) *Todd v. Emly* (1841), 10 L. J. Ex. 161, 262; 7 M. & W. 427; 8 M. & W. 505.

(*p*) *Burle v. Smith* (1831), 7 Bing. 705.

(*q*) *Cross v. Williams* (1862), 31 L. J. Ex. 145; 7 H. & N. 675.

(*r*) *Cockerell v. Aucompte* (1857), 26 L. J. C. P. 194; 2 C. B. N. S. 440.

CANADIAN NOTES.

Principal When Bound by Act of Agent.

In *Jury vs. Burrows*, 9 Grant's Ch., 367, parties having lots of land for sale employed an agent to sell them, and supplied him with blank forms of agreement signed and sealed by them and requiring for their completion only the name of the purchaser of the property sold and the amount of the purchase money. He was verbally instructed to reserve all pine timber fit for saw logs, but failed to do so, and it was held that the purchaser was not bound by this reservation and vendors were bound by the agreement as signed.

In *Torrop vs. Imperial Fire Insurance Company*, 26 S. C. R. 585, it was held that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by a breach of the condition making the policy void if the interest of the assured was sold or conveyed.

In *Elk Lumber Company vs. Crow's Nest Pass Coal Company*, 13 B. C. R., 169, plaintiffs claimed performance of an agreement for the sale of lands entered into by their agent, the strength of the claim being that they had invested their employers with the title of land commissioner, which title he had used in signing the memorandum of agreement. It was held that the mere fact of the company investing their employee with that title did not estop them from denying his authority to sell the land.

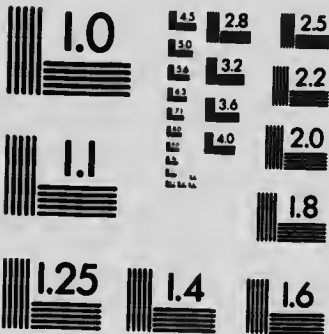
In *Wade vs. Town of Brantford*, 19 U. C. Q. B., 207, to an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it, and that before the term expired a decree was obtained against them in chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority and could not be renewed.

It was held on demurrer that this was no defence. Per Robinson, C. J.: "The principle that a person dealing with a corpora-



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tion must take notice whether the business he is transacting with them is done within the scope of their authority according to their charter was not applicable in this case, for that is to be understood in a general sense, and has reference to the description of business that the corporation may be engaged in, not to their authority to do a particular act in pursuit of what is clearly within the objects of their incorporation."

Agent Acting as Such Not Personally Bound.

In *Johnson vs. Hamilton*, 13 U. C. Q. B., 211, the plaintiff put in a paper headed "The memoranda of an agreement, etc., between the directors of the Victoria Bridge Company of the first part and James Johnson" (the plaintiff), etc. It contained an agreement by plaintiff to do certain work for prices which the parties of the first part thereby agreed to pay, and was signed by the defendant describing himself as "Pres. V. B." The company had been duly incorporated, and plaintiff had received £360 from them on account of this work. It was held that the defendant was not personally liable.

In *Tait vs. Hamilton*, 6 U. C. Q. B., O. S., 89, the commissioners of the St. Lawrence Canal, under 3 Wm. 4th, Ch. 17, were held to be mere agents of the government, who could not be held responsible personally on their contract unless they were shewn to have severally undertaken to be personally responsible.

Duty of Agent.

In *Hackett vs. Rorke*, 37 N. S. R., 435, defendants wrote plaintiff enquiring whether they knew of a vessel suitable for their requirements and which they could in every respect recommend and guarantee. Plaintiffs replied recommending a vessel offered for sale, but saying: "If you consider this vessel, we would advise you to send a man and inspect her, as we would not care about sending you a vessel and then not to turn out satisfactory." Defendants wrote in return that they were unable to send a man to examine the vessel, but were prepared to take her on plaintiff's recommendation. They thereupon authorized plaintiffs to buy the vessel and draw on them for part of the purchase money, agreeing to pay the balance on delivery. It was held that when the bargain was finally struck between

plaintiff, acting for the vendor, and the vendee, the property passed, and there was no further *locus poenitentiae* after that date. Some time after taking delivery defendants discovered that the vessel was infected with dry rot, a fact which made her practically valueless, but which could not be detected by an ordinary inspection. It was held that, in making the representations they did as to the condition of the vessel and in the conduct of the negotiations, plaintiffs were only bound to use ordinary diligence in the discharge of their duties, and the evidence fully warranted the conclusion that such diligence was used. It was held, further, that a reference to the part-payment as earnest money and a provision for forfeiture of the amount paid in the event of defendant's failing to complete the purchase were not sufficient to give defendant the option of forfeiting their deposit and refusing to carry out their contract as to the balance.

In *Eastmure vs. Canada Accident Assurance Company*, 25 S. C. R., 691, the contract of an agent was to fulfil conscientiously all the duties assigned to him and to act consistently for the best interests of his employers. It was held that it was a breach of this agreement, justifying dismissal, to act as agent for a rival insurance company.

Agency for the Crown.

In *O'Brien vs. The Queen*, 4 S. C. R., 529, the suppliant contracted with the Minister of Public Works to construct for \$78,000 a deep-sea wharf at Richmond, Nova Scotia, agreeably to plans and specifications. By the seventh clause of the contract no extra work could be performed unless ordered in writing by the engineer in charge before the execution of the work. By letter the Minister authorized suppliant to erect a coal floor for an additional sum of \$18,400, and further extra work amounting to between \$2,000 and \$3,000 was performed under another letter of the department. The work was completed and, on the final certificate of the engineer in charge, \$9,681, as the balance due, was paid to suppliant, who gave a receipt therefor. In a suit for extra work alleged not to be covered by this payment it was held that all work performed by the suppliant for the government was either contract work within the plans or specifications or extra work within the seventh clause, and that

he had been paid the full contract price and also the price of all extra work for which he could produce written authority, and that the written authority of the engineer and the estimate of the value of the work were conditions precedent to the right of the suppliant to recover payment for any other extra work.

It was held by Ritchie, C. J., that neither the engineer nor the clerk of works nor any subordinate officers in charge of the works of the Dominion of Canada has any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

In *Queen vs. Henderson*, 28 S. C. R., 425, it was held that the provision of the twenty-third section of the Act respecting the Department of Railways and Canals which requires all contracts affecting that department to be signed by the Minister, the Deputy Minister or some person specially authorized, and countersigned by the secretary, had reference only to contracts in writing made by that department. Where goods have been bought by and delivered to officers of the Crown for Public Works under orders verbally given by them in the performance of their duties payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing.

In *The Queen vs. Woodburn*, 29 S. C. R., 122, the Government of Canada entered into a contract with Carriere, by which the latter undertook to do all the government printing for five years. The contract was executed under the authority of 32 and 33 Vict., Ch. 7, section 6, and was assigned to Woodburn, November 25th, 1879, who performed all the work sent to him up to December 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer saying that he was directed by the Secretary of State to inform him that, pending future arrangements, the binding work of the government would be sent to him for execution under the same rates and conditions as under the contract which had just expired. Woodburn performed the work for two years under the authority of this letter, and then brought an action for the

profits he would have had on work given to other parties during the said years.

It was held that the letter of the Queen's Printer did not constitute a contract binding on the province; that the statute authorizing such contracts was not directory, but limited the power of the Queen's Printer to make a contract, except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer, and that the suppliant could not recover for the amount of work done after the contract had expired.

In *Sears vs. Robinson*, 4 Allen (N.B.), 366, by an agreement between plaintiff and defendant, therein described as Province Treasurer for and on behalf of the Queen, the plaintiff agreed to procure to be coined in England and delivered to the defendant a certain amount of copper coins for the use of the province. The Crown having refused to authorize the coining the plaintiff made application to the legislature for compensation, and a grant of money was made to him to reimburse him expenses incurred in endeavouring to execute a contract entered into with the Provincial Government for a supply of copper coins, the same to be in full. It was held, in an action against the defendant for falsely representing that he had the authority of the Queen to make the contract, first, that the defendant, having acted under the direction of the Provincial Government, which represented the Crown, had the authority of the Queen, and, secondly, that, by accepting the grant of money from the legislature, the plaintiff had acknowledged that the contract was made with the Provincial Government, and, therefore, that the defendant was not liable. It was questioned whether the words of the agreement amounted to a representation that the defendant had the Queen's authority to make the contract.

CHAPTER III.

CAPACITY OF PARTIES.

SECT. I.—POLITICAL STATUS.

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THE parties to contracts have hitherto been considered as consisting of persons having full capacity of contracting, independently of any special condition or status of the person. But special conditions affect the capacity of a person to become party to a contract, and modify the rights and obligations arising out of contract generally. It is not within the scope of this work to deal with contracts where the British Crown or its representatives are parties.

CH. III.
SECT. I.
Capacity of
persons.

Foreign States and sovereigns, as such, are exempt from being sued in the courts of this country; unless they appear and voluntarily submit to the jurisdiction (*a*). Hence a contract made with a foreign government, as a bond or debt of such government, cannot be enforced against them by municipal law (*b*); nor can the contracts of a foreign government be enforced against property of such government within the jurisdiction of the court (*c*); also the public property of a foreign State or sovereign in public use is exempt from proceedings *in rem* (*d*). Foreign States and sovereigns or representatives may sue as plaintiffs in the courts of this country, and may submit to be sued as defendants (*e*);

Foreign
States and
sovereigns.

(*a*) *Brunswick (Duke) v. King of Hanover* (1848), 2 H. L. C. 1; *Mighell v. Johore Sultan* (1893), 63 L. J. Q. B. 593; (1894) 1 Q. B. 149.

(*b*) *De Haber v. Queen of Portugal*, *Wadsworth v. Queen of Spain* (1851), 20 L. J. Q. B. 488; 17 Q. B. 171.

(*c*) *Smith v. Weyuelin* (1869), L. J. C. 165; L. R. 8 Eq. 198; *T. v. v. v. Dreyfus* (1877), 46 L. J. C. 510; Ch. D. 605.

(*d*) *The Parlement Belge* (1879), 48 L. J. Ad. 18; 5 P. D. 197.

(*e*) *Hullett v. King of Spain* (1828),

PART II.

they thereby render themselves subject to the *lex fori* respecting discovery, enforcing of cross claims, costs, and the like (f); but do not further waive their rights (g).—Contracts with a *de facto* foreign government are held by the courts as binding upon their successors, though the latter claim *de jure* by a title paramount (h).—Colonial governors have no general exemption from being sued in the courts of the colony or of this country; and, if sued, it is for the court to decide how far the cause of action is excused as being an act of state within his commission as governor (i).

Ambassadors.

The ambassadors and public ministers or representatives of a foreign State, duly accredited to the sovereign of this country, are privileged from being sued in civil actions; and therefore contracts cannot be enforced against them in the courts of this country, unless they voluntarily submit or appeal to the jurisdiction (k). The privilege of the ambassador extends to all the officers of the legation, and to his domestic servants, except where the appointment has been made merely for the purpose of screening them from their creditors (l). It extends to a British subject attached to a foreign legation; unless excluded by an express provision of English law (m).—Where a foreign minister of legation, having been sued, entered an appearance to the action and allowed it to proceed, it was held that he had thereby submitted to the jurisdiction for the purpose of the action; and the court refused his subsequent application to stay proceedings; although he would retain his privilege against execution under it (n). An acce-

2 Bli. N. S. 31; *United States v. Wagn* (1867), 36 L. J. C. 624; L. R. 2 Ch. 582; *Yezquierdo y Castaneda v. Clydebank Engineering Co.* (1902), 71 L. J. P. C. 94; (1902) A. C. 524.

(f) *King of Spain v. Hullett* (1833), 1 Cl. & F. 333; *Emperor of Brazil v. Robinson* (1837), 6 L. J. K. B. 168; 6 A. & E. 801; *Peru (Republic) v. Wyquelin* (1875), 44 L. J. C. 583; L. R. 20 Eq. 140; *Costa Rica v. Erlanger* (1875), 45 L. J. Ch. 145; 1 Ch. D. 171; *The Newbattle* (1885), 54 L. J. Ad. 16; 10 P. D. 33.

(g) *Farassier v. Krupp* (1878), 9 Ch. D. 351; *South African Republic v. Compagnie Franco-Belge* (1897), 66 L. J. C. 747; (1897) 2 Ch. 487.

(h) *Peru (Republic) v. Peruvian Guano*

Co. (1887), 56 L. J. C. 1081; 36 Ch. D. 489; *Peru (Republic) v. Dreyfus* (1888), 57 L. J. C. 53; 38 Ch. D. 348.

(i) *Musgrave v. Pulido* (1879), 49 L. J. P. C. 24; 5 Ap. Ca. 102. See *Mostyn v. Fabrigas* (1775), Cowp. 161; 1 Sm. L. C. 572.

(k) *Magdalena Nav. Co. v. Martin* (1859), 28 L. J. Q. B. 310; 2 E. & E. 94; *Gladstone v. Musurus* (1862), 32 L. J. C. 155; 1 H. & M. 495.

(l) 7 Anne, c. 12; *Hopkins v. De Robeck* (1789), 3 T. R. 79; *Ex p. Cloete* (1891), 65 L. T. 102.

(m) *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

(n) *Taylor v. Best* (1854), 23 L. J. C. P. 89; 14 C. B. 487.

dited ambassador, or servant of the embassy, suing in the courts of this country is not required to give security for costs (*o*).

Cr. III.
S. 1.

As to personal estate and contracts, there was no incapacity or disability incident to the political *status* of an alien, or subject of a foreign State at common law: and the incapacity of holding real estate as against the Crown, which existed at common law, was taken away by the Naturalization Act, 1870, s. 2, but the statute provides by s. 14, "Nothing in the Act shall qualify an alien to be the owner of a British ship." A foreigner may protect his rights by suing in the courts of this country, subject to giving security for costs if he is out of the jurisdiction; but he is not required to give security while within the jurisdiction, though temporarily so and only for the purpose of bringing the action; or if he has assets within the jurisdiction sufficient to answer the costs (*p*). But where a counterclaim is in substance a defence to the claim security will not be ordered (*q*).

Aliens.

An alien enemy, by reason of his personal status as a subject of a hostile State, is deprived of all rights of suing during the continuance of war: unless he has licence of the Crown to reside and enjoy his rights (*r*). But the fact of becoming an enemy only suspends his remedies; and on return of peace he resumes the rights which existed to him at the commencement of the war, and which have not been seized by the Crown during the war (*s*). Accordingly an alien enemy was admitted to prove a debt under a bankruptcy, the payment of the dividend being reserved (*t*).

Alien enemy.

The claim of the Crown to confiscate the rights of alien enemies extends only to real property, and not to debts and choses in action, as there is only a prohibition of payment while the war continues, nor is any further right recognised by international law. Where a foreign State upon declaring war with this country issued an ordinance confiscating all debts due to British subjects, and ordering payment to be made to commis-

Rights of
the Crown.

(*o*) *Montelasso, Duke v. Christin* (1816), 5 M. & S. 503; *Dacies v. Solomon* 1785, Tidd, Prac. 9th ed. 535, n. s.

(*p*) Ord. LXV. r. 6 (a); *Redondo v. Chaytor* (1879), 48 L. J. Q. B. 697; 4 Q. B. D. 453; *Ebrard v. Gussier* (1885), 54 L. J. C. 441; 28 Ch. D. 232; *Re Apollinaris Co.*, (1891) 1 Ch. 1.

(*q*) *Neck v. Taylor* (1893), 62 L. J. Q. B. 514; (1893) 1 Q. B. 550.

(*r*) *Usparicha v. Noble* (1811), 13 East, 332; *Alcinous v. Nigreu* (1854), 21 L. J. Q. B. 19; 4 E. & B. 217.

(*s*) *Le Bret v. Papillon* (1804), 4 East, 502; *Flindt v. Waters* (1812), 15 East, 260. And see *Janson v. Driefontein Mines* (1902), 71 L. J. K. B. 857; (1902) A. C. 484.

(*t*) *Ex p. Boismaker* (1806), 13 Ves. 71.

PART II.

Incapacity
of alien
enemy.

sioners; the payment of a debt under such order was held to be no answer to an action for the debt in this country (*u*).—During war an alien enemy can acquire no new rights by contract, because any trading or contracting with a person in that position is illegal (*x*). An alien enemy cannot draw bills upon persons in this country; the acceptance of them during war would be void, and an indorsement with notice would give no claim against the acceptor (*y*). But it seems that an alien enemy might acquire a title to a bill by indorsement, on which he might sue upon return of peace; or which he might transfer by indorsement to another (*z*).

Subject
adhering to
enemy.

A British subject, or subject of a neutral State, adhering to an enemy, as by voluntary permanent residence or by trading in the enemy's country, is in the same position in regard to disability, as an alien enemy (*a*).—A prisoner of war detained in an enemy's country is treated as an exception, and by reason of necessity may draw bills for his subsistence and indorso them to an enemy, who may recover upon them after the return of peace, or may transfer them by indorsement (*b*). And a prisoner of war in this country may recover upon a contract for services rendered by him whilst a prisoner, as wages for working a ship home (*c*).—A British subject, domiciled in a neutral State, may, as subject of that State, lawfully trade with an enemy of this country; and an insurance effected by him in this country upon his ships or goods engaged in such trade is lawful (*d*).

Prisoner of
war.Domicile in
neutral State.

Convicts.

At common law upon conviction of felony all the goods and chattels of the felon, including debts and *choses in action*, were forfeited to the Crown as a prerogative right (*e*). By the Forfeiture Act, 1870, s. 1, forfeiture upon conviction or judgment for any treason or felony is abolished. Sect. 6 defines the expres-

Forfeiture
abolished.

(*u*) *Wolff v. Orholm* (1817), 6 M. & S. 92.

(*v*) *Potts v. Bell* (1800), 8 T. R. 561. See *post*, Pt. III., Chap. IV.

(*y*) *Willison v. Patterson* (1817), 7 Taunt. 43.

(*z*) *Antoine v. Morshead* (1815), 6 Taunt. 237; *Daubuz v. Morshead* (1815), 6 Taunt. 332.

(*a*) *McDonnell v. Hector* (1802), 3 B. & P. 113; *Albrecht v. Sussman* (1813), 2 V. & B. 323. See *Roberts v. Hardy* (1815), 3 M. & S. 333.

(*b*) *Antoine v. Morshead* 1815, 6 Taunt. 237; *Daubuz v. Morshead* (1815), 6 Taunt. 332.

(*c*) *Spavenburgh v. Bonnatyne* (1797), 1 B. & P. 163; *Maria v. Hall* (1800), 2 B. & P. 236; 1 Taunt. 33, n.

(*d*) *Houiet v. Morris* (1812), 3 Camp. 303; *Bell v. Reid* (1813), 1 M. & S. 726.

(*e*) *Lambert v. Taylor* (1825), 3 L. J. O. S. K. B. 160; 1 B. & C. 138; *Barnett v. L. & N. W. Ry.* (1860), 29 L. J. Ex. 334; 5 H. & N. 604.

sion "convict" to mean any person against whom judgment of death or of penal servitude shall have been pronounced upon any charge of treason or felony; and sect. 8 enacts that "No action at law or suit in equity for the recovery of any property, debt, or damage shall be brought by any convict"; "and every convict shall be incapable of alienating or charging any property, or of making any contract."—By sect. 9 the custody and management of the property of a convict may be committed to an administrator, in whom, by sect. 10, all the real and personal property, including *choses in action*, shall vest. By sect. 12, "The administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property" (f); and by sect. 14 he may pay thereout the debts and liabilities of the convict. A convict may be made bankrupt, notwithstanding the above statute (g).—The capacity of a convict as to property and contract is restored by a pardon, or by completion of the sentence imposed (h).

Ch. III.
SECT. I.

Incapacity
of convict.

Administrator
of property.

(f) *Cory v. Anderson* (1903), 72 L. J. C. 534; (1903) 2 Ch. 279; *Re Gaskell and Walters' Cont.* (1906), 75 L. J. C. 503; 1906) 2 Ch. 1.

(g) *Ex p. Graves* (1881), 51 L. J. C. 1; 19 Ch. D. 1.

(h) *Leyman v. Latimer* (1877), 46 L. J. Ex. 765; 3 Ex. D. 352.

CHAPTER III.

CAPACITY OF PARTIES.

SECT. II.—INFANTS.

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PART II.

Liability of
infant on
contracts.Void
contracts.

At common law contracts made by a person during infancy, except contracts for necessities, were, as a general rule, voidable at his election; but after attaining full age he might give validity to the contract by a new promise, or by any other sufficient act of ratification (*a*). The burden of proof is on those who allege infancy (*b*).—At the same time both courts of law and equity, for the protection of infants from undue influence and oppression, laid down the principle, that a contract made by an infant which the court can pronounce to be clearly to his prejudice is absolutely void: as a bond or any contract imposing a penalty (*c*); a contract for the payment of interest (*d*); the acceptance of a bill of exchange or making of a promissory note (*e*); an admission of debt by an account stated, or any other admissions (*f*).

(*a*) *Keane v. Boycott* (1795), 2 F. 511; *Allen v. Allen* (1842), 2 Lr. & War. 307; *Edwards v. Carter* (1892), 63 L. J. C. 100; (1893) A. C. 360. See *Fiditz v. O'Hagan* (1900), 69 L. J. C. 507; (1900) 2 Ch. 87.

(*b*) *Hartley v. Wharton* (1840), 9 L. J. Q. B. 209; 11 A. & E. 934; *Roberts v. Bethell* (1852), 22 L. J. C. P. 69; 12 C. B. 778.

(*c*) *Sanderson v. Murr* (1788), 1 H. Bl. 75; *Meakin v. Morris* (1884), 53 L. J. M. C. 72; 12 Q. B. D. 352.

(*d*) *Baylis v. Dineley*, 3 M. & S. 477. *Fisher v. Mowbray*, 8 East, 330.

(*e*) *Re Saltgkoff* (1891), 60 L. J. Q. B. 339; (1891) 1 Q. B. 413.

(*f*) *Oliver v. Woodroffe*, 4 M. & W. 650; 8 L. J. Ex. 105; Ord. XIX. r. 13.

Upon this principle an apprenticeship deed which binds an infant to serve during a term, with liberty for the master by his voluntary act to stop the work and wages at any time, or a contract of service containing an unusual provision restricting the infant's right to enter into any other employment on the determination of his contract if then still an infant, is void (*g*); but a provision that the master need not pay wages while his business is at a standstill through circumstances beyond his control, is valid (*h*).

CH. III.
SECT. II.

The Infants Relief Act, 1874, enacts by sect. 1 that "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable" (*i*). Sect. 2 enacts that "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."—The latter section applies to all contracts made during infancy, and it deprives any promise or ratification made after full age of all actionable effect. The first section applies only to contracts entered into by infants for money lent, goods supplied, and upon accounts stated, and makes such contracts absolutely void. All other contracts of infants which are voidable before the Act remain voidable; but they cannot be validated by promise or ratification; and such contracts, if valid in other respects, continue valid until repudiated (*k*).

Infants
Relief Act.

g) *Reg. v. Lord* (1848), 17 L. J. M. C. 181; 12 Q. B. 757; *Corn v. Matthews* (1893), 62 L. J. M. C. 61; (1893) 1 Q. B. 310; *Sir W. Leng & Co. v. Andrews* (1908), 78 L. J. C. 80; (1909) 1 Ch. 763; *Gould v. Thompson* (1910), 80 L. J. K. B. 272; (1911) 1 K. B. 304.

h) *Green v. Thompson* (1899), 68 L. J. Q. B. 719; (1899) 2 Q. B. 1.

i) *Fellows v. Wood* (1898), 59 L. T.

513; *Nottingham Ry. Soc. v. Thurston* (1902), 72 L. J. C. 431; (1903) A. C. 6.

k) *Ex p. Kibb* (1875), 11 L. J. Bk. 63; L. R. 10 Ch. 373; *Re Trusts* (1875), 44 L. J. C. 628; L. R. 20 Eq. 677; *Duncan v. Dixon* (1890), 59 L. J. C. 437; 44 Ch. D. 211; *Edwards v. Carter* (1892), 63 L. J. C. 100; (1893) A. C. 360.

PART II.
Ratification
under
Ld. Tenter-
den's Act.

The doctrine of ratification after full age, as existing before the Infants Relief Act, 1874, was subject to sect. 5 of the Statute of Frauds Amendment Act, commonly called Lord Tenterden's Act, since repealed, which required the promise or ratification to be in writing, signed by the party to be charged therewith. The written document was for the court, and not the jury, to construe; and it was essential for it to contain, not merely a sufficient statement of the debt or contract, but a recognition of it as an existing liability (*l*). A contract of an infant by deed, could only be ratified by deed, or by an estoppel in law of as high authority as the deed itself (*m*).

Betting and
Loans
(Infants)
Act, 1892.

By the Betting and Loans (Infants) Act, 1892, s. 5, "If an infant who has contracted a loan which is void in law agrees, after he comes of age, to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement and any instrument negotiable or other, given in pursuance of or for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever."

Promises to
marry.

Mutual promises of marriage made during infancy are within the 2nd section of the Infants Relief Act, 1870; and the mere continuance of the relationship under such promises is held to operate as a ratification only, and is therefore void of legal effect (*n*). But any evidence of a new contract distinct from mere ratification raises a question of fact, from which a jury may infer a distinct contract upon which an action may be maintained (*o*).

Infants'
marriage
settlements.

A contract or covenant for a settlement upon marriage made by an infant is in general voidable by the infant after coming of age; though it is binding upon a husband of full age as against his marital rights to the wife's property (*p*). But where it manifestly

(*l*) *Mawson v. Blane* (1855), 23 L. J. Ex. 342; 10 Ex. 206; *Rowe v. Hopwood* (1868), 38 L. J. Q. B. 1; L. R. 4 Q. B. 1; *Maccord v. Osborne* (1876), 45 L. J. C. P. 727; 1 C. P. D. 568.

(*m*) *Baylis v. Dineley* (1815), 3 M. & S. 477.

(*n*) *Coshead v. Mullis* (1878), 47 L. J.

C. P. 761; 3 C. P. D. 439.

(*o*) *Northcote v. Doughty* (1880), 4 C. P. D. 385; *Ditcham v. Warrall* (1880), 49 L. J. C. P. 688; 5 C. P. D. 410.

(*p*) *Nelson v. Stocker* (1859), 28 L. J. C. 760; 4 De G. & J. 458; *Smith v. Lucas* (1881), 18 Ch. D. 531.

CH. III.
SECT. II.

to the prejudice of the infant, such a contract is absolutely void (*q*). But a voidable contract for a marriage settlement made by an infant is not within the Infants Relief Act, s. 1; and therefore it is valid unless repudiated within a reasonable time after the infant comes of age (*r*).—By the Infants Settlement Act, 1855, infants can make valid contracts for settlement of their property on marriage with the sanction of the court. But the court cannot compel the execution of the marriage settlement of an infant, before or after coming of age (*s*).

Infancy is no defence to actions for wrongs independent of contract; but it may be pleaded in all cases where the cause of action is substantially founded on a contract, though the claim may be framed in the form of tort. Thus in the case of a bailment of goods to an infant for use, he cannot be charged with the loss of or damage done to the goods under a claim of injury to the property, where the claim is substantially for breach of a contract annexed to the bailment (*t*). But where an infant has obtained money by fraudulent or wrongful means, infancy is no defence to an action for restitution of the money, the claim being substantially founded upon the wrong (*u*). So where an infant obtained payment from a trustee for her, upon a representation that she was of age, the trustee was held to be discharged from the trust to the extent of the money so paid (*x*). And an infant-trustee is liable for loss arising from breach of trust (*y*). Where an infant has induced a contract with him by a fraudulent misrepresentation that he was of full age, he is not precluded from pleading his infancy in avoidance of the contract; nor does the fraudulent misrepresentation afford any answer upon equitable grounds to the plea of infancy (*z*). Nor can he be charged with damages caused by the invalidity of the contract in an action founded upon the fraud as a substantive wrong (*a*). But where

Liability of
infant for
wrongs.

Money
obtained by
fraud.

Contract
induced by
fraud.

q *Kingsman v. Kingsman* (1880), 50 L. J. Q. B. 81; 6 Q. B. D. 122; *Duncan v. Dixon* (1890), 59 L. J. C. 437; 44 Ch. D. 211.

r *Edwards v. Carter* (1892), 63 L. J. C. 100; 1893 A. C. 360.

s *Re Leigh* (1888), 58 L. J. C. 306; 40 Ch. D. 290; *Bolton v. Bolton* (1891), 60 L. J. C. 689; (1891) 3 Ch. 270.

t *Jennings v. Randall* (1799), 8 T. R.

u *Brishaw v. Easton* 1791, 1 Esp. 172; *Re Sager* (1889), 60 L. T. 665.

x *Overton v. Bonister* (1811), 3 Ha. 503.

y *Scalthrow v. Tupper* (1871), 41 L. J. C. 266, L. R. 13 Eq. 232.

z *Bartlett v. Wells* (1861), 31 L. J. Q. B. 57; 1 B. & S. 836; *De Roo v. Foster* (1862), 12 C. B. N. S. 272.

a *Green v. Greenbank* (1816), 2 Marsh. 485. See *Lemproire v. Lange* (1879), 12 Ch. D. 675.

PART II.

an infant fraudulently represented himself to be of full age in order to obtain credit, and became bankrupt after full age, it was held upon equitable grounds that the debt was provable in the bankruptcy (*b*). An infant trading and incurring trade debts is not chargeable with fraud, as impliedly representing himself to be of age; he cannot be made bankrupt on such debts, nor are they provable in bankruptcy (*c*).

**Liabilities
incident to
property of
infant.**

An infant becoming possessed of real estate or other permanent property to which obligations are incident, is liable to those obligations as long as he continues in possession of the property. "As the estate vests, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority" (*d*).

**Lease of
infant.**

Thus, if an infant takes a lease of land and enters into possession, he becomes liable to the rent and other incidents of the estate, until he disagrees to it; and by continuing in possession after full age he affirms the lease and remains absolutely liable for the rent and covenants during the term (*e*). So if an infant makes a lease with a reservation of rent, and after full age accepts the rent, he affirms the lease, and cannot afterwards avoid it (*f*). An infant admitted to a copyhold estate, by retaining possession after coming of age, affirms the admittance, and is liable for the fines due (*g*).

**Infant
shareholder.**

Upon a like principle, if an infant enters into a partnership, and does not disaffirm the partnership upon coming of age, he becomes liable on contracts subsequently made with the firm upon the credit of his continuing a partner (*h*).—The same principle applies to a registered shareholder in a company, who cannot avoid his liability by pleading that he contracted for the shares and became holder during infancy, without further pleading that he has disagreed to

(*b*) *Ex p. Unity Banking Assn.* (1858), 27 L. J. Bk. 33; 3 De G. & J. 63.

(*c*) *Stikeman v. Dawson* (1847), 16 L. J. C. 2; 5; 1 De G. & S. 90; *Ex p. Jones* (1881), 50 L. J. C. 673; 18 Ch. D. 109. See *Lowell v. Branchamp* (1894), 63 L. J. Q. B. 802; (1894) A. C. 607.

(*d*) *Percy v. N. Western Ry. v. McMichael* (1851), 20 L. J. Ex. 101; 5 Ex. 127.

(*e*) *Kirtou v. Elliott* (1614), 2 Bulstr.

69. See *Lemprière v. Lange* (1879), 12 Ch. D. 675.

(*f*) *Ashfield v. Ashfield* (1627), Sir W. Jones, 157; *Smith v. Low* (1739), 1 Ark. 489.

(*g*) *Evelyn v. Chichester* (1765), 3 Burr. 1717.

(*h*) *Goode v. Harrison* (1821), 5 B. & Ald. 147. See *Brown v. H'ren* (1895), 64 L. J. Q. B. 119; (1895) 1 Q. B. 390.

the contract and repudiated the shares (*k*). And if an infant shareholder, after coming of age, accepts any benefit from the shares, or does any other act of confirmation, he may be taken to have affirmed his ownership; as will also be the case if he delays for an unreasonable time to get his name removed from the register (*k*). A transfer of shares to an infant or by an infant is voidable; but the acceptance and registration of an adult transferee claiming through intermediate infant transferors by the company releases the original adult transferor (*l*). In the case of the winding up of a company, a transfer of shares to an infant is void against the liquidator and creditors, and the transferor may be placed upon the list of contributories (*m*); unless the infant shareholder has come of age and accepted the ownership of the shares before the winding up (*n*). A director was held personally responsible for loss to the company caused by his allotting shares to a person whom he knew to be an infant (*o*).—The certificate of registration of a company is not invalidated by reason that one or more of the signatories of the memorandum of association were infants at the date of signing (*p*).

CH. III.
SECT. II.

"An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards" (*q*). "Necessaries" as applied to goods mean "goods suitable to the condition in life" of the infant, "and to his actual requirements at the time of the sale and delivery" (*r*). Where it appears that the defendant is an infant, the plaintiff must establish affirmatively not only that the goods were suitable to the infant's condition in life, but also that he had not a sufficient supply of similar goods at the time of the sale and delivery (*s*). It cannot be doubted that the decided cases

Contracts
of infant for
necessaries.

(*k*) *N. Western Ry. v. M. Mchae*, (1851), 20 L. J. Ex. 101; 5 Ex. 114.

(*l*) *Dublin and Wicklow Ry. v. Black* (1852), 22 L. J. Ex. 94; 8 Ex. 181; *Ebbett's case* (1870), 39 L. J. C. 679; L. R. 5 Ch. 302.

(*m*) *Gooch's case* (1872), 42 L. J. C. 381; L. R. 8 Ch. 265.

(*n*) *Copper's case* (1868), L. R. 3 Ch. 458; *Sydney's case* (1870), 39 L. J. C. 461; L. R. 5 Ch. 298; *Weston's case* (1870), 39 L. J. C. 753; L. R. 5 Ch. 614.

(*o*) *Hart's case* (1868), L. R. 6 Eq.

512; *Luttrell's case* (1868), L. R. 4 Ch. 31; *Mitchell's case* (1870), 39 L. J. C. 199; L. R. 9 Eq. 363.

(*p*) *Ex p. Wilson* (1872), 42 L. J. C. 81; L. R. 8 Ch. 45.

(*q*) *Re Laxon & Co.*, (1892), 61 L. J. C. 667; (1893) 2 Ch. 555.

(*r*) *Co. Lit.* 172 a; *Walter v. Everard* (1891), 60 L. J. Q. B. 738; (1891) 2 Q. B. 369. See *Re Clabbon* (1901), 73 L. J. C. 853; (1901) 2 Ch. 465.

(*s*) *Sale of Goods Act*, 1893, s. 2.

(*t*) *Nash v. Inman* (1908), 77 L. J. K. B. 626; (1908) 2 K. B. 1.

PART II. show a change in the law, not by reason of any modification in the principles upon which the court has proceeded, but by a change in the practice of withdrawing from the jury cases which would formerly have been submitted to them (*t*).

Apprenticeship.

An infant may bind himself by an indenture or contract of apprenticeship for his instruction; and the apprenticeship operates upon the infant by imposing a legal status or relationship to the master, and is attended with special laws and regulations by statute and custom (*u*). The infant is not bound by the indenture of apprenticeship by way of contract to serve, and cannot be sued in law or equity for damages or for an injunction against a breach of the service; for which reason the parent or some other surety is usually joined in the indentures who covenants on the infant's behalf (*x*). But the infant may validly covenant in the deed of apprenticeship to pay a premium for such instruction as is necessary to his position (*y*). An apprentice cannot avoid the apprenticeship during infancy; but he may avoid it on coming of age, unless under a special custom to bind for a longer period. But the avoidance of the apprentice does not discharge the covenant of the parent who has covenanted for him (*z*). An apprenticeship containing terms which are oppressive or prejudicial to the infant is wholly void against him (*a*). A contract of apprenticeship may be made with a trading corporation as the master (*b*).

Necessaries for wife and children.

An infant is bound to pay for all necessaries supplied to his wife; but not for necessaries supplied to his children except there be an express contract (*c*). Accordingly, an infant may be bound to pay for the funeral of his deceased wife; and an infant widow for the funeral of her deceased husband (*d*). A settlement by an infant of property on marriage is in general voidable; but a settlement by a husband in favour of an infant wife is so far a necessary for her that she may validly retain a solicitor to prepare it, and

(*t*) Cp. *Peters v. Fleming* (1840), 9 L. J. Ex. 81; 6 M. & W. 42; and *Hart v. Prater* (1837), 1 Jur. 623; with *Ryder v. Wombwell* (1868), 38 L. J. Ex. 8; L. R. 1 Ex. 32; and *Nash v. Inman* (1908), 77 L. J. Q. B. 626; (1908, 2 K. B. 1.

(*u*) See Burn's Justice, Apprentices; Smith's Master and Servant.

(*x*) *Branch v. Ervington* (1780, 2 Dougl. 518; *De Francesco v. Barnum* (1889), 59 L. J. C. 151; 43 Ch. D. 165.

(*y*) *Walter v. Everett* (1891), 60 L. J. Q. B. 738; (1891) 2 Q. B. 369.

(*z*) *Ex p. Davis* (1794), 5 T. R. 715; *Cuning v. Hill* (1819), 3 B. & Ald. 59; *Re v. Great Wigston* (1824), 3 L. J. O. S. K. B. 85; 3 B. & C. 484.

(*a*) See *ante*, p. 387.

(*b*) *Burley Corp. Soc. v. Casson* (1890), 50 L. J. M. C. 59; (1891) 1 Q. B. 75.

(*c*) *Turner v. Trisby* (1719), 1 Stra. 168; *Mactimore v. Wright* (1840), 9 L. J. Ex. 158; 6 M. & W. 182.

(*d*) *Chapple v. Cooper* (1814), 13 L. J. Ex. 286; 13 M. & W. 252. See *Re McMynn* (1886), 55 L. J. C. 845; 33 Ch. D. 575.

become liable for the costs; though by custom the husband is bound to indemnify her (e).

CH. III.
SECT. II.

An infant may contract a debt for necessities, although he has a sufficient income to pay with ready money (f). But if the infant was already sufficiently supplied he cannot be charged with the price of a further supply; though the party so charging him was ignorant of his existing supply (g).

Infant
already
supplied.

An infant cannot be charged on a bill of exchange or promissory note although given in payment for necessities (h); nor bind himself to an amount due for necessities by an account stated (i); nor by executing a warrant of attorney or *cognovit* (k), or a bond with a penalty (l); nor charge himself with the payment of interest (m); nor charge his estate by a mortgage deed (n) for a sum due for necessities. But an infant may take a debt due for necessities out of the Statute of Limitations by an acknowledgment in writing signed by him (o). —An infant cannot be charged at law for money lent or upon any security for money lent, though for the purpose of expending it in necessities (p); but he may be charged with an implied debt for money paid for his use, in respect of money which has been expended by another in supplying him with necessities (q). The court has jurisdiction to order that debts for necessities for the past maintenance of an infant shall be charged upon an infant's freehold estate (r). Maintenance of an infant by a parent or person *in loco parentis* is deemed presumptively to have been gratuitous (s).

Securities
given for
necessaries.

Money lent
to infant.

A contract which is voidable by an infant is binding upon the other contracting party until avoided; the privilege of avoidance being that of the infant only. Thus a contract of mutual promises to marry is voidable by an infant party; but he may sue the other party for a breach of promise (t). So a contract or settlement on

Rights of
infant on
contracts.

(e) *Helps v. Clayton* (1864), 34 L. J. C. P. 1; 17 C. B. N. S. 553; *De Staepool v. De Staepool* (1888), 57 L. J. C. 463; 37 Ch. D. 139.

(f) *Burghast v. Hall* (1839), 8 L. J. Ex. 235; 4 M. & W. 727.

(g) *Nash v. Inman* (1908), 77 L. J. K. B. 626; (1908) 2 K. B. 1.

(h) *Re Soltukoff* (1891), 60 L. J. Q. B. 339; (1891) 1 Q. B. 413.

(i) *Treeman v. Hurst* (1785), 1 T. R. 40; *Oliver v. Woodroffe* (1839), 8 L. J. Ex. 105; 4 M. & W. 653.

(k) *Saunderson v. Murr* (1788), 1 H. Bl. 75.

(l) Co. Lit. 172 a.; see *ante*, p. 386.

(m) *Fisher v. Mottebray* (1807), 8 East, 330.

(n) *Martin v. Gut*, 1876, 46 L. J. C. 84; 4 Ch. D. 428.

(o) *Wellous v. South* (1851), 24 L. J. Q. B. 62; 4 E. & B. 180.

(p) *Earle v. Pule* (1712), 10 Mod. 67; *Martin v. Gut* (1876), 46 L. J. C. 81; 4 Ch. D. 428.

(q) *Ellis v. Ellis* 1698, Comb. 182; 1 Ld. Raym. 341.

(r) *Re Horan* (1873), 42 L. J. C. 316; L. R. 8 Ch. 415. See *Re Hamilton* (1885), 55 L. J. C. 282; 31 Ch. D. 291.

(s) *Re Gutrell's Estate* (1871), 41 L. J. C. 70; L. R. 12 Eq. 566; *Re Moulton* (1906), 91 L. T. 451.

(t) *Holt v. Wood* (1733), 2 Strange, 937.

PART II.

Right to sue.

marriage affecting the property of an infant wife is valid against the husband of full age, and binds his rights in the wife's property (*u*). An infant may sue upon a contract during his minority (*x*); but he cannot appear in person, nor appoint an attorney, nor become liable for costs, and therefore he is required to sue by a next friend (*y*). And an infant may proceed against a debtor in bankruptcy (*z*). But a court of equity will not in general grant specific performance of a contract at the suit of an infant, because the remedy is not mutual until he has come of age (*a*).

Money paid
by infant
under a
contract.

Money paid
for executed
considera-
tion.

Where an infant has paid money under a contract for which the consideration remains executory, upon avoiding the contract he may recover the money, as upon an entire failure of consideration. Thus an infant having signed an agreement to purchase a share of a business under which he paid down part of the purchase-money as a deposit, to be forfeited on breach of the agreement, was held entitled on coming of age, having then taken no benefit under the agreement, to repudiate it altogether, and to recover the deposit, in an action for money received for his use (*b*). But after receiving the consideration in part, though he may avoid the contract, he cannot recover money paid under it, because the failure of consideration is not complete. Thus an infant, who paid a premium for a lease, which he enjoyed during minority, but avoided after coming of age, though he thereby discharged himself of the rent and covenants, could not recover the premium, because he had partially enjoyed the consideration (*c*). And an infant who has paid a premium for admission into a partnership, and has acted as partner and received a share of the profits, cannot recover back the premium (*d*). So, an infant who buys things which are not necessities, cannot recover back money paid for what he has consumed or used, although the contract is absolutely void by the Infants Relief Act, 1874 (*e*).

(*u*) *Care v. Care* (1852), 15 Beav. 227; *Smith v. Lucas* (1881), 18 Ch. D. 531.

(*x*) *Warwick v. Bruce* (1813), 2 M. & S. 205; 1815, 6 Taunt. 118.

(*y*) Ord. XVI. rr. 16, 20; *Oliver v. Woodroffe* 1839, 8 L. J. Ex. 105; 4 M. & W. 650. See *Rhodes v. Sweetenbank* (1889), 58 L. J. Q. B. 287; 22 Q. B. D. 577.

(*z*) *Ex p. Brooksbank* (1877), 46 L. J. Bk. 113; 6 Ch. D. 358.

(*a*) *Flight v. Bolland* (1828), 4 Russ. 298.

(*b*) *Corpe v. Overton* 1833, 3 L. J. C. P. 24; 10 Bing. 252; *Hamilton v. Vaughan-Sherrin Co.* (1894), 63 L. J. C. 795; (1894) 3 Ch. 589.

(*c*) *Holmes v. Blogg* (1818), 8 Taunt. 508.

(*d*) *Ex p. Taylor* (1856), 25 L. J. Bk. 35; 8 De G. M. & G. 254.

(*e*) *Valentini v. Canali* (1889), 59 L. J. Q. B. 74; 24 Q. B. D. 166.

CHAPTER III.

CAPACITY OF PARTIES.

SECT. III.—MARRIED WOMEN.

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By the common law a married woman was incapable of binding herself personally by contract (*a*). And by the rules of common law procedure a married woman could not sue or be sued without making her husband joint party to the action. In an action against a married woman upon a contract made before marriage non-joinder of the husband could only be pleaded in abatement. In an action against a married woman upon a contract made during marriage, the marriage was a plea in bar of the action (*b*). The principle of the above rules is that at common law husband and wife are regarded as but one person, in respect of property and rights of action (*c*).

Capacity of
married
woman at
law.

^a *Marshall v. Rutton* (1800), 8 T. R. 545. Sams. 633, n. (c). See Ord. XXI. r. 20.

^b *Fox v. Tremaine* (1670), 2 Wms. c. Lit. ss. 168, 291; Co. Lit. 3 a, 112 a; 187 a. b.

PART II.
Capacity in
equity.

But the Court of Chancery invested a married woman with the right to hold property, with full power of use and disposition, exclusively of her husband; with a consequent capacity of contracting by giving her creditor a remedy against her then disposable separate property, which she was presumed to make chargeable with her contracts. This property was known as property settled to her separate use, and might be vested in a trustee for her, or where a husband possessed himself of her property to which this equitable incident was attached, the court would compel him to respect her rights, and, if necessary, declare him to be a trustee for her (*d*). This proprietary incident has usually been regarded as the invention of the chancellors, but it is not unlikely that it was an extension to married women generally of rights analogous to customary rights which they possessed in the City of London and elsewhere, and to which the courts of common law gave effect. The court allowed a married woman to sue in respect of her separate property without joining her husband; but by a next friend, in order to give security for costs. And proceedings might be taken against her to charge her separate property with her contracts without joining her husband, but joining the trustee and all other necessary parties (*e*).—Now "married women may sue and be sued as provided by the Married Women's Property Act, 1882" (*f*). that is, as if they were unmarried. And they are subject to the ordinary rules as to giving security for costs (*g*).

Married
Women's
Property
Acts:—
separate
property.

The Married Women's Property Act, 1882, which consolidates and amends the law and repeals former Acts, enacts:—S. 1 (1). "A married woman shall be capable of acquiring, holding, and disposing of any real or personal property as her separate property, in the same manner as if she were a feme sole, and without the intervention of any trustee." S. 2. Every woman who marries after the Act shall be entitled to hold and dispose of as her separate property "all real and personal property which shall belong

(*d*) *Hulme v. Tenant* (1778), 1 Bro. C. C. 16; 1 Wh. & T. L. C. 683.

(*e*) *Roberts v. Evans* (1878), 47 L. J. C. 469; 7 Ch. D. 830; *Atwood v. Chichester*, (1878), 47 L. J. Q. B. 399; 3 Q. B. D. 722; *Butler v. Butler* (1885), 55 L. J. Q. B. 55; 16 Q. B. D. 374.

(*f*) Ord. XVI. r. 16.

(*g*) *Re Isaac* (1885), 54 L. J. C. 1136; 30 Ch. D. 418; *Re Thompson* (1888), 57 L. J. C. 748; 38 Ch. D. 317; *Whittaker v. Kershaw* (1890), 44 Ch. D. 296; and see *Hood Bays v. Heriot* (1896), 65 L. J. Q. B. 624; (1896) 2 Q. B. 375.

to her at the time of marriage or shall be acquired by or devolve upon her after marriage." S. 5. Every woman married before the Act shall be entitled to hold and dispose of as her separate property "all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder shall accrue after the commencement of this Act."

CH. III.
SECT. III.

S. 1 (2). "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise."

Capacity to
contract.

S. 1 (3). "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown."

Contracts
chargeable
on separate
property.

And s. 1 (4). Such contract "shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

The contract of a married woman under this statute, as was the case before the Act, was valid if she possessed, at the time of contracting, disposable separate property, which she could make chargeable, with the contract, and it lay upon the creditor to prove that she then had such property (*h*). This liability has since been extended by the Married Women's Property Act, 1893, s. 1, as regards contracts entered into after December 5, 1893. If the contract be one upon which she is personally liable, as not having been entered into by her as her husband's agent, she is liable in respect of her separate property, and property which she may, while discover, be possessed of or entitled to, whether she was or was not in fact possessed of or entitled to any separate property at the time when she entered into the contract.

Conditions
of validity
of contract.

(*h* *Stogdon v. Lee* (1891), 60 L. J. Q. B. 669; (1891) 1 Q. B. 661; *Re Fieldwick* (1908), 78 L. J. C. 153; (1909) 1 Ch. 1.

See *Mason, Templer & Co. v. De Fries* (1909), 79 L. J. K. B. 24; (1909) 2 K. B. 831.

Part II. Sect. 19 of the Act of 1882 expressly provides that "nothing in this Act shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation attached to the enjoyment of any property or income by a married woman under any settlement, will, or other instrument; but no restriction against anticipation contained in any settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage" (*i*). According to the construction put upon this section it was possible for the husband to defeat the wife's rights under the Act, and to defeat her creditor of his remedy against her property, but this has been altered by sect. 2 of the Married Women's Property Act, 1907. A contract of a married woman whose separate property was subject to a restriction against anticipation at the time of contracting was void of effect. It was not chargeable against subsequently-acquired property (*k*); and the removal of the restraint by the death of the husband did not validate the contract (*l*), nor did it render the property chargeable under a prior valid contract (*m*). This has been altered as regards the subsequently-acquired property by sect. 1 of the Act of 1893, which is referred to above; but the same section contains a proviso that property to which a restraint upon anticipation attaches is not to be available to satisfy any liability or obligation arising out of her contract, and this provision has been held to exempt property vested in trustees for the separate use of a married woman, subject to a restraint against anticipation, although paid into her hands after the determination of the coverture (*n*). A restraint on anticipation of a married woman's separate income ceases to attach to such income as soon as it becomes due and payable to her under the trusts of the instrument under which she is entitled (*o*). It is no longer necessary expressly to limit property to the separate use of a married woman by the use of that or an equivalent expression,

(i) As to debts contracted before marriage, see *Jay v. Robinson* (1890), 59 L. J. Q. B. 367; 25 Q. B. D. 467.

(k) *Leak v. Driffeld* (1889), 59 L. J. Q. B. 59; 24 Q. B. D. 98; *Re Fiddewick* (1908), 78 L. J. C. 153; (1909) 1 Ch. 1.

(l) *Roberts v. Watkins* (1877), 46 L. J. Q. B. 552. See *Stogden v. Lee* (1891),

60 L. J. Q. B. 669; (1891) 1 Q. B. 661.

(m) *Polton v. Harrison* (1891), 60 L. J. Q. B. 742; (1891) 2 Q. B. 422.

(n) *Barnett v. Howard* (1900), 69 L. J. Q. B. 955; (1900) 2 Q. B. 784.

(o) *Heed Barry v. Heriot* (1896), 65 L. J. Q. B. 352; (1896) A. C. 174.

in order that a restraint upon anticipation may attach (*p*). Restraint of anticipation is equivalent to restraint of alienation; and a covenant to settle after-acquired property of the wife does not apply to property which is limited to her upon such terms (*q*).

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The judgment in an action upon the contract entered into by a married woman after Dec. 5, 1893, adjudges the sum and costs recovered against her to be payable out of her separate property and not otherwise; and orders that execution thereon be limited to the separate property not subject to any restriction against anticipation, unless by reason of sect. 19 of the Married Women's Property Act, 1882, the property is liable to execution notwithstanding such restraint; with a proviso excluding property which at the date of the contract or thereafter, she was restrained from anticipating (*r*). Sect. 19 expressly avoids any restriction against anticipation contained in a settlement of a woman's own property made by herself against debts contracted by her before marriage. And it seems that a restriction so made by a woman to defeat creditors would be void against all debts contracted after as well as before marriage (*s*). The costs of an action against a married woman are chargeable in the judgment against her separate property (*t*); or may be set off against costs payable to her (*u*). The same rule used to apply respecting the costs of an unsuccessful action by a married woman (*x*). But now by the Married Women's Property Act, 1893, s. 2, the court may order payment out of property, which is subject to a restraint upon anticipation, of the costs of proceedings instituted, whether by original action or by counterclaim, by a married woman (*y*). A married woman plaintiff will not be required to give security for costs unless she sues by a next friend in indigent circumstances; but she may be required to give security for the costs of an appeal on the ground of her poverty (*z*).

Judgment
against
married
woman.

Costs of
action.

(*p*) *Ex p. Hood Baux* (1896), 65 L. J. Q. 837; (1896) 2 Ch. 690.

(*q*) *Re Curry* (1886), 55 L. J. C. 906; 32 Ch. D. 361.

(*r*) See *Scott v. Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 45; *Barnett v. Howard*, (1900) 2 Q. B. 781; 69 L. J. Q. B. 955.

(*s*) *Bursill v. Tanner* (1884), 13 Q. B. D. 691.

(*t*) *Morrell v. Cowan* (1877), 6 Ch. D. 166.

u. Pelton v. Harrison 1850, 61 L. J. Q. B. 144; 1892, 1 Q. B. 118.

(*x*) *Galmaige v. Cowan* (1889), 58 L. J. C. 769.

(*y*) *Hood Baux v. Harriet* (1897), 66 L. J. Q. B. 356; (1897) A. C. 177; *Dresel v. Ellis* (1905), 74 L. J. K. B. 401; (1905) 1 K. B. 571; *Pawley v. Pawley* (1905), 74 L. J. Ch. 344; (1905) 1 Ch. 595.

(*z*) *Re Isaac* (1885), 54 L. J. C. 1136; 30 Ch. D. 418; *Re Thompson* (1888, 57

PART II.
Operation of
judgment.

A plaintiff who obtains judgment against a married woman may take out of court any money which the married woman has paid in to abide the result of the trial (*a*).

After-
acquired
property.

In other cases a judgment against a married woman admits of no personal remedy against her (*b*), but must be enforced against her separate property existing at the date of the judgment, or acquired thereafter, provided that it is not subject to a restriction against anticipation; but the judgment cannot be enforced against separate property which at the date of the contract, or thereafter, she is restrained from anticipating unless the restraint is invalid by reason of sect. 19 of the Married Women's Property Act, 1882 (*c*). And by the Conveyancing Act, 1881, s. 39, "notwithstanding a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in the property." The court will only exercise the power with very great caution (*d*).—The judgment under sect. 4 of the Act of 1882 extends to separate property acquired during a subsequent marriage (*e*). But under the same statutory provision the judgment did not extend to property acquired upon or after the death of the husband, whether subject to a restraint upon anticipation or not (*f*); the reason for the distinction being that there was no separate property apart from coverture. But, as before pointed out (*g*), property coming to a married woman after the determination of coverture may now be made available to satisfy a judgment recovered against her during coverture under the provisions of the Act of 1893.—The judgment is so far personal that the creditor may attach a debt due to the married woman by a garnishee order (*h*). A married woman may also be brought

Attachment
of debt.

L. J. C. 748; 38 Ch. D. 317; *Whittaker v. Kershaw* (1890), 41 Ch. D. 256.

(*a*) *Burd v. Burdett* (1891), 61 L. J. Q. B. 1; 1892, 1 Q. B. 91.

(*b*) *Scott v. Morley* (1887), 57 L. J. Q. B. 15; 20 Q. B. 120; *Ex p. Lester & Co.* (1893), 12 L. J. Q. B. 372; (1893) 2 Q. B. 113.

(*c*) *Barnett v. Howard* (1900), 69 L. J. Q. B. 955; (1900) 2 Q. B. 781; *Brown v. Dimbleby* (1903), 73 L. J. K. B. 35; (1904) 1 K. B. 28; *Bolton v. Gidley* (1905), 74 L. J. K. B. 439; (1905) A. C. 98; *Puquins v. Smiley* (1909), 78 L. J. K. B. 361; (1909) 1 K. B. 688; *Mason, Templier & Co. v. De Fries* (1909), 79

L. J. K. B. 24; (1909) 2 K. B. 831.

(*d*) *Hodges v. Hodges* (1882), 51 L. J. Q. B. 549; 20 Ch. D. 749; *Re C's Settlement* (1887), 56 L. J. C. 556; *Re Little* (1889), 58 L. J. C. 231; 40 Ch. D. 418; *Re Pollard's Settlement* (1895), 65 L. J. C. 796; (1896) 2 Ch. 552.

(*e*) *Jay v. Robinson* (1890), 59 L. J. Q. B. 367; 25 Q. B. D. 467.

(*f*) *Re Shakespear* (1885), 55 L. J. C. 44; 30 Ch. D. 169; *Felton v. Harrison* (1891), 60 L. J. C. 742; (1891) 2 Q. B. 422.

(*g*) See pp. 397, 398.

(*h*) *Holtby v. Hodgson* (1889), 59 L. J. Q. B. 46; 24 Q. B. D. 103.

into an action by a third party notice, and charged upon a guarantee or indemnity (i).

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SECT. III.

The court could not give judgment against a married woman personally to compel her to the specific performance of a contract to sell an estate (k); or to grant a lease (l). But an agreement to purchase, or to take a lease, was binding in respect of her separate property, which became chargeable with the purchase-money, or rent, or any other debt or damages due under the agreement (m). The creditor of a married woman before obtaining judgment against her has no specific charge upon her separate property; and therefore cannot claim an injunction to restrain her dealing with it (n). If she contracts other debts, her creditors do not rank in order of priority, but are entitled to be paid *pari passu* in the administration of her estate (o). And her debts are subject to the Statutes of Limitation, like other debts of the same kind; though in effect chargeable only upon her separate property; and though there is in fact no such property chargeable when the judgment is obtained (p).

Specific performance.

Injunction.

By the Act of 1882, s. 1, sub-s. 4, "the execution of a general power by will of a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." Before this enactment the principle of equity that the fund assets for payment of debts was held not to apply to debts of a married woman, because the fund was not her separate estate (q). Property settled upon a person for life, with a general power of appointment, and the remainder in default of appointment, to the representatives is held to be equivalent to absolute ownership; and property so settled to the separate use of a married woman

Power of appointment.

(i) *Gloucestershire Bank v. Phillips* (1884), 53 L. J. Q. B. 492; 12 Q. B. D. 533.

(k) *Francis v. Wiggall* (1816), 1 Madd. 258.

(l) *Aylett v. Ashton* (1835), 5 L. J. C. 71; 1 M. & Cr. 105.

(m) *Gaston v. Frankau* (1819), 2 De G. & Sm. 561; *Pearce v. Hine* (1869), L. R. 5 Ch. 271.

(n) *Robinson v. Pickering* (1881), 50

L. J. C. 527; 16 Ch. D. 630; *Phr v. Fitzgibbon* (1881), 50 L. J. C. 391; 17 Ch. D. 474.

(o) *Turner, L. J., Johnson v. Gullagher* (1861), 30 L. J. C. 298; 3 De G. F. & J. 494; see *Shattuck v. Shattuck*, 35 L. J. C. 501; L. R. 2 Eq. 182.

(p) *Re Hastings* (1887), 56 L. J. C. 631; 35 Ch. D. 94.

(q) *Re Roper* (1888), 58 L. J. C. 215; 39 Ch. D. 482.

PART II. is chargeable with her contracts (*r*); but not if the remainder is to another person (*s*).

Liability in respect of contracts.

The liability as well in equity as under the statutes of a married woman in respect of her separate property extended to contracts and debts of all kinds: as bonds, bills of exchange and promissory notes (*t*); a contract to take shares in a company and to pay calls and all liabilities of a shareholder (*u*); including an indemnity of the transferor against calls with which he may become chargeable after the transfer (*x*). A married woman may enter into a contract jointly with another person, or jointly with her husband; and may sue or be sued as a joint plaintiff or a joint defendant, her interest being in respect of her separate property (*y*). Before the Act a married woman was not chargeable with contracts or debts merely implied in law, for which there could be no presumed intention to charge her separate estate; as an implied debt for money received under a mistaken claim (*z*). But the Act of 1882, s. 1 (2), which renders a married woman liable to be sued, "either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*," seems to include such claims as those above mentioned (*a*).

Contracts implied in law.

Contracts induced by fraud.

Before the Act a married woman could not be made liable for fraudulently representing herself as a *feme sole* for the purpose of obtaining a contract, or it seems for any fraud involving the warranty of a representation; because she would thereby be made indirectly liable for a contract (*b*). But since the Act she may be charged with the contract directly, though it may be voidable at her suit by reason of the fraud (*c*). Before the Married Women's Property Acts the property of a married woman could not be charged with frauds or wrongs committed by her during the mar-

Fraud.

(*r*) *London Bank of Australia v. Lempiere* (1872), 42 L. J. P. C. 49; L. R. 4 P. C. 572; *Mayd v. Field* (1876), 45 L. J. C. 625; 3 Ch. D. 587.

(*s*) *Ex p. Gidebrist* (1880), 55 L. J. Q. B. 580; 17 Q. B. D. 521; see *Re Van Hagan* (1880), 50 L. J. C. 1; 16 Ch. D. 18; *Willoughby v. Holysake* (1883), 52 L. J. C. 331; 22 Ch. D. 238.

(*t*) *Halsey v. Tennant* (1778), 1 Bro. C. C. 16; 1 Wh. & T. L. C. 683; *Owen v. Homan* (1853), 4 H. L. C. 997; *Davies v. Jenkins* (1877), 6 Ch. D. 728.

(*u*) *Mathewman's case* (1866), 36 L. J. C. 90; L. R. 3 Eq. 781; *Eutler v. Compton* (1868), 38 L. J. C. 35; L. R.

7 Eq. 16.

(*x*) *Whittaker v. Kershaw* (1890), 60 L. J. C. 9; 45 Ch. D. 320.

(*y*) *Howe v. Viblett* (1891), 60 L. J. Q. B. 565; (1891) 1 Q. B. 781.

(*z*) *Wright v. Chard* (1859), 29 L. J. C. 82; 4 Drew. 673.

(*a*) *Ante*, p. 397. See *Whittaker v. Kershaw* (1890), 60 L. J. C. 9; 45 Ch. D. 320.

(*b*) *Cannam v. Farmer* (1849), 3 Ex. 698; *Liverpool Adolphus Ass. v. Fairhurst* (1851), 23 L. J. Ex. 165; 9 Ex. 422.

(*c*) See *Collett v. Dickenson* (1879), 11 Ch. D. 687.

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SECT. III.

riage, the husband alone being liable (*d*). And since those statutes the person defrauded may join the husband in an action for a tort committed by the wife, as in the case of a fraud not inducing a contract (*e*). But a married woman is estopped in equity from setting up her real title to property, where by her conduct (as by concealing her real title), she has induced a third party to deal for value with the property in ignorance of her title thereto (*f*). Where a married woman obtained money on a mortgage of her property, by representing that she was a widow and entitled to convey it, upon her death the mortgagee was held entitled to an equitable charge upon the property as against the heir (*g*). And where a husband and wife obtained money on mortgage, by concealing that it had been settled upon their marriage, the mortgagee was given priority over their rights under the settlement (*h*). But where a married woman mortgaged her separate property by concealing that it was settled with a restriction against anticipation, it was held that no charging order could be made upon the dividends, the restriction being absolute (*i*).

By the Act of 1882, s. 1 (2), a married woman is made capable of suing, "either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*;" and "any damages or costs recovered by her in any such action shall be her separate property" (*k*). Before the Act a married woman acquired a right of action upon a contract only where she supplied the consideration, or, as it was said, where she was the meritorious cause of action. Upon such contract she might sue alone, subject to the objection (by plea in abatement) that the husband should have been joined. The husband might sue alone in exercise of his marital right of reducing the wife's personal property into his own possession; or he might join the wife as party, thereby admitting the interest to remain in her, in which case the right of action would survive to the wife upon the death of the husband (*l*). And an indorsement of a bill

Rights of
married
woman on
contracts.

(*d*) *Wainford v. Hoyle* 1875, 44 L. J. C. 567; L. R. 20 Eq. 321. See *Croft v. Leslie* (1909), 78 L. J. K. B. 695; (1909), 1 K. B. 880.

(*e*) *Earle v. Kingsdale* (1900), 69 L. J. C. 725; (1900) 2 Ch. 685.

(*f*) *Savage v. Foster* (1723), 9 Mod. 35; 1 Wb. & T. L. C. 464; *Nicholl v. Jones* (1867), 36 L. J. C. 562; L. R. 3 Eq. 709.

(*g*) *Langham v. Funderstegen* (1851), 23 L. J. C. 793; 2 Drew. 363.

(*h*) *Sharpe v. Fyfe* (1868), L. R. 4 Ch. 51.

(*i*) *Stanley v. Stanley* (1877), 47 L. J.

C. 236; 7 Ch. D. 589; and see *Bateman v. Fisher* (1897), 67 L. J. C. 150; (1898) 1 Ch. 111.

(*k*) *Ante*, p. 397. See *Bowley v. Roney* (1891), 60 L. J. Q. B. 408; (1891) 1 Q. B. 509.

(*l*) *Mason v. Morgan* (1833), 4 L. J. K. B. 12; 2 A. & E. 30; *Gaters v. Madeley* (1810), 9 L. J. Ex. 173; 6 M. & W. 423; *Dalbair v. Midland Counties Ry.* (1853), 22 L. J. C. P. 178; 13 C. B. 171; *Thwaites v. Preece* (1857), 27 L. J. C. 169; 2 De G. & J. 11.

PART II.

Contracts
with husband
and wife.

Lease by
husband and
wife.

or noto by the wife operated only by authority of the husband, and might be in her own name or his according to the authority given (*m*). On the other hand a married woman before the Act could not sue for the price of goods sold or for money lent by her, as all personal chattels and money in her actual possession became in law the property of her husband, and she could only deal with them as his agent (*n*). But a married woman might sue for money received by a third party to her use, which had not been reduced into possession (*o*). Where the husband paid money into an account opened with a banker in the name of the wife, it was held presumptively to remain the property of the husband only, although payable to the wife's order until he interfered to revoke the authority (*p*). And where the husband opened an account with a banker in his own and wife's name, with authority to the wife to draw, it was held that the balance at his death remained his property (*q*).—Where the wife paid income of her separate property into her husband's banking account, which he habitually drew upon for his own use, it was held presumptively a gift of such income to the husband, and could not be recalled (*r*).—Upon a bond or covenant made to husband and wife jointly, the husband before the Act might sue alone as claiming the whole interest or might join the wife as co-plaintiff (*s*). Where a promise was made to husband and wife in consideration of forbearance of a claim in which the wife had an interest, it was held that the wife might join in an action (*t*). And the wife might join with her husband in suing upon an account stated with them, concerning money due to the wife in her own right, or for which she might sue in her own right (*u*).—Upon a lease by husband and wife of the wife's land in which the covenants were made with both, the husband might sue alone or might join the wife, but at the death of either his interest ceased (*x*). But a lease made by the husband

(*m*) *Barlow v. Bishop* (1801), 1 East, 132; *Prestwick v. Marshall* (1831), 7 Bing. 565. See *Lindus v. Bradwell* (1818), 17 L. J. C. P. 121; 5 C. B. 583.

(*n*) *Bird v. Pagnum* (1853), 22 L. J. C. P. 166; 13 C. B. 639.

(*o*) *Fleet v. Perrins* (1869), 38 L. J. Q. B. 257; L. R. 4 Q. B. 500; *Jones v. Cuthbertson* (1873), 42 L. J. Q. B. 221; L. R. 8 Q. B. 504.

(*p*) *Lloyd v. Paghe* (1872), 42 L. J. C. 282; L. R. 8 Ch. 88.

(*q*) *Marshall v. Cretwell* (1875), 41 L. J. C. 504; L. R. 20 Eq. 328.

(*r*) *Caton v. Ridout* (1849), 1 Mac. & G. 599. See *Hovors v. Bishop* (1909), 75 L. J. K. B. 796; (1909) 2 K. B. 390.

(*s*) *Ankerstein v. Clark* (1792), 4 T. R. 616.

(*t*) *Wills v. Nurse* (1834), 1 A. & E. 65.

(*u*) *Johnson v. Lucas* (1853), 22 L. J. Q. B. 174; 1 E. & B. 659.

(*x*) *Arnold v. Revault* (1819), 1 Br. & B. 443; *Hill v. Saunders* (1825), 4 L. J. O. S. K. B. 2; 4 B. & C. 529.

alone affected his own interest only, and the wife could not join in suing (*g*).

CH. III.
SECT. III.

Married women before the Act under certain circumstances acquired a special capacity of contracting and suing; as in the case of the husband becoming civilly dead (*z*).—A married woman did not acquire a separate capacity by her husband being an alien, although he resided abroad (*a*); nor, it seems, by his becoming an alien enemy (*b*); nor by her husband becoming bankrupt and absconding abroad (*c*); nor by living apart from her husband, though with a separate maintenance (*d*).—By the custom of London a married woman, trading in the City on her sole account, might sue or be sued in the City courts as a *feme sole* upon contracts concerning her trade, and might be made bankrupt; and her trade creditors were entitled to the trade assets as against her husband (*e*); but she could not sue or be sued upon the custom in the superior courts (*f*).—Except under this custom a married woman, though having separate property, could not be made bankrupt (*g*). But the Act of 1882, s. 1 (5), has enacted generally that, "Every married woman carrying on *h* a trade separately from her husband (*i*) shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*" (*k*).

Special capacity of married woman.

Husband civilly dead.

Husband alien.

Separate trading by custom of London.

Bankruptcy.

A sentence of divorce *a mensa et thoro* pronounced in the Ecclesiastical Court did not affect the *status* of the parties or the legal incapacity of the wife to bind herself by contract (*l*). A decree *nisi* for a divorce made under the provisions of the Divorce and Matrimonial Causes Act, 1857, does not alter the *status* of the wife *m*; but where the decree is made absolute the wife is thence-

Divorce.

(*g*) *Harcourt v. Wynn* (1819), 18 L. J. Ex. 153; 3 Ex. 817.

(*z*) Co. Lit. 132 a; 133 a; *Ex p. Franks* 1831, 9 L. J. O. S. C. P. 209; 7 Bing. 762.

(*a*) *Stretton v. Butnach* (1831), 3 L. J. C. P. 224; 1 Bing. N. C. 139.

(*b*) *De Wahl v. Braune* (1836), 25 L. J. Ex. 343; 1 H. & N. 178.

(*c*) See *Williamson v. Davies* (1832), 2 L. J. C. P. 3; 9 Bing. 292.

(*d*) *Hatchett v. Biddleley* (1776), 2 W. Bl. 1079; *Lean v. Schultz* (1778), 2 W. Bl. 1195.

(*e*) *Lewis v. Phillips* (1765), 3 Burr. 1776, where the custom is stated.

(*f*) *Candell v. Shaw* (1791), 4 T. R.

361; *Boord v. Webb* (1800), 2 B. & P. 93.

(*g*) *Ex p. Jones* 1879, 48 L. J. Bk. 109; 12 Ch. D. 184.

(*h*) *Ex p. Swan* (1896), 65 L. J. Q. B. 466; 1896) 2 Q. B. 407.

(*i*) *Ex p. Harvey* (1895), 43 W. R. 509; *Ex p. Suron* (1908), 78 L. J. K. B. 392; (1909) 1 K. B. 201.

(*k*) *Ex p. Coulson* 1887, 57 L. J. Q. B. 149; 20 Q. B. D. 219; *Re a Debtor* (1898), 67 L. J. Q. B. 820; (1898) 2 Q. B. 576.

(*l*) *Faithorne v. Blagrove* (1817), 6 M. & S. 73; *Lewis v. Lee* (1821), 3 L. J. O. S. K. B. 22; 3 B. & C. 291.

(*m*) *Norman v. Vallars* 1877, 16 L. J. Ex. 579; 2 Ex. D. 359.

PART II.

Judicial
separation.

forth remitted to her position of a *feme sole* with respect to property and contract (*n*).

The same Act gives jurisdiction to decree a judicial separation; and by sect. 25, "in every case of a judicial separation, the wife shall, whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire": also by sect. 26, "for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding" (*o*). Property acquired during judicial separation is not bound by a covenant in the marriage settlement to settle all property acquired "during the coverture" (*p*). By the same Act, sect. 21, a wife deserted by her husband may obtain an order of a magistrate or of the court for the protection of her property, which places her in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be if she obtained a decree of judicial separation (*q*). An order made under sects. 4 and 5 of the Summary Jurisdiction (Married Women) Act, 1895, has the effect in all respects of a decree for a judicial separation on the ground of cruelty.

Order of
protection.Contracts
between
husband and
wife.

At common law, husband and wife being considered as one person, there could be no valid contract between them (*r*). But as to the wife's separate property in equity, unless restrained from alienation, she might contract with her husband, and might sue or be sued by him, as a *feme sole*; and the same capacity continues with extended remedies under the Married Women's Property Act, 1882 (*s*). And as to legal property of a married woman in which the husband acquired a partial interest at common law, they might make a settlement of the property which, being supported by their respective interests, was valid, not only between themselves and those claiming under them, but also as against a subsequent purchaser for value without notice (*t*).—The Married Women's Property Act, 1882, enabled a married woman to acquire and hold and dispose of any real and personal property as her separate property:

Loan to
husband.

(*n*) See *Wilkinson v. Gibson* (1867), 36 L. J. C. 646; L. R. 4 Eq. 162; *Johnson v. Landor* (1869), 38 L. J. C. 229; L. R. 7 Eq. 228; *Waite v. Morland* (1888), 57 L. J. C. 655; 38 Ch. D. 135.

(*o*) *Re Wingfield and Blew* (1904), 73 L. J. C. 797; (1904) 2 Ch. 665.

(*p*) *Davies v. Creyke* (1885), 54 L. J. C. 1096; 30 Ch. D. 500.

(*q*) *Midland Ry. v. Peck* (1861), 30 L. J. C. P. 314; 10 C. B. N. S. 179; *Mason*

v. Mitchell (1894), 31 L. J. Ex. 68; 3 H. & C. 528; *Nicholson v. Drury Building Co.* (1877), 17 L. J. C. 192; 7 Ch. D. 48; *Hill v. Cooper* (1893), 62 L. J. Q. B. 423; (1893) 2 Q. B. 85.

(*r*) *Ante*, p. 395.

(*s*) See *ante*, p. 396.

(*t*) *Trasdale v. Braithwaite* (1877), 46 L. J. C. 725; 5 Ch. D. 630; see *Shurmer v. Sedgwick* (1883), 53 L. J. C. 87; 21 Ch. D. 597.

and to contract with her husband in respect thereof. But by sect. 3, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy," under reservation of the wife's claim to a dividend as a creditor, after but not before, "all claims of the other creditors of the husband for valuable consideration have been satisfied." Under this section a loan to a husband is presumptively for his trade or business, and it lies upon the wife to prove that it was not lent for that purpose (*a*): if the loan is not for the purpose of his trade or business, it is not within the Act, and she is not postponed (*x*). This section does not apply to a loan to a firm in which the husband is partner (*y*): it applies in the case of bankruptcy only, and not to the administration of an insolvent estate of a deceased husband; in which a widow, as administratrix, may retain assets in full payment of the loan (*z*): or claim to prove with interest for a sum of money paid by her as surety for her husband (*a*).

CH. III.
SECT. III.

A wife may also contract with her husband concerning conjugal rights. They may execute a deed or agreement of separation, and either party may enforce covenants therein not to sue for restitution of conjugal rights (*b*). They may make such an agreement without the intervention of a trustee for the wife; and the wife may sue for arrears of an allowance which the husband has thereby contracted to pay (*c*). A wife is also competent to enter into an agreement with her husband respecting litigation between them, and the court will stay proceedings according to their agreement (*d*).

Contracts
concerning
conjugal
rights.

A married woman is presumptively invested with a certain authority to contract as agent for her husband. It is a delegated, not an inherent authority; the wife can bind her husband

Contract of
wife as agent
of husband.

(*a*) *Re Genese* (1885), 55 L. J. Q. B. 118; 16 Q. B. D. 700; *Ex p. Cronmire* (1901), 70 L. J. Q. B. 310; (1901) 1 Q. B. 480.

(*x*) *Mackintosh v. Popose* (1895), 64 L. J. C. 274; (1895) 1 Ch. 505.

(*y*) *Ex p. Nottingham* (1887), 56 L. J. Q. B. 440; 19 Q. B. D. 85.

(*z*) *Re May* (1890), 60 L. J. C. 34; 45 Ch. D. 499; *Re Ambler* (1905), 74 L. J. C. 367, (1905) 1 Ch. 697.

(*a*) *Ex p. Cronmire* (1901), 70 L. J.

Q. B. 310; 1901 1 Q. B. 480.

(*b*) *Wilson v. Wilson* (1854), 23 L. J. C. 637; 1 H. L. C. 578. *Re Saul v. Wood* (1879), 18 L. J. C. 497; 12 Ch. D. 605. See post, p. 555.

(*c*) *McGregor v. McGregor* (1888), 57 L. J. Q. B. 591; 21 Q. B. D. 121.

(*d*) *Stans v. Stans* (1877), 47 L. J. P. 19; 3 P. D. 14; *Hart v. Hart* (1881), 50 L. J. C. 697; 18 Ch. D. 670; *Aldridge v. Aldridge* (1888), 55 L. J. P. 8, 13 P. D. 210.

PART II. only as agent, and the party seeking to charge him with a contract of the wife must prove the authority (*e*). The authority may be referred to two sources: cohabitation, during which the wife is presumptively authorised to manage the domestic affairs of her husband; and necessity, caused by the husband refusing or failing to maintain the wife (*f*). The husband may also give the wife special authority upon occasions; and he may become liable upon contracts made by his wife on his behalf by subsequently ratifying them (*g*).

Authority
from
cohabitation.

Cohabitation raises a presumptive authority in the wife to contract for her husband in all domestic matters ordinarily entrusted to a wife; as the reasonable supply of goods and service for the use of the husband, his wife, children and household; such goods and service being suitable in kind, sufficient in quantity, and necessary in fact according to the condition in which they live; beyond which the authority does not extend (*h*). A wife who is permitted by her husband to remain in the possession and management of his house and family during his absence, retains the like presumptive authority (*i*). And a woman cohabiting with a man as his reputed wife, though not married, is presumed to have authority to bind him for goods suitable to that position which he permits her to assume (*k*). The agency of the wife presumed from cohabitation, like any other agency, may be revoked by the husband; and it is in general sufficient if such revocation be notified to the wife, though notice of it do not reach the party dealing with her (*l*). The presumptive authority of the wife is also revoked or rebutted by the husband providing her with funds sufficient to pay for the goods required without pledging his credit (*m*). But where there have been previous dealings of the same kind through the wife with the same person acknowledged by the husband, so giving a special consent to the agency,

Revocation of
authority.

(*e*) *Per cur.*, *Eastland v. Burchell* (1878), 47 L. J. Q. B. 500; 3 Q. B. D. 435; Selborne, L. C., *Debenham v. Mellon* (1880), 50 L. J. Q. B. 155; 6 Ap. Ca. 31; *Morel Bros. v. Westmoreland (Earl)* (1903), 73 L. J. K. B. 93; (1904) A. C. 11.

(*f*) Willes, J., *Cooper v. Lloyd* 1859, 6 C. B. N. S. 521.

(*g*) See *post*, p. 113.

(*h*) *Renoux v. Teakle* (1853), 22 L. J. Ex. 211; 8 Ex. 680; *Phillipson v. Hayter* (1870), 40 L. J. C. P. 14; L. R.

6 C. P. 38.

(*i*) Willes, J., *Cooper v. Lloyd* 1859, 6 C. B. N. S. 521.

(*j*) *Ryan v. Sams* 1848, 17 L. J. Q. B. 271; 12 Q. B. 160.

(*l*) *Jolly v. Ross* (1861), 33 L. J. C. P. 177; 15 C. B. N. S. 628; *Debenham v. Mellon* 1880, 50 L. J. Q. B. 155; 9 Ap. Ca. 24.

(*m*) *Morel Bros. v. Westmoreland Earl* 1903, 73 L. J. K. B. 93; (1904) A. C. 11.

the revocation is not effectual without notice to the person dealing upon faith in the continuance of the agency (*n*). Upon the above principle the agency of a wife is held to be revoked by insanity of the husband which disables him from acting for himself; but if he has previously given a special authority to the creditor to trust the wife, it is not revoked until notice is given of the insanity (*o*).

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An authority in the wife may also arise from necessity. The husband is bound by law to maintain his wife; and if he fail in this duty, she becomes entitled, except under certain circumstances of justification, to pledge his credit to procure it: nor can the husband, so long as the necessity lasts, deprive her of such authority even by express prohibition to the party who supplies her (*p*); but the husband is entitled to fix arbitrarily, within the limits of necessity, the standard of expenditure, or, as Chief Baron Gilbert tersely put it, "the wife is not to be her own carver" (*q*). Where the wife is living apart from her husband, there is no presumption in favour of the authority; and it lies upon the creditor seeking to charge the husband to prove the circumstances of the necessity (*r*). The creditor is considered as standing in the wife's place as regards the claim against the husband (*s*). The presumptive authority of a woman with whom a man cohabits as his reputed wife ceases upon desertion or separation, there being no legal duty in the man to provide her maintenance; but a tradesman who has dealt upon the footing of an implied authority is entitled to notice of its revocation (*t*). Where the husband has become lunatic, and is confined in an asylum, the wife has the same authority to pledge his credit for her maintenance, but no greater than if the husband had remained sane (*u*).—Where the husband by misconduct compels the

Authority
from
necessity.

Expulsion of
wife.

(*n*) *Ryan v. Sims* (1848), 17 L. J. Q. B. 271; 12 Q. B. 196; 1d. Blackburn, *Debenham v. Mellon* (1880), 50 L. J. Q. B. 155; 9 Ap. Ca. 24.

(*o*) *Dove v. Nunn* (1879), 48 L. J. Q. B. 591; 1 Q. B. D. 661.

(*p*) *Manby v. Scott* (1659), 1 Lev. 4; 2 Sm. L. C. 433.

(*q*) Bac. Ab. Baron & Feme, 188; *Jolly v. Ros* (1861), 15 C. B. N. S. 628; 33 L. J. C. P. 177; *Harrison v. Grady* (1865), 12 Jur. N. S. 110; *Debenham v. Mellon* (1880), 50 L. J. Q. B. 155; 6 Ap. Ca. 24.

(*r*) *Edwards v. Twiss* 1843, 12 L. J. C. P. 239; 5 Man. & G. 624; *Johnston v. Sumner* (1858), 27 L. J. Ex. 311; 3 H. & N. 261.

(*s*) Mansfield, C. J., *Ozard v. Turnford*, 1 Selw. N. P. 331, 12th ed.

(*t*) *Ryan v. Sims* (1848), 17 L. J. Q. B. 271; 12 Q. B. 196.

(*u*) *Reed v. Legard* (1851), 20 L. J. Ex. 300; 6 Ex. 636; *Richardson v. Du Bois* (1869), 39 L. J. Q. B. 69; L. R. 5 Q. B. 51. See *Davidson v. Wood* 1863, 32 L. J. C. 100; 1 De G. J. & S. 165.

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wife to leave his house, it is equivalent to a refusal to maintain her there, and unless she is sufficiently provided, entitles her to pledge his credit for her maintenance elsewhere; as where husband threatens her with personal violence; or where he is in the house in adultery with another woman (*x*); nor in such cases is she bound to return merely at his request upon removal of the cause of leaving (*y*). A threat to provide for her in an asylum under medical advice, presumptively according to law, was held not sufficient to compel her to leave him (*z*).

Voluntarily living apart.

But so long as the husband is willing himself to maintain the wife, there is no necessity for her to seek maintenance elsewhere, and no authority to pledge his credit to obtain it (*a*). A wife voluntarily living apart from her husband, though with his consent, has no inherent authority to charge him with her maintenance; she can only charge him upon an authority given or inferred in fact; but where the husband consents to his wife living apart, without any provision or agreement for her maintenance, it may generally be presumed as a fact that the husband intended that she should pledge his credit (*b*). If he consents to her living apart only upon the condition of not charging him, he could not be made liable (*c*). If the wife living apart incurs debts for necessaries for which the husband is not liable, she is presumptively taken to charge them upon her separate estate (*d*).

Wife supplied with funds.

— The wife is under no necessity, and consequently has no authority to pledge her husband's credit, if she is in fact provided by him with funds sufficient for her maintenance (*e*); and the creditor cannot charge the husband, although at the time of dealing with the wife he had no notice of such funds (*f*). If the funds allowed are insufficient, the husband may be charged for the deficiency (*g*); but an agreement made between the husband and wife, upon a separation by mutual consent, as to the

(*x*) *Houlston v. Smith* (1825), 3 L. J. O. S. C. P. 200; 3 Bing. 127; *Hunt v. De Blaquiere* (1829), 7 L. J. O. S. C. P. 198; 5 Bing. 550.

(*y*) *Emery v. Emery* (1827), 1 Y. & J. 501.

(*z*) *Biffen v. Bignell* (1862), 31 L. J. Ex. 189; 7 H. & N. 877.

(*a*) *Hindley v. Westmeath (Marq.)* (1827), 5 L. J. O. S. C. B. 115; 6 B. & C. 209.

(*b*) *Per cur.*, *Johnston v. Sumner* (1858), 27 L. J. Ex. 344; 3 H. & N. 261.

(*c*) *Biffen v. Bignell* (1862), 31 L. J. Ex. 189; 7 H. & N. 877.

(*d*) *Re Bacher* (1880), 15 Ch. D. 87.

(*e*) *Morel Bros. v. Westmoreland* (1903), 73 L. J. K. B. 93; (1904) A. C. 11.

(*f*) *Misen v. Pick* (1838), 7 L. J. Ex. 153; 3 M. & W. 481; *Morel Bros. v. Westmoreland* (1903), 73 L. J. K. B. 93; (1901) A. C. 11.

(*g*) *Baker v. Sampson* (1863), 14 C. B. N. S. 383.

amount of her allowance is conclusive of its sufficiency (*h*); and a decree of the court for the payment of a sum to the wife for alimony is evidence that the sum is sufficient (*i*). But if the alimony under the decree, or the allowance under the agreement, is not duly paid, the wife may be under necessity to pledge her husband's credit, and acquire authority to do so (*k*); subject to any right which the husband may have to be indemnified against his liability (*l*). A wife is not bound to charge her separate property in relief of the liability of her husband to maintain her (*m*).

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Adultery of the wife puts an end to all authority to charge the husband which is incident to the conjugal relation (*n*); and without giving the wife the legal capacity of contracting personally as a single woman (*o*). And having lost her legal right to maintenance from her husband, she cannot recover compensation for his death by the negligence of a third party (*p*). It is immaterial to the liability of the husband that the creditor had no notice of the adultery at the time he supplied her with necessaries (*q*); or that the husband first compelled her to leave him by adultery on his part (*r*); or that he has committed adultery after her leaving him (*s*). But if he connived at or condoned the adultery, the position of wife, with the authority incident thereto, remains as before (*t*). If the husband, knowing of the adultery of his wife, leaves her in charge of his house and family, she retains the presumptive authority incident to that position; and he is liable for necessaries supplied to her by a person who had no notice of the adultery (*u*). But he is not liable for goods supplied to the wife after adultery committed of which he

Adultery of
wife.

(*h*) *Eastland v. Burchell* (1878), 47 L. J. Q. B. 500; 3 Q. B. D. 432.

(*i*) *Willson v. Smyth* (1831), 9 L. J. O. S. K. B. 155; 1 B. & Ad. 801; *Re Wingfield & Blew* (1901), 73 L. J. C. 797; (1901) 2 Ch. 665.

(*k*) *Nurse v. Craig* (1806), 2 B. & P. N. R. 148; *Hunt v. De Blaquiere* (1829), 7 L. J. O. S. C. P. 198; 5 Bing. 550.

(*l*) *Jones v. Waite* (1839), 5 Bing. N. C. 341; *affd.* on other grounds 1842, 9 Cl. & F. 101.

(*m*) *Davidson v. Wood* (1863), 32 L. J. C. 400; 1 De G. J. & S. 165.

(*n*) *Atkins v. Pearce* 1857, 26 L. J. C. P. 252; 2 C. B. N. S. 763; *Cooper v.*

Lloyd 1859, 6 C. B. N. S. 519.

(*o*) *Meyer v. Hawthorth* (1835), 7 L. J. Q. B. 211; 8 A. & E. 167.

(*p*) *Stimpson v. Wood* 1888, 57 L. J. Q. B. 181.

(*q*) *Morris v. Martin* (1726, Sir. 647; *Atkins v. Pearce* 1857, 26 L. J. C. P. 252; 2 C. B. N. S. 763.

(*r*) *Gazier v. Hancock* (1796), 6 T. R. 603.

(*s*) See *Rea v. Flintan* (1830), 9 L. J. O. S. M. C. 33; 1 B. & Ad. 227.

(*t*) *Willson v. Glassop* 1888, 57 L. J. Q. B. 161; 29 Q. B. D. 351.

(*u*) *Norton v. Frazar* (1798), 1 B. & P. 226.

PART II. was ignorant; though the person supplying the goods was also ignorant of it (*x*).

Necessaries. The necessities for which the husband is chargeable include all reasonable expenses for the wife of a person of his estate and condition (*y*). A house and furniture may be necessary for a wife in a station of life requiring her to have a house of her own; also household servants, together with food and liveries for them; and the services of a waiting-maid (*z*). A wife may be entitled to charge her husband with the maintenance of his children, when properly and legally committed to her care (*a*).—It may be necessary for a wife to exhibit articles of the peace against her husband, and he would be chargeable with the cost; but he cannot be charged with the costs of a prosecution for an assault (*b*). An allowance made for separate maintenance cannot be considered as applicable to such costs (*c*). The costs of a suit for divorce could be recovered against the husband as necessary, if there were reasonable grounds for the suit; as may the costs of a suit for a judicial separation, or of a suit for restitution of conjugal rights (*d*). Under the statutory jurisdiction, the Divorce Division can make provision of a wider character for the wife's costs (*e*). The costs of legal advice respecting her marriage settlement, and the claims of tradesmen for goods supplied, and a distress levied in her husband's house in which she had been left, have been held to be chargeable against him (*f*). But the costs of a deed of separation cannot be charged against the husband without his special authority (*g*).—The husband was not liable at law to repay money borrowed by his wife, and applied by her in procuring of necessities for which she might have pledged his credit; or to the payment of debts previously incurred for such necessities (*h*); but in equity (and the equitable

Costs of legal proceedings.

Money lent to wife.

(*x*) *Atkins v. Paine* (1857), 26 L. J. C. P. 252; 2 C. B. N. S. 763.

(*y*) *See cur. Bazley v. Forder* (1868), 37 L. J. Q. B. 237; L. R. 3 Q. B. 562.

(*z*) *Hunt v. De Bagniere* (1829), 7 L. J. O. S. C. P. 550; 5 Bing. 530. See *White v. Gwyler* (1755), 6 T. R. 176.

(*a*) See *Bazley v. Forder* (1868), 37 L. J. Q. B. 237; L. R. 3 Q. B. 562.

(*b*) *Shepherd v. McKend* 1813, 3 Camp. 326; *Grindall v. Goddard* (1836), 6 L. J. K. B. 31; 5 A. & E. 755.

(*c*) *Trenne v. Roakes* (1839), 8 L. J. Q. B. 211; 10 A. & E. 47.

(*d*) *Brown v. Achroyd* (1856), 25 L. J.

Q. B. 193; 5 E. & B. 819; *Re Hooper* (1864), 33 L. J. C. 305; 2 De G. J. & S.

91; *Outway v. Hamilton* (1878), 47 L. J. C. P. 725; 3 C. P. D. 393; *Taylor v.*

Holst ne (1882), 52 L. J. Q. B. 101.

(*e*) See *Nairne v. Nairne* (1901), 71 L. J. P. 37; *Re Wingfield & Blox* (1904), 73 L. J. C. 797; (1905) 2 Ch. 665.

(*f*) *Wilson v. Ford* (1868), 37 L. J. Ex. 60; L. R. 3 Ex. 63.

(*g*) *Ladd v. Lynn* (1837), 6 L. J. Ex. 73; 2 M. & W. 265.

(*h*) *Knox v. Bushell* (1857), 3 C. B. N. S. 331.

rule must now be given effect to in all divisions of the High Court), a person advancing money to pay for necessaries supplied to the wife, or himself paying the cost of necessaries for which the husband is liable, may charge the husband or his estate with the sums so lent or paid (*i*).

Co. III.
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The husband may give a special authority to the wife, beyond the presumptive authority incident to her position; as if intrusted or permitted by the husband to carry on a trade or business on his behalf, she would have all the authority which is necessary or usual in that business; such as to receive or pay money or to order goods in the course of the business (*k*); or to draw and indorse bills and notes (*l*).

Special
authority

A husband may also become liable upon contracts made by his wife, in excess of her presumptive authority, if he subsequently ratifies them (*m*). Thus the husband may become liable to pay for articles ordered by his wife, without authority, if he sanctions the use of them; and a husband may be taken to have sanctioned the use of, and so become liable for articles of dress or jewellery which his wife has ordered upon his credit, by seeing her wear them without disapproval (*n*). So, where he has control over the goods improperly ordered by his wife, and does not return them (*o*). And he may ratify the purchase of goods by the wife conditionally so that the condition must be satisfied in order to charge him (*p*).

Ratification
by husband.

The liability of a husband for necessaries supplied upon the wife's order is not a liability jointly with her (*q*). Where the wife is acting under an express authority from the husband she cannot be charged with the price of goods although the tradesman is ignorant of the fact (*r*). If acting under her general authority she is presumed to bind her husband, and not to con-

Credit to
wife only.

Jenner v. Morris (1861), 30 L. J. C. 361; 3 De G. F. & J. 45; *Davidson v. Wood* (1863), 32 L. J. C. 400; 1 He G. J. & S. 465; *Deane v. Soutten* (1869), L. R. 9 Eq. 151.

(*k*) *Clifford v. Burton* (1823), 1 L. J. O. S. C. P. 61; 1 Bing. 199; *Plummer v. Sells* (1834), 3 N. & M. 422.

(*l*) *Lord v. Hall* (1849), 19 L. J. C. P. 47; 8 C. B. 627.

(*m*) See ante, p. 403.

(*n*) *Montague v. Benedict* (1825), 3 L. J. O. S. K. B. 94; 3 B. & C. 631; *Seaton*

v. Benedict (1828), 5 Wing. 28; 2 Sm. L. C. 463, 469.

(*o*) *Warthman v. Wakefield* (1807), 1 Camp. 120.

(*p*) *Holt v. Brion* (1821), 4 H. & Ald. 252.

(*q*) *Marell Bros. v. W'stmoreland Earls* (1903), 73 L. J. K. B. 94; (1904) A. C. 11; *French v. House* (1906), 75 L. J. K. B. 980; (1906) 2 K. B. 674.

(*r*) *Piquin, Ltd. v. Beauchamp* (1906), 75 L. J. K. B. 395; (1906) A. C. 148. See *Jewsbury v. Newbald* (1857), 26 L. J. Ex. 247.

PART II. tract in respect of her separate estate (s). And the husband may be charged although the creditor took a covenant of the wife and the security of a third party (t). But advances made to a married woman, living apart from her husband by consent, are presumptively a charge on her separate estate (u).

(s) *F. v. Wilson v. Wood* (1863), 32 L. J. C. 400; 1 D. & G. J. & S. 465.

(t) *White v. Ogley* (1796), 6 T. R. 176.
(u) *Re Barber* (1880), 15 Ch. D. 87.

CHAPTER III.

CAPACITY OF PARTIES.

SECT. IV. INSANITY AND INTOXICATION.

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Contract with person in state of insanity—notice of insanity . .	415
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A person may be mentally afflicted to such a degree as to be incapable of understanding an agreement, and consequently incapable of binding himself by contract. The degree of insanity necessary to affect the validity of a contract is not idiocy or mental infirmity which would justify the finding of a person to be a lunatic under a commission, it is sufficient if the party is incapable of understanding the contract when its purport is explained to him (*a*).

Contract with person in state of insanity.

Lunacy *per se* is not sufficient to avoid a contract, it must also be shown that the other party had notice of such insanity as affected the alleged lunatic's capacity to contract, and took an advantage of his knowledge of this fact (*b*). A contract with a lunatic is voidable at his option, and not void, and may be confirmed by him during a lucid interval or on his behalf (*c*). The general presumption of law in favour of the validity of a contract casts the burden of proof primarily upon the party alleging insanity (*d*). Where, however, there has been a commission of lunacy finding the party to be a lunatic at a date anterior to that of the contract the burden of proof is shifted, and the other party has to show that he had no notice of the insanity, or that the contract was made during a lucid interval (*e*). All acts done after a person has been found a lunatic under a commission and

(*a*) *Ball v. Mannin* (1829), 1 Bli. N. S. 1; *Bilchford v. Christian* (1 29), 1 Knapp, P. C. 73; *Jenkins v. Morris* (1880), 14 Ch. D. 674.

(*b*) *Multon v. Camroux* (1849), 18 L. J. Ex. 356; 4 Ex. 17; *Imperial Loan Co. v. Stone* (1892), 61 L. J. Q. B. 419; 1892 1 Q. B. 599. See *Bevan v. McDonnell* (1851), 23 L. J. C. 326; 10 Ex. 181.

(*c*) *Baldwin v. Smith* (1900), 69 L. J. C. 336; 1900 1 Ch. 588.

(*d*) *Campbell v. Hooper* (1855), 24 L. J. C. 614; 3 Sm. & G. 153; *Imperial Loan Co. v. Stone* (1892), 61 L. J. Q. B. 419; (1892 1 Q. B. 599).

(*e*) *Hall v. Warren* (1804), 9 Ves. 605; *Swick v. Watts* (1818), 11 Beav. 105.

PART II. before it is superseded are invalid, notwithstanding they are done during a lucid interval, or could be justified but for the commission, for in that case the prerogative of the crown is in question (*f*).

A power of attorney executed by a person of unsound mind is invalid unless executed during a lucid interval (*g*).

Insanity
subsequent
to contract.

Contracts are not in general affected by the subsequent insanity of one of the parties (*h*); but there may be an implied exception of performance under such circumstances. Upon a similar principle it was held that the rule of a trade union could be altered in accordance with the constitution of the society to the prejudice of a member who had become insane (*i*). The insanity of a principal revokes the continued authority of an agent to contract on his behalf; but a contract made with an apparently continuing agent by a party having no notice of the insanity of the principal is valid (*k*). Judgment may be recovered against a lunatic for debts incurred before the lunacy, and a charging order obtained upon such judgment, which will charge the estate of the lunatic after his death in priority to the claim of the representatives (*l*). A contract to marry, as it results in imposing a *status* upon the parties which they cannot enter into unless sufficiently sane to understand the import of their acts, becomes void by the insanity of one of the parties, because it is then impossible of performance; and it is immaterial whether the insanity existed at the time of contracting, and whether it was known or not to the other party (*m*). A marriage duly solemnised between competent parties is not affected by the subsequent insanity of one of them; but proceedings for dissolution of marriage upon sufficient grounds may be brought and prosecuted against a party who has become insane since the marriage and before the proceedings commenced (*n*).

Contracts of
marriage.

(*f*) *Re Walker* (1904), 71 L. J. C. 84; (1905) 1 Ch. 160.

(*g*) *Daily Telegraph Newspaper Co. v. McLaughlin* (1904), 73 L. J. P. C. 95; (1904) A. C. 776.

(*h*) *Affleck v. Affleck* (1857), 26 L. J. C. 358; 3 Sm. & G. 394. See *Re Pugini*, (1892) 1 Ch. 236.

(*i*) *Bucke v. Amalgamated Soc. of Dyers* (1906), 75 L. J. K. B. 533; (1906) 2 K. B. 553.

(*k*) *Deer v. Nunn* (1879), 48 L. J. Q. B. 591; 4 Q. B. D. 661.

(*l*) *Re Leavesley* (1891), 60 L. J. C. 385; (1891) 2 Ch. 1.

(*m*) *Durham v. Durham* (1885), 10 P. D. 80.

(*n*) *Mordant v. Moncrieff* (1874), 43 L. J. P. C. 49; L. R. 2 H. L. Ss. 371; *Baker v. Baker* (1880), 49 L. J. P. 83; 6 P. D. 12; *Yarrow v. Yarrow* (1892), 61 L. J. P. 69; (1892) P. 92.

A lunatic or his estate may be charged for necessities supplied to him suitable to his estate and condition, notwithstanding notice of his incapacity (*o*); and the maintenance of his wife is a necessary for which he may be charged (*p*). The costs of a commission of lunacy were held to constitute a valid debt as having been expended for the necessary protection of his person and property (*q*); including the costs of a medical witness called to prove his sanity (*r*). Such commission may be necessary and the costs charged against him, although he is found by the inquisition to be of sound mind (*s*).—A claim for necessities supplied to a lunatic is allowed by the court as a debt chargeable against his estate during his life; and as a debt payable in due course of administration after his death (*t*); subject to the limitation of having accrued due within six years, in analogy with a legal debt (*u*); but the right of the Crown to be re-imbursed the cost of maintaining a criminal lunatic is not subject to this limitation (*x*). The expenses of necessities supplied gratuitously and without intention of claiming repayment are not recoverable (*y*). The court in managing the estate of a lunatic has allowed debts for past maintenance of the lunatic, his wife and children, to be paid in full in priority to other creditors (*z*). The court acting in lunacy exercises a peculiar jurisdiction under which it may allow payments out of the estate of a lunatic by way of bounty (*a*).

CH. III.
SECT. IV.

Necessaries
supplied
during
insanity.

Necessaries
charged
against
estate.

The mere fact of one of the parties to the contract being insane is no ground in equity for setting aside the contract, or for refusing the ordinary equitable remedies, unless the other party has had notice of the insanity and derives an inequitable advantage from it (*b*). A sale or mortgage of land completed by a

Effect of
insanity in
equity.

(*o*) Sale of Goods Act, 1893, s. 2; *Baxter v. Portsmouth (Earl)* (1826), 5 B. & C. 170; *Re Gibson* (1871), L. R. 7 Ch. 52; *Re Rhodes* (1890), 59 L. J. C. 298; 41 Ch. D. 94.

(*p*) *Read v. Legard* (1851), 20 L. J. Ex. 309; 6 Ex. 636.

(*q*) *Williams v. Wentworth* (1842), 5 Beav. 325; *Re Meavys* (1879), 48 L. J. C. 190; 10 Ch. D. 552.

(*r*) *Brockwell v. Bullock* (1889), 58 L. J. Q. B. 289; 22 Q. B. D. 567.

(*s*) *Re Cathcart* (1891), 61 L. J. C. 99; (1892) 1 Ch. 549; (1893), 62 L. J. C. 320; (1893) 1 Ch. 466.

(*t*) *Re Marman's Trust* (1878), 8 Ch. D. 356.

(*u*) *Re Weaver* (1881), 21 Ch. D. 615.

(*v*) *Re J.* (1909), 78 L. J. C. 348; (1909) 1 Ch. 574.

(*y*) *Re Rhodes* (1890), 59 L. J. C. 298; 44 Ch. D. 94.

(*z*) *Re Fink* (1883), 52 L. J. C. 674; 23 Ch. D. 577. See *Re Winkle* (1894), 63 L. J. C. 511; (1894) 2 Ch. 519.

(*a*) *Re Whitaker* (1889), 58 L. J. C. 487; 42 Ch. D. 119.

(*b*) *Campbell v. Hooper* (1855), 24 L. J. C. 614; 3 Sm. & G. 153.

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conveyance is unimpeachable under these circumstances, though the vendor or mortgagor was in fact a lunatic at the time of executing it; and the mortgagee is entitled to foreclose the mortgage against the lunatic or his representative (*c*).—So the insanity of a contracting party is no ground of objection to a decree for specific performance against him, provided the contract be otherwise valid and capable of specific performance (*d*); and by order of the court the committee of a lunatic may give a discharge for the purchase-money and execute a conveyance in performance of a contract by the lunatic for the sale or disposal of land (*e*).

Contract with person in state of intoxication.

A person who has deprived himself of reason by intoxication is in a condition, as regards the capacity of contracting, analogous to that of mental insanity, and the same rules may in general be applied; he is *non compos mentis* by his own act (*f*). If a person enters into an agreement with another, who knows him to be then so far intoxicated as to be incapable of understanding the matter of the agreement, the contract is voidable by the party so incapacitated (*g*). But a person cannot avoid his own agreement merely upon the ground of the intoxication of the other party with whom he has contracted; and if the latter after becoming sober ratifies the agreement, it becomes binding on both sides (*h*). A court of equity will not set aside a contract at the instance of a party merely upon the ground that he was intoxicated when he made it, where it does not appear that the other party induced the intoxication, or took advantage of it to obtain the agreement (*i*). Nor under such circumstances can a party in general resist specific performance (*k*).—A person in a state of intoxication may render himself liable by an implied contract to pay for necessities supplied, or necessary services rendered to him, whilst in that state (*l*).

Necessaries supplied.

(*c*) *Price v. Berrington* (1851), 3 Mac. & G. 486; *Campbell v. Hooper* (1855), 24 L. J. C. 644; 3 Sm. & G. 153.

(*d*) *Hall v. Warren* (1804), 9 Ves. 605; *Frost v. Beavan* (1853), 22 L. J. C. 638.

(*e*) *Cowper v. Harmer* (1888), 57 L. J. C. 460; *Re Pagani*, (1890) 1 Ch. 236.

(*f*) *Beverley's case* (1604), 4 Co. 124 b.

(*g*) *Dunboyne (Lord) v. Mulvihill* (1819), 1 Bli. 137; *Gore v. Gibson* (1845), 14 L. J. Ex. 151; 13 M. & W. 623.

(*h*) *Matthea v. Baxter* (1873), 42 L. J. Ex. 73; 1 L. R. 8 Ex. 132.

(*i*) *Cooke v. Clapworth* (1811), 18 Ves. 12; *Say v. Barwick* (1812), 1 Ves. & B. 195.

(*k*) *Lightfoot v. Heron* (1839), 3 Y. & C. Ex. 586; *Shaw v. Thackray* (1853), 1 Sm. & G. 537.

(*l*) Sale of Goods Act, 1893, s. 2; *per cur. Gore v. Gibson* (1845), 45 L. J. Ex. 151; 13 M. & W. 623.

CHAPTER III.

CAPACITY OF PARTIES.

SECT. V.—CORPORATIONS AND COMPANIES.

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A corporation is an artificial person created by law, having perpetual succession, a distinctive name, and a common seal (*a*). A corporation may be only described by the word "person" (*b*).—A corporation constituted for some special purpose for which only it exists; as the capacity of the corporation, if not expressly defined and limited by the terms of its constitution, is impliedly defined and limited by the purpose of its existence, to which its funds are exclusively applicable (*c*). Accordingly if on the true construction of a statute creating a corporation it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enact-

Corporation.
Capacity to contract.

(a) 1 Blackst. Com. 467.

(b) *Pharmaceutical Soc. v. London Ship-ping Assn.* (1880), 49 L. J. Q. B. 736; 5 App. Cas. 857; *Willmott v. London Road Car Co.* (1910), 80 L. J. C. 1; (1910) 2 Ch. 525. See Conveyancing Act, 1881, s. 2; Interpretation Act, 1889, s. 19.

(c) *Reg. v. Reed* (1880), 49 L. J. Q. B. 600; 5 Q. B. D. 483; *Newcastle (Corp.) v. Atty.-Gen.* (1892), 62 L. J. Q. B. 72; 1892) A. C. 578. See *Bugood v. Henderson's Transvaal Estates* 1908, 77 L. J. C. 483; (1908) 1 Ch. 713.

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ment as illegal and void, and incapable of being ratified (*d*). It is also beyond the powers of a corporation or company to contract not to use the powers with which they are invested, presumptively for the public good; as a power for the compulsory purchase of land (*e*). The burden of proving that a contract is invalid upon the ground that it is *ultra vires* rests upon the party who asserts that it is so (*f*).

Contracts
ultra vires.

A contract which is beyond the power and capacity of the corporation, is described as being *ultra vires*, and is void (*g*). And any individual member of a corporate body may appeal to the court to restrain the application of the corporate funds to any contract or purpose which is *ultra vires*, though a majority of members are in favour of such application (*h*). A resolution of directors which is *ultra vires* is simply void, and those directors who act upon it become personally liable for the consequences (*i*).—A company constituted for a specified business has no power or capacity to engage in any other business or employ their property for any other purpose than their own specified business (*k*); and if a company can no longer carry on its legitimate business or abandons its legitimate business to carry on a business which is *ultra vires*, a shareholder may claim to have the company wound up (*l*). A company incorporated for the purpose of mining and selling copper ore was held incapable of dealing in iron; and a contract for the manufacture and delivery of iron rails was held void, because not within the scope

Company
engaging
in other
business.

(*d*) *Ashbury Ry. Car. Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653; *Att.-Gen. v. G. E. Ry.* (1880), 49 L. J. C. 545; 5 Ap. Ca. 473; *Wentlock (Baroness) v. River Dee Co.* (1885), 54 L. J. Q. B. 577; 10 Ap. Ca. 354; *Davis v. Leicester Corp.* (1894), 63 L. J. C. 410; (1894) 2 Ch. 208; *Corbett v. S. E. & C. Ry.* (1906), 75 L. J. C. 489; (1906) 2 Ch. 12.

(*e*) *Ayr Harbour v. Oswald* (1883), 8 Ap. Ca. 623.

(*f*) *Hire Purchase Furnishing Co. v. Richens* (1888), 20 Q. B. D. 387.

(*g*) *Shrewsbury & Birm. Ry. v. L. & N. W. Ry.* (1857), 26 L. J. C. 482; 6 H. L. C. 113; *Ashbury Ry. Car. Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653; *Quin & Ardens, Ltd. v. Salmon* (1909), 78 L. J. C. 506; (1909) A. C. 442.

(*h*) *Clinch v. Financial Corp.* (1868), 38 L. J. C. 1; L. R. 4 Ch. 117; *Pickering v. Stephenson* (1872), 41 L. J. C. 493; 14 Eq. 332; *Holmes v. Newcastle Abattoir Co.* (1876), 45 L. J. C. 383; 1 Ch. D. 682.

(*i*) *Cullerne v. London and Suburban Ry. Soc.* (1880), 59 L. J. Q. B. 525; 25 Q. B. D. 485; *Young v. Naval & Mil. Co-op. Soc.* (1905), 74 L. J. K. B. 302; (1905) 1 K. B. 687.

(*k*) *Mann v. Edinburgh Northern Tram.* (1892), 62 L. J. P. C. 74; (1893) A. C. 69; *Stephens v. Mysore Reefs* (1902), 71 L. J. C. 295; (1902) 1 Ch. 745.

(*l*) *Re German Date Coffee Co.* (1882), 51 L. J. C. 564; 20 Ch. D. 169; *Re Crown Bank* (1890), 59 L. J. C. 739; 44 Ch. D. 634. And see *Cotton v. Imperial and Foreign Corp.* (1892), 61 L. J. C. 684; (1892) 3 Ch. 454.

of its business (*m*). A company constituted for the purpose of carrying on the business of "mechanical engineers and general contractors," was held to be restricted to business and contracts of a mechanical kind, and therefore incapable of contracting for the purchase of a concession and for providing funds for a foreign railway *n*. So generally it is *ultra vires* for a company to contract for the purchase of the business and goodwill of another company (*o*); or to buy shares and become a shareholder in another company (*p*); unless authorised to do so by its constitution. And a power of "investing in securities" does not authorise taking shares for the purpose of engaging in another business (*q*).

Ch. III.
Sect. V.

Upon the same principle it is *ultra vires* for an ordinary railway company, having no special powers for the purpose, to trade in coals (*r*); or to trade with steamships to a foreign port (*s*); or to run passenger omnibuses (*t*); or to take a lease of another line (*u*); or to pay the costs of obtaining an Act for another line (*x*). But a railway company which has taken land is entitled to use it for such other purposes as do not interfere with the objects for which the company was established (*y*).

Railway
company.

A corporation has no power of borrowing money, unless expressly or impliedly given in its constitution; thus a school board, having power to raise money by rates, has no power of borrowing (*z*). And a benefit building society has no power of borrowing unless given by special rule of the society (*a*). A company constituted for commercial or trading purposes, involving the use of money and credit, is impliedly invested with power to

Borrowing
power.

(*m*) *Copper Miners' Co. v. Fox* (1851), 20 L. J. Q. B. 174; 16 Q. B. 229.

(*n*) *Ashbury Ry. Car. Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653.

(*o*) *Ernest v. Nicholls* (1857), 6 H. L. C. 401; *Clinch v. Financial Corp.* (1868), 38 L. J. C. 1; L. R. 4 Ch. 117; *Stace's case* (1869), L. R. 4 Ch. 682.

(*p*) *Ex p. Contract Corp.* (1867), 37 L. J. C. 81; L. R. 3 Ch. 105; *Ex p. Royal Bank of India*, L. R. 4 Ch. 252; *Ex p. British Nation Assoc.* (1878), 48 L. J. C. 118; 8 Ch. D. 679.

(*q*) *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381.

(*r*) *Att.-Gen. v. G. N. Ry.* (1860), 29 L. J. C. 794; 1 Dr. & Sm. 154.

(*s*) *Cobman v. Eastern Co. Ry.* (1846),

16 L. J. C. 73; 10 Beav. 1. See *South Wales Ry. v. Redmond*, 10 C. B. N. S. 675.

(*t*) *Att.-Gen. v. Mersey Ry.* (1907), 76 L. J. C. 568; (1907) A. C. 415.

(*u*) *East Anglian Ry. v. Eastern Co. Ry.* (1851), 21 L. J. C. P. 23; 11 C. B. 775.

(*x*) *Macgregor v. Dorer & Dal Ry.* (1852), 22 L. J. Q. B. 69; 18 Q. B. 618.

(*y*) *Foster v. L. C. & D. Ry.* (1893), 64 L. J. Q. B. 65; (1895) 1 Q. B. 711.

(*z*) *Reg. v. Reed* (1880), 49 L. J. Q. B. 600; 5 Q. B. D. 483.

(*a*) *Murray v. Scott* (1884), 53 L. J. C. 745; 9 Ap. Ca. 519; *Brooks v. Blackburn Ry. Sec.* (1881), 51 L. J. C. 376; 9 Ap. Ca. 857.

PART II.

Exercise of
borrowing
power.

Debentures.

borrow money for the reasonable requirements of the business (*b*). But an express power given of borrowing to a limited amount excludes the implication of any greater power (*c*). A loan made to a corporation or company having no borrowing power, or in excess of its borrowing power, is void; as the lender is in general bound to inquire into the extent of the borrowing powers (*d*); but so long as the borrowing powers are not exceeded in fact, the lender is not concerned to enquire whether the money raised is to be applied to a legitimate purpose (*e*). A security given for an unauthorised loan under the seal of the corporation is also void (*f*). Where a loan made to a corporation or company has been in fact expended in discharging debts and legal liabilities, the lender is entitled in equity to stand in the place of the creditors, to the extent to which his money has been so applied (*g*); and he is also entitled to the securities which the paid off creditors held (*h*). A corporation or company having borrowing power may exercise it by mortgage of its property and rights (*i*); or by deposit of title deeds (*k*); or by giving a bill of sale (*l*); or by overdrawing their banking account (*m*); or by mortgaging its uncalled capital, under a power to that effect (*n*).—A corporation or company may also exercise its borrowing power by issuing debentures or mortgages operating as a charge upon the undertaking and all its current property, in priority over general creditors (*o*); but may reserve the power to dispose of the property in the ordinary course of carrying on the business, or to give specific charges upon it, in priority to the claim of the debenture holders (*p*). A company

(*b*) *General Auction Co. v. Smith* (1891), 60 L. J. C. 723; (1891) 3 Ch. 432.

(*c*) *Chapleo v. Brunswick Bg. Soc.* (1881), 50 L. J. Q. B. 372; 6 Q. B. D. 696; *Wentlock (Baroness) v. River Dee Co.* (1885), 51 L. J. Q. B. 577; 10 Ap. Ca. 351; see *S. C.* (1888), 57 L. J. C. 946; 38 Ch. D. 531.

(*d*) *Chapleo v. Brunswick B. S.* (1881), 50 L. J. Q. B. 372; 6 Q. B. D. 696.

(*e*) *Re Payne & Co.* (1904), 73 L. J. C. 849; (1904) 2 Ch. 608.

(*f*) *Ex p. Watson* (1888), 57 L. J. Q. B. 609; 21 Q. B. D. 301.

(*g*) *Wentlock (Baroness) v. River Dee Co.* (1887), 56 L. J. Q. B. 589; 19 Q. B. D. 155. See *Re Johnston Foreign Patents Co.* (1904), 73 L. J. C. 617; (1904) 2 Ch. 234.

(*h*) *Neath Bg. Soc. v. Luce* (1889), 49 L. J. C. 3; 43 Ch. D. 158.

(*i*) *Australian Clipper Co. v. Mansony* (1858), 27 L. J. C. 729; 4 K. & J. 733. *Stagg v. Medway (Upper) Nav.* (1902), 72 L. J. C. 177; (1903) 1 Ch. 169.

(*k*) *Re Patent File Co.* (1870), 40 L. J. C. 190; L. R. 6 Ch. 83.

(*l*) *Shaw v. Jacob* (1806), 35 L. J. C. P. 241; L. R. 1 C. P. 513.

(*m*) *Brooks v. Blackburn Bg. Soc.* (1884), 54 L. J. C. 376; 9 Ap. Ca. 857.

(*n*) *Howard v. Patent Iron Co.* (1888), 57 L. J. C. 878; 38 Ch. D. 156; *Re Pyle Works* (1890), 60 L. J. C. 114; (1891) 1 Ch. 173.

(*o*) *Re General South American Co.* (1876), 2 Ch. D. 337; *Re Opera Co.* (1891), 60 L. J. C. 839; (1891) 3 Ch. 260.

(*p*) *Ex p. Moor* (1879), 48 L. J. C. 137; 10 Ch. D. 530; *Ex p. Pitman* (1880), 12 Ch. D. 707; *English and*

with borrowing power may issue debentures at a discount (*q*); and may issue debentures or give mortgages as security for a past debt (*r*). A company may thus pay contractors and other creditors for works done and services rendered in the execution of its undertaking by giving bonds or debentures in acknowledgment of the amount of its debts, upon which the creditors may raise money in payment; and the assignees of such bonds will stand in place of the creditors in respect of the amount of debt discharged (*s*). But so far as such bonds or debentures or any other securities of a like kind are not supported by *bonâ fide* debts legitimately incurred, they are not valid in law or equity unless issued in exercise of legal borrowing power (*t*).

A corporation or company constituted for commercial or trading purposes may have, as a necessary incident of such purposes, the implied power of drawing and accepting bills of exchange and promissory notes in the ordinary form (*u*). But no such power is incident to an ordinary railway company (*x*); or to a water-works company (*y*); or to a cemetery company (*z*).

By a general rule of common law a corporation can bind itself to a contract only by a deed or writing under the common seal (*a*). The affixing of the seal *primâ facie* imports the formal act of delivery which is required in the execution of a deed by a natural person; but the seal may be affixed conditionally in a manner analogous to the delivery of a deed as an escrow (*b*). The Companies Consolidation Act, 1908, s. 79, enables any company registered thereunder whose objects require or comprise the transaction of business in a foreign country, to have an official seal for use in any place out of the United Kingdom; and to appoint

CH. III.
SECT. V.

Bills of
exchange.

General rule
requiring the
common seal.

Scottish Mercantile Invt. Co. v. Broughton (1892), 62 L. J. Q. B. 136; (1892) 2 Q. B. 700. See Companies Consolidation Act, 1908, ss. 81, 93, 100, 104, 107.

(*q*) *Campbell's case* (1876), 4 Ch. D. 47; *Webb v. Shropshire Rys.* (1893), 63 L. J. C. 80; (1893) 3 Ch. 307.

(*r*) *Re Patent Felt Co.* (1890), 60 L. J. C. 114; (1891) 1 Ch. 173.

(*s*) *Re Cork and Youghal Ry.* (1869), 39 L. J. C. 277; L. R. 4 Ch. 748. See *Portsea Island Bg. Soc. v. Barclay* (1895), 64 L. J. C. 579; (1895) 2 Ch. 298.

(*t*) *Chambers v. Manchester & Milford Ry.* (1864), 33 L. J. Q. B. 268; 5 B. & S. 588. See *Fountain v. Carmarthen*

Ry. (1868), 37 L. J. C. 429; L. R. 5 Eq. 316.

(*u*) *Per cur. East London Waterworks v. Bailey* (1827), 5 L. J. O. S. C. P. 175; 4 Bing. 288.

(*x*) *Bateman v. Mid-Wales Ry.* (1866), 35 L. J. C. 205; L. R. 1 C. P. 499. See *Peruvian Ry. Co. v. Thames & Mersey Insee.* (1867), 36 L. J. C. 864; L. R. 2 Ch. 617.

(*y*) *Broughton v. Manchester Waterworks* (1819), 3 B. & Ald. 1.

(*z*) *Steele v. Harmer* (1845), 14 M. & W. 831.

(*a*) 1 Blackst. Com. 475.

(*b*) *Derby Canal Co. v. Wilmot* (1808), 9 East. 360. See *ante*, p. 92.

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an agent under the common seal to affix such official seal to any deed, contract, or instrument.

Exceptions to rule.

Contracts by trading corporations.

Exceptions occur to the above general rule, by reason of the particular purpose and constitution of the corporation, or upon the general ground of convenience and necessity.—A corporation or company constituted for the purpose of carrying on a trade or business may make the contracts required in the course of business in the usual form of such contracts, without the corporate seal: as a contract of a colliery company for the erection of pumping machinery (*c*); a contract with a gas company for the supply of gas meters (*d*), or to supply gas to customers (*e*); a contract of a telegraph company with an agent for sending messages upon commission (*f*); a contract by a navigation company for the supply of provisions for ships (*g*), or for bringing home an unseaworthy ship (*h*); a contract of a railway company for the supply of iron rails (*i*). But a contract with the London Dock Company for cleansing their docks was held to be a contract not within the ordinary scope of its business, and therefore to require a seal (*k*).

Exceptions of necessity or contracts executed.

Exceptions are also made where it becomes practically necessary to dispense with the common seal; as by reason of the slight importance or frequent recurrence or immediate urgency of the occasion, not admitting of such formality; or where the whole consideration for payment is executed, and the claim is in respect of work done or goods supplied to carry out purposes for which the corporation is created (*l*). Thus the guardians of a poor law union may contract by parol for the services of an accountant to audit the accounts of the union (*m*). But it was held that the guardians were not liable except under seal for extra work under a contract to build the workhouse, though the work was ordered by the architect and accepted by the guardians (*n*); nor

(*c*) *South of Ireland Colliery v. Waddle* (1869), 38 L. J. C. P. 338; L. R. 1 C. P. 617.

(*d*) *Berriley v. Lincoln Gas Light & Coke Co.* (1837), 6 L. J. Q. B. 113; 7 A. & E. 827.

(*e*) *Hutch v. Imperial Gas Light & Coke Co.* (1837), 7 L. J. Q. B. 118; 6 A. & E. 846.

(*f*) *Rentel v. Electric Tel. Co.* (1856), 26 L. J. Q. B. 47; 6 E. & B. 341.

(*g*) *Australian Mail Co. v. Marretti* (1855), 24 L. J. Ex. 272; 11 Ex. 228.

(*h*) *Henderson v. Australian Mail Co.*

(1855), 24 L. J. Q. B. 322; 5 E. & B. 409.

(*i*) *Re Contract Corporation* (1869), L. R. 8 Eq. 14.

(*k*) *London Dock Co. v. Simot* (1857), 27 L. J. Q. B. 129; 8 E. & B. 347.

(*l*) *Lawford v. Billericay Rural Council* (1903), 72 L. J. K. B. 554; (1903) 1 K. B. 772.

(*m*) *Haigh v. North Brierley Guardians* (1868), 28 L. J. Q. B. 62; E. B. & E. 873.

(*n*) *Lamprell v. Billericay (Union)* (1849), 18 L. J. Ex. 282; 3 Ex. 283.

for the costs of a survey and map of a parish made by their order (*o*). A municipal corporation, possessed of a dock for the use of the public to repair ships was held to be capable of letting the use of the dock according to the regulations without the corporate seal (*p*). But a municipal corporation cannot contract without seal to let the tolls of a market (*q*); or for the erection of building improvements in the borough (*r*).—A corporation may engage a servant for common services, in the manner without seal; and may appoint a bailiff to distrain without seal (*s*). So railway companies are empowered to employ managers, clerks, workmen, and servants, for their ordinary business without contracting under seal (*t*). The appointment of the clerk to a board of guardians (*u*), of the town clerk of a borough (*x*), of a coal meter in a borough with the right to take fees for his own profit, requires the corporate seal; because such persons are in the position of public officers and not servants of the corporation (*y*). The appointment of an architect by a school board was held sufficient without seal, under the power to appoint officers provided by the Education Act, 1870 (*z*).—A corporation cannot in general appoint an attorney without the common seal; and an attorney who has conducted suits upon a retainer not under seal cannot recover his costs (*a*). Companies incorporated by statute for trading purposes, as railway companies, generally have power given to retain solicitors and other like officers without a retainer under seal (*b*). A corporation may validly compromise an action without the corporate seal (*c*).

CH. III.
SECT. V.

Engagement
of servants,
clerks, and
agents.

Attorney.

A corporation cannot sue upon a contract not under seal, which requires a seal, whilst the consideration is executory; but after the consideration has been executed for the benefit of the other contracting party, the corporation may charge the latter upon the

Claim for
executed
considera-
tion.

(*o*) *Paine v. Strand Union* (1846), 15 L. J. M. C. 89; 8 Q. B. 326.

(*p*) *Wells v. Kingston-upon-Hull* (1875), 44 L. J. C. P. 257; L. R. 10 C. P. 402.

(*q*) *Kidderminster (Corp.) v. Hordwick* (1875), 13 L. J. Ex. 9; L. R. 9 Ex. 13.

(*r*) *Ludlow (Corp.) v. Charlton* (1810), 10 L. J. Ex. 75; 6 M. & W. 815.

(*s*) *Smith v. Birmingham Gas Co.* (1831), 3 L. J. K. B. 165; 1 A. & E. 526.

(*t*) See *Gives v. Taff Vale Ry.* (1853), 2 E. & B. 822.

(*u*) *Austin v. Bethnal Green* (1873), 43 L. J. C. P. 100; L. R. 9 C. P. 91.

(*x*) *Reg. v. Stamford (Corp.)* (1844), 6 Q. B. 433.

(*y*) *Smith v. Cortwright* (1851), 20 L. J. Ex. 401; 6 Ex. 927.

(*z*) *Scott v. Gl. & Lit. Clifton School Bd.* (1884), 14 Q. B. D. 500.

(*a*) *Arnold v. Poole (Corp.)* (1842), 12 L. J. C. P. 97; 4 Man. & G. 860.

(*b*) *Reg. v. Cumberland (Justices)* (1848), 17 L. J. Q. B. 102; 5 D. & L. 431 n.; *Forsell v. Eastern Counties Ry.* (1848), 17 L. J. Ex. 297; 2 Ex. 344.

(*c*) See *Att.-Gen. v. Gaskell* (1882), 52 L. J. C. 163; 22 Ch. D. 537.

PART II.

Use and
occupation
of land.

implied contract arising from the executed consideration (*d*).—Thus a corporation, though not capable of making a demise of land without the corporate seal, may charge the occupier upon an implied promise to pay for the use and occupation of the land (*e*). And a tenancy from year to year may be created by occupation and payment of rent under a lease which is void for want of the corporate seal; and under such tenancy the corporation may sue or distrain for the rent reserved (*f*). Such tenancy is held to include all such terms of the lease as are applicable to a yearly tenancy, as an agreement to keep the premises in repair (*g*). On the other hand, acceptance of the rent by the corporation renders the tenancy binding against the corporation in the same manner as against other persons (*h*). A corporation may also be charged for the actual use and occupation of land (*i*); but the liability of the corporation is measured by the actual period of occupation, and an implied tenancy from year to year founded on the payment of rent and occupation will not be inferred (*k*).

Liability for
executed con-
sideration.

A corporation cannot be charged at law upon a contract not under seal for which a seal is necessary, though the consideration has been executed for the benefit of the corporation (*l*). But the corporation may pay for the consideration executed under such contract; and the objection cannot be raised by a third party who becomes rateable to the corporation for the money so paid (*m*). The contract, after part execution of the contract, may be ratified under seal (*n*). But the seal cannot be affixed to validate the contract after the other party has repudiated the contract (*o*).

Contracts
implied in
law.

—A corporation may be charged with a contract implied in law; as in an action for money received to recover the fees of an office

(*d*) *Fishmongers' Co. v. Robertson* (1843), 12 L. J. C. P. 185; 5 Man. & G. 131; *Melbourne Bkq. Co. v. Brougham* (1879), 48 L. J. P. C. 12; 4 Ap. Ca. 156. See *ante*, p. 28.

(*e*) *Stafford (Corp.) v. Till* (1827), 5 L. J. O. S. C. P. 77; 4 Bing. 75.

(*f*) *Wood v. Tate* (1806), 2 B. & P. N. R. 247.

(*g*) *Eccles. Commrs. v. Merril* (1869), 38 L. J. Ex. 93; L. R. 4 Ex. 162.

(*h*) *Doe v. Taniere* (1818), 18 L. J. Q. B. 49; 12 Q. B. 998.

(*i*) *Lowe v. L. & N. W. Ry.* (1852), 21 L. J. Q. B. 361; 18 Q. B. 632.

(*k*) *Finlay v. Bristol & Exeter Ry.* (1852), 21 L. J. Ex. 117; 7 Ex. 409.

(*l*) *Young v. Leamington (Corp.)* (1883), 52 L. J. Q. B. 713; 8 Ap. Ca. 519.

(*m*) *Bournemouth Commrs. v. Watts* (1884), 54 L. J. Q. B. 93; 14 Q. B. D. 87.

(*n*) *Melliss v. Shirley Local Bd.* (1885), 54 L. J. Q. B. 408; 14 Q. B. D. 911; *Brooks v. Torquay Corp.* (1902), 71 L. J. K. B. 109; (1902) 1 K. B. 601.

(*o*) *Kidderminster Corp. v. Hardwick* (1873), 43 L. J. Ex. 9; L. R. 9 Ex. 21.

wrongfully taken by the corporation (*p*); or in an action to recover money paid for the use of the corporation (*q*).

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SECT. V.

The general rule requiring the common seal applies in equity as well as at law, and subject to the like exceptions (*r*). No equity arises from the mere want of a seal, without other ground for relief (*s*). But the equity arising from part performance operates against a corporation in the same manner as against an individual (*t*). Where a lessee under a corporation lease without seal entered and built upon the demised premises with the acquiescence of the corporation, they were compelled to execute a valid lease (*u*). The equity arising from part performance avails equally in favour of a corporation; and where a railway company had contracted without seal for the purchase of land, and had entered and constructed their railway upon it, it was held that they were entitled to specific performance against the vendor (*x*).

Effect of part
performance
in equity.

Special forms of contracting are prescribed or allowed by statute for companies and some other corporate bodies:—By the Companies Consolidation Act, 1908, s. 76, "Contracts on behalf of a company may be made as follows: (that is to say), (i.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged:—(ii.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:—(iii.) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person

Forms of
contract by
statute.

The Com-
panies Con-
solidation
Act, 1908.

(*p*) *Hull v. Swansea Corp.* (1841), 13 L. J. Q. B. 107; 5 Q. B. 526.

(*q*) *Jeffryys v. Gmyr* (1831), 1 L. J. K. B. 23; 2 B. & Ad. 833.

(*r*) *Carter v. Dean of Ely* (1835), 4 L. J. C. 132; 7 Sim. 211; *Gooday v. Colchester Ry.* (1852), 17 Beav. 132.

(*s*) *Crampton v. Varua Ry.* 1872ⁿ, 41 L. J. C. 817; L. R. 7 Ch. 562.

(*t*) *Laird v. Bickenhead Ry.* (1859), 29 L. J. C. 218; Johns. 500; *Wilson v. West Hartlepool Ry.* (1865), 34 L. J. C. 241; 2 De G. J. & S. 475.

(*u*) *Crook v. Sanford* (1871), L. R. 6 Ch. 551.

(*x*) *London & Birmingham Ry. v. Winter* (1840), Cr. & Ph. 57.

PART II.
The Companies
Clauses Act.

Bills of ex-
change and
promissory
notes.

Public Health
Act.

Contract in
corporate
name.

acting under its authority, express or implied, and may in the same way be varied or discharged." The Companies Clauses Consolidation Act, 1845, s. 97, which is applied to companies constituted for making railways and for other public undertakings, contains a section to the same effect, and in nearly the same words as that above cited.

By the Companies Consolidation Act, 1908, s. 77, "a bill of exchange or a promissory note shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company, by any person acting under its authority." This section does not give power to draw bills to companies which do not otherwise possess the power (*g*).

By the Public Health Act, 1875, s. 173, "Any local authority may enter into any contracts necessary for carrying this Act into execution." And by sect. 174 (1), "Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority." This enactment is imperative, and the authority cannot be charged with such contracts not sealed, though the consideration has been executed (*z*). The contract must be ascertained to exceed fifty pounds in value at the time of making in order to require the seal (*a*); but the seal may be affixed afterwards when the value is ascertained (*b*). This section applies only to contracts necessary for carrying the Act into execution (*c*). But the provisions of sect. 174 (2) requiring contracts with an urban authority where the value or amount exceeds fifty pounds to be in a particular form and to be secured by a pecuniary penalty are directory (*d*).

The contract of a corporation must be made in the proper corporate name (*e*). A contract purporting to be made by officers

(*g*) *Peruvian Ry. v. Thomas & Mersey Insur.* (1868), 37 L. J. C. 864; L. R. 2 Ch. 617; *Premier Industrial Bk. v. Carlton Mfg. Co.* (1908), 78 L. J. K. B. 103; (1909) 1 K. B. 106.

(*z*) *Young v. Leamington (Corp.)* (1883), 52 L. J. Q. B. 713; 8 Ap. Ca. 517.

(*a*) *Eaton v. Barker* (1881), 50 L. J. Q. B. 444; 7 Q. B. D. 529.

(*b*) *Melliss v. Shurby Local Bd.* (1885), 51 L. J. Q. B. 468; 11 Q. B. D. 311, reversed on another ground (1885), 55 L. J. Q. B. 113; 16 Q. B. D. 446.

(*c*) *Att.-Gen. v. Gaskill* (1883), 52 L. J. C. 163; 22 Ch. D. 537.

(*d*) *Southall Urban Council v. Wakefield Rural Council* (1905), 74 L. J. C. 703; (1905) 2 Ch. 516.

(*e*) See *Mayor of Lynn's case* (1613), 10 Co. 122 b; *Croydon Hospital v. Farley* (1816), 6 Taunt. 467. See Companies Consolidation Act, 1908, s. 8; *Atkins v. Wardle* (1889), 58 L. J. Q. B. 371, and see *Mellor v. Spateman* (1669), 1 Wms. Saund. 612, n. (1).

or members of a corporation, though sealed with the corporate seal, does not bind the corporation (*f*). On the other hand, a contract by parties named, but expressly restricting their liability to an alleged corporate capacity, there being in fact no such capacity, was held to bind them personally, the proviso restricting their liability being rejected as repugnant (*g*). Individual members or officers can in general neither sue nor be sued in their own names upon contracts made with the corporation or in respect of corporate property (*h*). But individual members may sue the corporate body in respect of their own shares or interest; and may sue on behalf of all persons having the same interest (*i*): as in an action to compel the company to exercise its rights in its own name (*k*). A minority of members cannot use the corporate name against the wish of the majority; but they may sue in their own names and make the corporation defendant (*k*).

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SECT. V.

A corporation can contract, whether with or without seal, only through some agency; and if the seal be affixed or a contract made in the name of the corporation without proper authority the corporation is not bound (*m*). An instrument produced bearing the seal of a corporation is *prima facie* taken to have been properly sealed; and it lies upon the party disputing the execution to prove that the necessary authority was not given (*n*). But a corporation is not responsible for a fraudulent or criminal act of its officer or agent unless he is acting within the scope of his duty (*o*).—A corporation, unless its constitution prescribes otherwise, acts by a majority of the members or committee at a meeting to which all must be summoned; and if the act, as a

Agents of
corporation.

Majority of
members.

(*f*) *Rex v. Haughley (Inhab.)* (1833), 2 L. J. M. C. 56; 4 B. & Ad. 650.

(*g*) *Furnivall v. Coombes* (1843), 12 L. J. C. P. 265; 5 Man. & G. 736.

(*h*) *Cook v. Goodman* (1812), 11 L. J. Q. B. 225; 2 Q. B. 580; *Russell v. Wakefield Waterworks* (1875), 44 L. J. C. 496; L. R. 20 Eq. 474.

(*i*) See Ord. XVI. r. 9; *Fraser v. Camper* (1883), 52 L. J. C. 681; 21 Ch. D. 718.

(*k*) *Russell v. Wakefield Waterworks* (1875), 44 L. J. C. 496; L. R. 20 Eq. 474.

(*l*) *Mason v. Harris* (1879), 48 L. J. C. 583; 11 Ch. D. 97; *Silber Light Co. v. Silber* (1879), 48 L. J. C. 385; 12 Ch. D. 717.

(*m*) *Bank of Ireland v. Evans' Charities* (1855), 5 H. L. C. 389; *D'Arcy v. Tamar Ry.* (1867), 36 L. J. Ex. 37; L. R. 2 Ex. 158; *Staple of England v. Bank of England* (1887), 57 L. J. Q. B. 418; 21 Q. B. D. 160.

(*n*) *Cairns, L. J., Ex p. Contract Corp.* (1867), 37 L. J. C. 81; L. R. 3 Ch. 105; *Royal British Bank v. Turquand* (1855), 21 L. J. Q. B. 327; 5 E. & B. 218; *affd.* (1856), 25 L. J. Q. B. 317; 6 E. & B. 329.

(*o*) *Ruben v. Gt. Fingall Consolidated* (1906), 75 L. J. K. B. 813; (1906) A. C. 439; *Kepitigallo Rubber Estates v. Nat. Bank of India* (1909), 78 L. J. K. B. 964; (1909) 2 K. B. 1010.

PART II.
Directors of
companies.

contract, requires the corporate seal, the resolution of the majority does not bind the corporation unless the seal is affixed (*p*).—Companies incorporated under the Companies Acts are managed by directors, who in general exercise all the powers of the company (*q*). "The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent" (*r*). In the case of a trading company where no particular agency or formality is prescribed for contracting, the acting managers of the business for the time being are impliedly authorised to affix the seal or contract in the usual way of that business (*s*).—The authority of directors is necessarily restricted by the powers of the company, and they cannot contract for any matter *ultra vires*; but it does not necessarily extend to all the powers of the company, and it may be further restricted by the articles of association or by particular resolutions (*t*). If they apply property of the company to purposes *ultra vires*, they are responsible as for a breach of trust (*u*): but may now plead the Statute of Limitations (*x*).

Notice of
powers of
company.

A person contracting with a corporation or company constituted by a public statute is taken to have notice of their powers and capacity, and cannot charge them with contracts which are *ultra vires*, though sealed with the corporate seal (*y*). A person contracting with a registered company is taken to have notice of the memorandum and articles of association, in which the powers of the company are defined and limited (*z*). And a person dealing with a society constituted by rules made under statutory au-

(*p*) *Roberts v. Price* (1847), 16 L. J. C. P. 352; 4 C. B. 231; *D'Arcy v. Tamar Ry.* (1867), 36 L. J. Ex. 37; L. R. 2 Ex. 158; *Staple of England v. Bank of England* (1887), 57 L. J. Q. B. 418; 21 Q. B. D. 160; *Campbell v. Australian Mutual Prop. Soc.* (1908), 77 L. J. P. C. 117.

(*q*) Companies Consolidation Act, 1908, First Sched., Table A, cl. 71 *et seq.*

(*r*) *Cairns, L. J., Ferguson v. Wilson* (1866), L. R. 2 Ch. 89.

(*s*) *Smith v. Hull Glass Co.* (1852), 21 L. J. C. P. 106; 11 C. B. 897; *Ex p. Contract Corp.* (1867), 37 L. J. C. 81; L. R. 3 Ch. 105.

(*t*) *Ashbury Ry. Car. Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653; *Grant v. U. K. Switchback Ry.* (1883),

58 L. J. C. 211; 40 Ch. D. 135; *Masonic Assoc. v. Sharpe* (1891), 61 L. J. C. 193; (1892) 1 Ch. 154.

(*u*) *Masonic Assoc. v. Sharpe* (1891), 61 L. J. C. 193; (1892) 1 Ch. 154; *Young v. Naval & Mil. Co-op. Soc.* (1905), 74 L. J. K. B. 302; (1905) 1 K. B. 687.

(*v*) *Re Lands Allotment Co.* (1894), 63 L. J. C. 291; (1894) 1 Ch. 616.

(*y*) *Fairtitle v. Gilbert* (1787), 2 T. R. 169; *East Anglian Ry. v. Eastern Co. Ry.* (1851), 21 L. J. C. P. 23; 11 C. B. 775; *Macgregor v. Dorer and Deal Ry.* (1852), 22 L. J. Q. B. 69; 18 Q. B. 618.

(*z*) *Ernest v. Nicholls* (1857), 6 H. L. C. 401; *Pierre v. Jersey Waterworks* (1870), 39 L. J. Ex. 156; L. R. 5 Ex. 20).

thority is bound to inquire into the sales and is taken to have notice of the powers given by them; as in the case of a building society (a). Persons contracting with directors of a company are affected with notice of their authority as limited in the articles of association, and cannot charge the company with any contract made by the directors in excess of their authority (b). Thus where the articles of association provide that business shall not be commenced until a certain amount of shares has been subscribed, the company cannot be charged with a contract made by the directors before satisfaction of that condition (c). But persons dealing with a company are not affected with notice of irregularity in the proceedings relating to the internal management of the company (d). Where directors are empowered to borrow such sums as should from time to time be authorised by a resolution of a general meeting, the company are bound by bonds issued by the directors in due form, although no sufficient resolution has in fact been passed (e); but where the borrowing power of directors was expressly limited to a fixed amount which might be extended by a vote of shareholders at a general meeting, it was held that the company could not be bound by the directors beyond the fixed amount, without proof by the lender that an extension had been duly voted (f). Upon the same principle where the deed of an insurance office provided that "the common seal shall not be affixed to any policy except by an order signed by three directors and countersigned by the manager," a policy issued from the office in the ordinary course of business with the seal of the company was held valid, though there had been no such order to affix the seal (g). So persons are entitled generally to assume that persons purporting to act in a particular capacity have been validly appointed, and a mere informality

Ca. III.
SECT. V.

Notice of
authority of
directors.

Notice of
proceedings
of company.

(a) *Chapleo v. Brunswick Ry. Soc.* (1881), 50 L. J. Q. B. 372; 6 Q. B. D. 696.

(b) *Ridley v. Plymouth Grinding & Baking Co.* (1848), 17 L. J. Ex. 252; 2 Ex. 711; *Fountaine v. Carmarthen Ry.* (1868), 37 L. J. C. 431; L. R. 5 Eq. 316.

(c) *Pierce v. Jersey Waterworks* (1870), 39 L. J. Ex. 156; L. R. 5 Ex. 209.

(d) *Gloucester Bank v. Rudry Merthyr Co.* (1895), 64 L. J. C. 451; (1895) 1 Ch. 629; *Duck v. Tower Galvanizing Co.* (1901), 70 L. J. K. B. 625; (1901) 2 K. B. 314; *Montreal & St. Lawrence Light & Power*

Co. v. Robert (1905), 75 L. J. P. C. 33; (1906) A. C. 196.

(e) *Royal British Bank v. Turquand* (1856), 25 L. J. Q. B. 317; 6 E. & B. 327; *Agar v. Atheneum Life Assce. Co.* (1858), 27 L. J. C. P. 95; 3 C. B. N. S. 725. See *Landowners' Co. v. Ashford* (1880), 50 L. J. C. 276; 16 Ch. D. 411.

(f) *Irvine v. Union Bank of Australia*, 2 Ap. Ca. 366; 48 L. J. P. C. 86.

(g) *Prince of Wales Assce. v. Harding*, 27 L. J. Q. B. 297; E. B. & E. 183; *S. P. R. Co. v. County Life Assce.*, 39 L. J. C. 471; L. R. 5 Ch. 232.

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By-laws of company.

in their appointment will not affect the validity of their acts (*h*). And if directors are authorised to accept bills upon taking sufficient security, and bills are accepted, the holders of such bills are not bound to inquire whether sufficient security or any security has been taken (*i*).—Upon a like principle, where the directors of a company have power from time to time to make by-laws for the regulation of the business, a person dealing with the directors is not affected by a by-law unless it is proved that he knew of it (*k*). But directors taking debentures of their own company are taken to have notice of all irregularities and defects in the issuing of them (*l*).

Ratification of unauthorised contract.

A contract made by directors or agent on behalf of a company without authority, or without the formalities necessary to bind the company, may be afterwards ratified by the company, or by directors or agents duly authorised in that respect; provided the contract is within the power of the company to make (*m*).—Where goods are ordered by an unauthorised agent, and delivered and invoiced to the company and used by the directors in the business, the directors may be taken to have ratified the order and to bind the company (*n*). Where a company having a general borrowing power invests the directors with a limited power only, which they exceed, the unauthorised excess of loan may be ratified by the shareholders confirming the accounts presented at a meeting of the company held after due notice (*o*). And ratification may be inferred generally from acquiescence of all the shareholders in the transaction after full knowledge of it and with the intention of adopting it (*p*). But a contract which is *ultra vires* of the company cannot be ratified even by

(*h*) Companies Consolidation Act, 1908, ss. 74, 77; *Mahony v. East Holyford Mining Co.* (1874), L. R. 7 H. L. 869; *Biggerstaff v. Rowatt's Wharf* (1896), 65 L. J. C. 536; (1896) 2 Ch. 93. See *Premier Industrial Bank v. Carlton Mfg. Co.* (1908), 78 L. J. K. B. 103; (1909) 1 K. B. 106.

(*i*) *Ex p. Overend, Gurney & Co.* (1869), 49 L. J. C. 27; L. R. 4 Ch. 460.

(*k*) *Ex p. Royal Bank of India* (1869), L. R. 4 Ch. 252.

(*l*) *Howard v. Patent Ivory Co.* (1888), 57 L. J. C. 878; 38 Ch. D. 156.

(*m*) *Reuter v. Electric Telegraph Co.* (1856), 26 L. J. Q. B. 46; 6 E. & B. 341; *Laure's case* (1863), 33 L. J. C. 84;

1 De G. J. & S. 504; *Boothock Proprietary Co. v. Fuke* (1905), 75 L. J. C. 261; (1906) 1 Ch. 148.

(*n*) *Smith v. Bull Glass Co.* (1852), 21 L. J. C. P. 106; 11 C. B. 897.

(*o*) *Irvine v. Union Bk. of Australia* (1877), 46 L. J. P. C. 86; 2 Ap. Cu. 366.

(*p*) *Spackman v. Evans; Evans v. Smallcombe; Howdsworth v. Evans* (1868), 37 L. J. C. 752, 793, 800; L. R. 3 H. L. 171, 249, 263; *Grant v. U. K. Switchback Co.* (1888), 58 L. J. C. 211; 40 Ch. D. 135. See *Blackburn Ry. Soc. v. Cudliff* (1885), 54 L. J. C. 1091; 29 Ch. D. 910; *Ashbury v. Watson* (1885), 54 L. J. C. 985; 30 Ch. D. 376.

the unanimous assent of the whole body of shareholders (*q*); as in the case of a loan beyond their borrowing powers (*r*).

CH. III.
SECT. V.

The directors and agents who contract on behalf of a company may be personally liable upon an implied warranty that they have the authority which they assume to exercise; as where they profess to borrow money, on behalf of the company without having any borrowing power, or after the borrowing powers of the company have been in fact exhausted (*s*). The directors of a company, which was incorporated under a private Act without power of accepting bills, having accepted a bill drawn on the company by the engineer for his services, were held liable to an indorsee of the bill, upon their implied representation that they were authorised to accept it for the company (*t*). Upon the same principle directors by instructing the company's banker to honour the cheques of the manager or other officers of the company are taken impliedly to warrant to the banker that they have power to authorise such cheques (*u*). But directors, having authority to give such instructions, do not thereby impliedly guarantee the account at the bank, and the cheques drawn are cashed upon the credit of the company only (*x*).

Liability of
directors for
unauthorised
contracts.

A company cannot be charged with the contracts of promoters and others made on behalf of the company before it was formed; unless they are expressly imposed upon the company in the Act or constitution of the company (*y*). Nor can the company when formed be charged upon a mere ratification of such contracts; for ratification requires that the contract should have been originally made on behalf of an existing person then capable of contracting (*z*). But the company when formed may by a new agreement with the parties adopt the contracts of promoters in whole

Contracts of
promoters of
company.

(*q*) *Ashbury Ry. Car. Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653.

(*r*) *Wenlock (Baroness) v. River Dee Co.* (1888), 57 L. J. C. 946; 38 Ch. D. 534.

(*s*) *Richardson v. Williamson* (1871), 40 L. J. Q. B. 145; L. R. 6 Q. B. 276; *Weeks v. Propert* (1873), 42 L. J. C. P. 129; L. R. 8 C. P. 427. See Companies (Consolidation) Act, 1908, s. 63 (3).

(*t*) *West London Com. Rk. v. Kitson* (1884), 53 L. J. Q. B. 345; 13 Q. B. D. 380.

(*u*) *Cherry v. Colonial Bank of Austral-*
L.

asia (1869), 38 L. J. P. C. 49; L. R. 3 P. C. 24.

(*x*) *Beattie v. Ebury (Lord)* (1874), 44 L. J. C. 20; L. R. 7 H. L. 102.

(*y*) *Shrewsbury (Earl) v. N. Staffs. Ry.* (1865), 35 L. J. C. 156; L. R. 1 Eq. 593. And see *ante*, p. 319.

(*z*) *Kelner v. Baxter* (1866), 36 L. J. C. P. 94; L. R. 2 C. P. 174; *Scott v. Ebury (Lord)* (1867), 36 L. J. C. P. 161; L. R. 2 C. P. 255; *Melhado v. Porto Alegre Ry.* (1874), 43 L. J. C. P. 253; L. R. 9 C. P. 503; *Baquet Tyre Co. v. Clipper Tyre Co.* (1902), 71 L. J. C. 153; (1902) 1 Ch. 146.

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or in part (a); so far as they are not *ultra vires* of the company (b). And the company when formed may become liable to pay for work and services of promoters by voluntarily accepting the benefit (c). The company may also be affected in equity with liabilities of the promoters by claiming through them and taking possession of their rights (d). And upon the same principle a company cannot by adoption or ratification obtain the benefit of a contract purported to have been made on its behalf, prior to its incorporation (e); but by taking upon itself the liabilities of the promoters, the company may become entitled in equity to enforce their rights (f).

Preliminary expenses.

A company may be made chargeable by an express clause of its constitution with the payment of the preliminary expenses incurred by the promoters, as a debt of the company (g). And the Companies Clauses Act, 1845, s. 65, as to companies incorporating its clauses, enacts generally, "that all the money raised by the company shall be applied firstly in paying the costs and expenses incurred in obtaining the special Act." In such cases the liability of the company is to the promoters who were directly engaged in its formation; parliamentary agents, solicitors, valuers and other subordinate agents cannot sue the company for their costs, but only the persons who in fact engaged their services (h). But the preliminary expenses may have been incurred gratuitously, or conditionally, or under such circumstances as not to be chargeable at all (i).

(a) *Spiller v. Paris Skating Rink* (1878), 7 Ch. D. 368; *Howard v. Patent Ivory Co.* (1888), 57 L. J. C. 878; 38 Ch. D. 156.

(b) *Preston v. Liverpool M. & N. Ry.* (1856), 25 L. J. C. 421; 5 H. L. C. 605.

(c) *Re Empress Engineering Co.* (1880), 16 Ch. D. 125.

(d) *Edwards v. Grand Junction Ry.* (1836), 6 L. J. C. 47; 1 M. & Cr. 650; *Stanley v. Chester & Birkenhead Ry.* (1838), 3 M. & Cr. 773; *Bagot Tyre Co. v. Clipper Tyre Co.* (1901), 71 L. J. C. 158; (1902) 1 Ch. 146.

(e) *Natal Land & Colonisation Co. v. Pauline Coll. & Development Synd.* (1903),

73 L. J. P. C. 22; (1904) A. C. 120.

(f) *Bedford & Cambridge Ry. v. Stanley* (1862), 32 L. J. C. 60; 2 J. & H. 746.

(g) *Carden v. General Cemetery Co.* (1839), 8 L. J. C. P. 163; 5 Bing. N. C. 253; *Touche v. Metrop. Warehouse Co.*, L. R. 6 Ch. 671.

(h) *Ex p. Hanley* (1888), 58 L. J. C. 737; 41 Ch. D. 215. See *Shaw's claim* (1875), 44 L. J. C. 670; L. R. 10 Ch. 177.

(i) *Savin v. Hoylake Ry.* (1865), 35 L. J. Ex. 52; L. R. 1 Ex. 9; *Head's claim* (1876), 45 L. J. C. 461; 2 Ch. D. 621.

CANADIAN NOTES.

Infancy.

In *Hubley vs. Moreash*, 27 N. S. R., 281, a promissory note was given by the defendant in satisfaction of a claim for damages in connection with an assault committed upon his son, a minor. It was held that the father, being the agent of the son and having authority and being so recognized by the defendant, there was consideration for the note, and also that the agreement by which the claim of the son was settled was a transaction voidable only by him. The right to treat the contract as voidable existed exclusively as a means of protection to the infant, and the contract was, until disaffirmed by the infant, binding upon the other party.

In *Meyers vs. Blackburn*, 38 N. S. R., 50, defendant advanced the plaintiff, who to his knowledge was an infant under the age of twenty-one years a sum of money to be employed in the purchase of a horse, taking as security for the loan a bill of sale which was properly executed and filed in the registry office. Defendant, hearing that plaintiff was about to sell the horse, took possession under the bill of sale and sold to a third party. It was held that the plaintiff was entitled to recover in an action for conversion, that the repudiation of the bill of sale by the infant avoided it, and that the defendant had no protection under it for the act which he committed; also that the ownership of a horse by one in plaintiff's circumstances did not come within the term necessities; also that the fact that plaintiff stood by and allowed the horse to be sold without objection would not assist the defendant, as an infant could no more estop himself by conduct of this sort than by contract.

Corporations.

In *Attorney-General vs. Halifax*, 36 N. S. R., 177, the Attorney-General applied on relation of a ratepayer to restrain the defendants from carrying into effect a resolution to rescind a previous resolution accepting an offer made by Carnegie to furnish a sum of money for the purpose of erecting a public library building in the city. It was held that the city council in passing the rescinding resolution was acting within the scope of its corporate powers, and, assuming that there was a breach of contract, that no one except the other party to the contract could

legally complain of its action or adopt a remedy for the enforcement of the contract.

The Court was evenly divided on this question, Graham, E. J., and MacDonald, C. J., affirming the judgment of Weatherbe, J., appealed from, that the corporation, having accepted the offer, was bound by its terms, and that the passing of the rescinding resolution was a breach of contract which the Court had the power to restrain, the council being agents or trustees of the ratepayers in accepting the gift.

In *McDougall vs. Water Commissioners of Windsor*, 31 S. C. R., 326, it appeared that by 37 Vict., Ch. 79, Ont., the water works of Windsor were under management of a board of commissioners, who collected the revenue, paid the city any surplus therefrom and initiated works for improving the system, the city supplying the funds. The total expenditure was not to exceed \$300,000 and not more than \$20,000 could be expended in any one year without a vote of the ratepayers. It was held by the Supreme Court of Canada that the board was merely the statutory agent of the city in carrying out the purposes of the act and a contract for work to be performed in connection with the water-works not authorized by by-law of the council and incurring an expenditure which would exceed the statutory limit was not a binding contract; also that if an action could have been brought on such a contract the city corporation would have been a necessary party. It was questioned whether the city corporation would not have been the only party liable to be sued.

In *Bernardin vs. North Dufferin*, 19 S. C. R., 581, the liability of a municipal corporation on a contract not executed under its corporate seal was discussed. The Supreme Court of Manitoba had non-suited the plaintiff on a contract under which the plaintiff had built a bridge for the defendant municipality, the defence being that the contract was not under the corporate seal of the municipality. Sir William Ritchie, Chief Justice, and Strong, J., held, in accordance with the view of the Manitoba Court of Queen's Bench, that the defendant was not liable on the contract for want of the corporate seal, but the majority of the Court held the defendant liable, Gwynne, J., applying the principle of the *Mayor of Ludlow vs. Charlton*, and Patterson.

J., also delivered an elaborate opinion concurring. The other members of the Court were Fournier and Taschereau, JJ. The judgment is too long to be condensed, and it is requisite that it should be carefully read, because it is difficult to resist the conclusion that it establishes a different principle with respect to the liability of corporations on their contracts not under seal from that which at its date, at all events, was held applicable by the English courts and which seems to be correctly stated by the learned dissenting judges.

In *Hill vs. Ingersoll, etc., Co.*, 32 O. R., 194, it was held that to bind a corporation by an executory contract to purchase from the plaintiff all the gravel, etc., required for a portion of their road for an indefinite and protracted period would require an agreement under their corporate seal.

PART III.

THE MATTER OF CONTRACTS.

CHAPTER I.

THE CONSIDERATION.

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A CONTRACT founded upon agreement consists of two distinct parts: the consideration for the promise on the one side; and the promise on the other. The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made; and it is a rule of law that a promise cannot be made binding by mere agreement without a consideration; the object of this rule being to avoid the risk of giving a binding effect to promises made without an obligatory intention (*a*).—Contracts which are put into writing but not under seal are simple or parol contracts which require a consideration (*b*). Contracts

The consideration.

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

(*b*) *Ante*, p. 6.

PART III.

made in the form of a deed under seal and contracts of record do not require a consideration as between the parties; the formality of the contract giving sufficient security for the obligatory intention (c).

Bills of exchange.

Bills of exchange require a consideration in fact between the parties, but by the custom of merchants (which was adopted by the common law, and is now embodied in the Bills of Exchange Act, 1882) the consideration is presumed to have been given; and in an action upon a bill it is not necessary to allege or prove the consideration, and if it is denied, the burden of proof is cast upon the party denying it (d). Promissory notes were placed upon the same footing as bills of exchange, in this respect, by the statute 3 & 4 Anne, c. 8; which has been superseded and repealed by the Bills of Exchange Act, 1882 (e). But if in an action on a bill or note it is admitted or proved that the acceptance, issue, or subsequent negotiation of the instrument was affected by fraud, duress, or force and fear, or illegality, the burden of proof is shifted until the holder proves that, subsequently to the alleged fraud or illegality, value has in good faith been given for the instrument (f). The Bills of Exchange Act, 1882, s. 27 (which is declaratory of the common law), enacts that "valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability, whether the bill is payable on demand or at a future time." An antecedent debt may constitute a consideration when the bill operates in payment of the debt (g).

Guarantees.

Contracts of guarantee, or "promises to answer for the debt, default or miscarriages of another person," which must be in writing by reason of the Statute of Frauds, also require a consideration to support them, and although there is not any presumption in favour of it, as in the case of bills and notes, the Mercantile Law Amendment Act, 1856, now allows the consideration to be proved by extrinsic evidence (h).

(c) *Ante*, p. 6; see *post*, p. 437.

(d) Bills of Exchange Act, 1882, s. 30 (1); *Mills v. Barber* (1836), 5 L. J. C. 204; 1 M. & W. 425.

(e) *Carlos v. Fancourt* (1794), 5 T. R. 452.

(f) Bills of Exchange Act, 1882, s. 30 (2); *Ld. Blackburn, Jones v. Gordon*

(1877), 47 L. J. Bk. 1; 2 Ap. Ca. 616; *Tatum v. Hasler* (1889), 58 L. J. Q. B. 432; 23 Q. B. D. 345.

(g) *Dixon v. Nuttall* (1834), 3 L. J. Ex. 290; 1 Cr. M. & R. 307. See Pt. IV., Chap. VII.

(h) *Ante*, p. 182.

The Bills of Sale Act, 1882, s. 8, requires that every bill of sale "shall truly set forth the consideration for which it was given, otherwise such bill of sale shall be void in respect of the personal chattels comprised therein" (*i*). The consideration of a bill of sale may be truly stated as being money then paid to the grantor, when the bill is given as security for a debt then due; the transaction being equivalent to paying off the old debts and creating a new one, though no money in fact passes (*k*); or where the money stated as paid to the grantor is in fact paid to a third party at the request of the grantor; as in discharge of the costs of his solicitor, or of other costs incurred by him (*l*); or where the money is paid in discharge of a prior bill of sale (*m*). But if the sum stated as paid or any part of it is accounted for by way of set-off against liabilities to the grantee not then due; as current bills, or future interest not yet accrued due, the consideration is not truly stated (*n*); so if part of the money is deducted as a bonus or commission to the grantee for making the loan (*o*); or if part is deducted for expenses of the grantee (*p*). An untrue statement of the consideration cannot be read as corrected by a receipt written and signed upon the deed stating truly the sum in fact paid for which the bill is security (*q*).

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Bills of sale.

A simple promise made voluntarily and without a legal consideration is not binding either at law or in equity (*r*). A voluntary bond or covenant, that is, one made without a consideration, is binding in law; but in equity, though allowed full legal effect, it is not assisted with the auxiliary equitable remedies of specific performance or injunction. Where a father in consideration of natural love and affection for his daughters con-

Voluntary
bonds and
covenants.

(*i*) See *Ex p. Nat. Merc. Bk.* (1880), 49 L. J. Bk. 62; 15 Ch. D. 42; *Ex p. Johnson* (1884), 53 L. J. C. 762; 26 Ch. D. 338; *Sharp v. McHenry* (1887), 57 L. J. C. 961; 38 Ch. D. 428; *Darlow v. Bland* (1896), 66 L. J. Q. B. 157; (1897) 1 Q. B. 125.

(*k*) *Credit Co. v. Pott* 1880, 50 L. J. Q. B. 106; 6 Q. B. D. 295; *Ex p. Allom* (1881), 14 Q. B. D. 43; *Ex p. Bolland* (1882), 52 L. J. C. 113; 21 Ch. D. 513.

(*l*) *Hamlyn v. Betteley* (1880), 49 L. J. C. P. 465; 5 C. P. D. 327; *Ex p. Chailnor* (1882), 51 L. J. C. 476; 16 Ch. D. 260.

(*m*) *Thomas v. Searies* (1891), 60 L. J.

Q. B. 722; (1891) 2 Q. B. 408.

(*n*) *Richardson v. Harris* (1889), 22 Q. B. D. 238; *Darlow v. Bland* (1896), 66 L. J. Q. B. 157; (1897) 1 Q. B. 125.

(*o*) *Hamilton v. Chaine* (1881), 50 L. J. Q. B. 456; 7 Q. B. D. 319.

(*p*) *Ex p. Firth* (1882), 51 L. J. C. 473; 19 Ch. D. 419.

(*q*) *Ex p. Charing Cross Bk.* (1880), 50 L. J. C. 157; 16 Ch. D. 35.

(*r*) *Sykes v. Dixon* (1839), 8 L. J. Q. B. 102; 9 A. & E. 693; *Re Whitaker* (1889), 58 L. J. C. 487; 42 Ch. D. 119. See per cur. *Kekewich v. Manning* (1851), 21 L. J. C. 577; 1 De G. M. & G. 176.

PART III. conveyed freeholds and covenanted to surrender copyholds upon trusts for their benefit: the court decreed the execution of the trusts as to the freeholds, because the conveyance of the freeholds was complete, but refused to enforce a surrender of the copyholds, because the covenant to surrender was voluntary (*s*). So if a covenant to transfer stock is purely voluntary a court of equity will not enforce it, but if the legal transfer is complete, though voluntary, equitable interests or trusts impressed upon it will be enforced (*t*). Upon the same principle the court will not rectify a voluntary deed or instrument executed by mistake, according to the common intention, though the court will set it aside if contrary to the intention (*u*). In the administration of assets in equity a voluntary bond or covenant was always admitted to proof against the estate of a deceased debtor in priority to legatees; but was postponed to all debts for value. By sect. 10 of the Judicature Act, 1875, the rule in bankruptcy has been introduced, and the creditors, whether claiming for value or as volunteers, rank *pari passu* in the administration of an insolvent estate in respect of debts by bond or covenants under seal (*x*). But a simple promise without consideration, as there is no claim at law available against the promiser, is not admitted to proof (*y*). —The same rule of postponing voluntary bonds and covenants to debts for value was applied to assets in bankruptcy; but by the Bankruptcy Act, 1883, s. 40 (re-enacting the Act, 1869, s. 32), all provable debts are now made payable *pari passu* (*z*). Upon the same principle, viz., that a court of equity will not assist a volunteer, an imperfect deed of gift is not aided in equity (*a*).

Voluntary conveyances. Voluntary conveyances of land were held to be within the Act 27 Eliz. c. 4, "against fraudulent conveyances"; and consequently void, both at law and in equity, as against a subsequent purchaser for value; and though the purchaser had notice of the conveyance (*b*). And this rule was applied to limitations in

(*s*) *Jefferys v. Jefferys* (1841), 1 Cr. & Ph. 138.

(*t*) *Ellison v. Ellison* (1802), 6 Ves. 656; 2 Wh. & T. L. C. 835; *Re Lucan* (1890), 60 L. J. C. 40; 45 Ch. D. 470.

(*u*) *Lister v. Hodgson* (1867), L. R. 4 Eq. 30.

(*x*) *Re Whitaker* (1900), 70 L. J. C. 6; (1901) 1 Ch. 9. See as to the earlier rule, *Stuart, V.-C., Dawson v. Kearton*

(1856), 25 L. J. C. 166; 3 Sm. & Giff. 186.

(*y*) *Re Whitaker* (1889), 58 L. J. C. 187; 42 Ch. D. 119.

(*z*) *Ex p. Pottinger* (1878), 47 L. J. Bk. 43; 8 Ch. D. 621.

(*a*) *Ellison v. Ellison* (1802), 6 Ves. 656; 2 Wh. & T. L. C. 835.

(*b*) *Doe v. Manning* (1807), 9 East. 59; *Buckle v. Mitchell* (1812), 18 Ves. 100.

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marriage settlements to persons who were not within the consideration of the marriage *c*. But now by the Voluntary Conveyances Act, 1893, conveyances of lands, tenements or hereditaments, if in fact made *bonâ fide* and without any fraudulent intent, are no longer to be deemed covinous within the meaning of the 27 Eliz. c. 4. Also voluntary conveyances of land or goods, if made by persons in insolvent circumstances, are held to be presumptively made with intent to delay or defraud creditors within the Act 13 Eliz. c. 5, and therefore void as against all persons intended to be thereby delayed or defrauded (*d*).

The consideration required to support a promise has been defined as consisting of any damage, or any suspension, or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking (*e*). It is immaterial that the promiser himself derives no benefit from the contract, provided he has made the promise in order to obtain the consideration from the promisee (*f*). Thus in contracts of guarantee it is enough if the person for whom the guarantor becomes surety derives a benefit, or the person to whom the guarantee is given suffer inconvenience, as an inducement to the surety to become guarantor for the principal debtor (*g*). And an agreement between two parties to pay money, or transfer property, to a third party shows a sufficient consideration between them, though the third party gains no right of action (*h*). It is further laid down as a rule that "the consideration in all cases must move from the promisee." The meaning of this rule seems to be that the matter of the consideration must be given, done or suffered by the promisee himself, or, if by a third party, at the request and by the procurement of the promisee, and as the agreed equivalent for the promise; and, with this meaning, the rule seems to import no more than is necessarily implied in the conception of a considera-

Consideration defined.

Consideration must move from the promisee.

See *Re Walhampton Estate* (1884), 53 L. J. C. 1009; 26 Ch. D. 391; *Rawson v. Gilchrist* (1892), 61 L. J. P. C. 72; (1892) A. C. 412.

(c) *De Mestre v. West* (1891), 60 L. J. P. C. 66; (1891) A. C. 264. See *post*, p. 449.

(d) *Twyne's case* (1601), 3 Co. 80; 1 Sm. L. C. 1.

(e) *Forth v. Stanton* (1669), 1 Wms. Saund. 220; *Carlisle v. Carbolic Smoke Ball Co.* (1892), 62 L. J. B. 257;

(1893), 1 Q. B. 256. And see *Barber v. Fox* (1670), 2 Wms. Saund. 418.

(f) *Bailey v. Jeff* (1812), 1 Taunt. 611; *Keenbody v. Farnstone* (1838), 8 A. & E. 743. *Disrupt v. Bishopp* (1846), 1 Ph. 698.

(g) *Newbury v. Lemington* (1829), 8 L. J. O. S. C. P. 4; 6 Bing. 201.

(h) *Davenport v. Bishopp* (1816), 1 Ph. 698; *Town v. Atkinson* (1861), 30 L. J. Q. B. 265; B. & S. 393.

PART III.

tion as an essential part of the agreement (*i*). If the consideration moves from a third party without the request or procurement of the promisee, the contract, if any, must be made with the third party, and the promisee could acquire no right in his own person (*k*). Where an agent signs a contract on behalf of his principal only, incurring no personal liability, there is no consideration on his part which will support an action in his name (*l*).

Executed and
executory
considera-
tions.

The consideration of a promise may be some matter executed and completed at the same time as the promise in return for which it is given; as goods sold and delivered, work done, money paid or lent, upon a promise of payment; or it may be a promise to perform some matter in return for the promise then given, as a promise to deliver goods, or perform work, or pay or lend money. In the former case the consideration is executed at the time of contracting; in the latter it is executory (*m*).—But a matter executed and past before the time of making the promise cannot constitute a valid consideration; for to give a promise in return for a past matter only must necessarily be a voluntary and gratuitous act (*n*).

Past con-
sideration.

Adequacy
of considera-
tion.

The adequacy of the consideration, in point of value, as an equivalent for the promise is immaterial to the validity of a contract; the parties being at liberty to agree upon any consideration, provided it is one that the law can recognise (*o*). The consideration of giving up a document, purporting to be a guarantee, was held sufficient, though it was invalid as a guarantee, the Court saying that "the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents"; and that they could not inquire into the motive of wanting the document (*p*). So the delivery up of a will,

(*i*) *Colyear v. Mulgrave* (Countess) (1836), 5 L. J. C. 335; 2 Keen, 81; *Lilly v. Hays* (1836), 6 L. J. K. B. 5; 5 A. & E. 548; *Dashwood v. Jermyn* (1879), 12 Ch. D. 776; *McGruther v. Pecher* (1904), 73 L. J. C. 653; (1904) 2 Ch. 306.

(*k*) *Price v. Easton* (1833), 2 L. J. K. B. 51; 4 B. & Ad. 443. See *ante*, p. 296.

(*l*) *Evans v. Hooper* (1875), 45 L. J. Q. B. 206; 1 Q. B. D. 45.

(*m*) See *ante*, p. 28.

(*n*) *Lamplegh v. Brathwaite* (1616), Hob. 105; 1 Sm. L. C. 136; *Wigan v. Eng. & Scot. Law Life Assoc.* (1908), 78 L. J. C. 120; (1909) 1 Ch. 291.

(*o*) *Bolton v. Madden* (1873), 43 L. J. Q. B. 35; L. R. 9 Q. B. 55; *Grimly v. Barnard* (1874), 43 L. J. C. 659; L. R. 18 Eq. 518; *Curdl v. Carbolic Smoke Ball Co.* (1892), 62 L. J. Q. B. 257; 1893) 1 Q. B. 256.

(*p*) *Haigh v. Brooks* (1839), 10 A. & E. 309.

though the will was invalid (*q*); a licensee to use a pretended patent right which was in fact invalid (*r*); the execution of indentures of apprenticeship which were void for not fully and truly setting forth the premium as required by statute (*s*); a licensee by a highway authority to open the soil of a road, though such authority has no property in the soil or right to open it (*t*); have all been held to be a sufficient consideration for a promise. An agreement to transfer and accept certain shares in a company upon which no money had been paid was held valid, in respect of the consideration of possible value in the shares on the one hand and liability attached to them on the other (*u*).—Employment in a business was held sufficient consideration for a promise not to carry on the same business within the same limits, although the employment was to continue only so long as the employer should please (*x*). Again, the employment of a broker named by a newspaper in answer to an enquiry addressed to one of the staff in response to an offer to supply financial advice is a sufficient consideration to support an implied contract to name an honest and reliable person (*y*). But a promissory note given for future services expected from the payee which he was under no legal obligation to render was held void for want of a consideration (*z*). A promise by a son to his father to cease complaints of the unequal distribution of property was held no consideration to support a promise by the father (*a*). A promise by an expectant devisee of an estate to assign it to another, if devised to him, was held a sufficient consideration for an advance of money by the assignee (*b*).

A nominal consideration, as of five shillings expressed in a deed or agreement to be paid and acknowledged, is sufficient to support it between the parties as evidence of the intention; but as regards third parties, if the consideration becomes material and

Nominal consideration.

(*q*) *Smith v. Smith* (1863), 32 L. J. C. P. 149; 13 C. B. N. S. 429.

(*r*) *Reggie v. Phosphate Sewage Co.* (1876), 41 L. J. Q. B. 233; 1 Q. B. D. 679.

(*s*) *Westlake v. Adams* (1858), 27 L. J. C. P. 271; 5 C. B. N. S. 248.

(*t*) *Edgeware Highway Bd. v. Harrow Gas Co.* (1874), 44 L. J. Q. B. 1; L. R. 10 Q. B. 92.

(*u*) *Cheale v. Kenward* (1858), 27 L. J. C. 784; 3 De G. & J. 27.

(*x*) *Gravelly v. Barnard* (1874), 43 L. J. C. 659; L. R. 18 Eq. 518; *Middleton v. Brown* (1878), 47 L. J. C. 411; *Haynes v. Doman* (1899), 68 L. J. C. 419; (1899), 2 Ch. 13.

(*y*) *De la Bere v. Pearson, Ltd.* (1907), 77 L. J. K. B. 380; (1908) 1 K. B. 280.

(*z*) *Hulse v. Hulse* (1856), 25 L. J. C. P. 177; 17 C. B. 711.

(*a*) *White v. Blunett* (1853), 23 L. J. Ex. 36.

(*b*) *Cook v. Field* (1850), 19 L. J. Q. B. 441; 15 Q. B. 461.

PART III. is called in question, such transaction would be deemed voluntary, and it becomes a question of fact in any particular case whether the consideration expressed was merely nominal or substantial (*c*). For any collateral purpose it is open to the parties to show a real and substantial consideration in support of the transaction, if it is not in other respects inconsistent with the terms of the deed (*d*).

Effect in equity of inadequacy.

The adequacy of the consideration is regarded in equity upon the same general principles as at law; but inadequacy may affect the claim to equitable remedies (*e*). "Mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, and still less can it be a ground for rescinding an executed contract. The only exception is where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case" (*f*). Adequacy of consideration was formerly material in equity upon the sale of reversionary interests, which might be set aside unless the buyer could prove that he gave a fair and adequate price; but the doctrine was abolished by the Sale of Reversions Act (31 & 32 Vict. c. 4), enacting that no purchase of any reversionary interest shall be set aside merely on the ground of undervalue (*g*).

Sale of reversion.

Distinction of good and valuable considerations.

For some purposes what is called a *good* consideration is distinguished from a *valuable* consideration. "A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as marriage, money, or the like, which the law esteems an equivalent for the grant" (*h*). A *good* consideration was sufficient to support a covenant to stand seised to uses in favour of a wife, child or blood relation; a mode of conveyance which operated by force of the Statute of Uses, without

(*c*) *Gully v. Erster* (1829), 8 L. J. O. S. K. B. 281; 10 B. & C. 584. See *Kelson v. Kelson* (1853), 22 L. J. C. 745; 10 Hare. 385.

(*d*) *Gale v. Wilkinson* (1841), 10 L. J. Ex. 446; 8 M. & W. 405; *Leischild's case* (1865), L. R. 1 Eq. 231; *Re Johnson* (1882), 51 L. J. C. 503.

(*e*) *Mortlock v. Buller* (1804), 10 Ves. 292; *Faleke v. Gray* (1859), 29 L. J. C. 28; 4 Drew. 651.

(*f*) *Wigram, V.-C., Borrell v. Dunn* (1843), 2 Hare. 450; *Middleton v. Brown* (1878), 47 L. J. C. 411.

(*g*) See *ante*, p. 287.

(*h*) 2 Blackst. Com. 297.

transmutation of possession, and therefore required a sufficient consideration in equity to raise the use (*i*). But the doctrine has no further application, and a covenant in consideration of, or a promise induced merely by, natural love and affection for the covenantee or promisee is a voluntary covenant or promise (*k*).

A doctrine formerly prevailed that an express promise moved by a previously existing moral obligation furnished sufficient consideration to create a valid contract. But it is obvious that a promise moved by a sense of moral obligation only is simply voluntary; and it is now settled, in accordance with the general rule, that no valid contract arises from it (*l*). Thus in a case where the plaintiff, who had expended money for the benefit of a person whom the defendant had afterwards married, charged the defendant upon a promise made after the marriage that he would pay the amount; and it appeared that there was no other ground to support the promise than the moral obligation of returning the benefit conferred on the wife: the court held the claim to be bad (*m*). So a promissory note which is given out of gratitude or affection or other moral motive is not binding in the hands of the promisee, notwithstanding the presumption of a consideration of value (*n*).

Consideration of moral obligation.

There are some cases of apparent moral obligation, where a debtor, having obtained protection or discharge by law without satisfaction of his creditor, renews his liability by a simple promise to pay the debt: as the promise to pay a debt barred by the Statute of Limitations; for a person may renounce the benefit of a law made for his own protection (*o*). Simple promises to pay debts discharged by bankruptcy are now deprived of all legal effect by the modern Bankruptcy Acts, which protect the bankrupt from any proceedings against him in respect of such debts (*p*). But a discharged bankrupt may enter into a new contract upon a sufficient consideration to pay the debt, upon which a new cause of action will accrue after his discharge (*q*).

Promise to pay debt discharged by law.

(i) *Mildmay's case* (1584, 1 Co. 175; Leake, *Law of Land*, 86.

(k) *Jefferys v. Jefferys* (1841), Cr. & Ph. 138; *Tweedle v. Atkinson* (1861), 30 L. J. Q. B. 265; 1 B. & S. 393.

(l) *Beumont v. Reece* (1846), 15 L. J. Q. B. 141; 8 Q. B. 483.

(m) *Eastwood v. Kenyon* (1840), 9 L. J. Q. B. 438; 11 A. & E. 438.

(n) *Holliday v. Atkinson* (1826), 5 B. & C. 591.

(o) See post, p. 721.

(p) Bankruptcy Act, 1883, s. 30; *Heather v. Webb* (1876), 46 L. J. C. P. 89; 2 C. P. D. 1.

(q) *Jakeman v. Cook* (1878), 48 L. J. Ex. 165; 1 Ex. D. 26.

PART III. Such a promise made before his discharge would be void as contravening the principle of the bankruptcy law which requires equality of treatment for the creditors (*r*). Any promise made after full age to pay any debt contracted during infancy is now rendered void of effect by the Infants' Relief Act, 1874, as already noticed (*s*).

Consideration
of existing
legal
obligation.

A promise to perform an existing legal obligation, without some new consideration to support it, is a voluntary promise, which, unless made under seal, does not create any new obligation. A promise by the acceptor of a bill of exchange to pay the bill is a void promise, unless made upon a new consideration, though the bill has been lost (*t*); but a promise to pay a lost bill upon receiving a bond of indemnity and discharge was held to be supported by a sufficient consideration (*u*). A promise by the maker of a promissory note payable on demand, to pay the amount by instalments, was held to have no effect in discharge of the original note, being void of consideration (*x*). But a promissory note taken for an existing debt is valid, because it operates as conditional payment (*y*). A promise under seal to pay a previous simple contract debt is valid, and may extinguish the debt by the doctrine of merger without any new consideration (*z*).

Promise to
pay existing
debts.

For the same reason the performance of or a promise to perform an existing legal obligation is not a valid consideration; as a promise by a person to pay his own debts (*a*). An existing debt is no consideration to support a promise by the creditor to give time for payment (*b*). And if a debt carries interest, a promise by the creditor to give an extended time for payment in consideration of the debtor paying the interest during that time, is void (*c*). Upon this principle payment of, or a promise to pay, part of a certain and immediate debt is alone no con-

(*r*) *Ex p. Barrow* (1881), 50 L. J. C. 821; 18 Ch. D. 464.

(*s*) *Ante*, p. 387.

(*t*) *Davis v. Dodd* (1812), 4 Taunt. 602.

(*u*) *Williamson v. Clements* (1809), 1 Taunt. 523.

(*x*) *M'Manus v. Park* (1870), 39 L. J. Ex. 65; L. R. 5 Ex. 65.

(*y*) *Dixon v. Nuttall* (1834), 3 L. J.

Ex. 290; 1 Cr. M. & R. 307; *Stott v. Fairclough* (1883), 53 L. J. Q. B. 47.

(*z*) See *post*, Pt. IV., Chap. IX.

(*a*) *Per cur. Jones v. Waine* (1839), 5 Bing. N. C. 351.

(*b*) *Williams v. Stern* (1880), 49 L. J. Q. B. 663; 5 Q. B. D. 409.

(*c*) *Skerry v. Preston* (1813), 2 Chit. 245; *Orme v. Galloway* (1854), 23 L. J. Ex. 118; 9 Ex. 544.

sideration for the discharge or forbearance of the residue (*d*). — But in compositions with creditors, the giving up part of their claims by all the creditors is a valid consideration for each one giving up a part and accepting the composition in discharge of his whole debt (*e*). And in the case of an unliquidated or uncertain demand, or a disputed debt, payment of an agreed sum is a sufficient consideration for a discharge of the demand in full (*f*).

CHAP. I.

Compositions
with
creditors.

Upon the same principle the performance of an existing contract by one of the parties is no consideration for a new promise by the other party (*g*). Where a lessee was liable to an action for breach of covenant to repair, a promise by him to repair by a certain day was held to be no consideration for a promise by the lessor to forbear bringing an action until that day (*h*). Where seamen have bound themselves to serve for a whole voyage, the performance of their duties during the voyage forms no consideration for promises of increased pay; and therefore where some of the crew had deserted, a promise by the captain to the others to give increased wages merely for continuing the voyage was held void (*i*). But where in consequence of desertions it became dangerous to continue the voyage, the remaining seamen, not being bound to proceed, were at liberty to make a new contract stipulating for increased pay (*k*). So if the captain dies during the voyage the mate is entitled to take his place and claim captain's wages; and a seaman appointed by him to act as mate is entitled to the increased wages of mate, because the services are not within his duties as seaman (*l*). — But a person may promise to a third party to do what he is already bound to do by contract with another; and such promise is a sufficient consideration to support a new contract with the third party; as in the case of a promise by a debtor to pay an assignee of the debt (*m*).

Performance
of existing
contract.

(*d*) *Foakes v. Beer* (1884), 54 L. J. Q. B. 130; 9 Ap. Ca. 605.

(*e*) *Norman v. Thompson* (1850), 19 L. J. Ex. 193; 4 Ex. 755; *Boyd v. Hind* (1857), 26 L. J. Ex. 164; 1 H. & N. 938; *Curey v. Burrell* (1879), 4 C. P. D. 379.

(*f*) *Crowther v. Farrer* (1850), 20 L. J. Q. B. 298; 15 Q. B. 677. And see *King v. Pinaoneault* (1875), 44 L. J. P. C. 42; L. R. 6 P. C. 245.

(*g*) *Jackson v. Cobbin* (1841), 10 L. J.

Ex. 389; 8 M. & W. 790.

(*h*) *Bayley v. Homan* (1837), 6 L. J. C. P. 309; 3 Bing. N. C. 915.

(*i*) *Harris v. Carter* (1854), 23 L. J. Q. B. 295; 3 E. & B. 559; *Fraser v. Halton* (1857), 26 L. J. C. P. 226; 2 C. B. N. S. 512.

(*k*) *Hartley v. Pinnamby* (1857), 26 L. J. Q. B. 322; 7 E. & B. 472.

(*l*) *Hanson v. Royden* (1867), 37 L. J. C. P. 66; L. R. 3 C. P. 47.

(*m*) *Morton v. Burn* (1837), 7 L. J.

PART III.
Performance
of legal duty.

Upon the same principle the performance of a legal duty affords no consideration for a contract. Thus it has been held that the mere maintenance of an illegitimate child by the mother, which she is bound by law to provide, if she be of ability to do so, will not support a promise made to her by the putative father; but if any provision for the child beyond such legal maintenance be included in the consideration, or if the mother agree not to take proceedings for affiliation against the putative father, the consideration is sufficient, and the promise valid (*n*).—At the common law the sheriff was compelled to execute process without fee or reward, accordingly a promise to pay money to a sheriff or his officer in consideration of his performing his duty is void, unless the claim is justified under some statute (*o*). A police constable may, however, recover the amount of a reward offered by advertisement for giving such information as would lead to the conviction of a felon, although it may be his duty generally to give information without reward (*p*).—Where money is exacted by a person for doing what he is under a previous legal obligation to do, the payment is in general considered as made under compulsion, and the money may be recovered back as a debt implied in law (*q*).

Forbearance
of rights.

Forbearance to sue for a certain time or for a reasonable time by a person who has a right of action is a valid consideration for a promise (*r*). A guarantee of a debt, expressed to be made "in consideration of your forbearing to press for immediate payment of the debt," no time being stated, was held good as importing forbearance for a reasonable time (*s*). A guarantee for the payment of a debt on a stated day, in consideration of forbearance for which no time is stated, is construed as presumptively meaning forbearance until the day stated for payment; and forbearance for that period is a condition precedent to liability upon

Q. B. 101; 7 A. & E. 19; *Scotson v. Pegg* (1861), 31 L. J. Ex. 225; 6 H. & N. 295.

(*n*) *Furillo v. Crowther* (1826), 7 D. & R. 612; *Crowhurst v. Laverack* (1852), 22 L. J. Ex. 57; 8 Ex. 208; *Smith v. Roche* (1859), 28 L. J. C. P. 237; 6 C. B. N. S. 233.

(*o*) *Bilke v. Havlock* (1813), 3 Camp. 374; *Dew v. Pursaux* (1819), 2 B. & A. 562; *Smith v. Broadbent* (1892), 61 L. J. Q. B. 490; (1892) 1 Q. B. 551.

(*p*) *Englant v. Durdson* (1810), 9 L. J. Q. B. 487; 11 A. & E. 856; *Neville v. Kelly* (1862), 32 L. J. C. P. 118; 12 C. B. N. S. 740.

(*q*) See ante, p. 62.

(*r*) *Wigan v. Eng. & Scott, Law Life Assoc.* (1908), 78 L. J. C. 120; (1909) 1 Ch. 291; *Willatts v. Kennedy* (1831), 1 L. J. C. P. 4; 8 Bing. 5.

(*s*) *Oldershaw v. King* (1857), 27 L. J. Ex. 120; 2 H. & N. 517.

the guarantee (*t*). So a promissory note payable at a future date given for a present debt is valid, being in substance an agreement to suspend the remedy for the debt until the note is due, or if the bill is in the hands of an indorsee for value, so long as it is outstanding notwithstanding it may be overdue and dishonoured (*u*). Forbearance in fact is a sufficient consideration to support a promise made upon condition of such forbearance, though there is no binding contract to forbear (*x*); and a promissory note payable with interest on demand given by a third party for the debt of another, which was not sued upon under an understanding that time would be given to the debtor, was held valid as supported by a sufficient consideration (*y*). Forbearance of an execution against a debtor is a sufficient consideration for a promise by a third party to pay a larger amount than the debt (*z*).

Equitable rights are recognised in law as supplying sufficient consideration of a contract, in respect of the forbearance, release, or assignment of such rights; as the release by a mortgagor of his equity of redemption (*a*); the assignment in equity of the beneficial interest in a debt (*b*); or the assignment of the benefit of a contract for a purchase or lease of land (*c*).

Pretended rights and claims which are void in law or equity will not supply a valid consideration. A release of all interest in an estate, reserving a lien for a debt, by a person who in fact had no interest except the lien, was held to be no consideration for a promise to pay the debt (*d*). The giving up of a security for a debt, after the creditor has released the debt, is no consideration to the debtor; because the creditor has no longer any right to retain it (*e*).—So forbearance of suit where there is no cause of action or no party liable to be sued is no consideration: as for-

Equitable
rights.

Pretended
rights and
claims.

(*t*) *Rolt v. Cozens* (1856), 25 L. J. C. P. 254; 18 C. B. 673.

(*u*) *Baker v. Walker* (1845), 14 L. J. Ex. 371; 14 M. & W. 465; *Balfour v. Sea Fire Life Assce.* (1857), 27 L. J. C. 17; 3 C. B. N. S. 300; *Ex p. Debtor* (1907), 77 L. J. K. B. 409, (1908) 1 K. B. 344.

(*x*) *Wilby v. Elgee* (1875), 44 L. J. C. P. 254; *Fullerton v. Prov. Bk. of Ireland* (1903), 72 L. J. P. C. 79; (1903) A. 11 309. *Hyams v. Stuart King* (1908), 77 L. J. Q. B. 794; (1908) 1 K. B. 696.

(*y*) *Orears v. Hunter* (1887), 56 L. J.

Q. B. 518; 19 Q. B. D. 341.

(*z*) *Smith v. Algar* (1830), 9 L. J. O. S. K. B. 79; 1 B. & Ad. 603.

(*a*) *Thorpe v. Thorpe* (1701), 1 Ld. Raym. 663.

(*b*) *Mouldsdale v. Birchall* (1672), 2 W. Bl. 820.

(*c*) *Price v. Seaman* (1825), 4 L. J. O. S. K. B. 4; 4 B. & C. 525.

(*d*) *Kaye v. Dutton* (1844), 13 L. J. C. P. 183; 7 Man. & G. 807.

(*e*) *Caeper v. Green* (1841), 10 L. J. Ex. 346; 7 M. & W. 633.

PART III. bearing to sue an heir on the bond of his ancestor in which he was not bound (*f*); forbearance by the assignee of a bond, upon which by reason of equities subsisting between the obligor and the assignor he has no right to sue (*g*).

Disputed and doubtful claims.

Disputed and doubtful claims to legal or equitable rights will support the consideration for a promise (*h*); and forbearing to sue for or releasing a *bonâ fide* claim which is reasonably doubtful in fact or in law, though no proceedings have been commenced, is a good consideration (*i*). Forbearance to apply for costs which are in the discretion of the court is a valid consideration for a promise to pay them (*k*). The withdrawal of a distress for rent in arrear, the amount of which is disputed, is a good consideration for a promise to pay a certain sum (*l*). But unless there appears some reasonable ground of dispute between the parties, a compromise made in consideration of forbearing to sue is not binding (*m*).—Where an action has been commenced, a promise made in consideration of staying proceedings is presumed against the promiser to have been well founded; and it lies upon the promiser to show that there was no good or doubtful cause of action forborne, to the knowledge of the plaintiff, in order to discharge himself from the promise (*n*). If a person commences legal proceedings, knowing that he has no cause of action, staying the proceedings would be no consideration to support a promise to pay the amount claimed (*o*).

Staying proceedings in action.

Illegal claims.

When arrest on civil process was available, the discharge of a prisoner from an illegal execution was no consideration to support a promise; but an execution was presumed to be legal and regular until the contrary was proved; and it was incumbent on the promiser to show that it was illegal to the knowledge of the promisee in order to avoid the promise (*p*). If the execution was merely irregular, requiring an application to the court for a discharge,

(*f*) *Barber v. Fox* (1670), 2 Wms. Saund. 418.

(*g*) *Graham v. Johnson* (1869), 38 L. J. C. 374; L. R. 8 Eq. 36.

(*h*) *Haigh v. Brooks* (1839), 10 A. & E. 309; *Lucy's case* (1853), 22 L. J. C. 732; 4 De G. M. & G. 356; *Orrell v. Coppock* (1857), 26 L. J. C. 269; *Keenan v. Handley* (1864), 2 De G. J. & S. 283.

(*i*) *Miles v. New Zealand Co.* (1886), 55 L. J. C. 801, 32 Ch. D. 269.

(*k*) *Bracewell v. Williams* (1866), L. R. 2 C. P. 196.

(*l*) *Skate v. Beale* (1840), 9 L. J. Q. B. 33; 11 A. & E. 983.

(*m*) *Edwards v. Baugh* (1843), 12 L. J. Ex. 426; 11 M. & W. 641; *Thomson v. Eastwood* (1877), 2 Ap. Ca. 215.

(*n*) *Temple v. Knowles* (1849), 10 L. J. C. P. 222; 7 C. B. 651; *Croft v. Farrer* (1850), 20 L. J. Q. B. 15 Q. B. 677.

(*o*) *Wade v. Simeon* (1846), 15 L. J. C. P. 114; 2 C. B. 548.

(*p*) *Smith v. Monteith* (1844), 14 L. J. Ex. 22; 13 M. & W. 427.

the discharge at the instance of the promiser was a valid consideration (*q*).—A promise to conduct proceedings in bankruptcy against a person in such a manner as to injure his credit as little as possible was held to be no consideration for a promise to pay the costs; being merely a promise not to abuse the process of the court (*r*). A promise not to disclose matters defamatory of another is not a valid consideration, because it is a duty to disclose such matters upon a justifiable occasion but not otherwise, and therefore the promise must be either void or illegal (*s*).

Marriage is a valid consideration between the parties to the marriage; as in the contract of mutual promises to marry (*t*). And it is a valid consideration for a promise by a third party made to either of the parties to the marriage (*u*). And the re-cession of mutual promises to marry is a valid consideration for a promise by one of the parties to pay a sum of money to the other (*x*).—Marriage, or a promise of marriage, is a valid consideration for a promise to convey or charge land or other property in settlement upon the marriage; and upon the marriage taking place a specific lien or charge is thereby created upon the property (*y*). And a conveyance made in consideration of marriage is valid as against a subsequent purchaser for value, and as against general creditors (*z*); if made in favour of persons who are deemed to be within the consideration of the marriage; namely, the husband and wife, and the survivor of them, and the issue of the marriage (*a*). Limitations in a marriage settlement to the issue of a former marriage of the husband or to his illegitimate issue, are not within the marriage consideration, and are therefore voluntary; but the children of the wife are not regarded as volunteers where the contract is between husband

Consideration
of marriage.

Marriage
settlements.

(*q*) *Butcher v. Stewart* (1843), 12 L. J. Ex. 391; 11 M. & W. 857.

(*r*) *Bracewell v. Williams* (1866), L. R. 2 C. P. 196.

(*s*) *Brown v. Brine* (1875), 45 L. J. Ex. 129; 1 Ex. D. 5.

(*t*) *Harrison v. Cope* (1697), 1 Ld. Raym. 386; 5 Mod. 412.

(*u*) *Shadwell v. Shadwell* (1860), 30 L. J. C. P. 145; 9 C. B. N. S. 159. See *ante*, p. 439.

(*x*) *Baker v. Smith*, cited T. Raym. 400.

(*y*) *Fremoult v. Dedire* (1718), 1 P. Wms. 429; *Mornington (Earl) v. Keane* (1558), 27 L. J. C. 791; 2 De G. & J. 292. See *Re Parkin* (1892), 62 L. J. C. 55; (1892) 3 Ch. 510.

(*z*) *Richardson v. Horton* (1843), 13 L. J. C. 186; 7 Beav. 112.

(*a*) *Nairn v. Prowse* (1802), 6 Ves. 751; *Dilkes v. Broadmead* (1860), 30 L. J. C. 268; 2 De G. F. & J. 556. See *Keane v. Crawford* (1877), 46 L. J. C. 729; 6 Ch. D. 29.

PART III.

and wife, an exception which has always been regarded as anomalous (*b*). And limitations to collateral relations of either party are in the same position (*c*). Limitations to the issue of a future marriage have been supported as being for value (*d*).—A post-nuptial settlement is voluntary as regards the consideration of marriage, because it is a past consideration (*e*).

Consideration of tenure.

The tenure of land involves a consideration in the implied obligations of the tenancy, although no rent or services or other consideration is expressly reserved or stipulated; and therefore a grant of land for a particular estate, in tail or for life or for years, as creating a tenure, requires no further consideration; but a grant in fee since the statute of *Quia Emptores*, as it creates no new tenure, requires a consideration, at least nominal, or an express declaration of uses, in order to rebut a resulting use in the grantor (*f*). Hence an agreement for a lease is sufficiently supported by the tenure to be thereby created without any other consideration (*g*). And an assignment of leasehold estate is sufficiently supported by the liabilities and covenants of the lease undertaken by the assignee (*h*). The consideration of tenure in such cases is sufficient as a valuable consideration in equity to protect the tenant or lessee against a prior equitable incumbrance of which he had no notice (*i*); but it is not alone a sufficient consideration to support a settlement impeached under the 13 Eliz. c. 5, as a fraud upon creditors (*k*).

Consideration partly void.

One and the same consideration is sufficient to support several distinct promises made in respect of it; and in general in a written agreement all the promises would be construed as referable to the consideration (*l*). If the consideration expressed is divisible and partly void for uncertainty or any other reason, it may be so far

(*b*) *Gale v. Gale* (1877), 46 L. J. C. 80; 6 Ch. D. 144; *Re Cameron and Wells* (1887), 57 L. J. C. 69; 37 Ch. D. 32; *De Mestre v. West* (1891), 60 L. J. P. C. 66; (1891) A. C. 264. See *Clarke v. Wright* (1861), 30 L. J. Ex. 113; 6 H. & N. 819.

(*c*) *Johnson v. Legard* (1816), 3 Madd. 283; 6 M. & S. 60; *Smith v. Cherrill* (1867), 36 L. J. C. 738; L. R. 4 Eq. 390.

(*d*) *Clayton v. Wilton* (1818), 6 M. & S. 67, n.; 3 Madd. 302, n.

(*e*) *Butterfield v. Heath* (1852), 22 L. J. C. 270; 15 Beav. 408; *Shurmur v.*

Sedgwick (1883), 53 L. J. C. 87; 24 Ch. D. 597.

(*f*) *Perkins*, ss. 533–537; *Barker v. Keate* (1678), 1 Mod. 262; *Pouchy v. Walker* (1793), 5 T. R. 373.

(*g*) *King's Leaseholds* (1873), L. R. 16 Eq. 521.

(*h*) *Price v. Jenkins* (1877), 46 L. J. C. 805; 5 Ch. D. 619.

(*i*) *Harris v. Tubb* (1888), 58 L. J. C. 434; 42 Ch. D. 79.

(*k*) *Re Ridler* (1883), 52 L. J. C. 343; 22 Ch. D. 74.

(*l*) *Harris v. Venables* (1872), 41 L. J. Ex. 180; L. R. 7 Ex. 235.

CHAP. I.

rejected, and the promise supported by so much as is valid and substantial (*m*). If the promise consists of several matters and is divisible, the consideration may be attributable to part only, leaving the rest unsupported by any consideration. As where a guarantee was given in terms to pay for all the gas to be supplied on certain premises, and also to pay all arrears then due for gas supplied; the only consideration being the future supply of gas, the promises were construed to be divisible; the former was held valid in respect of any gas to be supplied under it, and the latter void as given for a past consideration (*n*). So a bill of exchange may be given for sums attributable respectively to several considerations, some of which are void or have failed (*o*).—Where any part of the consideration is illegal it is not merely void and inoperative, but it generally renders the whole transaction illegal, and the promise induced in any degree by such consideration is wholly void. But if the promise be divisible and apportionable to the several parts of the consideration, the promise, so far as it is not attributable to the illegal consideration, may be valid (*p*).

Consideration
illegal.

In contracts with executory considerations, the execution of the consideration may form a condition precedent to the liability upon the promise, and the failure of the consideration then discharges the promise. If the execution of the consideration does not form a condition precedent to the liability upon the promise, failure of execution does not affect the promise, but has the effect only of a breach of contract, giving a claim for damages. The dependence of the promise on the one side upon the execution of the consideration on the other is, for the most part, a question of construction of the terms of the contract, which is dealt with hereafter in treating of contracts on the side of the promise (*q*).—Where money has been paid for a consideration which entirely fails, the money may in general be recovered back; and a contract or debt is implied in law to that effect (*r*).

Failure of
considera-
tion.

(*m*) *King v. Sars* (1835), 4 L. J. Ex. 181; 2 Cr. M. & R. 48.

(*n*) *Wood v. Benson* (1831), 1 L. J. Ex. 18; 2 Cr. & J. 94.

(*o*) *Darnell v. Williams* (1817), 2 Stark. 166; *Southall v. Rigg* (1851), 20 L. J. C. P. 145; 11 C. B. 481.

(*p*) *Shackell v. Rosier* (1836), 5 L. J. C. P. 193; 2 Bing N. C. 634; *Kearney v. Whitbaker Colliery* (1893), 62 L. J. M. C. 129; (1894) 1 Q. B. 700; *Goolson v. Grierson* (1908), 77 L. J. K. B. 507; (1908) 1 K. B. 761.

(*q*) See next Chapter.

(*r*) See *ante*, p. 67.

CANADIAN NOTES.

What is Sufficient Consideration.

In *Reid vs. Carrall et al*, 7 F. C. C. P., 283, a deposit of a sum of money by the plaintiff in the hands of a third party for a limited time during which the defendant would ascertain facts was held sufficient consideration to support a promise by defendants to delay entering a judgment and issuing execution.

In *Robertson vs. Broadfoot*, 11 F. C. Q. B., 407, plaintiff declared on an agreement that in consideration that plaintiff, a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on a farm of one Kinnettles on account of a judgment obtained by the defendant against one McNaught, the plaintiff promised defendant to indemnify him against all risks in relation to his doing his said duty. It was held that the declaration sufficiently shewed that plaintiff was required to do something which might turn out not to be a legal execution of the process. The agreement, therefore, was not without consideration or illegal. Per Robertson, C. J.: "If the undertaking had been to pay the officer for executing the process, as his duty required, it would be illegal, besides being without consideration."

In *Dunn vs. Irwin et al*, 25 F. C. C. P., 111, the use by the defendant of the plaintiff's mill in order to store and convert into lumber a stock of logs belonging to the plaintiff was held a sufficient consideration for the promise of the defendant to saw the logs, forward them to market and dispose thereof.

In *Berkley Church vs. Sterens*, 37 F. C. Q. B., 9, plaintiffs alleged that, in consideration that they would take down or remove their church and rebuild it so as better to answer the purposes of the trust deed, defendant promised to pay them \$160 to assist them in so doing. This was held not to be voluntary and without consideration, for the plaintiff, on the faith of it and of other promised subscriptions, had rebuilt the church and incurred obligations.

In *Waddell vs. McCabe*, 4 F. C. Q. B., O. S., 191, it was held that a consideration which could not legally be enforced might be sufficient to support a promise. The consideration in question was that plaintiff would not bid against defendant at a

sheriff's sale of lands for taxes. The agreement was held under the circumstances of the case not to be contrary to public policy.

In *Jackson vs. Yeomans*, 28 U. C. Q. B., 307, it was held that where a mortgage contained only a proviso making it void on payment of the mortgage money and a proviso to sell and eject on default, but no covenant to pay, there was no liability to pay created by mere proof of the mortgage; there must be evidence given of a loan or debt, and a mere promise to pay such money on forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be.

In *Williamson vs. Ewing*, 27 Grant's Ch., 596, the defendant was carrying on a photographic business and dealing in pictures. He sold out the business to the plaintiff and, by the agreement, covenanted not to open or start a retail and photographic business of a similar character in the City of Toronto for five years. The agreement was subsequently modified so as to allow defendant to sell in any manner to persons residing out of Toronto and to sell retail in Toronto, allowing plaintiff a percentage on the prices realized. The Court was of opinion that the second agreement had been executed for a valuable consideration, and granted a decree for an accounting as to goods sold thereunder, and also as to goods alleged to have been sold in contravention of the first agreement.

In *Copland Chatterton Company vs. E. Lok*, 16 Man., 610, defendant while in the employ of the plaintiffs at a monthly salary signed, at the request of the plaintiffs, an agreement not under seal that he would not within a year after the termination of his employment with the company engage or be interested in any business or works within Canada or Great Britain in competition with the business of the company. The defendant expected to be appointed manager of the business at Winnipeg, with an increase of salary, and had reason to believe that a refusal to sign the agreement would be followed by dismissal, but no promises were made to him prior to signing, nor was he told that he would be dismissed if he would not sign. It was a condition, however, that he would sign the agreement before having placed in his hands a new price book issued for use in the plaintiffs' business. He was made temporary manager at Winnipeg shortly after signing, but without any increase of salary or any terms or conditions.

It was held that there was no sufficient consideration for the signing of the agreement by the defendant, and it was not binding on him. Per Richards, J.: "The giving the defendant the price book was not a consideration. It was given for plaintiffs' benefit and not for the defendant's. Its object was to enable defendant to more readily do his work for the plaintiff, and thus to enable the plaintiffs to get more profit out of the work."

In *Cox vs. Sealey*, Contée's Dig., 378, the defendant agreed, in writing, to accept goods in payment of two bills of exchange accepted by plaintiff, and plaintiff, having delivered the goods in payment of such bills, was subsequently sued by an endorsee of one of them and compelled to pay it. In an action to recover the amount so paid by plaintiff defendant offered evidence to shew that at the time the agreement in writing was made the plaintiff orally agreed that the goods should not be taken as payment in full of the bill, and that he would pay the balance as soon as he was able. The Supreme Court affirmed the judgment appealed from, which held that such agreement as made was void for want of consideration.

In *Nichols vs. McGill*, 7 U. C. Q. B., 233, where defendant promised that if plaintiff would sell land to Mrs. Schell, and take a mortgage from her for payment of the purchase money by a certain day the money should be paid on that day, it was held that an action of assumpsit would lie against the defendant on the non-payment of the mortgage, and that a plea of Mrs. Schell's coverture was a bad plea. In the same case it was considered that a plea of coverture would be a good defence where the promise set up in the declaration was founded on a consideration of the plaintiff's forbearance to sue a married woman for a debt alleged to be previously due by her. Per Robinson, C. J.: "The difference lies in this, where there is an alleged pre-existing debt against a married woman and a third party engages that if forbearance shall be shewn to her he will guarantee the debt, then such promise is held to be without any valid consideration, because there being, in fact, no debt which the creditor can enforce, there is no value in his forbearance. But here the defendant engaged that if the plaintiff would convey certain property to Mrs. Schell and take a mortgage from her for payment of the purchase money by a certain day, the money should

be paid on that day. A valid consideration moves at once from the plaintiff."

Consideration.

In *Jackson vs. Evans*, 21 U. C. C. P., 33, it was held that where there was an express agreement between the owner of certain logs and the plaintiff that he would sell the logs subject to the plaintiff's charges thereon for rafting, which agreement was communicated to the defendant, the purchaser, who promised the plaintiff before the delivery by him to them of the whole of the logs to pay such said charges, the plaintiff was entitled to maintain an action against defendant for non-payment of the same.

Past Consideration.

In *Marlatt vs. Gooderham*, 14 U. C. Q. B., 221, a declaration that, in consideration that the plaintiff at the defendant's request had consigned and shipped certain wheat to Clemow & Bloor, at Oswego, defendants promised to advance him a certain sum thereon and to sell it for him within thirty days and pay over the proceeds, less the advance and charges, etc., that the defendants did make the advance, but did not sell the wheat, was held bad on demurrer, as not shewing a sufficient consideration, the consideration being a past consideration. It was unnecessary to consider whether the parties would have been placed in a different position if the contract had been stated to have been that in consideration that the plaintiff would ship the wheat the defendants would sell it within thirty days afterwards.

Similar cases of past consideration are presented in *Cunningham vs. Richardson*, 7 U. C. Q. B., 163; *Reese vs. Howcutt*, 4 U. C. C. P., 284, and *Wilson vs. Keyes*, 15 U. C. C. P., 32.

Antecedent Debt.

It was held in *Austin vs. Gordon*, 32 U. C. Q. B., 621, that an antecedent debt in respect of which an insolvent had duly received his discharge under the Insolvent Acts of 1864 and 1869 was a continuing debt in conscience and a sufficient consideration for a promise, there being no legislation such as that of the later English acts preventing a new promise for such a debt from being enforced.

Moral Obligation.

In *Dixie vs. Worthy*, 11 F. C. Q. B., 328, a married woman procured the plaintiff to endorse for her a bill of exchange, promising to indemnify him, and, after her husband's death, renewed the promise. It was held that no action would lie against her, although it was averred that the bill was negotiated for her own use. The question was treated as one of moral obligation arising out of the endorsement, the promise to indemnify for which was invalid for want of capacity, and the case of *Lee vs. Muggeridge*, 5 Taunt., 36, was treated as overruled (1834).

CHAPTER II.

THE PROMISE.

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THE promise in a contract may be made in express terms; or it may be presumed from the facts and circumstances creating the contract; or under certain circumstances it may be implied in law: these distinctions refer to the mode of formation of the contract and have been already noticed. The promise may be varied according to the specific object or purpose to which the contract is applied; but it is not within the scope of the present work to treat of the law of contracts in its various specific applications. There are, however, some modifications and distinctions of a general character concerning the matter of the promise which require notice.

PART III.

Absolute and conditional promises.

Condition precedent.

Condition subsequent.

Promises may be absolute or conditional. An absolute promise is due immediately, and independently of any event or contingency; as a debt due and payable at the present time. Such a debt arises upon a promissory note payable on demand, which is held to be a present debt due and payable without demand (a).—A conditional promise is one of which the performance becomes due only after a lapse of time, or upon the happening of some event, certain or uncertain. The lapse of time and the happening of the event are then conditions precedent, in reference to the liability for performance of the promise. —A promise may also be conditional, as being subject to cease or be discharged upon some event or contingency, which is then a condition subsequent: as a bond with condition, which according to the literal construction is an acknowledgment of a debt due to the obligee, conditioned to be void on the performance of some act or on the happening of some event. But the legal effect of the bond is to secure the performance or the event stipulated for in the condition; and in substance it constitutes a liability to pay conditional on a breach of the condition; the amount payable being restricted by law to the damages occasioned by the breach (b). Other instances of conditions subsequent occur in charter-parties containing a clause of cesser of liability upon the shipment of the cargo (c); and in contracts reserving conditions of forfeiture or of rescission at the option of one or other of the parties (d). And as a condition annulling the entire promise is valid, a right to vary some part only of the promise is effective (e).

Debts payable at a future time.

Contracts may be conditional upon mere lapse of time: as a debt payable at a future time *debitum in presenti solvendum in futuro*, which is subject to the condition precedent that the specified time must elapse before the debt becomes absolutely due and payable; as a debt for goods sold with a fixed period of credit; a debt upon a bill or note payable at a future date. Where goods are sold upon a contract to pay for them by a bill, and the bill is given, the price cannot be recovered until the period of the bill has elapsed; but if the contract is broken by not giving the bill, the

(a) *Norton v. Ellam* (1837), 6 L. J. Ex. 121; 2 M. & W. 461; *Bartram v. Caddy* (1838), 8 L. J. Q. B. 31; 9 A. & E. 275.

(b) See *ante*, p. 798.

(c) See *ante*, p. 344.

(d) See *post*, p. 481.

(e) *British Equitable Assur. v. Bailey* (1905), 75 L. J. C. 73; (1906) A. C. 35; *Whitcomb v. Hugh* (1906), 75 L. J. C. 677; (1906) 2 Ch. 283.

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remedy is by an action for the breach complained of (*f*). So wages may be due, though not payable until a future day (*g*); but there is no debt for accruing wages until earned and accrued due (*h*). Calls made upon shares in a company are debts owing from the time of making the calls, though a limit of time is allowed for payment (*i*). A bill given for a debt merely suspends the remedy, consequently the amount of a debt for which an acceptance has been given may be subject to a lien under articles of association providing that the company shall have a lien upon the shares of a member for any money "due," unless it appears from the context that the word "due" is only intended to apply to debts due and payable, and not to debts due but payable at a future date (*k*).

A contract or debt may be incurred upon terms which limit the right of the creditor to payment out of a special fund, making the raising and sufficiency of the fund a condition precedent to the liability; in which case the promiser would not become absolutely liable unless the fund failed through his own default. On the other hand a particular fund may be the primary fund for payment, in which case the promise is deemed to be absolute (*l*). As in the case of a loan made to promoters for the expenses of forming a company, "to be repaid out of the calls on shares" (*m*). So a policy of insurance covenanting that the capital stock and funds of the company alone should be liable to pay the losses insured was construed as an absolute covenant; the indication of the fund importing no more than the necessary restriction of the remedy to the funds of the company (*n*). And a covenant by an executor to advance money to a legatee "out of the assets" of the testator, upon receiving an indemnity, was construed as an absolute covenant, independent of the receipt of assets (*o*).

Debts payable
out of special
fund.

(*f*) *Dutton v. Solomonson* (1803), 3 B. & P. 582; *Paul v. Dal* (1816), 15 L. J. C. P. 177; 2 C. B. 800; *Wayne's Methylen Steam Coal Co. v. Morewood* (1877), 46 L. J. Q. B. 746.

(*g*) *Walsh v. Walley* 1871, 13 L. J. Q. B. 102; L. R. 9 Q. B. 367.

(*h*) *Boston Deep Sea Fishing Co. v. Ansell* (1888), 39 Ch. D. 359.

(*i*) *Daves' case* (1869), 38 L. J. C. 512.

(*k*) *Re London, Birm. & S. Staffs. Rk.* (1865), 34 L. J. C. 418; 34 Beav. 332; *Re Stockton Malleable Iron Co.* (1875), 45 L. J. C. 168; 2 Ch. D. 101.

(*l*) *Filbrow v. Filbrow's Atmospheric Ry.* (1848), 17 L. J. C. P. 166; 5 C. B. 440; *S. Pearson & Son, Ltd. v. Dublin & S. E. Ry.* (1909), 78 L. J. P. C. 91; (1909) A. C. 217. See *Williams v. Hathaway* 1877, 6 Ch. D. 514.

(*m*) *Scott v. Elbury* (Lord) 1867, 36 L. J. C. P. 161; L. R. 2 C. P. 255.

(*n*) *Sunderland Marine Insce. v. Kearney* 1851, 20 L. J. Q. B. 417; 16 Q. B. 925. See *Dowdall v. Hallett* (1851), 21 L. J. Q. B. 98; 18 Q. B. 2.

(*o*) *Bain v. Kirk* (1849), 18 L. J. Q. B. 83.

PART III.

Promises
conditional
upon certain
or uncertain
event.

Contracts may be conditional upon the happening of some event which is certain, but the time of happening of which is uncertain, as a *post obit* bond payable at death; or a covenant by a person that his heirs or executors after his death shall pay a sum of money (*p*). Contracts may be conditional upon the happening of some event or contingency which is altogether uncertain: as contracts of insurance against losses by perils of the sea or by fire; contracts of guarantee; the contract of a shareholder in a company to pay calls. A bill of exchange may be accepted payable upon a condition, if the holder will take such an acceptance; and it is then not absolutely due until the condition is satisfied (*q*): as an acceptance payable upon delivery of a bill of lading (*r*); or "when a navy bill was paid" (*s*). An acceptance is *prima facie* general, and a qualified acceptance is construed strictly against the acceptor (*t*).

Bills accepted
upon con-
dition.

Bills drawn
upon con-
dition.

—A bill or note may be drawn payable on a future event of certain occurrence, so that the money must become payable at a determinable future time; but not on an uncertain contingency without forfeiting the character of a bill or note (*u*). Such an instrument would not be negotiable; nor would it be attended with the presumption of consideration; and an action could be brought upon it only as an ordinary agreement, of which the consideration must be alleged and proved (*x*). An instrument promising to pay, subject to the contingency of the liability ceasing upon some event, as upon the death of the payee, is a special agreement which cannot be treated as a bill or note (*y*).

Promises
conditional
upon will of
promiser.

A promise cannot be conditional on the mere will of the promiser; for by promising to do a thing only in case it please himself he is not bound to anything. Agreements for service in which the remuneration is left to the discretion of the employer create no binding contract (*z*). A grant of land made in consideration of a covenant by the grantee to build upon the land

(*p*) *Cooper v. Cresswell* (1876), 36 L. J. C. 114; L. R. 2 Ch. 112.

(*q*) Bills of Exchange Act, 1882, s. 19; *Julian v. Shobrooke* (1753), 2 Wils. 9.

(*r*) *Smith v. Vertue* (1860), 30 L. J. C. P. 56; 9 C. B. N. S. 214.

(*s*) *Pearson v. Dunlop* (1777), Cowp. 571.

(*t*) *Meyer & Co. v. Devoix, Verley & Cie.* (1891), 61 L. J. Q. B. 205; (1891) A. C. 520.

(*u*) Bills of Exchange Act, 1882, ss. 3,

11; *Cooke v. Colehan* (1744), 2 Stra. 1217.

(*v*) Bills of Exchange Act, 1882, s. 83;

Carbox v. Fancourt (1791), 5 T. R. 482;

Hill v. Halford (1801), 2 B. & P. 413;

Robins v. May (1839), 9 L. J. Q. B. 22;

11 A. & E. 213.

(*y*) Bills of Exchange Act, 1882, s. 83;

Worley v. Harrison (1835), 5 L. J. K. B.

17; 3 A. & E. 669.

(*z*) *Taylor v. Brewer* (1813), 1 M. & S.

290; *Roberts v. Smith* (1859), 28 L. J.

Ex. 164; 4 H. & N. 315.

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conveyed such a house as he (the grantee) should think fit was held to be purely voluntary (*a*).—But a contract may be made terminable at the will of one of the parties, and will be valid until so determined; as in the case of a partnership at will which may be determined arbitrarily and without reason assigned (*b*). So upon the construction of a contract to employ an architect, it was held that his employer might determine the contract without being liable to pay for the services actually rendered (*c*).

A promise may be made, upon a valid consideration, to make a certain disposition of property by will; and although the promiser cannot be compelled to make a will according to his promise, his estate will be bound by the promise, after his death, either to make compensation in damages, or to the specific disposition of the property according to his undertaking (*d*). The promise must clearly show an absolute intention to make such a will, and not merely a present revocable testamentary intention (*e*). And it must be made to the promisee and accepted by him as a binding obligation (*f*). And a promise to leave "a share" of the testator's property does not bind the promiser to leave a share equal to that of other beneficiaries under his will (*g*). A promise to make a certain disposition of land, or of any interest in land, by will is within the fourth section of the Statute of Frauds and must be proved in writing (*h*).

Promise to dispose by will.

A promise to pay for work upon condition of the work being done to the approval of the promiser is valid: as a contract with an architect to prepare plans subject to approval (*i*). In such cases the condition of approval must pre-sumptively be exercised in a reasonable, and not arbitrary or capricious manner (*k*). It may be stipulated that the approval shall be quite arbitrary; and then the only restriction is that it must be exercised in good faith, however unreasonably, and not merely for the purpose of

Promise conditional upon approval of the consideration.

(*a*) *Rusher v. Willittus* (1875), 11 L. J. C. 419; L. R. 20 Eq. 210.

(*b*) Partnership Act, 1890, ss. 26, 32; *Hendry v. Turner* 1886, 55 L. J. C. 562; 32 Ch. D. 355.

(*c*) *Moffatt v. Laurie* (1855), 21 L. J. C. P. 56; 15 C. B. 583.

(*d*) *Hammerley v. Dr. Bell* (1815), 12 Cl. & F. 45; *Coverdale v. Eastwood* (1872), 42 L. J. C. 118; L. R. 15 Eq. 121.

(*e*) *Maunsell v. Hedges* (1854), 4 H. L. C. 1039.

(*f*) *Baxter v. Gray* (1842), 11 L. J. C. P. 63; 3 Man. & G. 771; *Dashwood v. Jermyn* 1879, 12 Ch. D. 776.

(*g*) *Re Fekus* 1899, 69 L. J. C. 161; (1900) 1 Ch. 331.

(*h*) *Maddison v. Alderson* (1883), 52 L. J. Q. B. 737; 8 Ap. Ca. 467; *Hamphreys v. Green* (1883), 52 L. J. Q. B. 149; 10 Q. B. D. 148.

(*i*) *Moffatt v. Jackson* (1853), 22 L. J. C. P. 265; 13 C. B. 513.

(*k*) *Dallman v. King* (1837), 7 L. J. C. P. 6; 4 Bing. N. C. 105.

PART III.

defeating the contract (*l*). Upon the same principle policies of insurance containing the condition that the insured shall furnish to the insurers such evidence or information as they may think necessary to establish the claim are construed to mean such evidence only as the insurers may reasonably, and not unreasonably and capriciously require (*m*). So with deeds of assignment for the benefit of creditors, requiring the creditors to verify their debts by such evidence as the trustee shall think fit (*n*). An agreement to take a lease "provided the terms of the draft lease are reasonable in our estimation" was held to leave the terms open to further negotiation or to an absolute refusal (*o*).—Where goods are delivered "on approval, or "for sale or return" or on like terms, there is a sale conditional upon the approval of the buyer, which is concluded by not returning the goods within the time appointed, or if no certain time is appointed, within a time reasonably sufficient for approval; and accordingly if the goods perish before approval there is no sale, and the loss falls upon the seller (*p*).

Condition
against
assigning
without
consent.

A covenant or condition in a lease that the lessee shall not assign without the consent of the lessor, "such consent not being arbitrarily withheld," does not import any covenant by the lessor not to withhold his consent arbitrarily; but if he does so, the lessee may assign without it (*q*). Where a lessee has contracted to sell and assign his lease it is his duty to obtain the consent of the landlord (*r*); but where a lessee contracted to sell and assign the lease "subject to the landlord's approval," it was held that the purchaser could not enforce the assignment against the refusal of the landlord to approve (*s*). And under a similar covenant an assignment without asking the landlord's consent, though to an unobjectionable assignee, was held to be a breach of the covenant (*t*). It is an unreasonable ground for refusal that the lessor

(*l*) *Andrews v. Belfield* (1857), 2 C. B. N. S. 779; *Stadhard v. Lee* (1862), 32 L. J. Q. B. 75; 3 B. & S. 361.

(*m*) *Braunstein v. Accidental Death Insur.* (1861), 31 L. J. Q. B. 17; 1 B. & S. 782.

(*n*) *Coles v. Turner* (1866), 35 L. J. C. P. 169; L. R. 1 C. P. 373.

(*o*) *Wilcox v. Redhead* (1880), 49 L. J. C. 539.

(*p*) Sale of Goods Act, 1893, s. 18; *Kirkham v. Attenborough* (1896), 66 L. J. Q. B. 149; (1897), 1 Q. B. 201. See *Weiner v. Gill* (1906), 75 L. J. K. B.

916; 1906) 2 K. B. 574.

(*q*) *Treloar v. Bigge* (1874), 43 L. J. Ex. 95; L. R. 9 Ex. 151; *Hyde v. Warden* (1877), 47 L. J. Ex. 121; 3 Ex. D. 72; *Sear v. House Property and Inct. Soc.* (1880), 50 L. J. C. 77; 16 Ch. D. 287; *Bates v. Donablon* (1896), 65 L. J. Q. B. 578; (1896) 2 Q. B. 211.

(*r*) *Mason v. Corder* 1816, 7 Taunt. 9. See *Lafkin v. Nunn* (1805), 11 Ves. 170.

(*s*) *Lehmann v. M. Arthur* (1868), 37 L. J. C. 625; L. R. 3 Ch. 496.

(*t*) *Larvor v. Isaacs* (1890), 60 L. J. Q. B. 179; (1891) 1 Q. B. 417.

wishes to buy the lease himself (*u*); but a refusal on the ground that a public body is about to buy the property under compulsory powers is reasonable (*x*).

A promise may be made conditional upon a voluntary act of a third party; as a policy of fire insurance conditioned that the minister of the parish should give a certificate as to the character of the assured and the *bonâ fide* nature of the loss; under which it was held that the assured could not recover without such certificate, however unreasonably refused (*y*). An agreement to purchase certain land, if the vendor should buy it of a third party, creates no binding contract until the vendor is bound to the third party (*z*). An agreement between two parties that one of them should take a lease from a third party becomes binding if the latter consents to grant a lease upon reasonable terms (*a*).

Promises conditional upon will of third party.

Upon a sale of land at a valuation to be made by persons named, the valuation is a condition precedent, and the purchaser cannot be charged unless a valuation is made according to the contract; but upon an agreement to sell at a fair valuation, no particular means of ascertaining the value being indicated, the court may direct the mode of valuation (*b*). If the appointed valuer is willing to undertake the valuation, the court will compel the vendor to allow him to enter and make the valuation, in order to compel specific performance (*c*).—So upon an agreement to buy goods at a valuation, there is no sale unless a valuation is made according to the agreement; but if after failure of the valuation the buyer retains the goods, he may be liable upon a new contract arising from his acceptance of the executed consideration (*d*).—A sale of land "subject to approval of title by purchasers' solicitor," is in terms conditional upon the approval of the solicitor; but it is held that this approval must be exercised *bonâ fide* and upon reasonable and legal grounds; and

Sale at valuation.

Sale on approval of title.

(*u*) *Bates v. Donaldson* (1896), 65 L. J. Q. B. 578; (1896) 2 Q. B. 241.

(*x*) *Trelour v. Bigge* (1874), 43 L. J. Ex. 95; L. R. 9 Ex. 151.

(*y*) *Worsley v. Wood* (1796), 6 T. R. 710.

(*z*) *Wylson v. Dunn* (1887), 56 L. J. C. 855; 34 Ch. D. 569.

(*a*) *Foster v. Wheeler* (1888), 57 L. J. C. 871; 38 Ch. D. 130.

(*b*) *Milnes v. Gery* (1807), 14 Ves. 400;

Morgan v. Milman (1853), 22 L. J. C. 897; 3 De G. M. & G. 21; *Firth v. Midland Ry.* (1875), 44 L. J. C. 313; L. R. 20 Eq. 100.

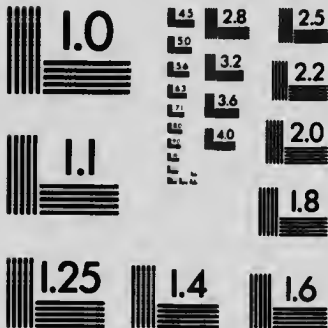
(*c*) *Morse v. Merest* (1821), 6 Madd. 26; *Smith v. Peters* (1875), 44 L. J. C. 613; L. R. 20 Eq. 511.

(*d*) *Thornell v. Balbirnie* (1837), 6 L. J. Ex. 255; 2 M. & W. 786; *Clarke v. Westrope* 1856, 25 L. J. C. P. 287; 18 C. B. 765.



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PART III.

therefore does not entitle the purchaser to any other title than that regarded as satisfactory by the court (*e*).

Work payable upon certificate of third party.

In building contracts with the condition that the architect or engineer shall give his certificate of the work done and of the sum due, no claim can be made for payment under the contract unless the certificate be given (*f*); though the architect or engineer unreasonably and wrongfully refuses to give such certificate (*g*); but the certificate of the architect or engineer may be subject to review, in which case it will not be conclusive (*h*). If he negligently certifies for a less or larger sum than is due there is no right of action against him (*i*); and his personal interest in the work, as being a shareholder in the works of a company, is no bar to his acting (*k*). But if the architect refuses to certify in collusion with and by the procurement of the employer, an action will lie against both the employer and the architect for the fraudulent collusion (*l*). There is no claim in equity for work done upon the mere ground of refusal of the certificate, unless there is fraud or misconduct or collusion on the part of the architect in refusing it (*m*). Where the architect was under an agreement to the employer that the works should not exceed a certain sum, which was concealed from the builder, it was held to be so far a fraud upon the latter, as to discharge the condition and to entitle him to recover for the work done notwithstanding the refusal of a certificate (*n*).—Upon the same principle, if a building contract is made determinable upon default in the builder, to be decided upon by the architect, the architect's certificate is conclusive (*o*); and so the liability for extras may be made to depend upon written orders of the architect (*p*). And where a builder undertakes to complete works

(*e*) *Ross v. Boards* (1838), 7 L. J. Q. B. 209; 3 A. & E. 290; *Hudson v. Buck* (1878), 47 L. J. C. 247; 7 Ch. D. 683; *Eadie v. Addison* (1882), 52 L. J. C. 80.

(*f*) *Milner v. Field* (1850), 20 L. J. Ex. 68; 5 Ex. 829; *Grafton v. Eastern Co. Ry.* (1853), 8 Ex. 699.

(*g*) *Clarke v. Watson* (1865), 34 L. J. C. P. 148; 18 C. B. N. S. 278.

(*h*) *Roberts v. Bury Commrs.* (1870), 39 L. J. C. P. 129; L. R. 5 C. P. 310; *Robins v. Goddard* (1904), 74 L. J. K. B. 167; (1905) 1 K. B. 291.

(*i*) *Stevenson v. Watson* (1879), 48 L. J. C. P. 318; 4 C. P. D. 148; *Chambers v. Goldthorpe* (1901), 70 L. J. Q. B. 482; (1901) 1 Q. B. 624.

(*k*) *Ranger v. G. W. Ry.* (1854), 5 H. L. C. 72.

(*l*) *Batterbury v. Tyse* (1863), 32 L. J. Ex. 177; 2 H. & C. 42; *Ladbroke v. Barrett* (1877), 46 L. J. C. P. 798.

(*m*) *M. Inosh v. G. W. Ry.* (1850), 19 L. J. C. 374; 2 Mac. & G. 74; *Scott v. Liverpool* (1858), 28 L. J. C. 230; 3 De G. & J. 334.

(*n*) *Kemp v. Rose* (1858), 1 Giff. 258; *Kimberley v. Dick* (1871), 41 L. J. C. 38; L. R. 13 Eq. 1.

(*o*) *Roberts v. Bury Commrs.* (1870), 39 L. J. C. P. 129; L. R. 5 C. P. 310; *Wadsworth v. Smith* (1871), 40 L. J. Q. B. 118; L. R. 6 Q. B. 332.

(*p*) *Lamprell v. Billricay Union* (1849),

according to the order of an architect within a given time, the order is conclusive as to the possibility of completing them, and he is liable for delay (*q*); but where the delay is occasioned by additional works ordered by the building owner, he cannot recover penalties for the delay unless the builder has agreed to complete the whole including the additional works by the specified date (*r*). The appointment of a surveyor is a condition precedent to the liability of the builder to undertake building operations according to his covenant to build (*s*). A certificate of an architect does not necessarily import a certificate in writing; a verbal certificate will satisfy the condition between the parties, unless they have expressly stipulated for a written certificate (*t*); nor did the mere want of writing give ground for relief in equity (*u*). The submission of work and payment under a contract to the certificate of a third party is not an arbitration; it cannot be revoked; nor can it be made a rule of court; nor is the certificate an award, or liable to be examined as such (*x*).

CHAP. II.

Certificate in writing.

A contract for the transfer of shares in a company may be conditional upon the approval of the transferee by the directors; there is no inherent power in the directors to this effect, and unless they are so authorised by the constitution of the company they cannot refuse to register a *bonâ fide* transfer of shares (*y*). According to the rules of the Stock Exchange it is presumptively the duty of the transferee to procure his registration as shareholder; and there is no undertaking by the seller that the company shall accept the transferee (*z*). It is the duty of the transferor, even where he has executed a transfer with a blank for the name of the transferee, to do nothing which will hinder or prevent the transferee from obtaining registration of the transfer (*a*). If a buyer fails or neglects to obtain registration,

Transfer of shares subject to approval of directors.

18 L. J. Ex. 282; 3 Ex. 283; *Russell v. Bandeira (Visc.)* (1862), 32 L. J. C. P. 68; 13 C. B. N. S. 149; *Tharsis Sulphur Co. v. McElroy* (1878), 3 Ap. Ca. 1040.

(*q*) *Jones v. St. John's Coll.* (1870), 40 L. J. Q. B. 80; L. R. 6 Q. B. 115.

(*r*) *Dodl v. Charlton* (1897), 68 L. J. Q. B. 477; (1897) 1 Q. B. 562.

(*s*) *Hunt v. Bishop* (1853), 22 L. J. Ex. 337; 8 Ex. 675.

(*t*) *Roberts v. Watkins* (1863), 32 L. J. C. P. 291; 14 C. B. N. S. 592. See *Goodyer v. Weymouth (Corp.)*, 35 L. J. C. P. 12.

(*u*) *Kirk v. Bromley Union* (1848), 17 L. J. C. 127; 2 Phill. 640.

(*x*) *Mills v. Bailey* (1863), 32 L. J. Ex. 179; 2 H. & C. 36; *Wadsworth v. Smith* (1871), 40 L. J. Q. B. 118; L. R. 6 Q. B. 332. See *Sharpe v. San Paulo Ry.* (1873), L. R. 8 Ch. 597.

(*y*) *Re Coalport China Co.* (1895), 64 L. J. C. 710; (1895) 2 Ch. 404; *Sutton v. English & Col. Produce Co.* (1902), 71 L. J. C. 685; (1902) 2 Ch. 592; *Maynard v. Coun. Kent. Coll. Corp.* (1903), 72 L. J. K. B. 681; (1903) 2 K. B. 121.

(*z*) *London Founders' Ass. v. Clarke* (1888), 57 L. J. Q. B. 291; 20 Q. B. D. 576.

(*a*) *Hooper v. Herts* (1906), 75 L. J. C. 253; (1906) 1 Ch. 549.

PART III. the seller remains liable to the company; but if there is a valid contract of sale, the seller may compel the buyer to do all in his power to obtain registration of the transfer, and until registration, it is the duty of the buyer to indemnify the seller against all liability in respect of the shares (*b*).

Promise conditional upon demand.

Present debts.

A promise may be conditional upon a request or demand of performance; which must then be proved in an action for a breach (*c*). A present debt of a certain amount, as for money lent, or for goods sold and delivered or upon a contract implied in law, is payable without demand; "a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him the debt when due" (*d*). So it is the duty of executors to pay debts of the testator without demand (*e*).

— A bond conditioned simply for the payment of money requires no demand, and non-payment is a breach of the condition; but if the condition is for payment on demand, there is no breach until a demand is made (*f*). If a warrant of attorney be given for payment of money on demand, no proceedings can be taken under it without demand (*g*). In the case of a debt of uncertain amount to be ascertained by reference to matters better known to the creditor than the debtor, a demand of the amount must be made before it can be considered due, because the debtor cannot otherwise know the amount (*h*). Money payable on demand is not payable at a "stipulated time," so as to satisfy the requirements of the Bills of Sale Acts (*i*). — The contract of a factor or agent, receiving money for his principal, is to account on demand, and a demand is necessary in order to charge him in an action for not accounting (*k*). — So upon a bailment of goods for safe custody a demand is necessary to charge the bailor with

Contracts to account on demand.

(*b*) *Wynne v. Price* (1849), 3 De G. & Sm. 310; *Loring v. Davis* (1886), 55 L. J. C. 725; 32 Ch. D. 625. See *Cyuse v. Paine* (1869), 38 L. J. C. 225; L. R. 4 Ch. 441.

(*c*) *Birks v. Trippet* (1666), 1 Wms. Saund. 33. See Order XIX., r. 14.

(*d*) *Parke, B., Walton v. Mascall* (1814), 14 L. J. Ex. 54; 13 M. & W. 458.

(*e*) *Re Birch* (1884), 51 L. J. C. 119; 27 Ch. D. 662.

(*f*) *Carter v. Ring* (1813), 3 Camp. 459; *Gibbs v. Southam* (1831), 5 B. & Ad. 911.

(*g*) *Nicholl v. Bronley* (1821), 2 B. & B. 464.

(*h*) *Brown v. G. F. Ry.* (1877), 46 L. J. M. C. 231; 2 Q. B. D. 406.

(*i*) *Hetherington v. Grooms* (1884), 53 L. J. Q. B. 576; 13 Q. B. D. 789.

(*k*) *Topham v. Braddick* (1809), 1 Taunt. 572; *Turner v. Burkinshaw* (1867), L. R. 2 Ch. 491.

re-delivery; though he may be charged with a wrongful conversion of the goods, or with the proceeds of a wrongful conversion, immediately and without demand (*l*).

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Parties primarily liable on mercantile instruments, as the acceptor of a bill or the maker of a note, are bound to pay the holder when the instrument becomes due, without presentment or demand. "When a party accepts a negotiable bill, he binds himself to pay the amount without notice to whomsoever may happen to be the holder, and on the precise day when it becomes due" (*m*). Notice of indorsement is not necessary (*n*). But if such instruments are made specially payable at a particular place only, presentment for payment at that place is necessary (*o*). A promissory note expressed to be payable on demand is a present debt, payable without any demand (*p*). A bill or note payable at a certain time after demand is not due and payable until a demand has been made and the time has elapsed (*q*).

Bills and notes.

A promise may be conditional upon notice of some event being given to the promisee; which must be given accordingly before an action can be maintained for a breach. A promise conditional upon the happening of some event does not further import the condition of his giving notice of that event, unless expressly stipulated for; but in some cases it is necessarily implied from the nature of the transaction that notice should be given. The general rule is stated to be, that "where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him" (*r*). If the matter does not lie more properly in the knowledge of one

Promise conditional upon notice.

(*l*) *Watkinson v. Verity* (1871), 40 L. J. C. P. 141; L. R. 6 C. P. 206. See *Miller v. Dell* (1890), 60 L. J. Q. B. 404; (1891) 1 Q. B. 468.

(*m*) Bills of Exchange Act, 1882, ss. 52, 51, 87; *Ke. B., Poo'e v. Tumbridge* (1837), J. Ex. 74; 2 M. & W. 225.

(*n*) *Reynolds v. Davies* (1796), 1 B. & P. 625.

(*o*) Bills of Exchange Act, 1882, ss. 19, 52, 87; *Gibb v. Mather* (1832), 1 L. J. Ex. 87; 8 Bing. 214; *Saul v.*

Jones (1858), 28 L. J. Q. B. 37; 1 E. & E. 59.

(*p*) *Norton v. Ellam* (1837), 6 L. J. Ex. 121; 2 M. & W. 461; *Maltby v. Murrells* (1860), 29 L. J. Ex. 377; 5 H. & N. 813; *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627.

(*q*) *Re Rutherford* (1880), 49 L. J. C. 654; 14 Ch. D. 687.

(*r*) *Abinger, C. B., Wyse v. Wakefield* (1840), 9 L. J. Ex. 274; 6 M. & W. 452; affd. 7 M. & W. 126; *Makin v. Watkinson* (1870), 40 L. J. Ex. 33; L. R. 6 Ex. 25.

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of the parties than the other, as where it is some act of a third party, notice is not requisite (*s*). The like rule applies with an obligation under a statute to be performed for the benefit of another (*t*).—Where a buyer promised to pay for barley as much as the seller sold it for to any other man: the seller was held bound to give notice of the price to the buyer before he could charge him with payment (*u*); and a covenant to supply sleepers to a railway company “as and when, and in such quantities, and in such manner as the engineer of the company” should direct in writing, was held to import that the covenantor was entitled to the specified notice (*x*). Where a person covenanted not to do anything whereby an insurance to be effected on his life by another person should be avoided or prejudiced, it was held that he was not bound by the covenant until he had notice of the policy, the conditions of which he was to observe (*y*). A vendor of land, who had covenanted to deduce a good title and produce the deeds on a certain day at one of three places mentioned, was held bound to give notice of the place to the purchaser (*z*). A covenant in a lease by the lessor to keep in repair the demised premises is impliedly conditional upon notice of want of repair: but a covenant by the lessor to put the premises in repair requires no notice (*a*). Where a debtor promised to pay his debt when he was able, it was held that the liability was complete as soon as he became of ability, without any implied condition to give notice to his creditor (*b*).

Notice of
dishonour of
bills and
notes.

The contract of the drawer or indorser of a bill or note, as surety for the acceptor or maker, is by the law merchant subject to the condition of true presentment for payment and due notice of dishonour: such notice of dishonour to be given within a reasonable time depending upon the circumstances of the case (*c*).

(*s*) *Cutler v. Southern* (1667), 1 Wms. Saund. 135, n. (2); *Hodsdon v. Hartridge* (1670), 2 Wms. Saund. 154, n. (5); *Dawson v. Wrench* (1849), 18 L. J. Ex. 229; 3 Ex. 559.

(*t*) *L. & S. W. Ry. v. Flower* (1875), 45 L. J. C. P. 51; 1 C. P. D. 77.

(*u*) *Hemming's case* (1617), Cro. Jac. 432; L. R. 6 Ex. 29, n. (2).

(*x*) *G. N. Ry. v. Harrison* (1852), 22 L. J. C. P. 49; 12 C. B. 576.

(*y*) *Fyfe v. Wakefield* (1840), 9 L. J. Ex. 274; 6 M. & W. 442; affd. 7 M. & W. 126.

(*z*) *Ripplinghall v. Lloyd* (1833), 5 B. & Ad. 742.

(*a*) *Coward v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153; *Manchester Warehouse Co. v. Carr* (1880), 49 L. J. C. P. 809; 5 C. P. D. 507.

(*b*) *Waters v. Thanet (Earl)* (1842), 11 L. J. Q. B. 87; 2 Q. B. 757.

(*c*) Bills of Exchange Act, 1882, ss. 45–50. See *Imp. Bk. of Canada v. Bk. of Hamilton* (1902), 72 L. J. P. C. 1; (1903) A. C. 49; *The Elarville* (1904), 73 L. J. P. 104; (1904) P. 319.

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An informal notice is sufficient, it is only necessary that the party entitled to notice is informed that the bill has been duly presented and dishonoured, and that he is looked to for payment (*d*). But if the drawer or indorser has in fact no remedy over against the acceptor or other party to the bill, the rule is excused; as in the case of a bill accepted for his accommodation, upon which notwithstanding his apparent position on the bill he is primarily liable and notice of dishonour is excused (*e*). And the condition of notice of dishonour does not apply to the case of a surety who guarantees the due payment of a bill or note without making himself a party to the instrument; upon such a guarantee he is liable absolutely upon dishonour of the bill without any notice or demand, unless he expressly stipulates for it (*f*).

In contracts of guarantee there is no implied condition that notice shall be given to the surety of the default of the debtor; nor that a demand shall be made upon the principal debtor, where such demand is not necessary to charge the debtor himself (*g*); as in the above case of a guarantee of a bill or note (*h*). But it may be made an express stipulation that the creditor shall demand the debt of the principal, and also give notice of his default, as a condition of charging the surety (*i*).—In contracts of indemnity no notice of the loss or damage is in general required; unless it has been expressly so stipulated (*k*); but giving notice of the claim which is the subject of indemnity, by affording to the party indemnifying the opportunity of admitting or defending it, may have the effect of precluding him from afterwards disputing that it was properly admitted, or properly defended or compromised, and of thereby rendering him chargeable with the costs (*l*).

Guarantees.

Indemnities.

In policies of marine insurance there is in general no condition Insurance.

(*d*) *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

(*e*) Bills of Exchange Act, 1882, ss. 28, 50; *Bickerdike v. Bowman* (1786), 1 T. R. 405; 2 Sm. L. C. 99.

(*f*) *Walton v. Mascall* (1844), 14 L. J. Ex. 54; 13 M. & W. 452; *Carter v. White* (1884), 51 L. J. C. 138; 25 Ch. D. 666.

(*g*) *Ride v. Farr* (1817), 6 M. & S. 121; *Price v. Kirkham* (1891), 34 L. J. Ex. 35; 3 H. & C. 337.

(*h*) *Walton v. Mascall* (1844), 14 L. J.

Ex. 54; 13 M. & W. 452; *Carter v. White* (1884), 51 L. J. C. 138; 25 Ch. D. 666.

(*i*) *Sicklemore v. Thistleton* (1817), 6 M. & S. 9; *Lawrence v. Wadmsley* (1862), 31 L. J. C. P. 143; 12 C. B. N. S. 799.

(*k*) *Cutler v. Southern* (1667), 1 Wms Saund. 131.

(*l*) *Buller, J., Duffield v. Scott* (1781) 3 T. R. 377; *Mellish, L. J., Parker Lewis* (1873), 43 L. J. C. 231; L. R. 2 Ch. 1058.

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that the assured shall give notice of the loss; the damage or loss of a ship by perils of the sea being a fact as much within the knowledge of one party as of the other (*m*). "However inconvenient it may be to an underwriter not to receive early notice of a loss, the assured is under no obligation to give it. A notice of abandonment must be given within a reasonable time; but notice of loss is no part of the contract, express or implied. If the underwriter wishes to have notice of a loss, he must stipulate for it in the policy" (*n*). Notice of abandonment is necessary for claiming a constructive total loss, when an actual total loss cannot be proved (*o*); and such notice must be given to the underwriter as soon as the assured has obtained sufficient information to enable him to make his election (*p*). But upon a constructive total loss, notice of abandonment need not be given to the underwriters of a policy of re-insurance (*q*).—In policies of insurance against fire it is commonly stipulated that the assured shall give notice and deliver particulars of the loss within a limited time, as a condition precedent to his claim on the policy (*r*).—In a policy of insurance against death or injury by accident, providing for notice of an accident to be given within a certain time, it was held that the notice was not a condition precedent to the claim, unless made so in express terms (*s*).

Construction
of contracts
as to con-
ditions.

In contracts containing executory considerations or mutual promises, the obligation of the one promise may be quite independent of the performance of the other. But it may appear upon the construction of the mutual promises, or from the connection of their matter, that the obligation of the one promise is expressly or impliedly conditional upon the due performance of the other: in which case the promises are not only mutual but also dependent (*t*). Hence it is said, "there are three kinds of covenants: 1. Such as

(*m*) *Dawson v. Wrench* (1849), 18 L. J. Ex. 229; 3 Ex. 359.

(*n*) *Lush, J., Potter v. Rankin* (1870), 39 L. J. C. P. 147; L. R. 5 C. P. 341.

(*o*) *Marine Insurance Act*, 1916, ss. 57, 60, 61; *Fleming v. Smith* (1848), 1 H. L. C. 513; *Trinder v. Thames and Mersey Insee.* (1898), 67 L. J. Q. B. 666; (1898) 2 Q. B. 114.

(*p*) *Marine Insurance Act*, 1906, s. 62; *Kaltenbach v. Mackenzie* (1878), 48 L. J. C. P. 9; 3 C. P. D. 467.

(*q*) *Marine Insurance Act*, 1906, s.

62 (9); *Uzielli v. Boston Marine Insee.* (1885), 54 L. J. Q. B. 142; 15 Q. B. D. 11.

(*r*) *Roper v. London* (1859), 28 L. J. Q. B. 260; *Hiddle v. National Fire and Marine Insee. of N. Z.* (1896), 65 L. J. P. C. 24; (1896) A. C. 372.

(*s*) *Stoneham v. Ocean Ry. and Gen. Acc. Insee.* (1887), 19 Q. B. D. 237. See *Re Coleman's Depositaries, Ltd. and Life and Health Assce.* (1907), 76 L. J. K. B. 865; (1907) 2 K. B. 798.

(*t*) See *ante*, p. 6.

are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." And the general rule of construction is: "That the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance" *ii*):-

"If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance: for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance, that which is the consideration of the money or other act is to be performed first. "But when a day is appointed for the payment of money, or for doing any other act, and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance" *ii*). "Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing

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Independent covenants.

Dependent covenants.

Concurrent covenants.

Construction resulting from time of performance.

(a) *Mansfield, C. J., Kingston v. Preston* (1773), cited 2 Doag. 689.
(c) *Portage v. Cole* (1669), 1 Wms. Saund. 551, rule 1; *Workman, Clarke &*

Co. v. Lloyd Brazilem (1908), 77 L. J. K. B. 953; 1908, 1 K. B. 963.

(ii) *Portage v. Cole* (1669), 1 Wms. Saund. 552, rule 2; *Peters v. Opie* (1671), 2 Wms. Saund. 742, n. (2).

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Construction upon the matter of mutual promises.

Express stipulation for condition precedent.

performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sales" (z).

But the construction mainly depends upon the matter of the mutual covenants or promises. "When two covenants in a deed have no relation to each other, the non-performance of the one could not be pleaded in bar to an action brought for the breach of another; for this plain reason amongst others, that the damages sustained by a breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other" (a). And "when from the consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance by the other, such performance is not a condition precedent" (b).—"When mutual covenants go to the whole consideration on both sides they are mutual conditions, the one precedent to the other; but where a covenant goes only to a part of the consideration, and a breach of such covenant may be paid for in damages, it is an independent covenant, and not a condition precedent" (c). And "where 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 each agrees to do all that is necessary to be done on his part for the carrying out of that thing" (d).

The above rules are serviceable only as general indications of the intention of the parties; and they yield to a contrary intention clearly expressed. "Parties may think some matter, apparently of very little importance, essential, and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *primâ facie* a condition precedent, is not really vital and may be compensated for in damages" (e). But "covenants, &c. are to be

(z) *Portage v. Cole* (1669), 1 Wms. Saund. 556, rule 5; *Sprague v. Booth* (1909), 75 L. J. P. C. 164; (1909) A. C. 576.

(a) Willes, C. J., *Thomas v. Goddall* (1744), Willes, 499; *Christie v. Buckley* (1860), 29 L. J. C. P. 153; 7 C. B. N. S. 561; *Fearon v. Aylesford* (Earl) (1881), 54 L. J. Q. B. 33; 14 Q. B. D. 792.

(b) Jervis, C. J., *Roberts v. Brett* (1856), 25 L. J. C. P. 286; 18 C. B. 573.

(c) *Portage v. Cole* (1669), 1 Wms.

Saund. 552, 554, rules 3, 4. See *Roberts v. Brett* (1865), 34 L. J. C. P. 211; 11 H. L. C. 337; *Bettini v. Gye* (1875), 45 L. J. Q. B. 209; 1 Q. B. D. 183; *Bousard v. Spiers* (1876), 45 L. J. Q. B. 621; 1 Q. B. D. 410.

(d) Ld. Blackburn, *Mockay v. Dick* (1881), 6 Ap. Ca. 263; *Ford v. Cotesworth* (1870), 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; *Sprague v. Booth* (1909), 78 L. J. P. C. 14; (1909) A. C. 576.

(e) *Per cur. Bettini v. Gye* (1875), 45 L. J. Q. B. 209; 1 Q. B. D. 183;

construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention" (f).

In contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are premissively concurrent and dependent acts, whether a particular day be appointed for completion or not; and readiness and willingness to complete on either side is a condition precedent to liability to complete on the other (g). An actual conveyance of the land is a condition precedent to the claim for the purchase-money; and the vendor, so long as he retains the property in the land, cannot claim the purchase-money, but only damages for breach of contract (h); but he may claim specific performance of the contract to compel the purchaser to accept the conveyance and pay the purchase-money (i). If the purchase-money is to be paid upon an appointed day, and the time appointed for the conveyance will not or may not arrive until after that day, the conveyance is not a condition precedent to the payment, and it is sufficient that the vendor is able and willing to convey according to the contract to entitle him to claim the purchase-money (k). Upon the contract for the sale of land, unless it be expressly stipulated otherwise, the deed of conveyance is presumptively to be prepared by and at the expense of the purchaser; and it lies upon him to tender it for execution, as a condition precedent to charging the vendor with default in completing (l). The same rule applies to the sale of terms of years, and of shares (m). Upon granting a lease it is the custom for the lessor's solicitor to prepare the lease, at the expense of the lessee, but the lessor bears the expense of the counterpart (n).—

Conditions in contracts of sale of land.

Winford, Welford, Wickham and Dutton Ry. v. Peacock (1853), 22 L. J. Ex. 146; 9 Ex. 279.

(f) *Partridge v. Cole* 1669, 1 Wms. Saund. 550, n. 2; *Roberts v. Brett* (1865), 31 L. J. C. P. 211; 11 H. L. C. 337; *London Guaranty and Account Co. v. Farnley* (1880), 5 App. Cas. 911; *Boston v. Bidwell* 1881, 18 Ch. D. 238.

(g) *Hard v. Woolham* (1801), 1 East. 619; *Marsden v. Moore* (1859), 28 L. J. Ex. 288; 4 H. & N. 500.

(h) *Tait v. Pim* (1841), 10 L. J. Ex. 259; 7 M. & W. 474; *East London Union v. Metrop. Ry.* (1869), 38 L. J. Ex. 225;

L. R. 4 Ex. 409.

(i) See *post*, Pt. V., Chap. II., Sect. I.

(k) *Partridge v. Cole* (1669), 1 Wms. Saund. 518; *Dicker v. Jackson* (1818), 17 L. J. C. P. 231; 6 C. B. 103; *Lindsay v. Jarret London and Portsmouth Ry.* (1850), 19 L. J. Q. B. 417; *Vates v. Gardner* (1851), 20 L. J. Ex. 327.

(l) *Po v. Hill* (1810), 10 L. J. Ex. 81; 6 M. & W. 835; *Thomas Haven Dock and Ry. v. Bryner* (1850), 19 L. J. Ex. 321; 5 Ex. 696.

(m) *Stephens v. Medina* (1843), 12 L. J. Q. B. 129; 1 Q. B. 122.

(n) *Gressell v. Robinson* (1836), 5 L. J.

PART III. Building agreements in the ordinary form, by which the builder agrees to build houses upon the land, and the landlord agrees to grant leases of the houses to be built at separate ground rents, are presumptively divisible and entitle the builder to have a lease of each house when finished, without the condition precedent of finishing all the other houses (*o*).

Conditions in leases. The usual covenants of a lease by the lessor and lessee respectively are for the most part independent, and not conditional upon performance on both sides; notwithstanding merely formal expressions to the contrary. Thus, the covenant of the lessor that the lessee, "paying the rent and performing the covenants on his part," shall quietly enjoy the demised premises is an independent covenant, upon which the lessee may recover damages, notwithstanding rent in arrear and covenants broken on his part (*p*). But a covenant to renew the lease is usually dependent upon the punctual payment of the rent, and performance of the covenants, as conditions precedent, but a condition that the rent shall be duly paid does not import punctual payment (*q*).—A covenant by the lessee to repair, the lessor finding the materials for the purpose, is unqualified or conditional according to the construction to be put upon the lease; and if the lessor has agreed to find timber his readiness and willingness to find it is a sufficient performance of the condition, for it is not reasonable that the timber should be cut before the lessee requires it (*r*). A covenant by the lessee to repair, taking upon the demised premises sufficient timber for the doing thereof, was held to be an absolute covenant, and not subject to the condition of there being sufficient timber on the premises (*s*). A covenant by the lessee to expend a certain sum in repairs under the direction of a surveyor of the lessor, is conditional upon the precedent appointment of the surveyor (*t*). A covenant by the lessee to repair a house and outbuildings, the same being first put in repair by the lessor, is conditional upon the whole being repaired by the lessor, and if part only has been put in repair

C. P. 313; 3 Bing. N. C. 10; *Re Ayle* (1891), 64 L. J. C. 79; (1895) 1 Ch. 73. See *Re Gray* (1900), 70 L. J. C. 133; (1901) 1 Ch. 239.

(*o*) *Walfenon v. Clements* (1872), 12 L. J. C. 28; 7 L. R. 8 Ch. 96.

(*p*) *Dawson v. Dyer* (1833), 5 B. & Ad. 581; *Edg v. Balcan* (1885), 55 L. J. Q. B. 90; 16 Q. B. D. 117.

(*q*) *Finch v. Underwood* (1876), 45 L. J.

C. 112; 2 Ch. D. 310; *Bastin v. Bidwell* (1881), 18 Ch. D. 238; *Starkie v. Burtow* (1908), 78 L. J. C. 129; (1909) 1 Ch. 281.

(*r*) *Monty v. Clue* (1852), 22 L. J. Q. B. 117; 18 Q. B. 661.

(*s*) *Dean of Bristol v. Jones* (1859), 28 L. J. Q. B. 201; 1 E. & E. 484.

(*t*) *Cambre v. Greene* (1843), 12 L. J. Ex. 291; 11 M. & W. 480.

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the lessor has no right of action (*u*). An agreement to take a house for three years from 24th June, in consideration of certain conditions being fulfilled, one of which was that the landlord should complete certain repairs by the 14th June, was held to make the completion of the repairs a condition precedent to the liability to take the house (*x*). A covenant by lessor to keep the demised premises in repair during the term is impliedly subject to the condition precedent of his receiving notice of want of repair (*y*).—Upon the letting of a furnished house for present occupation it is an implied condition, that the house and furniture are in a fit state for occupation, entitling the hirer, if the condition is not satisfied, to repudiate the contract and refuse to occupy the house or to pay the rent; as where the house and furniture are infested with vermin, or the drainage is defective (*z*).

Condition of hiring furnished house.

In contracts for the sale of goods the delivery of the goods and payment of the price are presumptively concurrent acts; and readiness and willingness on both sides to perform their respective parts of the contract are mutual conditions precedent (*a*); but it is not necessary that the buyer should actually tender the money, or that the seller should tender the goods, in order to satisfy the condition sufficiently to maintain an action for not delivering or for not accepting the goods (*b*). If the contract provides that the payment is to be *after* delivery, an actual delivery and not mere readiness and willingness to deliver, unless such delivery is waived or refused, is a condition precedent to claiming the price (*c*). Where a memorandum of agreement stated that the one party bought of the other certain goods, to be paid for by selling to him certain other goods at a stated price and giving a bill for the balance; it was held to be one entire contract, and that the sales were dependent and conditional upon each party being ready to complete on his part (*d*).—In contracts for the

Conditions in contracts of sale of goods.

(u) *Nash v. Ratcliffe* (1850), 20 L. J. Q. B. 130; 15 Q. B. 916; *Concord v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153.

(x) *Tidy v. Mollitt* (1864), 33 L. J. C. P. 235; 16 C. B. N. S. 298.

(y) *Manchester Warehouse Co. v. Carr* (1880), 49 L. J. C. P. 809; 5 C. P. D. 507; *Turrens v. Walker* (1906), 75 L. J. C. 645; (1906) 2 Ch. 166.

(z) *Smith v. Marryall* (1843), 12 L. J. Ex. 223; 11 M. & W. 5; *Wilson v. Finch-Hatton* (1877), 46 L. J. Ex. 189; 2 Ex. D. 336.

(a) Sale of Goods Act, 1893, ss. 28, 29; *Morton v. Lamb* 1797, 7 T. R. 125. See *Fild v. Lohan* (1861), 30 L. J. Ex. 168; 6 H. & N. 617.

(b) *Raeon v. Johnson* (1801), 1 East, 203; *Lawrence v. Knowles* (1839), 8 L. J. C. P. 210; 5 Bing. N. C. 399; *Gibson v. Carruthers* (1811), 11 L. J. Ex. 138; 8 M. & W. 321.

(c) *Spartali v. Bencke* (1850), 19 L. J. C. P. 293; 10 C. B. 212; *Staunton v. Wood* (1851), 16 Q. B. 638.

(d) *Atkinson v. Smith* (1845), 15 L. J.

PART III.
Delivery of
goods by
instalments.

sale of goods with successive deliveries at fixed periods and with separate payments, the right of the buyer to treat defective deliveries in respect of one or more instalments, or of the seller the neglect or refusal to take delivery of or to pay for one or more instalments, as a repudiation of the whole contract, or merely a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated, in each case depends upon the terms of the contract and the circumstances of the case (*e*).

Insolvency
of buyer.

In case of insolvency of the buyer amounting to inability to pay his debts, the seller may refuse further delivery of goods until payment for goods already delivered. "In such case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more until he is paid the debt due for those already delivered, as well as the price of those still to be delivered" (*f*).—Contracts for the sale of goods described by reference to a ship have, according to the terms of the contract, been held to be an absolute or conditional sale. Contracts for the sale of goods "to arrive by," or "on arrival by," or "expected to arrive by," a ship named, are construed to be subject to the double condition of the arrival of the ship, and with the goods on board; so that if the ship is lost or fails to arrive, or if the ship arrives without the goods, or if the goods are transhipped and arrive by another ship, the seller is not bound (*g*).

Sale of goods
to "arrive."

"The meaning of both these expressions, *to arrive*, and *on arrival*, is precisely the same; the word 'to' does not mean that the goods 'shall' arrive, but merely that they shall be sold on their arrival" (*h*). The condition of the arrival of the goods by the ship is not satisfied by the ship having goods on

Ex. 59; 14 M. & W. 695. See *Bankart v. Bouces* (1866), L. R. 1 C. P. 484.

(*e*) Sale of Goods Act, 1893, s. 31; *Swan v. Barber* (1880), 49 L. J. Ex. 253; 5 Ex. D. 130; *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 197; 9 Ap. Ca. 434; *Workman, Clark & Co. v. Lloyd Brazilians* (1908), 77 L. J. K. B. 953; (1908) 1 K. B. 968.

(*f*) Sale of Goods Act, 1893, ss. 39, 41, 62 (3); *Mellish, L. J., Ex p. Chalmers*

(1873), 42 L. J. Bk. 37; L. R. 8 Ch. 289; *Morgan v. Bain* (1874), 44 L. J. C. P. 47; L. R. 10 C. P. 15. See *Ex p. Carnforth Hematite Iron Co.* (1876), 46 L. J. C. 115; 4 Ch. D. 168.

(*g*) *Boyd v. Siffkin* (1809), 2 Camp. 326; *Idle v. Thornton* (1812), 3 Camp. 274; *Lowatt v. Hamilton* (1839), 5 M. & W. 639.

(*h*) *Parke, B., Johnson v. Mardonald* (1842), 12 L. J. Ex. 99; 9 M. & W. 600.

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board answering the description, but consigned to another person (*i*); nor by the arrival of goods of the same kind not substantially answering the description (*k*); nor, where the original shipment has failed, is the contract necessarily applicable to another shipment of like description in the same ship (*l*). A contract for the sale of goods to arrive by a certain date makes the arrival within the date a condition precedent, and not merely an independent undertaking or warranty on the part of the seller (*m*). A contract for the sale of goods merely "on arrival of" a ship named is presumptively not conditional upon the goods being on board; the seller warrants that the goods are shipped and is responsible if the ship arrive without them (*n*). So a sale of goods described as "now on passage and expected to arrive by" a ship named, the contract to be void if the ship lost, was construed to be an absolute contract to deliver such goods upon arrival of the ship (*o*). Upon a contract for sale of goods to arrive by a ship to be named by the seller, "as soon as known to him," or "on receipt of next mail," or "as soon as the goods are shipped," the naming of the ship as agreed is a condition precedent to the liability of the buyer to accept the goods (*p*). A stipulation as to the delivery of the goods, that they should be taken from the quay, was construed to be made in favour of the seller, obliging the buyers, if required, to take delivery from the quay; and not a condition of accepting the goods, that they should be delivered on the quay (*q*).

Sale of goods
"on arrival
of ship."

In charter-parties, the stipulation that the ship shall sail for the port of loading (*r*); or shall reach the place of loading (*s*); or shall be ready for loading (*t*) on or before an appointed day, is generally a condition precedent to the liability of the charterer

Conditions
in charter-
parties:
as to loading:

(i) *Garrison v. Perrin* (1857), 27 L. J. C. P. 29; 2 C. B. N. S. 681.

(k) *Fernie v. Weber* 1856, 26 L. J. Ex. 326; 1 H. & N. 311.

(l) *Smith v. Myers* 1871, 11 L. J. Q. B. 91; L. R. 7 Q. B. 139.

(m) *Idle v. Thornton* 1812, 3 Camp. 274; *Alcock v. Pryor* 1826, Ry. & M. 406.

(n) *Hale v. Rowson* 1858, 27 L. J. C. P. 189; 4 C. B. N. S. 85.

(o) *Garrison v. Perrin* (1857), 27 L. J. C. P. 29; 2 C. B. N. S. 681.

(p) *Graves v. Legg* (1854), 23 L. J. Ex. 228; 9 Ex. 709; *Gilles v. Leonard* (1858), 4 C. B. N. S. 485.

(q) *Wyll v. Whitworth* 1865, 34 L. J.

C. P. 155; 18 C. B. N. S. 435.

(r) *Graham v. Hays* 1841, 10 L. J. C. P. 98; 2 Man. & G. 257; *Crookert v. Fletcher* (1857), 26 L. J. Ex. 153; 1 H. & N. 893. See *Cranston v. Marshall* (1850), 19 L. J. Ex. 340; 5 Ex. 395.

(s) *Ollive v. Barker* 1817, 17 L. J. Ex. 21; 1 Ex. 416; *Hark v. Twedy* 1890, 63 L. T. 765; *Potter v. Burdell* 1896, 66 L. J. Q. B. 63; 1897 1 Q. B. 97; *Leomis SS. Co. v. Rank, Ltd.* 1907, 77 L. J. K. B. 221; (1908) 1 K. B. 499.

(t) *Ollive v. Fielden* (1819), 18 L. J. Ex. 353; 1 Ex. 135. See *Little v. Stevenson* (1896), 65 L. J. P. C. 69; (1896) A. C. 198.

PART III.

to load. But where a charter-party, dated February 6, but not executed until March 15, contained a covenant by the owner that the ship would proceed from the port where she then lay on or before February 12, the covenant to sail before the named day was held not to be a condition precedent (*a*). So too the right to repudiate the contract may be waived, as where the charterers induce the shipowner to send the ship to the port of loading in the belief that the damages alone will be insisted upon for breach of the covenant (*x*). But stipulations as to time, of an indefinite character, do not amount to conditions precedent; in such case delay or deviation is only ground for a claim for damages, and it does not discharge the charterer, unless it is such as entirely to frustrate the object of the charter-party (*y*). A deviation for the purpose of salving property is not justified unless the right be reserved by the charter-party, but if towage services rendered under a liberty to tow do not frustrate the object of the charter-party, the charterer is not entitled to put an end to the contract (*z*). So also delay caused by an accident of navigation while proceeding to the port of loading, or an accidental fire breaking out in the ship in the course of loading, only exonerates the charterer if the object of the charter-party be frustrated (*a*). And it seems that want of notice of the ship being ready does not discharge the charterer, unless he is in fact prevented from loading by that cause (*b*). Upon the same principle the stipulation respecting the place of discharge is a condition precedent to the liability of the charterer to unlead (*c*). In time charters time is of the essence of the contract, and it is a condition precedent that the ship be ready in time for the charterer to have the use of the ship for the period agreed (*d*). Upon a

(*a*) *Hall v. Cazenove* (1804), 4 East, 477.

(*x*) *Bontsen v. Taylor*, 1893, 63 L. J. Q. B. 15; (1893) 2 Q. B. 274.

(*y*) *M'Andrew v. Chappell* (1866), 35 L. J. C. P. 281; L. R. 1 C. P. 613; *Hudson v. Hill* (1874), 43 L. J. C. P. 273; *Potter & Co. v. Burrell* (1896), 66 L. J. Q. B. 63; (1897) 1 Q. B. 97.

(*z*) *Seyramanga v. Stamp* (1880), 49 L. J. C. P. 674; 5 C. P. D. 295; *Potter & Co. v. Burrell* (1896), 66 L. J. Q. B. 63; (1897) 1 Q. B. 97.

(*a*) *Jones v. Holt* (1867), 36 L. J. Ex. 192; L. R. 2 Ex. 335; *Jackson v. Union Insce.* (1871), 44 L. J. C. P. 27; L. R.

10 C. P. 125; *Tully v. Howlong* (1877), 46 L. J. Q. B. 388; 2 Q. B. D. 182.

(*b*) *Stanton v. Austin* (1872), 41 L. J. C. P. 218; L. R. 7 C. P. 631.

(*c*) *Dahl v. Nelson* (1881), 50 L. J. C. 111; 6 Ap. Ca. 38; *Thursis Sulphur Co. v. Morel* (1891), 61 L. J. Q. B. 11; (1891) 2 Q. B. 617; *Reynolds v. Tomlinson* (1896), 65 L. J. Q. B. 496; (1896) 1 Q. B. 586; *Sanders v. Jenkins* (1896), 66 L. J. Q. B. 40; (1897) 1 Q. B. 93. See *Bulman v. Fenwick & Co.* (1893), 63 L. J. Q. B. 123; 1894) 1 Q. B. 179.

(*d*) *Tully v. Howlong* (1877), 46 L. J. Q. B. 388; 2 Q. B. D. 182.

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charter of a ship for continuous voyages during a certain time. a continuous supply of cargoes is a condition precedent, a default in which discharges the shipowner from further performance; so upon a charter for outward and homeward voyages. failure to supply an outward cargo discharges the shipowner (e). — A statement in the charter-party of the place of the ship at a certain date may operate as a condition precedent to the liability of the charterer; so that the ship is "now at sea having sailed three weeks ago" (f); or that the ship is "now in the port of A." (g); or "has finally sailed from port" (h). A statement that the ship was "expected to be at A." about a stated date was held to be a warranty that the ship was in such a position as would render it reasonable to expect she might reach the named port about the date indicated, for breach of which the shipowner was responsible (i). — A description of the ship as being A 1 is a warranty of the fact of her being so classed, and is also a condition precedent to the liability to load; but it is satisfied by the truth of the description at the date of the charter-party, though the ship loses that class before arrival at the port of loading (k). So the description of the ship as being a steamship warrants that the principal motive power during the voyage shall be steam (l). The description of the ship as to size and capacity is a condition precedent to the obligation to load, which may, however, be satisfied with a reasonable allowance, more or less, having regard to the object and terms of the charter-party. "A representation of this sort in a charter-party is a condition precedent or not according to whether it does or does not enter into and affect the substance of the contemplated voyage" (m). — The description of the ship as being tight, staunch and strong, and fitted for the voyage operates as a condition precedent to the liability to load, if the ship be in fact so unfit for the voyage

as to place of ship.

Description of ship.

Seaworthiness.

(e) *Storer v. Gordon* (1814), 3 M. & S. 368; *Bradford v. Williams* (1872), 41 L. J. Ex. 164; L. R. 7 Ex. 259.

(f) *Oliver v. Booker* (1818), 17 L. J. Ex. 21; 1 Ex. 416.

(g) *Behu v. Bormuss*, 1863, 32 L. J. Q. B. 201; 3 B. & S. 751.

(h) *Price v. Livingstone* (1882), 53 L. J. Q. B. 118; 9 Q. B. D. 679; "*Garston*" Co. v. *Hackie* (1885), 15 Q. B. D. 580.

(i) *Corkling v. Massey* (1873), 42 L. J. C. P. 153; L. R. 8 C. P. 395.

(k) *Routh v. Macmillan* (1863), 33 L. J.

Ex. 38; 2 H. & C. 750; *Franch v. New-gass* (1878), 47 L. J. C. P. 361; 3 C. P. D. 163.

(l) *Frazer v. Telegraph Co.* (1872), 41 L. J. Q. B. 249; L. R. 7 Q. B. 569.

(m) *Jervis, C. J., Barker v. Windle* (1856), 25 L. J. Q. B. 349; 6 E. & B. 675; *Past v. Davie* (1865), 31 L. J. Q. B. 127; 5 B. & S. 20; *The Norway* (1865), 3 Moo. P. C. N. S. 215; *Mackall v. Freight* (1888), 11 Ap. Ca. 106. See *Darling v. Bachman* 1907, 76 L. J. K. B. 570; (1907) 1 K. B. 846.

PART III.

Conditions as to delivery of cargo, and payment of freight.

or the cargo as to frustrate the object of the charter-party; but a breach of the condition short of frustrating the charter-party would only be ground for a claim to damages (*n*). It is an implied term of every charter-party, that the ship should be used for the purposes of the charterer primarily, and the shipowner must not reduce unduly the carrying power of the ship by providing an excessive quantity of stores or tackle (*e.g.* bunker coal) or the like (*o*). Seaworthiness and fitness of the ship for the purpose of carrying the goods to their destination, or in the case of a voyage divided into stages at the commencement of each stage, is implied in a contract for the carriage of goods in a ship (*p*); and seaworthiness is a condition precedent to the claim for freight payable in advance, because the freighter could not insure the risk except upon such condition (*q*).—Under a charter-party or bill of lading the freight is earned when the goods are carried to their destination, and payment of freight and right delivery of cargo are presumptively concurrent acts (*r*). If the freight is payable "after the vessel's report inward" or "after right delivery," there is no lien until the condition is fulfilled (*s*). Where the freight was payable "within three days after arrival of ship and before delivery of the goods," it was held that the three days were allowed for the freighter to pay and take the cargo, and readiness to deliver was a condition precedent: so that the goods having been destroyed by accident within the three days, the freighter was discharged (*t*). The condition of delivery of cargo is subject to losses excepted in the charter-party; and a lump sum agreed for freight becomes payable in full upon delivery of the remainder; but if the whole cargo is lost, though by perils excepted, there can be no delivery and the freight cannot be claimed (*u*).

n. *Tarrabochau v. Huckle* (1856), 26 L. J. Ex. 26; 1 H. & N. 183; *Stanton v. Richardson* (1872), 13 L. J. C. P. 230; L. R. 9 C. P. 390; in H. L. (1875), 45 L. J. C. P. 78.

o. *Darling v. Rochburn* 1907, 76 L. J. K. B. 570; 1907, 1 K. B. 846.

p. *Steel v. State Line Co.* (1877, 3 Ap. Ca. 72; "*Maoi King*" v. *Hughes* (1895), 65 L. J. Q. B. 168; (1895) 2 Q. B. 550; *Queensland Nat. Bk. v. P. & O. Steam Nav. Co.* (1898), 67 L. J. Q. B. 402; 1898) 1 Q. B. 567; *The Fortigern* (1899), 68 L. J. P. 49; (1899) P. 140. See *City of Lincoln v. Smith* (1904), 73 L. J. P. C. 45; 1904 A. C. 250.

q. *Thompson v. Gillespie* (1855), 24 L. J. Q. B. 340; 5 E. & B. 209.

r. *Cargo ex Galah* 1864, 33 L. J. Ad. 97; 2 Moo. P. C. N. S. 216; *Paynter v. James* 1867, L. R. 2 C. P. 348; affirmed in Ex. Ch. (1868) 18 L. T. 449; 16 W. R. 768.

s. *Foster v. Colby* (1858), 28 L. J. Ex. 81; 3 H. & N. 705; *Brown v. Tanner* (1868), 37 L. J. C. 923; L. R. 3 Ch. 597.

t. *Duthie v. Hilton* (1868), 38 L. J. C. P. 93; L. R. 1 C. P. 138.

u. *Robinson v. Knights* (1873), 42 L. J. C. P. 211; L. R. 8 C. P. 465; *Merchant Shipping Co. v. Armitage* (1873), 43 L. J. Q. B. 21; L. R. 9 Q. B. 99.

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Loss or damage of cargo, not excepted in the charter-party, are ground of action or counterclaim, and cannot be deducted from the freight due upon the cargo delivered, unless under a local usage to that effect (*x*). Freight in the absence of special agreement to the contrary is presumptively payable on so much cargo as has been both shipped, carried and delivered; calculated, subject to local usage, according to measurement at the port of shipment (*y*). Freight is presumptively conditional upon the completion of the voyage, though it is expressed to be payable at a rate of so much per month during the voyage; and there is no implied claim *pro rata* for an incomplete voyage (*z*).

In indentures of apprenticeship, which are usually made between the master, the apprentice, and the father of the apprentice, the covenant of the master to teach is conditional upon the continued readiness and willingness of the apprentice to learn (*a*). On the other hand, the covenant on behalf of the apprentice to serve and learn is conditional upon the continued readiness and willingness of the master to teach: and in a case where the master carried on, and covenanted to teach, three trades, it was held to be a good answer to an action for the desertion of the apprentice that the master had relinquished one of the trades (*b*). But the covenants are so far independent that misconduct of the apprentice, though it may be ground for a cross action upon the covenant to serve, is no answer to an action upon the covenant to teach (*c*); unless it is expressly provided in the indentures that the covenant to teach shall be conditional upon good behaviour (*d*), or unless the misconduct is such as to render the continuance of the apprenticeship impossible, as where the apprentice habitually stole the money taken in the business (*e*). The covenant that the master shall teach or the apprentice shall serve, like all other contracts for personal services, is conditional upon his continued capability, and

Conditions in apprenticeships.

(*x*) *Davidson v. Gwynne* (1810, 12 East, 381; *Blanchet v. Powell & Co.* (1873), 43 L. J. Ex. 50; L. R. 9 Ex. 74.

(*y*) *Spaight v. Furnworth* (1880), 5 Q. B. D. 115; 49 L. J. Q. B. 346; *Mediterranean and N. Y. SS. Co. v. Mackay* (1902, 72 L. J. K. B. 147; (1903) 1 K. B. 297; *London Transport Co., Ltd. v. Trevelyan* (1904, 73 L. J. K. B. 253; (1904) 1 K. B. 635.

(*z*) *Gilham v. Mende* (1818), 2 B. & Ald. 17. See *ante*, p. 39.

a, *Raymond v. Manton* (1866), 35 L. J. Ex. 153; L. R. 1 Ex. 244.

b, *Ellen v. Topp* (1851), 20 L. J. Ex. 241; 6 Ex. 424.

(*c*) *Winstone v. Lenn* (1823), 1 L. J. O. S. K. B. 126; 1 B. & C. 460.

d, *Westwick v. Theodor* (1875), 44 L. J. Q. B. 110; L. R. 19 Q. B. 224.

(*e*) *Leacopt v. Brook* (1891), 60 L. J. Q. B. 373; (1891) 1 Q. B. 431.

PART III. if the master dies or if the apprentice is incapacitated by illness, the performance is excused (*f*).

Performance
of conditions
precedent.

Conditions precedent must be fully performed and satisfied in order to render the promise absolute; and it lies upon the promisee to prove the performance or an excuse for non-performance (*g*). It is no longer necessary to allege the performance of all conditions precedent; but the opposite party must specify in his pleading any conditions the performance of which he intends to dispute (*h*).

Part performance.

A partial or defective performance of a condition precedent is in general not sufficient; unless the condition and promise are made divisible and apportionable, as in the case of a contract for the delivery of goods or any part thereof, or of a covenant to build or repair several distinct houses (*i*). But after one party has performed the contract in a substantial part, and the other party has accepted the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability; in such case he must perform the contract on his part, and claim damages in respect of the defective performance (*k*). "It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantor in accepting less. . . . This is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue *must be the substantial part of the contract*" (*l*). Thus, the conditions in charter-parties that the

(*f*) *Barter v. Barfield* 1747, 2 Stra. 1266; *Boast v. Firth* 1868, 38 L. J. C. P. 1; L. R. 4 C. P. 1.

(*g*) *Hunt v. Bishop* 1853, 22 L. J. Ex. 337; 8 Ex. 675; *Barlow v. Gray* (1873), 43 L. J. C. 229; L. R. 8 Ch. 932; *Slack v. Wood* (1882), 9 Q. B. D. 276.

(*h*) Ord. XIX. r. 14. As to the former rule of pleading see *Hobdipp v. Olway* (1670), 2 Wms. Saund. 357, n. 3; *Peters*

v. Opie (1671), 2 Wms. Saund. 742, n. 2.

(*i*) *Wilson v. London Tobacco & Adriatic S. Nav. Co.* (1865), 35 L. J. C. P. 9; L. R. 1 C. P. 61; *Wellinson v. Clements* (1872), 42 L. J. C. 8; L. R. 8 Ch. 96.

(*k*) *Mills v. Blackall* (1817), 17 L. J. Q. B. 31; 11 Q. B. 358; *Carter v. Scargill* (1875), L. R. 10 Q. B. 564.

(*l*) *Per cur. Ellen v. Topp* (1851), 20 L. J. Ex. 241; 6 Ex. 124.

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ship shall be ready for loading at a certain day or a certain place, or that the ship shall be seaworthy, which are originally conditions precedent to the obligation of the charterer, cease to be so as to payment of the freight, after the loading and sailing of the ship, or if the charterers induce the shipowner to send the ship to the port of lading in the belief that strict performance of the condition will be waived (*m*). So the stipulation of loading a full cargo is not a condition precedent as to the payment of freight *pro ratâ* for goods in fact shipped and carried; the freighter having a remedy in damages, if any, for the short delivery (*n*). And a stipulation in the charter-party as to the size and capacity of the ship, after loading and sailing, cannot be treated by the charterer as a condition precedent to his liability to pay freight for the cargo shipped and carried (*o*).

Performance of a condition is excused by the refusal of the other party to accept it. "The party must show he was ready; but if the other party stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and do a nugatory act" (*p*). Upon an executory contract for the sale of goods, a refusal by the buyer to accept, notified by him to the seller and unretracted up to the time appointed for delivery, discharges the condition precedent of delivery or further readiness to deliver, and entitles the seller to claim damages for not accepting the goods without further act on his part (*q*). So a request by the buyer not to deliver, or to postpone the delivery, will excuse delay in delivery, and the seller may recover for a subsequent refusal to accept: but after default in delivery, a request by the buyer to deliver does not waive the default, and he cannot be charged, unless upon a new contract founded upon the request (*r*). And if a party prevents the performance of the condition (*s*) or repudiates his liability under the contract (*t*), the performance of conditions is dispensed with.—In ordinary contracts for work and labour, the work is a condition precedent, and

Excuses of performance of conditions precedent:—refusal to accept.

(*m*) *Havelock v. Geddes* (1899), 10 East, 555; *Bentson v. Taylor* (1893), 63 L. J. Q. B. 15; (1893, 2 Q. B. 274.

(*n*) *Ritchie v. Atkinson* (1898), 10 East, 295.

(*o*) *Past v. Dawie* (1865), 34 L. J. Q. B. 127; 5 B. & S. 20.

(*p*) *Minsfield, C. J., Jones v. Barkley* (1781), 2 Dougl. 694.

(*q*) *Ripley v. McClure* (1819), 18 L. J. Ex. 419; 4 Ex. 315; *Curt v. Ambergate*

Ry. (1851), 20 L. J. Q. B. 460; 17 Q. B. 127.

(*r*) *Williams v. Wheeler* (1860), 8 C. B. N. S. 299; *Plecius v. Downing* (1876), 45 L. J. C. P. 695; 1 C. P. D. 220.

(*s*) *Mackay v. Dick* (1881), 6 Ap. Cl. 251.

(*t*) *Re Coleman's Dep., & Life & Health Assoc.* (1907), 78 L. J. K. B. 865; (1907) 2 K. B. 798.

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must be completed before the payment can be claimed (*u*); but if the employer refuses to allow the other party to do the work contracted for, the latter may claim damages without completion; and the liability will depend upon which party was in fault in occasioning the contract not to be carried into effect (*x*). Under a charter-party the liability to pay freight for the carriage of a cargo and delivery to the freighter at a safe wharf, becomes absolute if the freighter refuses to name a wharf for delivery (*y*). A promise to pay a sum of money on condition of the promisee executing a release to be prepared by the promiser was held to be made absolute by the default of the latter in preparing and tendering the deed (*z*). And generally if the promiser refuses to accept the stipulated benefit, which the promisee is ready and willing to give, he may be charged with his promise as absolute (*a*).—A condition precedent which consists in some act of a third party, as the granting of a certificate or a licence, or the making of a valuation, is not excused or discharged by the refusal of such person to act in the matter (*b*); but it is dispensed with by the other party to the contract preventing its performance, so far as it may be dependent upon him, as by refusing to appoint a valuer (*c*). Upon an assignment of a lease, subject to obtaining the licence of the lessor, a refusal to accept the lease dispenses with the condition of the licence, and renders the assignee liable in damages (*d*).

Dispensation
of perform-
ance.

"If a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform" (*e*). Thus if a person contracts to sell or lease land to another, and afterwards disables himself by conveying or demising the land to a third party, he thereby dispenses with any request or other act which would otherwise be a condition precedent to his liability, and renders

(*u*) *Peters v. Opie* (1671), 2 Wms. Saund. 742.

(*x*) *Planché v. Colburn* (1831), 1 L. J. C. P. 7; 8 Bing. 14; *Pontifex v. Wilkinson* (1845), 1 C. B. 75; (1845), 2 C. B. 349.

(*y*) *Stewart v. Rogerson* (1871), L. R. 6 C. P. 424.

(*z*) *Giles v. Giles* (1846), 15 L. J. Q. B. 387; 9 Q. B. 164.

(*a*) *Bradley v. Benjamin* (1877), 46 L. J. Q. B. 590.

(*b*) *Worsley v. Wood* (1796), 6 T. R. 710; *Milner v. Fuld* (1850), 20 L. J. Ex. 68; 5 Ex. 829; *Grafton v. Eastern Co. Ry.* (1853), 8 Ex. 699; *Scott v. Avery* 1856, 25 L. J. Ex. 303; 5 H. L. C. 811.

(*c*) *Hotham v. East India Co.* (1787), 1 T. R. 638; *Thomas v. Fredricks* (1847), 16 L. J. Q. B. 393; 19 Q. B. 775.

(*d*) *Ellis v. Rogers* (1885), 29 Ch. D. 661.

(*e*) *Per cur. Sands v. Clarke* (1849), 19 L. J. C. P. 84; 8 C. B. 762.

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himself at once liable for a breach of contract (*f*). So if a person sells goods, to be delivered upon the request of the buyer, and afterwards sells and delivers the same goods to another person, he dispenses with the request of the former as a condition of delivery (*g*). And if a man promises to marry one person and afterwards marries another, he thereby dispenses with all conditions, as to time or request or otherwise, which might have been precedent to his liability to the former (*h*).

Contracts may provide, expressly or impliedly, for termination by lapse of time, or by notice, or by other events; which then operate as conditions subsequent. Where the promise is made to two jointly, both must join in annulling the contract, unless the contract otherwise provides (*i*). It is said "that *primâ facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination" (*k*). Accordingly, where a contract was made between two railway companies for giving to one of them running power over the lines of the other, but without mentioning any limit of time or any mode of terminating the power: it was held that, considering the perpetuity of the contracting parties and of the subject-matter, the contract must have an indefinite duration, according to the *primâ facie* construction of its terms; and that there was no implied condition to terminate it by notice or otherwise (*l*).

Where a contract provides that it may be terminated by notice, the formality may be waived (*m*).

Contracts may be terminable at the will of one of the parties; as partnerships, which are terminable by a partner at any time,

Conditions subsequent.

Contracts terminable at will.

(*f*) *Ford v. Tiley* (1827), 5 L. J. O. S. K. B. 169; 6 B. & C. 325; *Lorbeck v. Franklin* (1846), 15 L. J. Q. B. 146; 8 Q. B. 371.

(*g*) *Burdell v. Parsons* (1808), 10 East, 359.

(*h*) *Short v. Stone* (1816), 15 L. J. Q. B. 113; 8 Q. B. 358; *Caines v. Smith* (1816), 15 L. J. Ex. 106; 15 M. & W. 189.

(*i*) *Attwood v. Ernest* (1853), 22 L. J.

C. P. 225; 13 C. B. 881.

(*k*) *James, L. J., Lancashire Ry. v. L. & N. W. Ry.* (1873), 12 L. J. C. 887; L. R. 8 Ch. 919. And see *Ld. Selborne, S. C.* (1875), 45 L. J. C. 539; L. R. 7 H. L. 507.

(*l*) *Lancashire Ry. v. L. & N. W. Ry.* (1875), 45 L. J. C. 539; L. R. 7 H. L. 550.

(*m*) *Marnaghten v. Paterson* (1907), 76 L. J. P. C. 91; (1907) A. C. 483.

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Leases
terminable by
notice.

unless a definite term is fixed in the articles of partnership (*n*). And a partnership continued after the term fixed without further agreement, though subject to the original articles so far as they are applicable, is terminable by either partner at will (*o*). But a provision that an agreement for a partnership "shall be terminated by mutual arrangement only," requires the assent of both partners to the dissolution (*p*). A notice of dissolution once given cannot be withdrawn, nor can the partnership be restored without the consent of the other partners (*q*).—A continuing guarantee for an indefinite period cannot in general be withdrawn by notice and payment of the amount then due under it (*r*).—Charter-parties frequently contain an express provision entitling one or other of the parties to terminate the agreement (*s*).—An insurance terminable on return of the premium, "for any cause whatever," may be terminated by notice at the mere will of the insurer (*t*).—Leases and tenancies of land may be made terminable by notice. Tenancies at will are terminable by notice at the will of either party (*u*); and a tenancy for a term of years, or from year to year, may be made terminable at will by agreement (*x*). A lease for 7, 14, or 21 years continues for those successive periods, unless the election to determine it at the end of one of the periods is duly exercised; and the election rests with the lessee, if no intention to the contrary is expressed (*y*). A tenancy from year to year, in the absence of any agreement to the contrary, is by a rule of law terminable by either party giving to the other notice to determine the tenancy half a year before the expiration of the current year (*z*); which

n) Partnership Act, 1890, ss. 26, 32; *Hendry v. Turner* 1886, 55 L. J. C. 562; 32 Ch. D. 355; *Green v. Howell* (1910), 79 L. J. C. 519; (1910) 1 Ch. 495.

o) Partnership Act, 1890, s. 27; *Parsons v. Hayward* (1862), 31 L. J. C. 666; 4 De G. F. & J. 474; *Myers v. Myers* (1891), 60 L. J. C. 311; *Doe v. Herring* (1891), 61 L. J. C. 5; (1892) 1 Ch. 284.

p) *Moss v. Elphick* (1910), 79 L. J. K. B. 631; (1910) 1 K. B. 846.

q) *Jones v. Lloyd* (1874), 13 L. J. C. 826; L. R. 18 Eq. 271. See *Glossop v. Glossop* (1907), 76 L. J. C. 610; (1907) 2 Ch. 370.

r) *Lloyd v. Harper* 1880, 50 L. J. C. 140; 16 Ch. D. 290.

s) *Lydehorn S.S. Co. v. Duncan, Fox*

& Co. (1909), 79 L. J. K. B. 105; 1909) 2 K. B. 929; *Macl. Tyran Ship Co. v. Andrew Weir & Co.* (1910), 79 L. J. K. B. 898; (1910) 2 K. B. 844.

t) *San Fore Office v. Hart* (1858), 58 L. J. P. C. 69; 14 Ap. Ca. 98. See *Bamberger v. Commercial Credit Mutual Assoc.* (1855), 24 L. J. C. P. 115; 15 C. B. 677.

u) Leake, Law of Land, p. 156.

x) *Re Threlfall* (1880), 50 L. J. C. 320; 16 Ch. D. 271.

y) *Dunn v. Spurgier* (1803), 3 B. & P. 399; *Doe v. Dixon* (1807), 9 East, 16; *Fowell v. Trantee* 1861, 34 L. J. Ex. 6; 3 H. & C. 158; *Fowell v. Smith* (1872), 41 L. J. C. 731; L. R. 11 Eq. 85. See *Grey v. Friar* (1851), 4 H. L. C. 565.

z) *Siddebotham v. Halliart* (1894), 64 L. J. Q. B. 200; (1895) 1 Q. B. 378;

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Conditions of
Forfeiture.

is extended to one year for tenancies within the Agricultural Holdings Act, 1883, s. 33, unless otherwise agreed (*a*). Leases with conditions of forfeiture are terminable upon the specified default of the tenant, as for non-payment of rent, not repairing, or not performing or observing other covenants (*b*). Such conditions render the lease voidable at the election of the lessor, who must give notice or in some other sufficient manner express his election to avoid it (*c*); but they do not enable the lessee to take advantage of his own wrong to determine the lease against the will of the lessor (*d*). But before proceeding to enforce a forfeiture by action the lessor must now, by force of sect. 14 of the Conveyancing and Law of Property Act, 1881, give notice in writing to the tenant stating the breach complained of and requiring the breach to be remedied, and the statute invests the court with a power to grant relief against forfeiture (*e*). The forfeiture may be waived by a subsequent acceptance of rent or other unequivocal recognition of the tenancy by the lessor, after having notice of the cause of forfeiture (*f*).

In contracts for the sale of land it is usual to insert a condition entitling the vendor to rescind the contract in case of objections made to the title which he is unable or unwilling to remove (*g*). This condition must be exercised *bonâ fide* and upon reasonable grounds and not arbitrarily; and it is held to be presumptively the duty of the vendor, notwithstanding the condition, to answer all reasonable requisitions of the purchaser as to the title, in order to give him the opportunity of waiving such objections as cannot be removed and accepting such title as the vendor can give (*h*). If the purchaser insist upon his requisition the vendor may within a reasonable time give an absolute notice of rescission; and the

Sale of land
with con-
dition for
rescission.

Somers v. Nicholson (1901), 71 L. J. K. B. 24; (1902) 1 K. B. 157.

(*a*) *Barlow v. Todd* (1885), 54 L. J. Q. B. 564; 15 Q. B. D. 501.

(*b*) See *Evans v. Davis* (1879), 48 L. J. C. 223; 10 Ch. D. 717; *Re Anderton and Milner* (1890), 59 L. J. C. 765; 45 Ch. D. 476; *Weston v. Metrop. Asylum* (1882), 51 L. J. Q. B. 399; 9 Q. B. D. 404.

(*c*) *Roberts v. Darby* (1843), 2 L. J. K. B. 141; 4 B. & Ad. 661; *Thomas v. Latham* (1895), 64 L. J. Q. B. 720; (1895) 2 Q. B. 400; *Moore v. Ullevoot's Manana Co.* (1908), 77 L. J. C. 282; 1908, 1 Ch. 575.

(*d*) *Reh v. Farr* (1817), 6 M. & S. 121.

(*e*) *Dowdy v. Evans* (1900), 79 L. J. K. B. 121; (1910) 1 K. B. 263.

(*f*) *Ward v. Day* (1861), 33 L. J. Q. B. 254; 5 B. & S. 339; *Walton v. Hawkins* (1875), 44 L. J. C. P. 416; L. R. 10 C. P. 342; *Davenport v. Reg.* (1877), 47 L. J. P. C. 8; 3 Ap. Ch. 115.

(*g*) *Re Torry and White* (1886), 55 L. J. C. 343; 32 Ch. D. 14. See *Re Deighton and Harris* (1898), 67 L. J. C. 210; (1898) 1 Ch. 458.

(*h*) *Smith v. Wallace* (1894), 61 L. J. C. 240; (1895) 1 Ch. 385; *Quinion v. Horne* (1906), 75 L. J. C. 293; (1906) 1 Ch. 595; *Re Jackson & Haden* (1906), 75 L. J. C. 226; (1906) 1 Ch. 412.

PART III.

Sale of
goods with
warranty.

purchaser will be thereby precluded from afterwards waiving the objection (*i*). On the other hand, if the vendor elects not to rescind he is bound by his election once made, but his continued negotiations or delay may entitle the purchaser to treat the contract as subsisting, or abandoned, according to the circumstances, unless the condition empowers the vendor to put an end to the contract at any time (*k*). A notice to rescind expressed to be "without prejudice" is inoperative (*l*). The right to rescind under a condition is not suspended by the institution of legal proceedings, but cases if prosecuted to judgment (*m*). The above condition does not apply to the case of a vendor selling without any title at all; nor to objections which are made independently of the title shown by him (*n*). A condition that in case the vendor fails to show a good title, or the purchaser fails to pay the money on the appointed day, the contract shall be void, is construed to give an election to the one party to rescind the contract upon the specified default of the other; but not to entitle either to avoid the contract by a default on his own part (*o*).

Goods may be sold upon terms that in case of a breach of the warranty the buyer may return the goods and recover the price paid; the buyer may then rescind the contract, in case of breach of warranty, but he could not do so without such condition, except with the consent of the seller, or in a case of fraud (*p*). He must return the goods under the condition as soon as he reasonably can after discovery of the breach of warranty; but if the condition provides a limited time for the return of the goods, the buyer may act upon it at any time within the limit; and in the meantime the goods remain at the risk of the seller (*q*). A warranty of goods is sometimes made with the condition that a claim for a breach of

(*i*) *Buddell v. Simpson* (1866), 36 L. J. C. 70; L. R. 2 Ch. 102; *Re Dames and Wood* (1865), 54 L. J. C. 771; 29 Ch. D. 626.

(*k*) *Mortby v. Cook* (1842), 1 L. J. C. 136; 2 Hare, 106; *Re C. A. Ry. and Sanderson* (1881), 53 L. J. C. 415; 25 Ch. D. 788; *Smith v. Wallace* (1891), 61 L. J. C. 240; 1895) 1 Ch. 385.

(*l*) *Re Weston and Thomas* (1906) 76 L. J. C. 179; (1907) 1 Ch. 211.

(*m*) *Gray v. Fowler* (1873), 42 L. J. Ex. 161; L. R. 8 Ex. 219; *Re Arabah and Chiss* (1891), 60 L. J. C. 263; (1891), 1 Ch. 601; *Isaacs v. Towell* 1898, 67 L. J. C. 508; (1898) 2 Ch. 285.

(*n*) *Gordon v. Lee* (1865), 34 L. J. Ex. 113; 3 H. & C. 651; *Bateman v. Hyland* (1878), 47 L. J. C. 581; 8 Ch. D. 588; *Re Doughton and Harris* (1898), 67 L. J. C. 240; (1898) 1 Ch. 458; *Re Jackson and Hadu* (1905), 74 L. J. C. 389; (1905) 1 Ch. 603; see *S. C.* on appeal (1906), 75 L. J. C. 226; (1906) 1 Ch. 412.

(*o*) *Roberts v. Wynn* (1810), 2 Taunt. 268.

(*p*) *Sale of Goods Act*, 1893, ss. 11, 53. See *ante*, p. 268.

(*q*) *Hood v. Telford* (1871), 41 L. J. Ex. 4; L. R. 7 Ex. 7.

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the warranty shall be made or the goods returned within a limited time: the claim must be made or the goods returned within the stipulated time where the condition is applicable to the particular state of facts (*r*).

Contracts of hiring or for personal services are usually made terminable by a notice to be given by either party; and in some cases the condition of notice is imported into the contract by usage or by law, in the absence of agreement to the contrary (*s*). The engagement of menial or domestic servants is by general usage terminable by a month's notice on the part of the servant; and by a month's notice or payment of a month's wages on the part of the employer (*t*). A hiring of service for an undefined period at annual wages is presumptively a hiring for a year, which requires no notice unless continued beyond the year (*u*); and this although wages are to be paid monthly (*x*), but a hiring at weekly wages is presumptively a hiring by the week (*y*). Where a notice is required to terminate a yearly hiring, and there is no stipulation or usage applicable, the contract is terminable by a reasonable notice according to the circumstances (*z*). It is not illegal for a person to contract to serve in a certain employment exclusively for the term of his life (*a*).—"The relation of a master of a ship to his employer, the shipowner, is not one in which, in the case of an indefinite hiring, the law has made, nor is there any custom making, the hiring a hiring for a year or for any other definite time, nor the notice by which the service is to be determined certain": but the nature of the service implies a reasonable notice for its termination by either party (*b*).

Contracts of service terminable by notice.

An alternative promise binds the promiser to the performance Alternative promises.

(*r*) *Chapman v. Gougher* (1866), 35 L. J. Q. B. 112; L. R. 1 Q. B. 463; *Hocheliff v. Barwick* (1880), 19 L. J. Ex. 495; 5 Ex. D. 177; *Chapman v. Withers* (1888), 57 L. J. Q. B. 457; 20 Q. B. D. 821.

(*s*) *Parker v. Holtson* 1858, 27 L. J. C. P. 236; 4 C. B. N. S. 346; *Re African Assn. and Allen* (1910), 79 L. J. K. B. 239; (1910) 1 K. B. 396.

(*t*) *Nowlan v. Ablett* (1835), 4 L. J. Ex. 155; 2 Cr. M. & R. 54; *Johnson v. Blenkinsopp* (1841), 5 Jur. 870; *Abdell v. Holliday* (1897), 67 L. J. Q. B. 151; (1898) 1 Q. B. 127.

(*u*) *Lilley v. Echin* (1818), 17 L. J. Q. B. 132; 11 Q. B. 712; *Fairman v.*

Uckford 1860, 29 L. J. Ex. 159; 5 H. & N. 635; *Brown v. Samuels* (1860), 29 L. J. C. P. 251; 8 C. B. N. S. 208; *Langton v. Carleton* (1855), 43 L. J. Ex. 51; L. R. 9 Ex. 57.

(*x*) *Fourett v. Cash* (1831), 3 L. J. K. B. 113; 5 B. & Ad. 901.

(*y*) *Robertson v. Jenner* (1867), 15 L. T. 514; *Evans v. Roe* (1872), L. R. 7 C. P. 138.

(*z*) See *per curiam*, *Beeston v. Collyer* (1827), 5 L. J. O. S. C. P. 186; 4 Bing. 309.

(*a*) *Wallis v. Day* (1837), 6 L. J. Ex. 92; 2 M. & W. 273.

(*b*) *Green v. Wright* (1876), 1 C. P. D. 591.

PART III. of one or other of several matters, either at the election of the promiser or at the election of the promisee. And the presumption is that "the person who is to perform one of two things in the

Election in the promiser.

alternative has the right to elect" (*c*).—Thus an agreement for a loan of money "for the term of nine or six months" was held to give the borrower the election as to the time (*d*). So a sale of goods at six months' credit and then to be paid for by a bill at two or three months, was held to give nine months' credit, before the debt for the goods accrued due (*e*).—A covenant to make a settlement in certain terms by deed or will was construed to leave the election in the covenantor to make it in either form; so that the covenant was discharged by a will in the required terms of settlement, although in that form it was subject to failure by lapse (*f*). So where a person bound himself either to convey land to his wife, or to leave her the value by legacy, it was held that, having the election, he was discharged by the death of his wife in his lifetime (*g*).—But the contract may in terms give the right to elect to the promisee (*h*); as in the case of a bond conditioned for delivery to the obligee at a certain time and place twenty pounds or ten kine, at the then choice of the obligee; which binds the obligor to tender both at the time and place for the obligee to make his election (*i*).

Election in the promisee.

Notice of election.

If the promiser has the right to elect, he must give notice of his election so as to bind the promisee as upon a complete contract (*k*); and conversely, if the promisee has the election of the alternative act, he must give notice of the election made to the promiser, as a condition precedent to charging him with the promise (*l*). Thus under a lease reserving rent "to be paid quarterly or half-quarterly if required," it was held that the lessor could not distrain for a half-quarter's rent without previous notice to the lessee of his election to take the rent at that period (*m*). A contract to deliver a certain quantity of iron, all in November, or equally in November, December, and January at an increased

(*c*) *Langton v. Pearce* (1778, 1 Dougl. 15. See *Reg. v. S. F. Ry.* (1853), 1 H. L. C. 471.

(*d*) *Reed v. Kilbarn Co-op. Soc.* (1875, 44 L. J. Q. B. 126; L. R. 10 Q. B. 264.

(*e*) *Helps v. Winterbottom* (1831, 9 L. J. O. S. K. B. 258; 2 B. & Ad. 431.

(*f*) *Re Brookman's Trusts* (1869), 39 L. J. C. 138; L. R. 5 Ch. 182.

(*g*) *Langhlee's case* (1595), 5 Co. 21 b.

(*h*) *Ferguson v. Washoe Mining Co.*

1867), 17 L. T. 409.

(*i*) *Fordley's case* (1587, 1 Leon. 68.

(*k*) *Rippinghall v. Lloyd* (1833, 5 B. & Ad. 742.

(*l*) *Pro cur. Eyse v. Wakefield* (1840), 9 L. J. Ex. 271, 6 M. & W. 442; affd. 7 M. & W. 126; *Thorn v. City River Mills* 1889, 58 L. J. C. 237; 40 Ch. D. 357. See ante, p. 465.

(*m*) *Mallum v. Archr.* 18 L. J. C. P. 48; 10 Bing. 299.

price per ton, was held to give the election to the buyer; who was bound to give notice of his election in time for the seller to execute the alternative chosen; and in default of notice during November, the seller was discharged from delivering any portion (*n*).

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An election once made is final and irrevocable, according to the maxim "*quod semel placuit in electionibus amplius displicere non potest*."—Under a policy of insurance against fire, with a condition reserving to the insurer the election to reinstate the insured premises instead of paying for the damage, the insurers having given notice that they elected to reinstate were held bound by their election; although the premises were afterwards pulled down by the public authority as being in a dangerous condition but not attributable to the fire (*o*). Where a contract was made to deliver cotton in August or September at seller's option, and notice was given by him that the cotton was ready for delivery in August; he was held bound by the notice given, and having made default in August the buyer was discharged from accepting any later delivery (*p*).

Election irrevocable.

The construction of the contract may bind the promiser to a certain specified performance or to pay a certain sum of money. It then becomes a question of construction in each case whether the promiser may elect to perform the contract or pay the stipulated sum as the price of not doing so, or whether the promisee may insist upon the performance. Whatever the true construction may be, the promisee may waive performance and claim payment as upon the non-performance of a condition precedent; in which case, unless the money is construed as a mere penalty, it becomes an absolute liquidated debt (*q*). Accordingly, under an agreement to return bills of exchange which were delivered for presentment or to pay the amount of the bills, the promiser, on default in returning the bills, was held liable to pay the full amount though the bills had become worthless (*r*). So with a bond conditioned to marry the obligee or to pay him a stated

Promises to pay in default of performance.

(*n*) *Houch v. Muller*, 1881, 50 L. J. Q. B. 529; 7 Q. B. D. 92. See *Calaminus v. Barclays Iron Co.* (1878), 17 L. J. Q. B. 575.

(*o*) *Brown v. Royal Insur.*, 1859, 28 L. J. Q. B. 275; 1 E. & F. 853. See *Anderson v. Commercial Union Assur.* (1885), 55 L. J. Q. B. 146.

(*p*) *Guth v. Lees*, 1865, 3 H. & C. 558.

(*q*) *Denton v. Richmond* (1833), 2 L. J. Ex. 269; 1 Cr. & M. 731; *Wiston v. Metrop. Asylum Inst.*, 1882, 51 L. J. Q. B. 509; 9 Q. B. D. 404. See *Warkman, Clarke & Co. v. Lloyd Braziers* (1908), 77 L. J. Q. B. 955; (1908) 1 K. B. 968. And see *post*, p. 796 *et seq.*

(*r*) *Derrill v. Burnell*, 1873, 42 L. J. C. P. 214; 1 R. & C. P. 475.

PART III. sum (*s*). So with a covenant not to carry away manure, or to pay an increased rent (*t*); and a covenant by a lessee of minerals to work a certain quantity every year, or to pay a fixed rent (*u*). Upon sale of goods to be paid for by cash with discount, or by bill at three months, the buyer upon refusing to accept the bill, becomes at once indebted for the cash (*x*). Where the grantee of a patent covenanted to pay a certain sum in royalties, or to forfeit the patent, it was held that he was not bound absolutely to pay the money, but might alternatively forfeit the patent (*y*).—But in the case of a promise strictly alternative between two independent matters, if the promiser neither elects nor performs either, the amount recoverable as damages is measured by the alternative which is least beneficial to the promisee (*z*).

s) *Boe v. Day* (1744), 1 Wils. 59.

t) *Lough v. Lillie* (1860), 50 L. J. Ex. 25; 6 H. & N. 165.

u) *Bate (Marg.) v. Thompson* (1844), 14 L. J. Ex. 95; 14 M. & W. 487. See *Clifford v. Watts* (1870), 40 L. J. C. P. 36; L. R. 5 C. P. 577.

x) *Rugg v. Wier* (1864), 16 C. B. N. S.

471. See *Schneider v. Foster* (1857), 2 H. & N. 1.

y) *Talbot v. Hooper* (1850), 20 L. J. Ex. 78; 5 Ex. 833.

z) *Bovill, C. J., Dwyer v. Bannell* (1873), 42 L. J. C. P. 214; L. R. 8 C. P. 475. See *post*, p. 771.

CANADIAN NOTES.

Divisible Promise.

In *Collins Bay Rafting and Forwarding Company vs. New York and Ottawa Railway Company*, 32 S. C. R., 216, by a contract to remove spans from a wrecked bridge in the St. Lawrence the contractors agreed "to remove both spans of the wrecked bridge and put them ashore for the sum of \$25,000, we to be paid \$5,000 as soon as one span is removed from the channel and another \$5,000 as soon as one span is put ashore, and the balance as soon as the work is completed, it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season." It was held that the contract was divisible, and the contractors having removed one span from the channel and put it ashore were entitled to the two payments of \$5,000 each, notwithstanding the whole work was not completed in the second season.

Promise to Leave by Will.

In *Orr vs. Orr*, 21 Grant's Ch., 397, the father of the plaintiff died leaving a widow and nine children. The plaintiff, the eldest son, was then sixteen years old, and he continued to reside with his mother on the farm, which she owned, for about six years, when, becoming dissatisfied with his position, he informed his mother thereof, and that he had determined to leave the farm and work for himself, whereupon his mother urged him to remain, work the farm and assist her in bringing up the family and she would give him the south half of the farm and the other half to a younger brother on consideration of the plaintiff supporting her for life. The plaintiff, in consequence, remained with the family, and erected a brick dwelling on the south half of the farm, of which house he agreed to give and did give his mother a certain part for the use of herself and a granddaughter. The brothers and sisters of the plaintiff were all aware that the plaintiff claimed under this alleged agreement or promise and the south half of the lot was always designated as his. The plaintiff continued to fulfil the terms stipulated for until the death of his mother, about seven years afterwards, but she died without having executed a deed to the plaintiff. It was held, on appeal, reversing the decree of the Court below, that what had occurred could not be treated as an agreement to convey, but

was, at most, only to be looked upon as a promise or expectation held out by the mother to the son to induce him to remain with her, and, as such, was not capable of being specifically enforced in equity. This case was followed in *Jibb vs. Jibb*, 24 Grant's Ch., 487, in which the plaintiff alleged that, having remained at home working for his father until he was of the age of twenty-five or twenty-six years, he then told him that he must have wages, whereupon the father agreed that he would purchase a certain farm, and that, if plaintiff would remain at home and work until the land was paid for, he would convey the same to the plaintiff; that the plaintiff, accordingly, remained with and worked for his father until the farm was fully paid for, and that the father put the plaintiff in possession. The answer to the bill for specific performance denied the agreement alleged by the bill, but admitted that the land had been bought with the intention to devise it to the plaintiff, and that the father had executed a will so disposing of it which he alleged he had no intention to alter. It was held that specific performance could not be decreed.

In *McDonald vs. Rose*, 17 Grant, 657, a father and son entered into mutual bonds, the father agreeing that just before his death he would convey the farm to his son in fee, and the son agreeing that he would, during his father's life, work, till and improve the farm. Quarrels took place afterwards, and ultimately the father left the farm, the son retaining possession until ejected at the father's suit. It was held that the contract could not be enforced against the father, but the decision was put in part on the ground of want of mutuality in the remedy, the consideration on one side being for personal services.

In *Walker vs. Boughner*, 18 O. R., 448, it was held that where a contract on the part of a testator founded upon a sufficient and valuable consideration that he will leave by his will to the other contracting party a sum of money as a legacy is clearly made out, the representative of the testator may be compelled to make good his obligation, but where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her and maintained her while she worked for him for nine years,

but, although he made his daughters residuary legatees, left the plaintiff nothing by his will and paid her nothing for her services, it was held that the promise made and the consideration for it were both of too uncertain a character to entitle the plaintiff to specific performance, but that the circumstances gave rise to an implied contract for the payment of wages and took the case out of the ordinary rule that children are not to look for wages from their parents or those *in loco parentis* in the absence of special contract, whilst they form part of the household. The rule was stated by Arnour, C. J., to be that where a party renders services for another in the expectation of a legacy and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for them by will, and the party for whom such services are rendered dies without making such provision, no action lies, but where from the circumstances of the case it is manifest that it was the understanding of both parties that compensation should be made by will and none is made, an action lies to recover the value of such services.

In *Cross vs. Cleary et al*, 29 O. R., 542, the plaintiff sought to recover from the executors of a will the whole of a deceased's estate upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said, "You give me a home as long as I live and when I die you have what is left," to which she answered, "All right," and he then said, "That is an agreement." He was maintained by her for eight years after the alleged agreement, but made his will in favour of other persons. It was said that such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been proved before it.

In *MacKay vs. MacKay*, 15 Grant's Ch., 371, plaintiff's father had verbally agreed to give plaintiff land for work which, after coming of age, plaintiff had done for his father. Two years afterwards plaintiff, on his marriage, went into possession, with his father's permission, but his father had refused to give him a deed or part with the control of the property. Plaintiff remained in possession to his own use for eight years, when his father died, having devised the property to the defendant. It

was held that the plaintiff could not enforce the alleged agreement; that he had taken possession relying on his father's bounty and expressly informed that his father, by allowing him to have possession, did not mean to part with his own control over the property.

In *McGugan vs. Smith*, 21 S. C. R., 263, a girl of fourteen lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughter. She lived with him and performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in wild and ungovernable horses. It was held that the agreement to provide for her by will was one of which specific performance could not be decreed, and Strong, J., doubted if it had any validity at all as an agreement, but it was held that she was entitled to remuneration for her services.

Condition Subsequent.

In *Torrop vs. Imperial Fire Insurance Company*, 26 S. C. R., 585, a policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed. It was held, affirming the Supreme Court of New Brunswick, that by a chattel mortgage, given by the assured on the property, his interest therein was changed and the policy forfeited.

Conditions Precedent.

In *Cape Breton Electric Company vs. Slayter*, 36 N. S. R., 513, the Dominion Act, 1894, ch. 13, sec. 13, having provided that whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractor shall cause a duplicate of such reading to be left with the purchaser, it was held that the burden was upon the plaintiff suing to recover for electric lighting and rent of meter to shew compliance with the act, and that non-compliance was not excused by the fact that the persons to whom the duplicate was required to be delivered might not be able to understand it, and also that an offer to compromise made on the part of the defend-

ant could not in any case be treated as a waiver of the right conferred by statute.

In *Cullen vs. Nickerson*, 10 U. C. C. P., 549, it was held that upon a covenant to pay in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract, the performance of the work was not a condition precedent to the payment.

In *Commercial Union Assurance Company vs. Margeson*, 29 S. C. R., 601, certain conditions of a policy of fire insurance required proof, etc., within fourteen days after loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not for the space of three months after the occurrence of the fire be in all respects verified in the manner aforesaid. It was held, reversing the judgment of the Supreme Court of Nova Scotia, that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurers; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proof within the time specified the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.

In *Northern Pacific Express Company vs. Martin et al.*, 23 S. C. R., 135, an express company gave a receipt for money to be forwarded with a condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by a written statement with a copy of the contract annexed. It was held that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee.

The case of *Richardson vs. The Canada West Farmers, etc., Insurance Company*, 16 U. C. C. P., 430, was held not to apply, for the reasons given by Mr. Justice Killam in the court below, but Strong, C. J., said that if that case had been in point he should have been unable to follow it. "The parties have chosen to enter into a contract subject to a condition which the appellants have a right to insist on an exact compliance with. That they have suffered no disadvantage or inconvenience from the respondent's neglect to comply with it is, of course, wholly immaterial. The parties must abide by the terms of the contract they have chosen to make for themselves."

In the case referred to the declaration was on a policy of insurance, and the plea was that by a condition on the policy any loss or damage was to be paid within three months after due notice or proof thereof made by the insured in conformity with the by-laws and conditions annexed to the policy, and that such proof should further contain a certified copy of the written portion of the policy, and defendant averred denying that the proof did contain such certified copy.

The plea was held bad on demurrer, apparently because the production of the written part of the policy was not a condition precedent to the plaintiff's right to recover, but Mr. Justice Killam upon this remarks, (10 Man. L. R., 613), that the decision was upon demurrer, and it might not improperly be considered that the plea did not show that in the proof the copy of the written portion of the policy was absolutely required to make it such proof as was a condition precedent to the existence of liability.

In *Sarton vs. Ridley*, 13 U. C. R., 522, the declaration was upon an agreement by which the defendant undertook to commence certain work "so soon after the opening of navigation this spring" as he could remove a steam dredge and working apparatus to Port Burwell. It was held insufficient to allege that the spring had elapsed, and that it was necessary to aver that since the opening of navigation the defendant could have removed the dredge.

In *Boulton vs. Bethune*, 21 Grant's Ch., 110, by an agreement between the vendor and purchaser, it was agreed that so soon as a title to the land and premises satisfactory to the solicitors of

the vendee could be afforded to him the vendee should purchase the land at four thousand dollars cash. It was held that, in the absence of *mala fides*, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for specific performance of the agreement. The case is distinguished from that of *Lord vs. Steven*, in which the contract required that there should be a title satisfactory to the purchaser himself, who, according to the construction contended for on his behalf, might himself have arbitrarily put an end to the contract, on pretence of an unsatisfactory state of the title. The construction put upon the contract in the case last mentioned by Lord Abinger is criticized in this case by Strong, C. J.

In *Walsh vs. Brown*, 18 U. C. C. P., 60, a contract was made for the purchase of \$67,000 in greenbacks, for which four notes were given in Canadian currency. One of the notes being overdue, the vendor notified the purchaser that he could no longer carry the amount of Canadian currency, and had, therefore, converted it at that day's rate of exchange, charging plaintiff's account with the same. It was held that the payment of the note was a condition precedent to the delivery of the greenbacks.

In *Sherlock vs. Powell*, 26 Q. A. R. 407, it was held that where there was a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts equal to eighty per cent. of the total amount when the work was done and the balance of twenty per cent. in thirty days after the completion and acceptance, completion was a condition precedent to the right to payment, and where the work was not completed there was no right to recover the proportion done as upon a *quantum meruit*. The case does not decide that the plaintiff was not entitled to be paid according to the agreement as the work proceeded.

In *Tulloch vs. Wells*, 7 U. C. C. P., 47, the declaration claimed damages for breach of a contract for sawing timber containing an agreement by defendant to supply the plaintiff with such a portion of the price as would enable the plaintiff to carry out the contract, but did not aver any demand upon or refusal by the defendant to supply such money. This was held bad on demurrer because payment was not a condition precedent to plaintiff's performance.

In *Fee vs. Whyte*, 13 U. C. C. P., 83, the plaintiff agreed to do certain work for the defendant, for which he was to be paid half in cash on completion of the work and half by a bankable note at three months, defendant to pay the bank charges and interest and the note to be renewed if required for two months longer. On the 30th of July, 1862, plaintiff sued for the work done. The evidence shewed that it was not completed until the 2nd of May. It was held that the action was brought too soon, as the entire debt was not due until three months after the completion of the work and the *onus probandi* that the time of credit had expired was on the plaintiffs. The trial Judge had treated the payment of the bank charges and interest as in the nature of a condition which the defendant must comply with before he was entitled to the credit, but this was held to be erroneous.

In *Robson vs. Wride*, 13 Grant's Ch., 419, defendant entered into a contract for the purchase of property, the price being paid by instalments, and, there being a mortgage not yet due, the vendor was to give the vendee a bond of indemnity in respect thereof. A decree was made for specific performance at the suit of the vendor on the undertaking of the plaintiff recited in the decree to procure a release or discharge of the mortgage, and the overdue instalments were ordered to be paid into the bank, subject to the further order of the Court. It was held that the performance of this undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out.

In *Tanner vs. D'Ercado*, 3 U. C. Q. B., 154, it was held that where payment is to be a condition precedent or a concurrent act and is to be made in a certain manner, the plaintiff must aver a readiness to pay in the precise manner stipulated. The case was on a demurrer, and the language of the Court is: "Instead of alleging that he was ready at all times to perform the agreement on his part, he should have averred expressly that he was ready to pay for the timber in the manner he undertook to do. There does not seem to be much value in the distinction, but the case of *Kemble vs. Miles*, 1 M. and G., 757, and many other authorities require such an averment, and the objection is taken here on special demurrer." (1845.)

Concurrent Conditions and Mutual Conditions Precedent.

In *Arenberg vs. Wagner*, 33 N. S. R., 396, by an agreement entered into between plaintiff and defendant for the sale of land, it was provided that if the purchase money was paid by instalments the deed was to be given when, and not before the last instalment was paid. If defendant exercised his option and paid the whole purchase money at any time within four years, then the deed was to be given when the money was paid. It was held that the obligations were mutual and dependent, and that the acts were to be performed concurrently.

In *Sutherland et al. vs. Westhaver*, 39 N. S. R., 52, the plaintiff and defendant entered into an agreement in writing for the assignment by defendant to plaintiff of all his rights in a gold separator of which he was the inventor, upon receiving a certain number of shares in the company to be organized for the purpose of obtaining a patent for the separator and for other purposes in connection therewith. Prior to the incorporation of the company a patent obtained in Canada was assigned to plaintiff, and an action was brought claiming an injunction to prevent defendant from dealing as his own as he claimed to do with a patent obtained in the United States, and which was included in the terms of the agreement. It was held that the obligation to transfer the invention on one side and to allot the shares on the other were concurrent conditions, and that plaintiffs had no right to ask for a transfer of the invention until they were ready to deliver the shares; also that in the absence of indication of readiness or willingness on the part of plaintiffs to perform their part of the agreement they were not in a position to come into a court of equity and ask for an injunction against defendant to restrain him from selling the American patent or for a declaration as to their interest in it.

Condition as to Certificate of Engineer, Architect, Inspector, Etc.

In *The Queen vs. McGreevy*, 18 S. C. R., 371, the respondent filed a petition of right for actual work on a section of the Intercolonial Railway without having obtained a final certificate from the chief engineer, Fleming. The latter having resigned.

another engineer was appointed, who investigated respondent's claim and reported in his favor of \$120,371. This report was never approved by the commissioners nor by the Minister of Railways and Canals.

It was held that the report in question could not be construed to be a certificate of the chief engineer, and no legal claim could be founded thereon; also, per Ritchie, C.J., that the contractor was not entitled to be paid anything until the final certificate of the engineer was approved of by the commissioners or Minister of Railways and Canals; while Patterson, J., held that, although Shanley was duly appointed engineer and his report might be held to be the final and closing certificate, yet, as it was provided by a clause of the contract that any allowance for increased work was to be decided by the commissioners and not by the engineer, suppliant was not entitled to recover on Shanley's certificate. Strong, Patterson and Tascherenn, J.J., held that the office of commissioners having been abolished and transferred generally to the Minister of Railways, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded him by the final certificate of the chief engineer.

In *Murray vs. The Queen*, 26 S. C. R., 203, a contract with the Crown for building locks and other works on a government canal provided for monthly payments up to ninety per cent. of the value of the work done to be made on the certificate of the engineer approved by the Minister of Railways, the certificate so approved to be a condition precedent and the engineer to be the sole judge of work and materials, and his decision on all questions with regard thereto or as to the meaning and intention of the contract to be final. He was to be at liberty to make changes or alterations in the work which he should deem expedient. It was held that, though the value of the work certified to by the monthly certificate was only approximate and subject to revision on completion of the whole, yet, where the engineer in charge had changed the character of a particular class of work and, when completed, had classified it and fixed the value, his decision was final, and could not be reopened and revised by a succeeding engineer. It was also held that the contractors could proceed by action if payment on a monthly certificate was withheld and were not obliged to await the final completion of the work before suing.

In *Goodwin vs. The Queen*, 28 S. C. R., 273, the foregoing case was distinguished. In this case the eighth and twenty-fifth clauses of the appellants' contract for constructing certain public works were as follows:

8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material or as to the meaning or intention of the contract and the plans, specifications and drawings shall be final, and no works or extra or additional works or charges shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same unless the same shall have been executed to the satisfaction of the engineer as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor." (But before the contract was signed by the parties the words "as to the meaning or intention of this contract and the plans, specifications and drawings" were struck out.)

25. Cash payments to about ninety per cent. value of the work done, approximately, made up from returns of progress measurements and computed at the prices agreed upon, or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for or on account of which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work, computed as above mentioned, and upon approval of such certificate by the minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof.

A difference of opinion arose between the contractor and the engineer as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water-tight" embankment, under the provisions of the contract and specifications relating to the work, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progress estimate for the amount thus in dispute in the usual form, but added, after his signature the

following words: "Certified as regards item 5" (the item in dispute), "in accordance with a letter of the Deputy Minister of Justice, etc." The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor.

It was held that, under the circumstances of the case, the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract, that the decision of the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon the dispute under the said eighth section, and did not preclude him from subsequently granting a valid certificate to enable the contractor to receive payment of his claim, and that the certificate given in this case, whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract.

In *Thompson vs. Matheson*, 30 S. C. R., 357, a contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained this provision: "the inspection of this lumber to be made after the same is landed here (at Windsor) by a competent inspector, to be agreed upon between buyer and seller, and his inspection to be final." It was held that it was not essential for the parties to agree upon an inspector before the inspection was begun, and a party chosen by the buyer having inspected the lumber and before his work was completed, the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the party.

In *The Queen vs. Cimon*, 23 S. C. R., 62, a contract between Her Majesty and the respondent for the construction of departmental buildings at Quebec contained the usual clause that the balance of the contract price was not payable until the final certificate by the engineer in charge was given. There was a clause providing for the final decision by the Commissioner of Public Works in matters in dispute, on taking over or settling for public work. The commissioner, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a

balance of \$31.36 was due upon the contract price and \$42.84 on extras. The suppliants by their petition of right claimed \$70,000 due on extras. It was held that the suppliants were bound by the final certificate of the engineer given under the terms of the contract.

In *Courtney vs. The Provincial Exhibition*, 11 N. S. 71, Monaghan and Sutherland contracted with the defendant for the construction of a half-mile track on the Exhibition Grounds at Halifax. Under the terms of the contract, which certain plans and specifications were made a part, the track was to be located as nearly as possible on the lines shewn on the plan and the exact location was to be staked out by the engineer or his assistant. It was held that the word location referred only to the horizontal location of the track and had no reference to the grading or sub-grade.

It was required by the specification that the track should be finished to the required grades in every particular and that the decision of the engineer on any matter connected with the grading or lines should be final, also that no deviation should be allowed from the specifications and plans unless directed by the engineer in writing. It was held that the construction of the track a foot lower than as shewn in the plan was a deviation and that the placing of stakes by the engineer or his assistant, assuming it to have been done, was not equivalent to written instructions making a change in the terms of the contract.

It was further held that the height and width of the track, grades and so on being fixed by the plans and the specifications and the only duty of the engineer being to see that the contractors built accordingly, the finding of the jury that the contractors were misled by stakes placed by the engineer or his assistant was irrelevant; further, that, the engineer being the sole judge as to whether the contract was completed to his satisfaction or not, a finding of the jury that it was practically completed was irrelevant and must be set aside.

It was also held that it was not an acceptance of the work for the defendants to take possession under a provision of the contract enabling them to do so in the event of the contract not being completed within the time specified.

In *Nelson vs. City of Toronto*, 25 S. C. R., 579, a contract for construction of a public work contained a clause providing

that in case the works were not carried on with such expedition, materials and workmanship as the architect or clerk of works might deem proper, the architect should be at liberty to give the contractors ten days' notice in writing to supply such additional force or materials as in his opinion was necessary, and, on failure to supply the same, it should be lawful for the architect to dismiss the contractors and employ other persons to finish the work. The contract also provided that the general conditions were made a part of the contract except so far as inconsistent therewith, in which case the terms of this contract shall govern. The first clause in the general conditions was to the effect that in case the works, for want of sufficient or proper workmen or materials, were not proceeding with all the necessary despatch, the architect might give ten days' notice to do what was necessary and upon failure to do so the architect should have the power at his discretion, with the consent in writing of the Court House Committee or Commission, as the case might be, without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractors.

It was held that this last clause was inconsistent with the clause first recited which must, therefore, govern, and the architect had power to dismiss the contractor without the consent in writing of the committee.

In *McCarron vs. McGreery*, 13 S. C. R., 378, the appellant entered into a contract with the respondent, who was a contractor, for the construction of a railway between Montreal and Quebec, to perform work of construction on a portion of the road, and agreed to keep open at certain times and hours, at his own cost and expense, the main line for the passage of traffic or express trains run by the respondent, without any charge to the latter; but there was a proviso that "any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby, shall be paid by the contractor, on a certificate to that effect signed by the superintendent of the contractor." In an action for damages caused by the interruption of the work by the passing of respondent's trains it was held that it was the duty of the plaintiff to get the superintendent's certificate within a reasonable time, and, not having taken any steps to get it until six years after the superintendent had left defendant's employ-

ment, failure to produce such certificate was sufficient ground for dismissing the appellant's action.

In *Guilbault vs. McGreevy*, 18 S. C. R., 609, a sub-contract for the construction of part of a railway provided that the said work should in all particulars be made to conform to the plans, etc., of the engineer, and the contractor bound himself that upon the certificates of the engineer that the work contemplated had been fully completed the party of the first part would pay for the materials and workmanship. It was further agreed that estimates should be made during the progress of the work, and that payments should be made upon the estimate and certificate of the engineer, on or before the twentieth of every month, ten per cent. being deducted until the final completion of the work, when all sums due should be fully paid. On completion of the contract the engineer made a final estimate fixing the value of the work done by the sub-contractor at an amount stated. It was held that the estimate as given by the engineer was substantially such a certificate as the contract contemplated, but that, if not, plaintiff must fail, as the final certificate of the engineer was a condition precedent to the right to recover.

In *Peters vs. The Quebec Harbour Commissioners*, 19 S. C. R., 685, in a bulk sum contract for various works and materials in connection with the Quebec harbour works the contractors were allowed by the final certificate of the engineers a balance of \$52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th of October, 1882, but the certificate was only granted on the 4th of February, 1886. In an action by the contractors for \$181,241 for alleged balance of contract price and extra work it was held that the certificate of the engineers was binding on the parties, and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specification and the quantities actually done, and, therefore, the certificate in this case should be corrected in that respect.

In *Brown vs. Allen*, *Countée's Dig.*, 308, the action was for breach of contract to supply the Windsor Hotel with meat, "the quantity and quality of the foregoing supplies to be satisfactory to the steward of the hotel, * * * and if at any time the hotel steward is obliged to procure supplies elsewhere through any cause or negligence of ours, any excess of cost then paid over the prices of the contract" to be chargeable against the deposit made under the contract. The steward was dissatisfied, and repeatedly notified plaintiff of his dissatisfaction, but did not immediately stop receiving the meat, but, the supplies continuing unsatisfactory, he so reported, and the contract was cancelled according to its terms. It was held that the parties having agreed to make the steward the sole judge and abide by his decision the plaintiff was bound by it.

In *McDonald vs. Oliver*, 3 O. R., 310, a contractor for government works entered into a contract for part of the same with a sub-contractor, whom they covenanted to pay at the rate mentioned therein per mile. The contract was expressed to be subject to the condition that the payments should be made to the sub-contractor within twenty days after the estimate of the engineer in charge to be by him put in from time to time to the Minister of Public Works and service of a copy of such estimate on the contractor. It was held that this provision alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof a condition precedent to the sub-contractor's right to recover for work done under his contract.

In the same case, by a third contract, a firm or parties contracted both with the sub-contractor and the contractor to make advances to the sub-contractor and to become security for his due completion of the work: it being agreed therein that, upon completion of the contract, the contractors should pay the said party the amount due them by the sub-contractor for supplies before paying the sub-contractor anything. It was held that there must be an amount owing by the contractors to the sub-contractor for which the latter could recover against them before the contractors were liable under the contract to pay such parties anything, and that the intention was only to enable the latter to intercept payment by the contractors to the sub-contractor of money due by them to the sub-contractor.

Referring to the first point, Ferguson, J., said: "I am of the opinion that the condition precedent stated in the fifth condition of the contract between the plaintiff and the defendant Oliver Davidson & Co., applies to the whole of the work under the contract to be subject, which says that 'payment of the prices cannot recover for any of the work under his contract without complying with the provisions of what is called the first of the conditions or stipulations to which the parties declare the contract to be subject, which says that 'payment of the prices hereinbefore mentioned for the construction of the said works at the rate aforesaid upon the basis of this contract, shall be made to the plaintiff within twenty days after the estimate of the engineer, &c., and a copy thereof served upon the defendants Oliver Davidson & Co.' I think it clear beyond reasonable doubt that the obtaining of the estimate of the engineer or officer and service of a copy of it on those defendants is made a condition precedent to the plaintiff's right to recover for work done under the contract."

In *Coatsworth vs. City of Toronto*, 10 F. C. C. P., 73, upon a contract extending over several years for work and labour to be paid for by instalments, the defendant admitted part performance of the contract, and pleaded general non-performance to the satisfaction of their officers named in the contract, and that thorough and complete performance would be conditions precedent to payment. It was held that by payment in part they were not barred from claiming full performance to the satisfaction of their engineer, etc., as a condition precedent, the contract being in consideration of performance and not in consideration of the covenant to perform.

In *Hamilton vs. Miles*, 23 F. C. C. P., 293, a contract to put up hoists that should be capable of raising 2,000 pounds without risk was held to be a contract requiring the hoists to be capable of working in the ordinary way with a weight of two thousand pounds. On appeal, however, a question was raised as to the power which the contractor was entitled to call for in doing the work, and Strong, J., held that the words must be read in connection with the words "to the satisfaction of defendant's architect," which latter meant that the judgment of the architect was to take the place of any specification as to power. Patterson, J., thought the satisfaction of the architect was to be

with the performance of the contract as properly construed, and such satisfaction was a question of fact, not necessarily to be shewn by an express declaration or certificate of the architect.

Condition precedent to Claims for Extras.

In *Berlinquet vs. The Queen*, 13 S. C. R., 26, the suppliants agreed to complete two sections of the Intercolonial Railway for a specified sum in full compensation for all the works embraced in or contemplated by the contract, and it was provided that the contractors should not upon any pretext whatever be entitled by reason of any change, alteration or addition made to the work or in the plans or specifications or by reason of the exercise of any powers vested in the governor-in-council, or by the act, or in the commissioners or engineers by the contract or by law to claim or demand any further sum for extra work or as damages or otherwise, the contractors expressly waiving and abandoning any such claims, except as provided in the fourth section.

It was held, affirming the judgment of the Exchequer Court, that the contractors had waived all claims for the payment of extra work and could not claim for any work in the absence of a certificate. It was also held that, the work not having been completed, the commissioners were entitled under a term in the contract to take the work out of the hands of the contractors and charge them with the extra cost of completing the same, deducting, however, the value of the plant and materials taken over from the contractors.

See also *Queen vs. Starrs*, 17 S. C. R. 118, as to necessity for certificate as condition precedent.

In *Jones vs. The Queen*, 7 S. C. R., 570, the plaintiffs contracted for the construction of a section of the Intercolonial Railway for a bulk sum. During the progress of the work changes were made. The contractors claimed for extra work beyond what was included in their contract, and the commissioners, on a report from the chief engineer, recommended an amount named to be paid upon the full discharge of all claims of every kind under the contract. The suppliants refused to accept this amount, which had been tendered, and their petition of right claimed \$124,000 from the Crown for extras, alleging

that by orders of the chief engineer additional work and alterations were required, that these orders were carried out only on the understanding that such additional work and alterations should be paid for, and, further, that they were put to large expense and much extra work in consequence of misrepresentation of plans and bills of works exhibited at time of letting. On the profile plan it was stated that the best information in possession of the chief engineer as to probable quantities of the several kinds of work would be found in the schedules, but contractors must understand that these quantities were not guaranteed; and a similar statement was contained in the bill of works. The contract provided that the price at which the work was contracted for should be held to be full compensation for all works embraced in or contemplated by the contract, etc., and that the contractors should not, upon any pretext whatever, be entitled by reason of any change, alteration or addition made by reason of the exercise of any of the powers vested in the Governor-in-Council by the Act respecting the construction of the Intercolonial Railway, or in the commissioners or engineer, by contract or by law to claim or demand any further or additional sum for extra work or as damages or otherwise; the contractors thereby expressly waiving and abandoning any such claim except as provided in the fourth section of the contract relating to alterations in the grade or line of location; and the contract was made subject to the provisions of the Railway Act so far as they might be applicable. That Act provides that no money shall be paid to any contractor until the chief engineer shall have certified that the work has been duly executed nor until such certificate shall have been approved by the commissioners. No certificate was given by the chief engineer of the execution of this work.

It was held by the Exchequer Court (Ritchie, J.) that, as the contract required that any work done on the road must be certified to by the chief engineer, the contractors were not entitled to be paid anything until the contract was so certified and the certificate approved of by the commissioners; that if the work in question was extra work the contractors had by the contract waived all claim for payment for any such work, and that if such extra work was of a character so peculiar and unexpected as to be considered *dehors* of the contract, then there was no such contract with the commissioners as would give

the contractors any legal claim against the Crown, the commissioners alone being able to bind the Crown, and they only as authorized by statute; that there was no warranty, express or implied, as to quantity, nor any misrepresentations respecting them; but, even if there had been, a petition of right would not lie against the Crown for *tort* or for a claim based on an alleged fraud imputing to the Crown fraudulent misconduct of its servants.

In *Royal Electric Company vs. City of Three Rivers*, 23 S. C. R., 289, the plaintiff having sued the defendant for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the Court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that, owing to certain defects, the contract had not been satisfactorily completed. It was held, affirming the judgments of the courts below, that it being found that appellants had not fulfilled their contracts within the time specified they could not recover. It was also held that when a contract provides that no payment shall be due until the work has been satisfactorily completed a claim for extras made under the contract will not be eligible prior to the completion of the main contract.

It was also questioned in the above case whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration.

Condition for Penalty to be Deducted from Last Payment Held a Covenant.

In *Gaskin vs. Wales*, 9 L. C. C. P., 314, defendant agreed to do certain excavations and plasterer's work on a building to be completed at a specified time, with a penalty of four pounds per week as a rental for the premises to be deducted from the last payment on the contract. It was held that this condition to pay four pounds a week, although not incorporated in the specification, formed a covenant on the part of the defendant to pay that sum for so long as his contract should remain unperformed, and that an action would lie at the suit of the plaintiff to recover it, notwithstanding the provision that it was to be deducted from the last payment.

CHAPTER III.

IMPOSSIBILITY OF PERFORMANCE.

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THE promise expressed in the terms of the agreement may be impossible of performance, and questions then arise as to the nature and effect of the impossibility. The impossibility may be absolute, that is, inherent in the nature of the matter promised; or it may exist only relatively to the ability and circumstances of the promiser. The performance may be impossible as a matter of fact; or it may be impossible only by the rules of law. The impossibility may exist at the time of contracting, either with or without the knowledge of the parties; or it may arise subsequently to the making of the contract, and in the latter case it may be caused by events beyond the control of the parties, or it may be caused by some act of the promiser or of the promisee. The impossibility may affect the promise, or the consideration for the promise. These variations in the nature and incidence of the impossibility produce corresponding modifications in its effect, which have been the subject of judicial consideration.

Impossibility
of perform-
ance.

PART III

Impossibility
in fact.

A promise is impossible in fact which is contrary to the law of nature; and a practical impossibility, or impossibility relative to existing circumstances, is equivalent for most purposes to impossibility in fact (a). "In matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost"; thus if a ship sustains such extensive damage that when repaired it will not be worth the sum spent upon it, "the repairs are, practically speaking, impossible, and it is a case of total loss" (b). If a promise is reasonably certain and practicable, it is immaterial whether it is reasonable or not. "When a person enters into a contract, he is bound to perform it, whether reasonable or not. An obligation imposed by law is necessarily both reasonable and practicable; but a person may undertake by agreement to do any particular act, and, if it is not reasonable, it is his own fault

Uncertainty
of terms.

entering into such a contract" (c).—But a promise must be reasonably certain; and if the parties have expressed the matter of their agreement in terms so uncertain or imperfect that it is impossible to ascertain any definite meaning, the agreement is necessarily void (d). In considering the sufficiency of a description the maxim "*id certum est quod certum reddi potest*" may be applied, and vague expressions be made sufficiently certain (e).

Impossibility
relative to
promiser.

—Impossibility relative to the ability of the promiser is immaterial to the validity of a contract; as in the case of a person contracting debts which he is or becomes unable to pay for want of money (f); or contracting for the happening of events over which he has no control, as a contract to insure his life, and becoming unable to insure owing to failing health (g).—So a person may promise for the acts of a third party, and he will be liable in damages, though he cannot compel the performance; as in the case of a contract to procure a third party to execute a release (h).

(a) Holt, C. J., *Thornburn v. Whitacre* 1706, 2 Ld. Raym. 1165.

(b) Maule, J., *Hass v. Smith* (1850), 19 L. J. C. P. 225; 9 C. B. 103.

(c) Rolfe, B., *Fyfe v. Wakefield* (1810), 9 L. J. Ex. 271; 6 M. & W. 156; *Schiltz v. Derry* 1855, 21 L. J. Q. B. 193; 4 E. & B. 873; *Taylor v. Caldwell* (1863), 32 L. J. Q. B. 164; 3 B. & S. 826.

(d) *Broome v. Jeffries* (1760), 2 Vern. 415; *Guthing v. Lyon* 1831, 9 L. J. O. S. K. B. 181; 2 B. & Ad. 232; *Peaves v. Watts* (1875), 20 L. J. Eq. 492;

L. R. 20 Eq. 492; *Douglas v. Baynes* 1908, 78 L. J. P. C. 13; 1908 A. C. 477.

(e) *Coles v. Hulan* (1828), 7 L. J. O. S. K. B. 29; 8 B. & C. 568; *Shortrede v. Chalk* 1831, 3 L. J. K. B. 125; 1 A. & E. 57; *Owen v. Thomas* (1834), 3 L. J. C. 205; 3 M. & K. 353.

(f) Holt, C. J., *Thornburn v. Whitacre* 1706, 2 Ld. Raym. 1165.

(g) *Re Arthur's Estate* 1880, 49 L. J. C. 556; 14 Ch. D. 603.

(h) *Doughty v. Neal* (1669), 1 Wms. Saund. 236.

The vendor of a lease which contains a covenant against assignment impliedly undertakes to obtain the consent of the landlord to the sale (*i*).

A promise may be impossible in law, in that it may import to have or produce a legal effect or operation which the law does not admit of. Impossibility of this kind differs from illegality in that it relates only to the legal effect which the act purports to have, and not to the question whether an act possible in itself is allowed or forbidden by law (*k*).

Impossibility
in law.

Impossibility of performance caused "by the act of God" is sometimes treated as a special kind of impossibility affecting the obligation of contracts (*l*). It is a compendious phrase including such accidents as death, tempest, and the like, which though referable to natural causes, are beyond the control and calculation of the parties; and it is commonly used for the purpose of excepting such accidents from the contract. "The act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract" (*m*). And it is a rule of law that in all cases of duty or liability imposed by common law there is an implied exception of "the act of God;" but that contracts are to be construed according to their terms, without any such implied exception (*n*).—The events excepted as being acts of God include all natural accidents, which it is practically impossible to foresee or guard against. "No doubt a shower is the act of God as much as a storm; so is an earthquake in this country; yet everyone understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called an act of God, or *vis major*. No doubt not the act of God or a *vis major* in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so" (*o*). The question is always one of degree, and according to the circumstances ice or a

Impossibility
by act of
God.

Events
excepted.

(*i*). *Mason v. Carter* (1816), 7 Taunt. 9.

(*k*). See post, pp. 492-508.

(*l*). *Nugent v. Smith* 1876, 45 L. J. C. P. 697; 1 C. P. D. 423.

(*m*). *Per cur. Baily v. De Crespigny* (1868), 38 L. J. Q. B. 102; L. R. 4 Q. B. 185.

(*n*). *Per cur. Nichols v. Marsland* (1876), 16 L. J. Ex. 178; 2 Ex. D. 4; *Re Athol's Estate* (1880), 49 L. J. C. 556; 14 Ch. D. 603.

(*o*). *Per cur. Nichols v. Marsland* (1875), 44 L. J. Ex. 131; L. R. 10 Ex. 258.

PART III. frost (*p*), a fall of snow (*q*), a rainfall (*r*), or a high tide (*s*), may or may not excuse the non-performance of the promise. A fog is an ordinary peril of navigation and not such an exceptional event (*t*). And fire is also considered as an ordinary preventible accident (*u*).

Impossibility at time of contracting—known to the parties.

Legal impossibility.

Where a promise is impossible in fact at the time of making the agreement, the construction depends, in great measure, upon whether such impossibility is then known or not known to the parties. Where the impossibility is known to the parties at the time of making the agreement, it seems obvious that there can be no intention of performing it on the one side, and no expectation of performance on the other, and therefore the essentials of a valid promise are wanting. The impossible act cannot reasonably be supposed to be the subject of a promise or of the consideration for a promise (*x*). A covenant in a charter-party executed on the 15th March, that the ship should sail on or before the 12th of February, was held to be wholly nugatory, and therefore no part of the contract (*y*). Upon this principle, where the promise is impossible in law, both parties being presumed to know the law, there is no valid contract; as a covenant by a person to pay a sum of money to himself and others, which was held void by reason of the impossibility of a person paying money to himself (*z*); an agreement for opening a theatre at a place where by law a licence could not be obtained (*a*); or a contract which is *ultra vires* a railway company (*b*). An agreement by the assignees of a bankrupt, as the consideration for a promise to pay certain debts, that the bankrupt should not be examined concerning those debts, was held void because it was beyond their legal capacity to perform (*c*).

(*p*) *Blyth v. Birmingham Waterworks* (1856), 25 L. J. Ex. 212; 11 Ex. 781; *Grant v. Goeppels* (1881, 53 L. J. Q. B. 462; 9 Ap. Ca. 170; S.S. Knutsford, Ltd. v. Tillmanns 1908, 77 L. J. K. B. 977; 1908, A. C. 406.

(*q*) *Briddon v. G. N. Ry.* 1858, 28 L. J. Ex. 51; *Frearick v. Schmidt* 1868, 37 L. J. C. P. 78; L. R. 3 C. P. 313.

(*r*) *Nichols v. Marsland* (1876), 46 L. J. Ex. 174; 2 Ex. D. 1.

(*s*) *Nitrate-Phosphate Co. v. London and St. Kath. Docks* 1878, 9 Ch. D. 503; *Fidling Cammrs. v. Ry.* (1896, 56 L. J. M. C. 1; 11 Ap. Ca. 449.

(*t*) *Liver Alkali Co. v. Johnson* (1874), 43 L. J. Ex. 216; L. R. 9 Ex. 338.

(*u*) *Forward v. Pitard* (1785), 1 T. R. 27; *Faughan v. Mulvane* (1837, 6 L. J. C. P. 92; 3 Bing. N. C. 498.

(*x*) See Brett, J., *Chifford v. Watts* (1870), 49 L. J. C. P. 36; L. R. 5 C. P. 588.

(*y*) *Hall v. Cazenove* (1801, 4 East, 477.

(*z*) *Faulkner v. Lowe* (1848, 2 Ex. 595.

(*a*) *Everings v. Ashurst* 1837, 6 L. J. C. 161; 2 M. & Cr. 53; *Lory v. Yates* (1838, 7 L. J. Q. B. 138; 8 A. & E. 129.

(*b*) *Chubb v. S. E. & C. Ry.* 1909, 75 L. J. C. 189; (1906 2 Ch. 12.

(*c*) *Nerat v. Wallace* (1789, 3 T. R. 17.

In the case of a bond, a condition impossible in law is void; and if the bond is given for an illegal purpose, the bond also is void by reason of the participation of the obligee in the illegal transaction; as a bond conditioned for the assignment of a patent to a company, contrary to a provision of the patent restricting such assignment (*d*).

The parties may come to an agreement in ignorance that the performance is then impossible; either under a common mistake of fact and with the intention of contracting only upon the supposition of the performance being possible; or knowing the circumstances, with the intention of contracting for the performance in all events, whether possible or not. In such cases the question is whether upon the construction of the agreement, as applied to the circumstances, it has been made impliedly conditional upon the possibility of performance, or whether there is an absolute unconditional contract in the terms expressed (*e*). Thus upon the sale of a certain cargo of goods then supposed to be on the voyage, but which unknown to both parties had been then sold by reason of sea damage, it was held that the contract imported the condition that the cargo was then in existence, and under the circumstances was void (*f*). But upon a contract for the sale and delivery of goods on the arrival of a certain ship, the seller was held liable for non-delivery, though no such goods were on board; the only condition expressed being the arrival of the ship (*g*). And where the vendor of a ship covenanted that he had then power to sell the ship, it was held that if the ship, however damaged, was then in existence, there was no breach (*h*). So the sale of a life annuity is impliedly conditional upon the annuitant being alive at the time of the sale (*i*); and the renewal and the sale of a policy of insurance upon life is impliedly conditional upon the continued existence of the life insured (*k*). But a covenant in an assignment of a

Impossibility at time of contracting not known to the parties.

Implied condition of possibility

(*d*) Co. Lit. 206 b.; *Invergor v. Fellows* (1830), 1 Cl. & F. 39.

(*e*) *Bute (Marg.) v. Thompson* (1815), 11 L. J. Ex. 95; 13 M. & W. 487; *Ciffard v. Watts* (1870), 10 L. J. C. P. 36; L. R. 5 C. P. 577; *Harrison v. Manaster* 1891, 61 L. J. Q. B. 102; 1891 2 Q. B. 680.

(*f*) Sale of Goods Act, 1892, s. 6; *Cantuar v. Hastie* (1856), 25 L. J. Ex. 253; 5 Ll. L. C. 673.

(*g*) *Hale v. Rowson* (1858), 27 L. J. C. P. 189; 4 C. B. N. S. 85. See ante,

p. 472.

(*h*) *Bute v. Gibson* (1838), 7 L. J. Ex. 121; 3 M. & W. 390. See Sale of Goods Act, 1892, s. 11; *Jones v. Jost* (1868), 37 L. J. Q. B. 89; L. R. 3 Q. B. 197.

(*i*) *Strickland v. Turner* (1852), 22 L. J. Ex. 115; 7 Ex. 208.

(*k*) *Pritchard v. Merchants' Life Assce.* (1858), 27 L. J. C. P. 169; 3 C. B. N. S. 622; *Stuart v. Freeman* (1902), 72 L. J. K. B. 1; (1903) 1 K. B. 47; *Scott v. Coulson* 1903, 72 L. J. C. 600; (1903) 2 Ch. 219.

PART III. lease for lives, that the lease is a valid lease for the lives and the survivor, was held to import only that the lease so described was still subsisting, thereby excluding any implied covenant or condition that all the lives were then in existence (*l*).—In a lease or agreement for a lease of a mine it is a question in each case, whether the parties have contracted with respect to the existence of minerals capable of being worked, or whether the contract has been entered into without any implied condition as to the possibility of working the minerals (*m*). So a contract for the sale and delivery of a certain quantity out of a specific crop of potatoes was held to be impliedly conditional upon the crop producing that quantity (*n*).—In the case of a charter-party providing that the ship is to proceed to a named port, the ship-owner is bound to make himself acquainted with the conditions of that port as to depth of water (*o*).

Impossibility known to promisor only.

Where the impossibility is known to the promiser, but not known to the promisee, he must be taken to promise absolutely; as where a married man promised to marry a woman, who was then unaware of his being married (*p*). Where the charterer of a ship undertook to load "with the usual despatch of the port," which he knew he was then incapable of doing, he was held to be absolutely bound by his contract and responsible for delay (*q*). If the impossibility of performance was known to the promisee, though not known to the promiser, the promise could not be accepted by the promisee with the expectation that it would be carried out and therefore would not be binding (*r*).

Known to promisee only.

Impossibility subsequent to contracting.

Where the performance of the promise becomes impossible subsequently to the making of the contract, the question also depends upon the construction of the agreement with reference to the circumstances; and the general rule is that where a party has not qualified his obligation, be it expressed or implied, to do anything,

(*l*) *Cotes v. Collins* (1871), 40 L. J. Q. B. 157; L. R. 7 Q. B. 144.

(*m*) *Bate (Marq.) v. Thompson* (1845), 11 L. J. Ex. 95; 13 M. & W. 487; *Clifford v. Watts* (1870), 40 L. J. C. P. 36; L. R. 5 C. P. 577; *Jeffreys v. Fairs* (1876), 46 L. J. C. 113; 4 Ch. D. 448.

(*n*) *Howell v. Coupland* (1876), 43 L. J. Q. B. 201; 1 Q. B. D. 258.

(*o*) *Carlton S.S. Co. v. Castle Mail Packet* (1898), 67 L. J. Q. B. 795; (1898) A. C.

485. See *Barque Quilpe v. Brown* (1903), 73 L. J. K. B. 596; 1904 2 K. B. 264.

(*p*) *Wild v. Harris* (1849), 18 L. J. C. P. 297; 7 C. B. 999; *Milward v. Littlewood* (1850), 20 L. J. Ex. 2; 5 Ex. 775.

(*q*) *Ashcroft v. Cron Colliery Co.* (1874), 43 L. J. Q. B. 194; L. R. 9 Q. B. 540.

(*r*) *Scott v. Coulson* (1903), 72 L. J. C. 609; (1903) 2 Ch. 249. See *ante*, p. 225.

he must make compensation in damages for the breach, although the performance was rendered impracticable by some unforeseen cause over which he had no control (s). "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, there the law will excuse him"; but "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract" (t). A statute imposing a duty is construed in this respect like a contract, according to its terms in application to the subject (u). Conversely where performance according to the terms of a written contract becomes in the event impracticable, the promisee cannot insist upon any other performance without the assent of the other party to a new agreement (x).

CHAP. III.

The liability imposed by common law upon a tenant for waste of the demised tenement was limited to acts of voluntary waste (y). But if the tenant covenants to repair, or to keep and leave in repair the demised premises, he is bound to reinstate them although they have been destroyed by accidental circumstances (z). And the same obligation may be annexed to an estate, by an expressed condition that the tenant shall keep the premises in tenantable repair (a). It is not unusual in covenants to repair to make express exception of casualties by fire, tempest, and the like (b).—The liability to pay rent is not suspended or excused by the accidental destruction of the demised premises, though neither tenant nor landlord is bound to restore them (c). Nor in such case has the tenant any equitable claim to relief against the liability for the rent (d); nor any equitable claim to have a sum

Covenants to repair.

Covenant to pay rent.

(s) *Ford v. Cotesworth* (1870), 39 L. J. Q. B. 188; L. R. 5 Q. B. 514; *Ashmore v. Cor* (1898), 68 L. J. Q. B. 72; (1899) 1 Q. B. 436. See *Mellers v. Devonshire (Duke)* (1852), 22 L. J. C. 310; 16 Beav. 119.

(t) *Willes J., Clifford v. Watts* (1870), 40 L. J. C. P. 36; L. R. 5 C. P. 586.

(u) *Rice v. Weir Commrs. v. Adamson* 1877, 47 L. J. Q. B. 193; 2 Ap. Ca. 713; *Re Peckham, Dulwich & Crystal Pal. Tram. Bill* (1910), 79 L. J. K. B. 451; 1910) 2 Ch. 1.

(x) *Darby (Earl) v. L. C. & D. Ry.* (1867), 36 L. J. C. 401; L. R. 2 H. L. 13.

(y) *Shrewsbury's (Countess) case* (1600), 5 Co. 13 b; *Re Cartwright* (1889), 58 L. J. C. 590; 41 Ch. D. 532.

(z) *Walton v. Waterhouse* (1672), 2 Wms. Saund. 826; *Bullock v. Dammitt* (1796), 6 T. R. 650; *Pym v. Blackburn* (1796), 3 Ves. 31.

(a) *Re Skingley* (1851), 20 L. J. C. 112; 3 Mac. & G. 221.

(b) *Per cur. Bullock v. Dammitt* (1796), 6 T. R. 650; *Brewer v. Knell* (1821), 2 Br. & H. 395; *Manchester Bonded Warehouses Co. v. Carr* (1880), 49 L. J. C. P. 809; 5 C. P. D. 507.

(c) *Baker v. Holtzapffel* (1811), 4 Taunt. 15; *Ison v. Gorton* (1859), 8 L. J. C. P. 272; 5 Bing. N. C. 501; *Marshall v. Schofield* (1882), 52 L. J. Q. B. 58.

(d) *Holtzapffel v. Baker* (1811), 18 Ves. 115; *Leeds v. Chetham* (1827), 5 L. J. O. S. C. 105; 1 Sim. 146.

PART III.

of money insured by the landlord applied in reinstating the demised premises (e). Hence in leases provision is sometimes made for suspension of the rent in the event of destruction of the demised premises by such casualties until the premises are restored; and the tenant is then liable only for an apportionment of the rent to the time of the fire or other casualty (f). An express exception of casualties in a covenant to repair is not impliedly extended to a covenant to pay rent in the same lease (g). And a covenant to repair is not impliedly limited in amount by a covenant of the tenant to insure to a certain amount (h). Upon a similar principle, where property had been demised by a lease which provided that the premises should be used as a beerhouse only, and the licence was subsequently extinguished, the lessee continued liable for the rent reserved (i).

Covenant to
build
becoming
impossible.

Upon the same principle a covenant to build a bridge and to keep it in repair for a certain time was held to bind the covenantor to rebuild the bridge when it was broken down by an extraordinary flood (k). So an insurance company which had elected to reinstate insured buildings which had been damaged by fire, were held bound to reinstate, though the buildings were taken down by the public authority as dangerous (l). Where a builder contracted to do certain works within a fixed time, including alterations which might be ordered under the contract, he was held liable for not completing within the time, although alterations ordered, without allowing an extension of time, rendered performance within the time impossible (m). But a contract to build a bridge according to a specification drawn up by the engineer was construed as impliedly conditional upon the supposed practicability of the specification, though without a warranty of it; consequently the contractor could not claim for work which failed because the specification was impracticable (n).

(e) *Leeds v. Cheetham* (1827), 5 L. J. O. S. C. 105; 1 Sim. 146; *Leff v. Dennis* (1838), 28 L. J. Q. B. 168; 1 E. & E. 474. See 14 Geo. 3, c. 78, s. 85; *Ex p. Garly* (1864), 34 L. J. B. 1; 4 De G. J. & S. 477; *Westminster Fire Office v. Glasgow Prov. Soc.* (1888), 13 Ap. Ca. 699.

(f) *Sauer v. Bilton* (1878), 47 L. J. C. 267; 7 Ch. D. 815; *Manchester Bonded Warehouse Co. v. Carr* (1880), 49 L. J. C. P. 809; 5 C. P. D. 507.

(g) *Holtzapffel v. Baker* (1811), 18 Ves. 115; *Manchester Bonded Warehouse Co. v.*

Carr 1880, 49 L. J. C. P. 809; 5 C. P. D. 507.

(h) *Digby v. Atkinson* (1815), 4 Camp. 275.

(i) *Grimsdick v. Secretan* (1909), 78 L. J. K. B. 1162; (1909) 2 K. B. 740.

(k) *Brecknock Nar. v. Pritchard* (1796), 6 T. R. 720.

(l) *Beauch v. Royal Insce.* (1859), 28 L. J. Q. B. 275; 1 E. & E. 853.

(m) *Jones v. St. John's Coll.* (1870), 40 L. J. Q. B. 80; L. R. 6 Q. B. 115.

(n) *Thorn v. London* (1876), 45 L. J. Ex. 487; 1 Ap. Ca. 120.

CHAP. III.

Charter-parties.

Upon the same principle under a charter-party in the ordinary form the shipowner is bound to have his ship in seaworthy condition at the appointed place and time for loading; and he is not excused by contrary winds or bad weather or any other such cause preventing him, unless expressly excepted in the charter-party (*o*). And where a ship is chartered with an option to the charterers to cancel the charter-party if the ship should not have arrived at a named port of loading by a named date; the shipowner cannot call upon the charterer to exercise his option to cancel before the arrival of the ship at the named port, although the date fixed for arrival has passed (*p*). The shipowner also undertakes to take his ship to the place appointed for unloading, and has no claim for delay, nor is demurrage chargeable, until the ship has reached the appointed place (*q*). But where a contract is made with respect to a particular ship, it is an implied condition that if at the time named for the performance of the contract, the ship shall, without default attributable to the shipowner, have ceased to exist as a ship capable of carrying the cargo, then that the contract shall be treated as at an end (*r*). The charterer undertakes to provide and load a cargo at the time and place appointed, the time being computed from the instant the ship is an "arrived ship" (*s*), and if prevented or delayed by an unforeseen cause is responsible to the shipowner in damages (*t*); as where prevented loading by the dock authorities or the quantity of shipping in the dock after due arrival of the vessel (*u*); or where no such cargo as stipulated is obtainable at the place (*x*). But where a berth became unexpectedly vacant in consequence of the non-arrival of the cargo of another ship, the charterer was held not to be liable for demurrage, upon the ground that he was not under any duty to have a

Providing and loading cargo.

(*o*) *Shubrick v. Salmon* (1765), 3 Barr. 1637; *Sharp v. Gibbs* (1857), 1 H. & N. 801; *Potter v. Burrell* (1896), 66 L. J. Q. B. 63; (1897) 1 Q. B. 97.

(*p*) *Mack Tug-boat Ship Co. v. Andrew Weir & Co.* (1910), 79 L. J. K. B. 858; (1910) 2 K. B. 844.

(*q*) *Dahl v. Nelson* (1883), 50 L. J. C. 411; 6 Ap. Ca. 38; *Alton v. Cultart* (1881), 52 L. J. Q. B. 86; 11 Q. B. D. 782; *Thurston & Co. v. Morel* (1891), 61 L. J. Q. B. 11; (1891) 2 Q. B. 647.

(*r*) *Nicholl v. Ashton* (1901), 70 L. J. K. B. 600; (1901) 2 K. B. 126.

(*s*) *Leunis S.S. Co. v. Rank* (1907), 77 L. J. K. B. 224; (1908) 1 K. B. 499.

(*t*) *Jours v. Adamson* (1875), 45 L. J. Ex. 61; 1 Ex. D. 60; *Potter v. Burrell* (1896), 66 L. J. Q. B. 63; (1897) 1 Q. B. 97; *Time Shipowning Co. v. Leach* (1900), 69 L. J. Q. B. 353; (1900) 2 Q. B. 12; *Arden S.S. Co. v. Andrew Weir & Co.* (1905), 74 L. J. P. C. 143; (1905) A. C. 501.

(*u*) *Aschcroft v. Crow Gill, Co.* (1874), 43 L. J. Q. B. 194; L. R. 9 Q. B. 540; *Davies v. McVeagh* (1879), 48 L. J. Ex. 686; 4 Ex. D. 265; *Pyman v. Dreyfus* (1889), 59 L. J. Q. B. 113; 24 Q. B. D. 152.

(*x*) *Hills v. Sughrue* (1846), 15 M. & W. 253.

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Unloading
and delivery
of cargo.

cargo ready for loading upon the bare chance that by some unforeseen event a berth might become available at an earlier date than would reasonably be expected (*y*). A charterer having undertaken to provide a full cargo of coals is not excused by a strike of the colliers making it impossible to procure a cargo (*z*); nor by a severe frost closing up the canal to the colliery (*a*). But where both the parties knew that the colliery was not in work during repairs, it was held that there was an implied exception of delay caused by the repairs (*b*). But this rule will yield to the intention of the parties, and in construing the obligation of the charterer, regard must be had to customs and rules of the loading port (*c*). Where the number of days within which the loading is to take place is not fixed, the charterer must have the cargo ready to put on board within a reasonable time, and where without any default on the part of the charterer the vessel had to leave the dock during the neap tides to avoid taking the ground, he was held not liable for the delay which occurred until the return of the spring tides (*d*).—So with the obligation of unloading and delivery of cargo, where a certain number of lay days is allowed for that purpose and the time occupied in excess of that number of days is to be paid for by a sum for demurrage, the charterer is taken to contract absolutely that the ship shall not be detained beyond the fixed number of days, calculated from the time when the ship becomes an “arrived ship” (*e*); and he becomes liable for damages if the ship is not discharged within the time, though the delay may be caused by an unforeseen event beyond his control, not being some act of the shipowner himself (*f*). If, however, a ship is ordered to proceed to a port under the terms of a charter-party which contains an exception of any delay occasioned by strikes, the charterer is not bound, upon a strike subsequently occurring, to change the port named for another (*g*). If there is no time expressly fixed for unloading, the contract imports only

(*y*) *Little v. Stevenson* (1895), 65 L. J. P. C. 69; (1896) A. C. 108.

(*z*) *Adams v. Royal Mail Co.* (1859), 28 L. J. C. P. 33; 5 C. B. N. S. 492.

(*a*) *Keiron v. Pearson* (1862), 31 L. J. Ex. 1; 7 H. & N. 386; *Grant v. Coverdale* (1881), 53 L. J. Q. B. 462; 9 Ap. Ca. 470.

(*b*) *Harris v. Dreesman* (1854), 23 L. J. Ex. 210.

(*c*) *Barque Quilpué, Ltd. v. Brown* (1904), 73 L. J. K. B. 596; (1904) 2 K. B. 264;

Jones, Ltd. v. Green & Co. (1904), 73 L. J. K. B. 601; (1904) 2 K. B. 275; *Hulthen v. Stewart & Co.* (1903), 72 L. J. K. B. 917; (1903) A. C. 389.

(*d*) *Carlton Co. v. Castle Mail Co.* (1898), 67 L. J. Q. B. 795; (1898) A. C. 486.

(*e*) *Sanders v. Jenkins* (1896), 66 L. J. Q. B. 49; (1897) 1 Q. B. 93.

(*f*) *Budgett v. Binnington* (1890), 60 L. J. Q. B. 1; (1891) 1 Q. B. 55.

(*g*) *Bulman v. Fenwick* (1893), 63 L. J. Q. B. 123; (1891) 1 Q. B. 179.

that each party shall use reasonable despatch in performing his part, and neither party is responsible to the other for delay unless caused by his own default or negligence; as where the delay was caused by war and a threatened bombardment of the port; "the delay having happened without default on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls" (*h*). So where no time is fixed and the delay is caused by insufficient accommodation and means of unloading at the port, over which the parties have no control (*i*); or where the delay is caused by a strike of workmen (*k*).

Charter-parties and contracts for the carriage of goods by sea are sometimes drawn with a clause exempting the shipowner from liability for acts of God, restraints of princes and rulers, the King's enemies, fire, negligence, or dangers and accidents of the seas, rivers, and navigation (*l*). These exceptions are introduced for the benefit of the shipowner, and they so far excuse non-performance on his part; but they do not dispense with performance on his part as a condition precedent to charging the charterer. Though the shipowner may be delayed by excepted accidents in arriving at the port of loading without incurring liability: yet if the delay is such as to render the stipulated voyage commercially impossible, the charterer is discharged (*m*). And if the arrival of the ship at an appointed day is made a condition precedent delay discharges the charterer from providing a cargo (*n*).

Exceptions
in charter-
parties.

Exceptions enure for the benefit of charterer and shipowner, but are construed strictly against the shipowner; and it lies upon him to prove the facts which entitle him to the benefit of the exception (*o*). Thus, an exception of loss by "thieves" is construed to apply only to thieves external to the ship; and an exception of "damage" does not apply to an abstraction of the

Exceptions
construed
strictly.

(*h*) *Ford v. Collesworth* (1870), 39 L. J. Q. B. 188; L. R. 5 Q. B. 541; *Cunningham v. Dunn* (1878), 48 L. J. C. P. 62; 3 C. P. D. 443.

(*i*) *Postthwaite v. Freehand* (1880), 49 L. J. Ex. 630; 5 Ap. Ca. 599; *Lyle Shipping Co. v. Cardiff Corp.* (1900), 69 L. J. Q. B. 889; (1900) 2 Q. B. 633.

(*k*) *Hick v. Raymond* (1892), 62 L. J. Q. B. 98; (1893) A. C. 22.

(*l*) See *Russell v. Niemann* (1864), 34 L. J. C. P. 10; 17 C. B. N. S. 163; *The Cressington* (1891), 60 L. J. P. 25; (1891) P. 152; *S.S. Knutsford Ltd. v.*

Tillmanns & Co. (1908), 77 L. J. K. B. 977; (1908) A. C. 103.

(*m*) *Jackson v. Union Marine Insce.* (1874), 44 L. J. C. P. 27; L. R. 10 C. P. 125. See *Jones v. Holm* (1877), 36 L. J. Ex. 192; L. R. 2 Ex. 335.

(*n*) *Smith v. Dart* (1884), 54 L. J. Q. B. 121; 14 Q. B. D. 105.

(*o*) *Re Norman and Dale S.S. Co* (1902), 72 L. J. K. B. 110; (1903) 1 K. B. 262; *The Pearlman* (1904), 73 L. J. P. 50; (1904) P. 286; *Nelson Line v. Jax, Nelson & Co.* (1907), 77 L. J. K. B. 82; (1908) A. C. 16.

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goods (*p*). So the term "look-out" has been restricted to the dismissal of servants in consequence of trade disputes (*q*); and an exception in a bill of lading that a steamer should not be accountable for a breakdown of machinery, nor for accidents to or defects in machinery, nor for neglect of engineers, did not exclude the implied warranty of seaworthiness, and the shipowner was held liable for damage to a cargo of frozen meat due to defective refrigerating machinery (*r*).—The exception of "dangers and accidents of the sea" was held to include an incursion of sea-water through a hole in the ship gnawed by rats, without neglect or default of the carrier (*s*); but not damage done by rats gnawing the goods (*t*). It includes an incursion of sea-water through a breach caused by collision, unless the collision was caused by the negligent navigation of the ship (*u*); and an express exception of "collision" does not cover a collision due to negligence in the carrier's ship (*x*). The exception of dangers of the sea also includes acts of piracy (*y*); and it includes barratrous acts of the crew, as boring holes for the purpose of scuttling the ship (*z*).—The above exceptions apply only to the liabilities under the contract for the carriage of the goods; and not to a liability for contribution to general average arising from the excepted accidents (*a*). They do not apply to liability for the stowage of the goods unless expressly so extended (*b*); nor to liability for accidents occurring during an unjustifiable deviation from the voyage (*c*); and negligence as the cause of the accidents or losses specified above must be excepted in express terms (*d*).

(*p*) *Taylor v. Liverpool Steam Co.* (1874), 43 L. J. Q. B. 205; L. R. 9 Q. B. 546; *Steinman v. Angier Line* (1891), 60 L. J. Q. B. 425; (1891) 1 Q. B. 619.

(*q*) *Re Richardson and Samuel* (1897), 66 L. J. Q. B. 868; (1898) 1 Q. B. 621.

(*r*) *Maori King v. Hughes* (1894), 65 L. J. Q. B. 168; (1895) 2 Q. B. 550; *Ranson v. Atlantic Transport Co.* (1903), 72 L. J. K. B. 811; (1903) 2 K. B. 666.

(*s*) *Hamilton v. Pandorf* (1887), 57 L. J. Q. B. 24; 12 Ap. Ca. 518.

(*t*) *Laceroni v. Drury* (1852), 22 L. J. Ex. 2; 8 Ex. 166; *Kay v. Wheeler* (1867), 36 L. J. C. P. 180; L. R. 2 C. P. 302.

(*u*) *Wilson v. Xantho* (1886), 56 L. J. Ad. 116; 12 Ap. Ca. 503; *The Glendarroch* (1894), 63 L. J. P. 89; (1894) P. 226.

(*x*) *Chartered Merc. Bk. of India v. Netherlands India Steam Nav. Co.* (1883),

52 L. J. Q. B. 220; 10 Q. B. D. 521.

(*y*) *Pickering v. Birkley*, Styles, 132.
(*z*) *The Chusca* (1875), 44 L. J. Ad. 17; L. R. 4 A. & E. 146.

(*a*) *Schmidt v. Royal Mail Co.*, 45 L. J. Q. B. 646; *Royal Exchange Shipping Co. v. Dixon* (1856), 56 L. J. Q. B. 265; 12 Ap. Ca. 11.

(*b*) *Hoyu v. Culliford* (1879), 48 L. J. C. P. 372; 4 C. P. D. 182.

(*c*) *Searamunga v. Stamp* (1880), 49 L. J. C. P. 674; 5 C. P. D. 295; *Leduc v. Ward* (1888), 57 L. J. Q. B. 379; 20 Q. B. D. 475; *Glynn v. Margeson* (1893), 62 L. J. Q. B. 466; (1893) A. C. 351.

(*d*) *Norman v. Binnington* (1880), 59 L. J. Q. B. 490; 25 Q. B. D. 475; *Raerselman v. Bailey* (1895), 64 L. J. Q. B. 707; (1895) 2 Q. B. 301; *The Schuman* (1909), 78 L. J. P. 112; (1909) A. C. 450.

The contract of carriers of goods within the realm is by the common law impliedly subject to the two exceptions of "the act of God and of the King's enemies"; in all other events the common carrier insures the safety of the goods (*e*). A common carrier by sea, or shipowner employing his ship as a general carrying ship, whether to places within or beyond the realm, is under the same legal liability; so far as the liability is not regulated by charter-party or bill of lading or other express contract (*f*). A barge-owner or lighterman carrying goods in barges for hire incurs the same legal liability (*g*).—A common carrier, as insurer of the safety of goods, is not liable for accidents caused by an inherent vice or quality in the nature of the thing carried (*h*) unless there has been negligence or default on his part (*i*). Nor is a common carrier liable for natural decay or deterioration of perishable goods during the carriage (*k*). An express stipulation that the goods shall be carried "at the owner's risk" excepts the liability of the carrier as insurer; but not his liability for delay or negligence in the carriage and delivery of the goods (*l*); nor for detention of the goods after the carriage is completed (*m*).

By the Railway and Canal Traffic Act, 1854, s. 7, railway and canal companies are rendered incapable of restricting their liability by any conditions except such as may be adjudged by a court or judge to be just and reasonable, and which are made in the form of a special contract signed by the party (*n*). The provisions of this statute have been extended to steam vessels by the Railways Clauses Act, 1863, s. 31; but this liability does not apply where the special Acts of the railway company were passed before 1863 (*o*). A condition substantially exempting the company from

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Implied
exceptions to
liability of
carriers.

Railway and
Canal Traffic
Act.

(*e*) *Forward v. Pittard* (1785), 1 T. R. 27; *Pozzi v. Shipton* (1838), 8 L. J. Q. B. 1; 8 A. & E. 963. See *Widd v. Parkford* (1811), 10 L. J. Ex. 382; 8 M. & W. 413; *Chattuck v. Bellamy* (1895), 61 L. J. Q. B. 250.

(*f*) *Crouch v. L. & N. W. Ry.* (1854), 23 L. J. C. P. 73; 14 C. B. 235; *Hill v. Scott* (1895), 65 L. J. Q. B. 87; (1895) 2 Q. B. 713; *Nelson Line, Ltd. v. Jax, Nelson & Sons, Ltd.* (1907), 77 L. J. K. B. 82; (1908) A. C. 16.

(*g*) *Inter-Akaki Co. v. Johnson* (1874), 43 L. J. Ex. 216; L. R. 9 Ex. 338; *Price v. Union Lighterage Co.* (1904), 73 L. J. K. B. 222; (1904) 1 K. B. 412.

(*h*) *Blower v. G. W. Ry.* (1872), 41 L. J. C. P. 268; L. R. 7 C. P. 655; *Nugent v. Smith* (1876), 45 L. J. C. P.

697; 1 C. P. D. 423.

(*i*) *Gilt v. Manchester, Sheffield & Lancs. Ry.* (1872), 42 L. J. Q. B. 89; L. R. 8 Q. B. 186; *Littor v. Loues & Yorks. Ry.* (1903), 72 L. J. K. B. 385; (1903) 1 K. B. 878.

(*k*) *Willes, J., Blower v. G. W. Ry.* (1872), 41 L. J. C. P. 268; L. R. 7 C. P. 655.

(*l*) *Robinson v. G. W. Ry.* (1865), 35 L. J. C. P. 123; *D'A v. L. & N. W. Ry.* (1874), L. R. 9 C. P. 325.

(*m*) *Gordon v. G. W. Ry.* (1881), 51 L. J. Q. B. 58; 8 Q. B. D. 44.

(*n*) *Peck v. North Staffs. Ry.* (1863), 32 L. J. Q. B. 241; 10 H. L. C. 473.

(*o*) *The Stella* (1900), 69 L. J. P. 70; (1900) P. 162. See *Doonan v. Midland Ry.* (1877), 2 Ap. Ca. 792.

PART III. all liability is held not to be just and reasonable (*p*). But a special contract with such a condition is not void, if at the time of making it the company offers to carry the goods upon some practicable alternative condition which is just and reasonable (*q*).

Carrier of passengers.

A carrier of passengers is liable only for negligence, and not as an insurer of their safety; and a stipulation that the passenger shall travel "at his own risk" excepts the liability for negligence (*r*); but a carrier is not entitled to limit his liability unless he quotes an alternative rate, under which his liability is not limited (*s*). In the absence of such stipulation the carrier undertakes that due care shall be used in carrying the passenger throughout the whole journey whether by himself or others (*t*). Also that the carriages and means of conveyance are safe so far as skill and care can make them; and in case of an accident, it lies upon him to prove that they were so (*u*). The liability of a carrier of passengers for safe carriage is based upon tort (*x*). Also that the passenger shall be carried within the appointed time or within a reasonable time; but he may stipulate against any guarantee of punctuality or any liability for delay (*y*). But a carrier is not responsible for robbery by fellow passengers (*z*); or for an assault by fellow passengers (*a*). A carrier of a passenger's luggage is under the same liability as a common carrier of goods, for loss or damage by negligence and also as an insurer of their safety; he is entitled to the protection of the Carriers Act, 1830 (*b*); and such goods are within the Railway and Canal Traffic Act, so that conditions restricting the liability must be just and

Passenger's luggage.

- (*p*) *Pick v. North Staffs. Ry.* (1863), 32 L. J. Q. B. 211; 10 H. L. C. 17.
 (*q*) *Manchester, Sheff. & Lincs. Ry. v. Brown*, 1883, 53 L. J. Q. B. 124; 8 Ap. Ca. 703; *G. W. Ry. v. McCarthy* (1886), 56 L. J. P. C. 33; 12 Ap. Ca. 218; *Williams v. Midland Ry.* 1907, 77 L. J. K. B. 157; (1908) 1 K. B. 252; *Stutcliffe v. G. W. Ry.* (1909), 79 L. J. K. B. 437; (1910) 1 K. B. 178.
 (*r*) *Gallin v. L. & N. W. Ry.* 1875, 44 L. J. Q. B. 89; 1 L. R. 10 Q. B. 212; *Hall v. N. E. Ry.* (1875), 41 L. J. Q. B. 164; 1 L. R. 10 Q. B. 437; *Hugh v. Royal Mail Steam Packet Co.* 1883, 52 L. J. Q. B. 640. See *Richardson, Spence & Co. v. Rowntree* (1894), 63 L. J. Q. B. 283; (1894) A. C. 217.
 (*s*) *Clarke v. W. Ham Corp.* (1909), 79 L. J. K. B. 56; (1909) 2 K. B. 858.
 (*t*) *Thomas v. Rhymney Ry.* (1871), 40

- L. J. Q. B. 89; 1 L. R. 6 Q. B. 266.
 (*u*) *Railroad v. Mitchell Ry.* 1869, 38 L. J. Q. B. 169; 1 L. R. 4 Q. B. 379; *Hugan v. Nye* (1881), 6 Q. B. D. 685. See *Richardson v. G. E. Ry.* 1876, 1 C. P. D. 312.
 (*v*) *Lyles v. Southend-on-Sea (Ship.)* (1905), 74 L. J. K. B. 484; (1905) 2 K. B. 1.
 (*w*) *McCartan v. N. E. Ry.* (1885), 54 L. J. Q. B. 411; *Woodgate v. G. E. Ry.* (1885), 51 L. T. 826; 33 W. R. 428. See *L. Blanche v. L. & N. W. Ry.* 1876, 45 L. J. C. P. 521; 1 C. P. D. 286.
 (*x*) *Cobb v. G. W. Ry.* 1894, 63 L. J. Q. B. 62; (1894) A. C. 119.
 (*y*) *Powder v. N. F. Ry.* (1891), 61 L. J. Q. B. 136; (1892) 1 Q. B. 355.
 (*z*) *Casswell v. Cheshire Lines Committee* (1907), 76 L. J. K. B. 734; (1907) 2 K. B. 499.

reasonable (c). But if the passenger retains his luggage under his own personal care and control, he cannot charge the carrier as insurer of its safety, nor with a loss caused by his own negligence, nor for any loss occurring without negligence or default on the part of the carrier (d). The liability of the carrier continues only from the delivery of the luggage to him or to an agent, as to a railway porter, for the purpose of the journey, until the completion of the journey (e). In the case of a passenger travelling with a free pass, the carrier may exempt himself from liability (f).

CHAP. III.

Some contracts, though expressed in absolute terms, are by the nature of the matter so obviously dependent upon the possibility of performing the promise, that the parties are taken to have impliedly excepted the events which render the performance according to the promise impossible; and of this character generally are contracts in which a person binds himself to do something which requires to be performed by him in person (g). Thus contracts to marry are impliedly conditional upon the continued existence of the parties, and are put an end to by the death of either; and no action will lie by or against the executor of a deceased party for a breach of promise committed before the death: except, it is said, for special damage accrued from the breach independent of the loss of marriage (h). But disease rendering the defendant incapable of marriage without danger to his life is not such an impossibility of performance as to be impliedly excepted from the contract (i). — Contracts for personal services are generally taken as subject to the implied condition of the parties continuing alive and in sufficient health to perform and receive the service respectively (k). Thus the covenant in an indenture of apprenticeship that the apprentice shall remain and serve during the term, though in terms absolute and uncondi-

Implied exceptions of impossibility in contracts for personal performances.

Contracts of marriage.

Contracts of service.

(c) *Loxley v. L. C. & D. Ry.* 1876, 45 L. J. Q. B. 476; *Cohen v. S. E. Ry.* (1877), 46 L. J. Q. B. 417; 2 Ex. D. 253; *Cutler v. N. L. Ry.* (1887), 56 L. J. Q. B. 648; 19 Q. B. D. 61.

(d) *Talley v. G. W. Ry.* 1870, 40 L. J. C. P. 9; L. R. 6 C. P. 11; *Bosqhem v. G. E. Ry.* (1878), 47 L. J. C. P. 318; 3 C. P. D. 221.

(e) *G. W. Ry. v. Bunch* (1885), 57 L. J. Q. B. 361; 13 Ap. Ca. 31.

(f) *The Stella* 1900, 69 L. J. P. 70; (1900) P. 162.

(g) *Per cur. Bailly v. De Crespigny*

(1869), 38 L. J. Q. B. 102; L. R. 4 Q. B. 185; *per cur. Taylor v. Caldwell* (1863), 32 L. J. Q. B. 167; 3 B. & S. 835.

(h) *Chamberlain v. Williamson* (1811), 2 M. & S. 108; *Ford v. Chinn* (1888), 57 L. J. Q. B. 247; 20 Q. B. D. 191.

(i) *Hall v. Wright* (1859), 29 L. J. Q. B. 43; E. B. & E. 765.

(k) *Farmer v. Wilson* (1869), 38 L. J. C. P. 325; L. R. 4 C. P. 714. See *Stubbs v. Holwell Ry.* (1867), 36 L. J. Ex. 166; L. R. 2 Ex. 311.

- Part III.** tional, is impliedly conditional upon his continuing in such a state of health as to be capable of rendering the service, and excepts illness which renders performance impossible (*l*). And the covenant of the master to maintain and teach is similarly put an end to by the death of the master (*m*); unless it is expressly extended to his executors carrying on the same trade or business (*n*).—The engagement of a dramatic or musical performer for an appointed day impliedly excepts incapacity caused by illness (*o*). And if the incapacity is such as to produce a substantial failure of consideration it would also operate in discharge of the employer (*p*). A contract with a farm bailiff, expressed to be determinable by six months' notice or payment of six months' wages, was construed with the implied condition of both parties living to perform it, so as to be dissolved by the death of the employer, without further liability (*q*). The contract of a parent with a schoolmaster not to remove his child from school without notice is subject to the implied condition of the child continuing in a state of health proper for remaining at school (*r*).—Upon the same principle a general contract of partnership is dissolved by the death of one of the partners, and though it was contracted for a fixed term (*s*). A contract to serve a firm of partners in the partnership business is impliedly subject to the continuance of the partnership, and is therefore discharged by the death of one of the partners, which puts an end to the partnership (*t*). An order for compulsory winding up, or the appointment of a receiver and manager in a debenture holders' action, operates as a discharge of the servants, but a voluntary winding up does not have that effect, as there is a change of personality in the former case but not in the latter (*u*).
- Partnership.**
- Companies.**
- Contracts relating to specific things.**

Where, from the nature of the contract, it appears that the parties must have known, from the beginning, that it could not be fulfilled unless, when the time for the fulfilment of the contract

(*l*) *Boast v. Firth* (1868), 38 L. J. C. P. 1; L. R. 4 C. P. 1.

(*m*) *Whincup v. Hughes* (1870), 40 L. J. C. P. 104; L. R. 6 C. P. 78.

(*n*) *Cropper v. Simmonds* (1862), 31 L. J. M. C. 138; 7 H. & N. 707.

(*o*) *Robinson v. Davison* (1871), L. J. Ex. 172; L. R. 6 Ex. 269.

(*p*) *Cockson v. Starck* (1858), 28 L. J. Q. B. 25; 1 E. & E. 218; *Foussard v. Spers* (1876), 45 L. J. Q. B. 621; 1 Q. B. D. 410.

(*q*) *Farrow v. Wilson* (1869), 38 L. J. C. P. 326; L. R. 4 C. P. 744.

(*r*) *Sinram v. Watson* (1877), 46 L. J. C. P. 679.

(*s*) Partnership Act, 1890, s. 33; *Holme v. Hoodmood* (1872), 41 L. J. Ex. 157; L. R. 7 Ex. 218.

(*t*) *Tucker v. Shepherd* (1861), 30 L. J. Ex. 207; 6 H. & N. 575.

(*u*) *Mallond Conduits Dist. Bk. v. Attwood* (1904), 74 L. J. C. 286; (1905) 1 Ch. 357.

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arrived, some particular specified thing continued to exist, the contract will generally be construed as subject to an implied condition that the parties shall be excused from further performance in case, before breach, the contract becomes impossible from the perishing of the thing without the default of either party, but this implied term does not operate so as to avoid the contract *ab initio* (x). The application of this principle depends upon the circumstances of each particular case, as will appear immediately to those who attempt to reconcile the reported decisions respecting contracts in connection with the procession and naval review contemplated on the occasion of the coronation of King Edward VII. Where it appeared that the parties contracted on the footing that the procession or the review would take place, the postponement of these events was held to put an end to the contract, and the further performance on either side to be excused (y). But where parties did not contract on this footing, a party who had paid a deposit or the whole sum of money agreed to for the hire of a ship or room was not allowed to recover the deposit or the full amount so paid (z); and a party who had agreed to let a room or ship was held entitled to recover the balance of the hire whether it had been agreed that it should be paid before the date on which the postponement of the procession was announced or at, wards (a). Where a steamship company had let the ship to another upon repudiation of the contract, the party originally contracting was entitled to have the sum payable by him reduced by the amount earned (b). A contract for the sale of a cargo to be shipped by a named steamer was held to be conditional upon her existence as a cargo-carrying ship (c). And where a servant was to be remunerated by a commission on orders obtained, it was held to be an implied term that the employer would execute the orders, and the relinquishment of business upon the destruction of his manufactory was no defence (d).—Upon the same principle upon a sale

Sale of goods.

(x) *Per cur.* *Taylor v. Caldwell* (1863), 32 L. J. Q. B. 166; 3 B. & S. 838; *Appleby v. Myers* (1867), 36 L. J. C. P. 331; L. R. 2 C. P. 651; *Anglo-Egyptian Nav. Co. v. Renouf* (1875), 44 L. J. C. P. 130; L. R. 10 C. P. 271.

(y) *Krell v. Henry* (1903), 72 L. J. K. B. 794; (1903) 2 K. B. 710; *Elliott v. Cutchley* (1905), 75 L. J. K. B. 147; (1906) A. C. 7.

(z) *Civil Service Co-op. Soc. v. Gen. Steam Nav. Co.* (1903), 72 L. J. K. B. 933; (1903) 2 K. B. 756; *Chandler v.*

Webster (1904), 73 L. J. K. B. 401; (1904) 2 K. B. 493.

(a) *Horne Bay Co. v. Hutton* (1903), 72 L. J. K. B. 879; (1903) 2 K. B. 683; *Chandler v. Webster* (1904), 73 L. J. K. B. 401; (1904) 2 K. B. 493.

(b) *Horne Bay Co. v. Hutton* (1903), 72 L. J. K. B. 879; (1903) 2 K. B. 683.

(c) *Nickoll & Knight v. Ashton, Eldridge & Co.* (1901), 70 L. J. K. B. 600; (1901) 2 K. B. 126.

(d) *Turner v. Goldsmith* (1891), 60 L. J. Q. B. 247; (1891) 1 Q. B. 544.

PART III.

Contracts of
bailment.Negligence
of bailee.

of goods, if the property has passed to the buyer and the goods are destroyed or perish without default of the seller before delivery, the loss falls upon the buyer, and the delivery having become impossible is excused; nor can the buyer in such case claim a return of the price *e*). The loss presumptively rests with the owner: and if the contract expressly provides that the risk until delivery shall lie upon one or other of the parties, the property will presumptively remain with the risk *f*). The same principle applies to the sale of a house, which is destroyed by an accidental fire after the purchaser has accepted the title *g*).

Upon this principle contracts of bailment, as for the hire of goods, or for work to be done upon goods, and the obligation to re-deliver the goods in the same condition of the bailment, are presumptively subject to the implied condition of the continued existence of the goods bailed; and if they perish without any default in the bailee, so that the re-delivery becomes impossible, he is excused: as expressed in the maxim, *res perit domino* *h*). As where a horse is delivered to a proposed buyer, upon sale or return, with a certain time allowed for trial, and the horse dies pending the trial from no fault of the buyer, the loss falls upon the seller, as being the owner *i*). And if the buyer of a horse stipulates for the right to return it in the case of a breach of warranty, his right to return it for breach of warranty is not affected by an accident happening to it during his possession, caused by a fall or by taking fright without any default on his part *k*).—A bailee or depository of goods is not in general liable as an insurer, but only for loss or damage caused by negligence: as a warehouseman or wharfinger *l*); or a carrier who has completed the carriage and continues to hold the goods only as a warehouseman, though he retains a lien upon the goods for the carriage *m*); or a banker with whom goods and securities are deposited for safe keeping *n*):

See *Turner v. Sardin* 1901, 70 L. J. K. B. 857; 1901 2 K. B. 653.

e Sale of Goods Act 1893, ss. 20, 31, 33; *Rugg v. Mott* 1896, 11 East. 211.

f *Croft v. Playford* (1871), 11 L. J. Ex. 11; L. R. 7 Ex. 91; *Maclean v. Ritchie* 1872, 41 L. J. Q. B. 227; L. R. 7 Q. B. 436.

g *Pearce v. Heller* 1861, 6 Ves. 319. See *Rimmer v. Preston* 1881, 50 L. J. C. 172; 18 Ch. D. 1.

h *Clegg v. Bernard* (1701), 2 L. J.

Raym. 909; 1 Sm. L. C. 167.

i *Elphick v. Burns* (1880), 19 L. J. C. P. 698; 5 C. P. D. 321.

k *Head v. Tattersall* (1871), 11 L. J. Q. B. 4; L. R. 7 Ex. 7; *Chapman v. Withers* (1888), 57 L. J. Q. B. 157; 20 Q. B. D. 821.

l *Clegg v. Bernard* 1701, 2 Ld. Raym. 909; 1 Sm. L. C. 167.

m *Chapman v. G. W. Ry* (1880), 49 L. J. Q. B. 420; 5 Q. B. D. 278.

n *Giblin v. McMullen* 1868, 38 L. J. P. C. 25; L. R. 2 P. C. 317.

or a contract for the removal of household furniture *c*). But by custom of trade in the City of London a wharfinger is in the same position as a common carrier as to insuring the safety of goods deposited *p*. Except as modified by statute an innkeeper is liable for the loss of or injury to the goods of a guest, unless it arise from the negligence of the guest, the act of God, or the King's enemies *q*.

Impossibility of performance caused by an act of a party to the contract involves different considerations. "It is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract; and it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different" *r*. "Where the condition of a bond is possible at the time of making it, and, before the same can be performed, becomes impossible by the act of the obligor, then the obligation is saved" *s*. Under a contract to complete building or other works by a fixed day, with penalties for delay, no claim can be made for penalties in respect of delays caused by the defect or interference of the employer *t*; as where the delay was caused by not providing the plans required for building work *u*; or where alterations were ordered which rendered completion within the time impossible *x*.

An act of the promisor which renders performance impossible, while it dispenses with the performance of all conditions precedent on the other side, constitutes at once a breach of contract *y*. Where a publisher engaged an author to write a treatise for a periodical publication, and before completion of the treatise, abandoned the publication, the author was held excused from further writing, as it had become impossible to publish it in the manner stipulated; and he was held entitled to claim remuneration for the part already written *z*. Where an incoming tenant

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Impossibility caused by act of parties.

Impossibility caused by promisor.

Impossibility caused by the promisor.

a See *Scarf v. Barrett* (1875), 11 L.J. Ex. 36; L.R. 10 Ex. 358.

b See *North British Ins. v. London Assurance*, 1877, 36 L.J. C. 537; 51 Ch. D. 569.

c *Morgan v. Barry*, 1861, 30 L.J. Ex. 131; 6 H. & N. 265; *Oppenheim v. White Lion Hotel Co.*, 1871, 40 L.J. C. P. 221; L.R. 9 C. P. 515.

d *Mellish, L. J., Panama F.R. v. Indemnity Co.* (1875), 15 L.J. C. 121, L.R. 10 Ch. 532.

e See *Booth v. Wagg*, 1867, 3 Wms. Samuel 81.

f *Holme v. Grogan*, 1838, 3 M. & W. 387; *Russell v. Bannister*, 1862, 32 L.J. C. P. 68; L.R. 8, 119.

g *Roberts v. Barclay Curie & Co.*, 1866, 38 L.J. C. P. 367; L.R. 1 Ch. P. 310. *h* *Dodd v. Chanton*, 1897, 66 L.J. Q. B. 377; (1897) 14 Q. B. 562.

i See *ante*, p. 179.

j *Flonché v. Colbourn* (1831), 1 L.J. C. P. 7; 5 Buz. 14.

PART III. agreed to buy the straw upon a farm at a price to be fixed by valuation, and then consumed the straw before a valuation could be made and so rendered it impossible, he was held liable to pay the value assessed by a jury (*a*). Upon the sale of a business to be paid for by instalments dependent in amount upon the profits, it was held to be an implied undertaking by the buyer to carry on the business, and that discontinuing it so as to render it impossible to ascertain the price was a breach of the contract (*b*). So where a traveller is to be remunerated by a commission upon orders, the employer cannot relinquish business during the term fixed for the employment (*c*); unless the contract be made expressly conditional upon the continuation of the business (*d*). A power to determine a contract of service by twenty-eight days notice, was held to import a term that the employer would provide a reasonable amount of work for the servant up to the expiration of the notice although the master could no longer carry on the business at a profit (*e*). So where merchants offered to persons dealing exclusively with them a share in a bonus proportionate to their purchases the relinquishment of business by the merchants was held to be a breach of contract (*f*). So with bonds, when a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond (*g*).

Impossibility
caused by
law.

A promise is excused by a supervening impossibility caused by act of law. "No contract can be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law" (*h*). Persons in general are taken to contract with reference to the law existing at the time; and an impossibility arising from an Act of the Legislature subsequent to the contract, generally discharges the contractor from liability (*i*); but it is a question dependent upon the construction

(*a*) *Clarke v. Westrope* (1856), 25 L. J. C. P. 287; 18 C. B. 765.

(*b*) *McIntyre v. Belcher* (1863), 32 L. J. C. P. 251; 11 C. B. N. S. 654; *Telegraph Despatch Co. v. M'Lean* (1873), L. R. 8 Ch. 658.

(*c*) *Turner v. Goldsmith* (1891), 60 L. J. Q. B. 217; (1891) 1 Q. B. 544.

(*d*) *Beswick v. Swindells*, 5 L. J. Ex. 287; 3 A. & E. 868.

(*e*) *Thornald v. Rosser* (1906), 75 L. J.

K. B. 688; (1906) 2 K. B. 728.

(*f*) *Ogdens, Ltd. v. Nelson* (1905), 74 L. J. K. B. 433; (1905) A. C. 109.

(*g*) *Vynior's Case* (1610), 8 Co. 81b. See *Brown v. Tanner* (1825), McCl. & Y. 464.

(*h*) *Per cur. Atkinson v. Ritchie* (1809), 10 East, 534.

(*i*) *Newington Loc. Bd. v. Cottingham Loc. Bd.* (1879), 48 L. J. C. 226; 12 Ch. D. 731.

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of each particular statute whether the failure to perform a contract is thereby excused (*k*). Thus where land is let subject to a covenant or condition against assignment without the licence of the lessor, and the land is afterwards taken under the compulsory powers of the Lands Clauses Act, the covenant or condition is discharged by the operation of the Act (*l*). So covenants restrictive of the use of land, as regards building and the like, are discharged by a railway company subsequently taking the land under compulsory powers and building a station upon it (*m*). A covenant to repair is discharged under like circumstances; but the lessee remains liable for breaches committed before the compulsory taking of the premises (*n*). And where land is let for a particular purpose, a covenant for quiet enjoyment does not warrant against future legislative interference with the use; as a statutory prohibition of storing cartridges upon the premises (*o*). The Corporation of London, as Conservators of the Thames, having borrowed money upon bonds conditioned for payment out of the tolls chargeable under their statutory powers, by a subsequent Act the right of the Corporation to receive and apply the tolls was taken away and vested in a new body of conservators: it was held that, the condition having been rendered impossible by Act of Parliament, the bonds were discharged (*p*).

"The force of a declaration of war has been held equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an act of State done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law" (*q*). Therefore a charter-party for loading at a foreign port is discharged by a declaration of war, rendering it impossible to ship the cargo without an illegal act of trading with the enemy (*r*). And an insurance of foreign ships or goods is discharged by a declaration of war between the countries of the insured and assured, pending

Acts of State.

Declaration of war.

(*k*) *Tendring Union (Guard, v. Docton* 1891), 61 L. J. C. 82; (1891) 3 Ch. 265; *Metrop. Water Bd. v. Solomon* (1908), 77 L. J. C. 517; (1908) 2 Ch. 214; *Grimsdick v. Sweetman* (1909), 78 L. J. K. B. 1162; (1909) 2 K. B. 740.

(*l*) *Slipper v. Tottenham Junet. Ry.* (1867), 36 L. J. C. 841; L. R. 4 Eq. 112.

(*m*) *Baily v. De Crespigny* (1869), 38 L. J. Q. B. 98; L. R. 4 Q. B. 180.

(*n*) *Mills v. East London Union* (1872),

42 L. J. C. P. 46; L. R. 8 C. P. 79.

(*o*) *Norby v. Sharpe* (1878), 47 L. J. C. 617; 8 Ch. D. 39.

(*p*) *Brown v. Mayor of London* (1862), 31 L. J. C. P. 280; 13 C. B. N. S. 828. See *Davis v. Cary* (1850), 20 L. J. Q. B. 48; 15 Q. B. 418.

(*q*) *Per cur. Exposito v. Bowden* (1857), 27 L. J. Q. B. 17; 7 E. & B. 763.

(*r*) *Exposito v. Bowden* (1857), 27 L. J. Q. B. 17; 7 E. & B. 763.

PART III.

Embargo on
Shipping.Impossibility
caused by
foreign law
or State.

the continuance of hostilities (*s*). But a hostile seizure in anticipation of an actual declaration of war, is not equivalent to a declaration of war (*t*). Where a company incorporated and registered in a British colony, and also incorporated and registered in an adjoining foreign State but merely to obviate certain legal difficulties, insured in England with an English insurer against the "arrests, restraints, and detrainments of all kings, princes and peoples," and there was no evidence that the company intended to carry on business in the foreign State after the declaration of war, and during the continuance of the war, the assured was held entitled to recover (*u*). A temporary embargo imposed upon shipping by an Order in Council operates as a legal interruption of the voyage and of the contracts relating to it, and excuses all liabilities during its continuance; but the contract is restored upon removal of the embargo (*x*). If it lasts so long, or is imposed under such circumstances, as in fact to frustrate the object of the voyage, it would be held to discharge the contract altogether (*y*).

An impossibility caused by foreign law, or by the act of a foreign State, does not discharge a contract in this country. Upon a sale of goods to be shipped from a foreign port, it is no defence to an action for not delivering the goods that a war broke out in the country which rendered the shipment impossible, the contract being construed according to the law of this country (*z*). So in an action upon a charter-party for not providing a cargo at a foreign port, it is no defence that the charterer was prevented by the government at that port prohibiting the exportation of the intended goods (*a*); or that the authorities at the port prohibited all public intercourse in consequence of the prevalence of an infectious disorder (*b*). "If the performance of the covenant had been rendered unlawful by the government of this country the contract would have been dissolved on both sides, and the defendant would have been excused for the non-performance of it, and not liable to damages. But it in consequence of events which happen at a

(*s*) *Brandon v. Curling* (1803), 4 East, 410.

(*t*) *Janson v. Driefontein Gold Mines* (1902), 71 L. J. K. B. 857; (1902) A. C. 481. See *Hagedorn v. Bell* (1813), 1 M. & S. 467.

(*u*) *Nigel Gold Co. v. Hoode* (1901), 70 L. J. K. B. 1006; (1901) 2 K. B. 849.

(*v*) *Hadley v. Clarke* (1799), 8 T. R. 249.

(*y*) *Gripel v. Smith* (1872), 41 L. J. Q. B. 153; L. R. 7 Q. B. 404.

(*z*) *Jacobs v. Credit Lyonnais* (1884), 53 L. J. Q. B. 156; 12 Q. B. D. 589.

(*a*) *Blight v. Page* (1801), 3 B. & P. 295, n. (*a*); *Sjorreds v. Luscombe* (1812), 16 East, 201.

(*b*) *Barker v. Hodgson* (1814), 3 M. & S. 267.

foreign port, the freighter is prevented from furnishing a loading there which he has contracted to furnish, the contract is neither dissolved, nor is he excused from performing it, but must answer in damages" (c).—Upon the same principle a shipowner who has contracted absolutely to carry and deliver goods is not excused by the goods being seized at an intermediate port, as contraband by the law of that country (d). Where a cargo of petroleum was shipped under a bill of lading for delivery at a foreign port, stipulating that it should be taken out by the shipper within a fixed time: it was held that the freight was earned upon arrival ready for delivery, and that the shipper was not excused from taking the cargo and paying the freight by reason of a prohibition at the port against landing such cargo (e). But if the foreign power produces a disability in both parties to perform their mutually dependent obligations: as readiness and ability to provide and to take in cargo, or to deliver and to receive cargo, neither party can maintain an action against the other, unless the defendant has absolutely engaged to perform the stipulation for the breach of which he is sued (f). And in a charter-party of a foreign ship there is an implied exception of what is prohibited by the law of the State to which the ship belongs, as for example discharging at an enemy's port; and consequently war declared between that State and that of the port of discharge excuses the contract (g).

Hence it is usual in charter-parties to make the express exception (amongst other things) of "restraint of princes and rulers," which includes any public act of a State or government, whether in peace or war, restraining the performance; as an order of the local public authorities of a port, capture by the public forces, an embargo upon shipping, a blockade of a port, or a siege of a town (h). Exceptions of this kind are presumptively introduced for the benefit of the shipowner (i); but an exception, "in the event of war, &c. preventing loading, this charter-party to be cancelled," was construed to render the charter-party void in the

Exception of
"restraint of
rulers."

(c) *Ellenborough, C. J., Barker v. Hodgson* (1811), 3 M. & S. 270.

(d) *Spence v. Chadwick* (1817), 16 L. J. Q. B. 333; 10 Q. B. 517.

(e) *Cargoe v. Argos* (1873), L. R. 5 P. C. 134.

(f) *Ford v. Coteneorth* (1870), 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; *Cun-*

ingham v. Inan (1878), 48 L. J. C. P. 62; 3 C. P. D. 445.

(g) *The Tentonia* (1872), 41 L. J. Ad. 57; L. R. 4 P. C. 171.

(h) *Rodocanachi v. Elliott* (1873), 42 L. J. C. P. 247; L. R. 8 C. P. 649; *Nobel's Explosives Co. v. Jenkins* (1896), 65 L. J. Q. B. 638; (1896) 2 Q. B. 326.

(i) See *ante*, p. 499.

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events specified, and not merely voidable at the option of either party (*k*). A restraint within the exception excuses delay in sailing so long as it continues; and if in fact it continues so long as to frustrate the object of the voyage it may discharge the contract altogether (*l*). And a reasonable apprehension of restraint justifies delaying the voyage (*m*). Under a bill of lading for the delivery of goods "dangers of the seas only excepted," a blockade of the port of discharge and risk of capture by an enemy were held not to be within the exception (*n*). An exception in a charter-party or bill of lading of "the king's enemies" means the enemies of the sovereign of the shipowner (*o*).—Similar exceptions may be made in policies of marine insurance, as by the phrase "warranted free from capture and seizure" (*p*). In an insurance of a foreign ship there is always an implied exception of capture by the British Government: because an insurance against such loss would be illegal (*q*). But there is no similar implied exception of acts of the government of the country of the assured (*r*).

Impossibility
of one of
alternative
promises.

If a person promises to do one of two things in the alternative and at the time of making the contract one of them is impossible, as a general rule, he must perform that which is possible. Where a bond was given upon the discharge of a debtor from execution, conditioned to pay a sum of money, or in default of payment to surrender the debtor in execution; it was held that as the alternative of surrendering a debtor in execution who had once been discharged was legally impossible, the obligor could satisfy the condition by payment only (*s*). If an award directs one of two things to be done in the alternative, and either of the two is impossible or uncertain, it is incumbent on the party to perform the other of them (*t*). Where both alternatives are possible at the

Subsequent
impossibility.

(*k*) *Adamson v. Newcastle Steam Co.* (1879), 48 L. J. Q. B. 670. 4 Q. B. D. 462.

(*l*) *Gripot v. Smith* 1872, 41 L. J. Q. B. 153; L. R. 7 Q. B. 404.

(*m*) *The Express* 1872, 41 L. J. Ad. 79; L. R. 3 A. & E. 597; *The San Raim* (1873), 42 L. J. Ad. 46; L. R. 5 P. C. 301; *Nollet's Explosives Co. v. Jenkins* (1896), 65 L. J. Q. B. 633; (1896) 2 Q. B. 326.

(*n*) *The Patria* (1871), 41 L. J. Ad. 23; L. R. 3 A. & E. 436.

(*o*) *Russell v. Nymann* (1864), 34 L. J. C. P. 10; 17 C. B. N. S. 163.

(*p*) *Johnston & Co. v. Hogg* (1883), 52 L. J. Q. B. 343; 10 Q. B. D. 432; *Cory v. Burr* (1883), 52 L. J. Q. B. 657; 8 Ap. Ca. 393.

(*q*) *Fartado v. Rodgers* (1802), 3 B. & P. 191; *Brandon v. Curling* (1803), 1 East, 110. See *post*, p. 542.

(*r*) *Aubert v. Gray* (1862), 32 L. J. Q. B. 59; 3 B. & S. 163. See *Janson v. Driefontein Gold Mines* (1902), 71 L. J. K. B. 857; (1902) A. C. 484.

(*s*) *Da Costa v. Davis* (1798), 1 B. & P. 242.

(*t*) *Simmonds v. Swaine* (1809), 1 Taunt. 549; *Wharton v. King* (1831), 9 L. J. C. S. K. B. 271; 2 B. & Ad. 528.

time of making the contract, and one of them subsequently becomes impossible, "it is impossible to lay down any universal proposition either way; but that the principle to be applied in each case is, that it must depend on the intention of the parties to the bond or covenant or agreement, such intention to be collected from the nature and circumstances of the transaction, and the terms of the instrument; and that if the court is satisfied that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode" (u). Under a policy of fire insurance whereby "the company may reinstate property damaged or destroyed instead of paying the amount of the loss or damage," if it becomes impossible to reinstate, the insurer must pay (x). In a lease of a coal mine the lessee covenanted to raise a stated quantity in each year and pay a royalty upon it, or to pay the same amount of money as a fixed rent; it was held that he must continue to pay the rent during the term, though it became impossible to raise the coal because the mine was worked out (y).

A covenant to make a certain disposition of property by deed, or by will, presumptively gives an option during life; and it may be discharged by the death of parties rendering the disposition by will inoperative. A father upon the marriage of his daughter covenanted with the husband to give to his daughter by deed or will an equal share with his other children of all the estate of which he should die possessed, and the daughter died in the lifetime of the father without issue; it was held that the father, having the alternative of the will, was discharged from the covenant (z). And where under like circumstances the covenant was by deed or will to make a settlement of property in certain stated terms for the benefit of the wife and children of the marriage, the covenant was held to be satisfied by a will in the required terms, though the interest of the children lapsed by their death in the lifetime of the testator (a). A father upon the marriage of his daughter promised

Covenant to
dispose by
deed or will.

(u) *Kimberley, V.-C., Barkworth v. Young* (1856), 26 L. J. C. 163; 4 Drew. 24, 25.

(v) *Brown v. Royal Insce.* (1859), 28 L. J. Q. B. 275; 1 E. & E. 853; *Anderson v. Commercial Assee.* (1886), 55 L. J. Q. B. 146.

(y) *Bate (Marq.) v. Thompson* (1814), 14 L. J. Ex. 95; 13 M. & W. 187.

(z) *Jones v. How* (1849), 9 C. B. 1; (1850), 19 L. J. C. 324; 7 Hare, 267.

(a) *Brookman's Trust* (1869), 39 L. J. C. 138; L. R. 5 Ch. 182.

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the intended husband that at his (the father's) death his daughter "should share" with his other children; the daughter died in the lifetime of the father leaving children of the marriage, and the father died bequeathing his property to two surviving daughters: it was held that there was a promise to leave an equal share (*b*), and that the promise was alternative as capable of being performed in one of two ways, viz., either by bequeathing an equal share by will, or by leaving his children to share equally upon intestacy; that the death of the daughter in his lifetime rendered the latter way impossible, but did not render the former impossible, because under the Wills Act, s. 3, the bequest of a share by will would not lapse in the event of the death of the daughter leaving children (*c*).

Consideration impossible of performance.

Consideration becoming impossible.

Impossibility of performance may affect the consideration of a contract, where the consideration is executory. A promise which is impossible of performance either in fact or in law at the time of making it cannot form a valid consideration (*d*). A promise which is possible and valid at the time of making it is a sufficient consideration, though it may subsequently become impossible. But in such case the mutual promises may be impliedly dependent, or conditional upon performance on each side; and then the one promise would fail by reason of the non-performance of the other as a condition precedent, in the event of such performance becoming impossible (*e*); or the contract might be such as to import an implied exception of the circumstances of impossibility (*f*). Where further performance is rendered impossible before completion, questions may arise whether or not a new contract may be implied from the acceptance of a part performance of the consideration on the one hand, or, on the other hand, for a return of money already paid for the consideration which fails; upon the principles already stated respecting the formation of contracts (*g*).

(*b*) *Re Fickus* (1899), 69 L. J. C. 161; (1900) 1 Ch. 331.

(*c*) *Barkworth v. Young* (1856), 26 L. J. C. 153; 4 Drew. 1.

(*d*) *Nerot v. Wallace* (1789), 3 T. R. 17; *Levy v. Yates* (1838), 7 L. J. Q. B. 138; 8 A. & E. 129.

(*e*) See *ante*, p. 468.

(*f*) See *ante*, p. 501.

(*g*) *Appleby v. Myers* (1867), 36 L. J. C. P. 331; L. R. 2 C. P. 631; *Anglo-Egyptian Nav. Co. v. Rennie* (1875), 11 L. J. C. P. 130; L. R. 10 C. P. 271.

CANADIAN NOTES.

Impossibility of Performance.

In *Hill vs. Fraser*, Thompson, 294, it was held that where a party entered into a contract to build a coffer-dam and there was no sustaining substratum an action would not lie for the work and labour performed in attempting to complete his contract.

In *McKenna vs. McNamee*, 14 O. A. R., 339, the defendants had had a contract with the Government of British Columbia for the performance of a public work, but had forfeited it after part of the work had been done. They then agreed with the plaintiffs that the latter should do the remainder of the work under the contract and receive ninety per cent. of every estimate issued until the completion of the work. It was fully understood by all the parties that at the time of making the agreement the contract had been forfeited and the government had taken possession of the work, but they all trusted to the possession of influence by which the contract could be restored and work resumed.

It was held that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking, and the proposition was affirmed that, where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by act of God or *vis major*, over which neither party has any control and without either party's default, the parties are relieved. The principle of *Taylor vs. Caldwell*, 3 B. and S., 833, was held to be applicable to the case.

The case came before the Supreme Court of Canada on appeal where the decision was affirmed, and it was held that where one contracts to do work for another the preparation for which involves outlay and expense a corresponding agreement in the absence of any express provision will be implied on the part of the person with whom he contracts to furnish the work, but no such implication will be made where from circumstances known to and in the contemplation of both parties at the date of the agreement to do the work it was and continued to be beyond the power of the party to carry out such implied agreement. 15 S. C. R., 311.

In *Dorland vs. Bonter*, 5 U. C. Q. B., 583, it was considered no defence to an action against the commander of a steamboat for not towing, etc., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice.

In *McCraney vs. McCool*, 18 O. A. R., 217, the defendants agreed to deliver lumber to a firm of three partners. Before delivery the firm was dissolved and the defendants refused to carry out their contract. It was held that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract.

In *Ellis vs. Midland Railway Company*, 7 O. A. R., 464, where the plaintiff was engaged by defendant for the season from May to November as master to manage a steamer named the "Idlewyld" for a thousand dollars, and he continued so employed until September, when the steamer was burnt, it was held that the plaintiff was not entitled to more than a proportionate share of the salary agreed upon, for the contract was subject to the continued existence of the steamer, and the performance was excused by its destruction without the fault of the defendant.

In *Stratford Gas Company vs. City of Stratford*, 26 O. A. R., 109, it was held that no action would lie for the non-performance of a term of a contract which term was on its face impossible of performance by any of the parties. Where therefore a contract was made by a company for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, there not being as many as the named number of nights before that date, and the company did not supply lights the nights that there were, and were not prevented from doing so by the city, it was held that they were not entitled to recover at the contract rate for the named number of nights or for more than the nights actually lighted.

In *Sampson vs. The Queen*, 2 Exch. R., 30, the claimants sought to recover from the Crown the amount of damages they alleged they were obliged to pay to the contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them. It was held that, as the contractor had been prevented from completing

the construction of the wharf by the exercise of powers conferred by act of parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf.

In *Boswell vs. Sutherland*, 8 O. A. R., 233, the plaintiff lent a sum of money for security of which the borrower gave a chattel mortgage on goods of which he was to retain possession, and the defendant executed a bond conditioned that in default of payment the goods should be forthcoming for the purpose of seizure and sale under the mortgage. Before the day of payment arrived the goods were destroyed by fire, and, an action having been commenced against the defendant on his bond, he pleaded the fact of such destruction without any default on his part, which was held bad, on demurrer, for not negating any default on the part of the borrower. The principle applicable to the case is carefully discussed with references to the cases of *Taylor vs. Caldwell*, *Appleby vs. Myers*, and *Howell vs. Coupland*, all referred to in the text and the case of *Chamberlain vs. Trenough*, 23 U. C. C. P., 497, in which a lessee covenanted with his lessor to restore to him certain goods at the end of his term, and the goods having been destroyed by fire before the end of the term without his default, the principle of *Taylor vs. Caldwell* was held to apply, and the lessee was held to be excused because of the supervening impossibility.

In *Laine vs. The Queen*, 5 Exch., 103, the suppliants entered into a contract with the Crown to place a second-hand compound screw condensing engine in a steamship belonging to the Dominion Government and convert a paddle steamer into a steam propeller, to stop up all the holes in the bottom and side of the vessel and make new any part of the engine or machinery though not named in the specifications and put the steamer in perfect running order. The vessel was built of iron and very old, and, when grounded preparatory to placing in the dry-dock, it was found that the bottom of the vessel under the old engine-seat had been eaten away by rust. It, therefore, gave way, and was broken in when she grounded. The accident did not occur through the negligence of the suppliants, and it was insisted that the suppliants were liable to repair this damage under the contract and specification. It was held that there was nothing to

show by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the part of the steamship lying below and hidden by the engine seat would require renewing, and that the stipulation in the specifications that the steamer was to be put in perfect running order was intended to apply only to work the suppliants had expressly agreed to do, and should not be extended to other works or things which they did not agree to do or to replace or renew.

It was also held that, in such a contract as this, neither by the law of England nor that of Quebec was there any warranty to be implied on the part of the owner of the thing upon which the work was to be performed, that the same should continue in a state fit to receive the work contracted for.

Incapacity from Illness.

In *Marks vs. Ferry Commission*, 34 S. C. R., 366, the plaintiff was employed by the defendant commission to act in the capacity of captain of one of their ferry steamers under a contract in writing. The employment commenced on the 1st of March, 1889. On the 8th of January, 1900, the defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to Marks, but there was evidence that he was aware of its terms and that on two occasions a portion of his wages was deducted for absence from duty. On the 15th of December Marks was taken ill, and was thereafter continuously absent from duty until the time of his death, which occurred in July, 1901. In an action by the executrix for payment of wages during the time in which he was so absent from duty it was held that the illness of the employee by which he was permanently incapacitated from performing the service would in itself terminate the contract. Held also that an illness terminating in the employee's death and during the whole period of which he was incapacitated for service was a permanent illness, though both the employee and his physician believed that it was only temporary, and that a finding of the jury that he did not continue in the employ after notice of the rule and acquiescence in his employment under the terms thereof was against the evidence and must be set aside.

CHAPTER IV.

ILLEGALITY.

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An agreement may involve some matter or purpose which is illegal, and therefore renders it void of legal effect as a contract. The general presumption of law in favour of validity (a), casts the burden of establishing illegality as a fact upon the party asserting it (b). Where a contract has been confirmed by Act of Parliament, no objection can be taken to any of its provisions on the score of illegality (c); and it may be said generally that the

(a) See *ante*, pp. 232, 278, 407.

(b) *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387; *Mills*

v. Dunham (1891), 60 L. J. C. 362; (1891) 1 Ch. 576.

(c) *Delacherois v. Delacherois* (1864), 11

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courts will not interpose to prevent a party from resorting to Parliament to escape from the consequences of an obligation which he has undertaken (d). The illegality may be found in the matter of the consideration or of the promise as expressed in the agreement, or it may be found in the purpose to which the agreement, though legal in expression, is applied.—It is purposed here to consider shortly the sources of illegality in general, and to review the principal matters which have been held to avoid agreements upon the ground of illegality, and then to treat of the effects of such avoidance upon the rights of the parties.

Illegality at common law.

A matter may be illegal at common law or by statute. The common law prohibits generally whatever is contrary to public policy and morality, as defined by the decisions of the courts. "Public policy requires that a contract to commit a crime, or to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void" (e). But the mere good of the public is not a matter which the court will consider as affecting a contract otherwise legal: as when a railway company had covenanted not to build on certain land which they had purchased, it was held that they were not entitled to avoid their covenant and build an extension of the railway, merely for the reason that it was required for the convenience of the public (f).

By statute.

"A contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to

H. L. C. 62; *Manchester Ship Canal v. Manchester Rivercourse Co.* (1901), 70 L. J. C. 468; (1901) 2 Ch. 37; *In re Wilton's (Earl) Settled Estates* (1906), 76 L. J. C. 37; (1907) 1 Ch. 50.
(d) *Att.-Gen. v. Manchester and Leeds Ry.* (1839), 3 Jur 379; *Ex parte Hart-ridge* (1870), L. R. 5 Ch. 671.

(e) *Jessel, M. R., Printing Registering Co. v. Sampson* (1875), 44 L. J. C. 705; L. R. 19 Eq. 465.

(f) *Lloyd v. L. C. & D. Ry.* (1865), 34 L. J. C. 401; 2 De G. J. & S. 768; *Raphael v. Thames Valley Ry.* (1867), 36 L. J. C. 209; L. R. 2 Ch. 147.

prohibit the contract" (*g*). And where the prohibition is absolute, it cannot be waived by the party for whose benefit it is made (*h*). But where a penalty is imposed upon an offending party merely with the object of protecting the revenue a contract may be valid, although involving an infringement of the statute (*i*). On the other hand, if an act be prohibited without any express penalty, it cannot be the subject of a valid contract (*k*). The phrase in a statute "it shall be lawful," taken literally, is permissive and enabling only, but the context and application may require it to be construed as obligatory (*l*). There is no distinction between *malum prohibitum* and *malum in se* as regards the effect of illegality upon an agreement: "the court is bound, in the administration of the law, to consider every act to be unlawful, which the law has prohibited to be done" (*m*). A contract may be invalidated by reason of a matter of substance, as by a statute forbidding members of a local board to be interested directly or indirectly in contracts of the local board (*n*); or by reason of its provisions not being in a particular form (*o*). And any contract which precludes a party from exercising statutory powers, in the performance of which the public is interested, will, as a general rule, be held to be invalid (*p*).

The courts of this country admit actions upon foreign contracts for performances which are legal in this country, though they may not be legal in the foreign country; as a contract made in America with a British shipowner to carry cattle to England, excepting all liability for negligence; such exception being valid by English law, but not by American (*q*). But no action can be brought upon a foreign contract for a performance which is illegal

Foreign law.

g *Parke, B., Cope v. Rowlands* (1826), 6 L. J. Ex. 63; 2 M. & W. 149; *Melliss v. Shirley Loc. Bd.*, 16 Q. B. D. 446; 55 L. J. Q. B. 143; *Levy v. Bracken* (1893), 63 L. J. Q. B. 96; (1894) 1 Q. B. 114; *White v. Jennings* (1906), 75 L. J. K. B. 542; (1906) 2 K. B. 11; *Whitman v. Sadler* (1910), 79 L. J. K. B. 1050; (1910) A. C. 514.

h *Bingood v. Henderson's Trustees* (1908), 77 L. J. C. 486; (1908) 1 Ch. 743.

i *Smith v. Marchand* (1815), 15 L. J. Ex. 149; 11 M. & W. 452.

k *Bramwell, B., Cowan v. Milbourn* (1867), 36 L. J. Ex. 124; L. R. 2 Ex. 233.

l *Julius v. Oxford (Bp.)* (1880), 49

L. J. Q. B. 577; 5 Ap. Ca. 214.

m *Per cur. Cannon v. Beyer* (1819), 3 B. & Ald. 183; *Best, J., Bousley v. Bignold* (1822), 5 B. & Ald. 311.

n See *City of London Elec. Light Co. v. London (Corp.)* (1903), 72 L. J. C. 737; (1903) A. C. 431.

o *Young v. Leamington (Corp.)* (1883), 52 L. J. Q. B. 713; 8 Ap. Ca. 517; *Smith v. Whitman* (1909), 78 L. J. K. B. 1073; (1909) 2 K. B. 437; *Richard v. Graham* (1910), 79 L. J. C. 378; (1910) 1 Ch. 722.

p *Re S. E. Ry. & Whiffen's Cont.* (1907), 76 L. J. C. 481; (1907) 2 Ch. 366.

q *Re Missouri Steam Co.* (1889), 58 L. J. C. 721; 42 Ch. D. 321.

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here, though it may be legal by the foreign law (*r*); as a contract made abroad with a solicitor to transact business in this country upon terms which infringe the law of champerty (*s*); or a contract obtained by duress (*t*); or a foreign contract which in this country operates in unreasonable restraint of trade (*u*). The courts of this country admit actions upon contracts to be performed abroad which are legal by the foreign law; unless they are contrary to universally recognised principles of justice, or to express statutory prohibition (*x*); as a contract for the sale and delivery of slaves in a foreign country where the possession and sale of slaves is legal; except within the statutory prohibitions concerning slavery applying universally to British subjects (*y*); or a contract to sell goods according to weights or measures which are valid according to the law of the place where the goods are, although prohibited by the English law (*z*). In the case of a settlement made in Scotland upon the marriage between a domiciled Scotchwoman and a domiciled Englishman of the wife's property, an inalienable alimentary provision in favour of the husband will be given effect to in the English courts (*a*). But actions upon foreign contracts are subject to the rules of procedure of the courts of this country; including the rules of evidence, and the statutes of limitation of actions (*b*).

Agreements
affecting
government.

Upon the ground of public policy any agreement tending to interfere with or unduly influence the legislature, or the government, is illegal and void; as a promise to a member of the legislature in consideration of his giving or withholding his vote upon a bill before parliament (*c*). But an agreement by the promoters of a railway bill with a landowner, who is also a member of the legislature, for payment of an agreed sum of money for the damage to his property by the proposed railway, in consideration of his withdrawing opposition to the bill, is legal if made in his

(*r*) *Hope v. Hope* (1857), 26 L. J. C. 417; 8 De G. M. & G. 731; *Moulis v. Owen* 1907, 76 L. J. K. B. 396; (1907) 1 K. B. 746.

(*s*) *Grell v. Levy* (1864), 16 C. B. N. S. 79.

(*t*) *Kaufman v. Gerson* (1904), 73 L. J. K. B. 320; (1904) 1 K. B. 591.

(*u*) *Rousillon v. Rousillon* (1880), 49 L. J. C. 343; 14 Ch. D. 351.

(*x*) *South African Breweries v. King* (1900), 69 L. J. C. 171; (1900) 1 Ch. 273.

(*y*) *Santos v. Illidge* (1860), 29 L. J. C. P. 318; 8 C. B. N. S. 861.

(*z*) *Rosseter v. Culmann* (1853), 22 L. J. Ex. 128; 8 Ex. 361.

(*a*) *Re Fitzgerald* (1904), 73 L. J. C. 436; (1904) 1 Ch. 573.

(*b*) *De la Vega v. Viana* (1830), 8 L. J. O. S. K. B. 388; 1 B. & Ad. 284; *Dow v. Lippmann* (1837), 5 Cl. & F. 1; *Leroux v. Brown* (1852), 22 L. J. C. P. 1; 12 C. B. 601.

(*c*) *Per cur. Houlden (Lord) v. Simpson* (1839), 8 L. J. Ex. 281; 10 A. & E. 821.

private character of landowner only (*d*).—Any agreement involving bribery or undue influence at the election of members of parliament, or at an election of an officer of a municipal corporation, or of any officer to be chosen by public election is illegal and void; as a wager with a voter upon the result of an election (*e*). These matters are for the most part defined by statute and visited with penalties (*f*). A promise to pay money in consideration of abandoning a petition against the return of a member for bribery is illegal and void (*g*): as is a promise to pay the costs of an election petition, unless made by an elector or party interested (*h*).

CHAP. IV.
Corruption
at elections.

The sale of public offices is illegal at common law, and is further prohibited in some cases by statute (*i*). The sale of the command of a ship in the service of the East India Company, without the knowledge and approval of the company, was held to be void, and no money or damages recoverable under it (*k*). And the sale of a recommendation, nomination, or influence in procuring a public office (*l*); and an agreement to pay over the profits of the office in return for procuring it by such means is illegal and void (*m*); so also bonds given to secure payment of annuities, in consideration of an appointment being procured, are void (*n*).—Contracts for the resignation of public offices are also illegal and void (*o*); as where the party resigning stipulates for a share of the emoluments from his successor (*p*); or a bond given by a junior officer of a regiment to secure his contribution for buying out a senior officer (*q*).—Agreements for the procuring of titles of honour for

Sale of public
offices.

Resignation
of public
offices.

Titles of
honour.

(*d*) *Simpson v. Hadden* (1812), 1812, 9 Cl. & F. 61. See *Shrewsbury v. Earl*, v. *N. Staffs. Ry.* (1865), 35 L. J. C. 156; L. R. 1 Ex. 593; *Taylor v. Chichester & Midhurst* (1870), 39 L. J. Ex. 217; L. R. 1 H. L. 628.

(*e*) *Allen v. Hearn* (1785), 1 T. R. 56.

(*f*) The Corrupt Practices Prevention Act, 1854; the Corrupt Practices (Municipal Elections) Act, 1872; the Illegal and Corrupt Practices Prevention Act, 1883. See *Cooper v. Slade* 1858, 27 L. J. Q. B. 449; 6 H. L. C. 746; *Simpson v. Ford* (1869), 38 L. J. Q. B. 313; L. R. 4 Q. B. 626; *Reg. v. Hall* (1891), 60 L. J. M. C. 121; (1891) 1 Q. B. 747.

(*g*) *Copple v. Bower* (1838), 8 L. J. Ex. 9; 4 M. & W. 361.

(*h*) *Wallis v. Portland (Duke)* (1797, 3 Ves. 494; (1798), 8 Bro. P. C. 181.

(*i*) Co. Lit. 231 a. See Chitty's Stat. tit. "Offices against Sale of."

(*k*) *Blackford v. Preston* (1799), 8 T. R. 89; *Thomson v. Thomson* (1802), 7 Ves. 170; *Cord v. Hope* (1821), 2 L. J. O. S. K. B. 96; 2 B. & C. 661.

(*l*) *Hopkins v. Prescott* (1817), 16 L. J. C. P. 259; 4 C. B. 578; *Reg. v. Charvett* (1819), 18 L. J. M. C. 100; 13 Q. B. 447.

(*m*) *Gosforth v. Pearson* (1787), 1 H. Bl. 527.

(*n*) *Hanington v. Duchatel* (1781), 1 Bro. C. C. 124.

(*o*) *Graine v. Wroughton* (1855), 24 L. J. Ex. 265; 11 Ex. 146.

(*p*) *Parsons v. Thompson* (1790), 1 H. Bl. 322; *Waldo v. Martin* (1825), 1 B. & C. 319.

(*q*) *Graine v. Wroughton* (1855), 24 L. J. Ex. 265; (11 Ex. 116; *Eyre v. Forbes* (1862), 12 C. B. N. S. 191.

PART III. a consideration of money or profit are illegal; and a disposition of property made for that purpose or upon that condition is void (*r*).—Upon grounds of public policy the salary or emoluments of a public office cannot be assigned or charged by the holder: as the salary of a clerk of the peace (*s*), or the full pay of a military or naval officer (*t*). A pension granted entirely for past services, whether granted for life or merely during pleasure, is assignable, subject to any control of the Government over it; but a pension granted wholly or partly as a consideration or retainer for some continuing or future public service is not assignable (*u*); as the half pay of a military officer (*x*).

Ecclesiastical benefices.

A contract to present to a vacant "benefice with cure of souls," for money or other valuable consideration, is simoniacal and void by statute 31 Eliz. c. 6, s. 5 (*y*). A presentation to a living, in consideration of the new incumbent paying a sum of money for repairs which had been previously done at the rectory was held void under the above statute, and the money not recoverable (*z*). But an agreement between two incumbents upon an exchange of livings that neither shall have a claim upon the other for dilapidations is valid (*a*). Resignation bonds by incumbents of livings were illegal at common law, but were legalised conditionally by statute 9 Geo. 4, c. 94 (*b*). The incumbent of an ecclesiastical benefice, as a rector or vicar, cannot validly assign or charge the profits of his office (*c*). But a canon of a collegiate church entitled to a share of the income of the corporate property is not in this position (*d*); nor is the chaplain of a workhouse, who is appointed by the guardians, and paid out of local rates (*e*).

Agreements affecting public justice.

"Any contract or engagement having a tendency, however

r *Egerton v. Brownlow* (Earl) (1853), 23 L. J. C. 348; 4 H. L. C. 1.

s *Palmer v. Dale* (1821), 2 Br. & B. 673.

t *Barwick v. Road* (1791), 1 H. Bl. 627; *Apthorp v. Apthorpe* (1887), 12 P. D. 192.

u *Eldon, L. C., Davis v. Marlborough (Duke)* (1818), 1 Swanst. 74; *Wells v. Foster* (1841), 8 M. & W. 149; 10 L. J. Ex. 216. See *Lucas v. Harris* (1886), 56 L. J. Q. B. 15; 18 Q. B. D. 127.

x *Flarty v. Odham* (1790), 3 T. R. 681; *Lidderdale v. Montrose (Duke)* (1791), 4 T. R. 248. See *Crooke v. Price* (1889), 58 L. J. Q. B. 215; 22 Q. B. D. 428.

y *Fox v. Chester (Bp.)* (1829), 3 Bli. N. S. 123.

z *Moss v. Killick* (1881), 50 L. J. Q. B. 300.

a *Goldhaus v. Edwards* (1856), 25 L. J. C. P. 223; 18 C. B. 389; *Wright v. Davies* (1876), 46 L. J. C. P. 41; 1 C. P. D. 638.

b *Fletcher v. Soudes (Lord)* (1827), 1 Bli. N. S. 144.

c *Mony v. Leake* (1799), 8 T. R. 411; *Arbuckle v. Courtin* (1803), 3 B. & P. 321.

d *Grenfell v. Dean of Windsor* (1840), 2 Beauv. 544.

e *Re Mirams* (1891), 60 L. J. Q. B. 397; (1891) 1 Q. B. 594.

slight, to affect the administration of public justice would be illegal and void" (f). An attempt to pervert the course of justice is a misdemeanour at common law: as a bond given to a witness for not appearing to give evidence on an indictment for perjury (g); an agreement to pay money to a witness in proportion to the amount recovered by his evidence (h); an indemnity given by a defendant in a criminal case to his bail, because in effect it deprives the public of the intended security for the conduct of the defendant (i); and where a third person paid a sum of money to the solicitors of a petitioning creditor, upon their undertaking, which had the sanction of their client, not to appear at the public examination of the bankrupt, and not to oppose his order of discharge, the contract was held illegal and the money irrecoverable, the illegal object having been partly performed (k).

Agreements for the commission or encouragement of crime are illegal and void. A printer cannot recover the price of printing a libellous work; nor the publisher the price of selling it (l); and an indemnity against publishing a libel is illegal and void (m). An agreement between two or more to purchase shares in a company, in order to induce persons who might thereafter purchase shares in the company to believe, contrary to the fact, that there was a *bonâ fide* market for those shares, and that the shares were at a real premium, is an indictable offence, and no action can be maintained in respect of such agreement or purchase of shares (n). And there is no implied indemnity or contribution between persons who have participated in a criminal act (o). Upon this principle policies of life insurance become void if the owner himself causes the death by a criminal act, as by suicide or murder; and payment is not recoverable (p).

Commission of crimes.

The compounding or compromise of public offences, for the purpose of preventing the ordinary course of prosecution, is prohibited at common law; and contracts involving such compromises are

Compounding offences.

(f) *Ld. Lyndhurst, Egerton v. Brownlow* (Earl) (1853), 23 L. J. C. 286; 4 H. L. C. 163.

(g) *Collins v. Blanton* 1767, 2 Wils. 341; 1 Sm. L. C. 355.

(h) *Salford (Corp.) v. Larver* (1891), 60 L. J. Q. B. 39; (1891) 1 Q. B. 168.

(i) *Hermann v. Jenchner* (1885), 54 L. J. Q. B. 340; 15 Q. B. D. 561.

(k) *Kearley v. Thomson* (1890), 59 L. J. Q. B. 288; 24 Q. B. D. 712.

(l) *Fors v. Johns* (1802), 4 Esp. 97; *Poplett v. Stockdale* 1825, 2 Car. & P. 198.

(m) *Shackell v. Rosier* (1836), 5 L. J. C. P. 193; 2 Bing. N. C. 634.

(n) *Scott v. Brown* (1892), 61 L. J. Q. B. 738; 1892 2 Q. B. 724.

(o) *Calburn v. Patmore* (1834), 3 L. J. Ex. 311; 1 Cr. M. & R. 73.

(p) *Chaver v. Mutual Reserve Fund* (1891), 61 L. J. Q. B. 128; (1892) 1 Q. B. 147.

PART III.

Payment by
offender.

illegal and void: as a bond given in consideration of forbearing or withdrawing criminal proceedings against the obligor, or against a third party (*q*); a promissory note given in consideration of the payee forbearing to prosecute the maker or a third party for obtaining money by false pretences (*r*); an agreement to consent to an acquittal upon an indictment for obstructing a highway, though made upon the terms of the defendant restoring the highway (*s*). An agreement to withdraw from a prosecution for felony upon a promise by the party charged to bring no action for false imprisonment or malicious prosecution is illegal, and an action subsequently brought will not be stayed upon the ground that it was brought against good faith (*t*). An agreement to acknowledge the signature of a forged bill in consideration of the holder forbearing to prosecute the forger was held to be illegal and void, and inoperative as a ratification of the signature (*u*). The person whose name is forged may, if by his conduct he has induced the holder of a bill or cheque to alter his position, be estopped from setting up the forgery, but mere silence is not sufficient for that purpose as a general rule (*x*). A mere threat or apprehension of criminal proceedings is not sufficient to vitiate a contract, if there is no stipulation to abstain from prosecuting (*y*). But a creditor may take payment or securities for payment from his debtor, though the debtor may be subject to criminal proceedings in respect of the debt, as where he embezzled the money, or obtained the money or credit by forgery or false pretences; provided there is no condition not to prosecute (*z*). So an indorsee for value of forged bills may take good bills in exchange for them (*a*). A security taken from a father in consideration of delivering up to him bills forged by his son, was held void, the reasonable inference being that the basis of the

(*q*) *Gallus v. Bluntern* (1767), 2 Wils. 341; 1 Smith, L. C. 355; *Loud v. Grimade* (1888), 57 L. J. C. 725; 39 Ch. D. 605.

(*r*) *Clabb v. Hutson* (1865), 18 C. B. N. S. 414; *Jones v. Merioneth Ry. Soc.* (1891), 61 L. J. C. 138; (1892) 1 Ch. 173.

(*s*) *Woodhall Lee, Bd. v. Vint* (1890), 59 L. J. C. 608; 45 Ch. D. 351.

(*t*) *Rawlings v. Coal Consumers' Co.* (1874), 43 L. J. M. C. 392.

(*u*) *Brook v. Hook* (1871), 40 L. J. Ex. 50; L. R. 6 Ex. 89.

(*x*) *McKenzie v. British Linen Co.* (1881), 6 Ap. Ca. 82; *Ogilvie v. W. Australium Corp.* (1896), 65 L. J. P. C. 46; (1896) A. C. 257.

(*y*) *Flower v. Sadler* (1882), 10 Q. B. D. 572; *Jones v. Merioneth Ry. Soc.* (1891), 61 L. J. C. 138; (1892) 1 Ch. 173.

(*z*) *Ex p. Caldecott* (1876), 46 L. J. Bk. 14; 1 Ch. D. 150; *Flower v. Sadler* (1882), 10 Q. B. D. 572. See *Ex p. Leslie* (1882), 51 L. J. C. 689; 20 Ch. D. 131.

(*a*) *Wallace v. Hardacre* (1807), 1 Camp. 45.

agreement was the abandonment of any prosecution against the son (b). CHAP. IV.

"In all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle the private damage in any way he may think fit" (c). Accordingly after conviction for an assault the parties may refer to arbitration the costs of the indictment and the damages for the assault (d). A security given for the costs of a prosecution for assault, which the court took into consideration in assessing the punishment, was held valid (e). The compromise of an indictment for not obeying an order of Sessions for maintenance of a child, by the payment of a sum of money for costs and maintenance, was held valid (f). And the compromise of a prosecution for infringing a trade mark was allowed (g). But a compromise, upon payment of a sum of money and the costs of the prosecution, of an indictment for an assault which was attended with a riot and an obstruction of a public officer in the execution of his duty, was held illegal and void (h).

Compound-
ing private
injuries.

Agreements operating in fraud of the bankrupt law are illegal and void: as an agreement by a creditor to forbear opposition to the discharge of a bankrupt (i), or to his making a composition (k); agreements interfering with the equal distribution of the assets, or for obtaining payments or benefits in excess of the dividend (l); an assignment or charge by the debtor of his property conditioned to take effect in the event of bankruptcy (m); a sale at a fictitious price in order to secure a dividend sufficient

Agreements
in fraud of
bankrupt law.

b) *Williams v. Bayley* (1866), 35 L. J. C. 717; L. R. 1 H. L. 200. See *McClatchie v. Haslam* (1891), W. N. 191; 65 L. T. 691.

(c) *Ter car. Keir v. Leeman* (1816), 15 L. J. Q. B. 360; 9 Q. B. 395.

d) *Baker v. Townsend* (1817), 7 Taunt. 422. See *Flaorthy v. Bied* (1825), 2 Sim. & S. 372.

(e) *Bechey v. Wingfield* (1809), 11 East, 46.

(f) *Goodall v. Lowmles* (1844), 6 Q. B. 461.

(g) *Fisher v. Apollinaris Co.* (1875), 44 L. J. C. 500; L. R. 10 Ch. 297.

(h) *Keir v. Leeman* (1816), 15 L. J. Q. B. 359; 9 Q. B. 371.

(i) *Hall v. Dyson* (1852), 21 L. J. Q. B.

221; 17 Q. B. 785; *Kearley v. Thomson* (1890), 59 L. J. Q. B. 258; 21 Q. B. D. 712.

k) *McKewan v. Sanderson* (1875), 44 L. J. C. 447; L. R. 20 Eq. 65; *Ex p. Barre* (1880), 50 L. J. C. 821; 18 Ch. D. 464.

(l) *Jackman v. Mitchell* (1807), 13 Ves. 581; *Staines v. Wainwright* (1840), 9 L. J. C. P. 107; 6 Bing. N. C. 174; *Ex p. Midner* (1885), 51 L. J. Q. B. 125; 15 Q. B. D. 605. See *Ex p. Off. Receiver, Re Griffith* (1897), 66 L. J. Q. B. 763.

(m) *Ex p. Mackay* (1873), 42 L. J. C. 68; L. R. 8 Ch. 643; *Ex p. Williams* (1877), 47 L. J. Bk. 26; 7 Ch. D. 138; *Ex p. Jay* (1880), 14 Ch. D. 19.

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to cover the real value in case of the bankruptcy of the buyer (*n*); a mortgage with attornment at an excessive rent enabling the mortgagee to distrain sufficient goods to secure the debt (*o*). But if the debtor treats with his creditors individually, and not upon the footing of a common basis of consent, it is no objection that some creditors obtain greater benefits than others (*p*). A composition under the Bankruptcy Act, 1869, would be set aside at the instance of a single creditor, although passed by a majority of the creditors, if its sole object was to benefit the debtor (*q*). Upon the same principle the rules of the Stock Exchange by which the assets of a defaulting member are applied to Stock Exchange liabilities to the exclusion of external creditors are held illegal and void, as operating in fraud of the law of bankruptcy (*r*).

Maintenance and champerty.

The *maintenance* of a civil suit (*s*) of another, without having any interest in the suit (*t*), and *champerty* or the purchase of an interest in the suit of another in consideration or for the purpose of maintaining it, are offences at common law; and they are further prohibited by statutes which for the most part are declaratory of the common law (*u*).

Agreements to provide costs.

Agreements involving maintenance or champerty are illegal and void (*x*); as an indemnity or security for the costs, given to a party for the purpose of maintaining the suit (*y*); a contract to advance money for maintaining a suit upon security of the property in suit (*z*); or with a stipulation for the nomination and control of the solicitor (*a*); and the advance of a stated sum for maintaining a suit, though without undertaking to carry it on

n) *Jones v. Gordon* (1877), 47 L. J. Bk. 1; 2 Ap. Ca. 616.

o) *Ex p. Jackson* (1881), 14 Ch. D. 725. See *Ex p. Vasey* (1883), 52 L. J. C. 121; 21 Ch. D. 442.

p) *Levitt's Claim* (1894), 64 L. J. C. 13; (1894) 3 Ch. 365.

q) *Ex p. Cobb* (1873), 42 L. J. Bk. 63; L. R. 8 Ch. 727. See *Ex p. Russell* (1884), 22 Ch. D. 778; *Ex p. Reed* (1886), 55 L. J. Q. B. 241; 17 Q. B. D. 244; *Ex p. Kearsley* (1887), 56 L. J. Q. B. 220; 18 Q. B. D. 168.

r) *Timmins v. Saffery* (1877), 47 L. J. Bk. 11; 3 Ap. Ca. 213.

s) *Grant v. Thompson* (1895), 72 L. T. 264.

t) *British Cash and Parcel Register v. London Store Service Co.* (1908), 77 L. J.

K. B. 619; 1908, 1 K. B. 1006.

u) Co. Lit. 368 b; 2 Inst. 181. See *Bradburgh v. Newdigate* (1883), 52 L. J. Q. B. 458; 11 Q. B. D. 1; *Harris v. Briscoe* (1886), 55 L. J. Q. B. 423; 17 Q. B. D. 504; *Holden v. Thompson* (1907), 76 L. J. K. B. 889; 1907 2 K. B. 489.

x) *Stevens v. Bagwell* (1808), 15 Ves. 139; *Grell v. Lery* (1864), 16 C. B. N. S. 73.

y) *Bradburgh v. Newdigate* 1883, 52 L. J. Q. B. 458; 11 Q. B. D. 1.

z) *Hutley v. Hutley* (1872), 42 L. J. Q. B. 52; L. R. 8 Q. B. 112; *James v. Kerr* (1889), 58 L. J. C. 355; 40 Ch. D. 449.

a) *James v. Kerr* (1889), 58 L. J. C. 355; 40 Ch. D. 449.

to the end (b).—An agreement to supply information and evidence to maintain a suit, in consideration of a share of the property in suit, is not illegal, unless it be also a term that the stranger is either to recover the property or actively assist in the recovery of it (c). And an advertisement offering a reward for evidence in proof of a particular fact, is not illegal (d).

CHAP. IV.
Agreement to supply evidence.

Upon the same principle the purchase of a mere right of litigation is illegal and void: as the right to rectify or set aside a conveyance on the ground of mistake or fraud; or to recover from trustees for a breach of trust (e); or the right of proceeding with a petition to wind up a company (f). But the rule does not apply in bankruptcy, where the rights of action of the bankrupt vest in the trustee, who may sue himself or sell and assign them to another for the benefit of the creditors (g). The purchase of property which is the subject of a pending suit is not, of itself, illegal (h); and a *bonâ fide* purchase or assignment of property carries with it all rights of suit incidental to its realization and protection (i) as the right to have a prior voidable transaction set aside (k); unless it appears that the purchase was made for the special purpose of carrying on litigation (l). So the assignment of the benefit to a contract carries with it rights of action subsequently arising out of the contract (m). And an agreement for the sale of an estate with a stipulation that the purchaser shall be entitled to recover the arrears of rent and the charges for dilapidations, and for that purpose to maintain actions then pending in the name of the vendor, is not illegal (n). A claim under sect. 68 of the Lands Clauses Consolidation Act, 1845, to compensation in respect of an interest in land injuriously

Purchase of rights in litigation.

(b) *Ball v. Warwick* (1881), 59 L. J. C. P. 382.

(c) *Brydell v. Sprye* (1852), 21 L. J. C. 633; 1 De G. M. & G. 660; *Sprye v. Porter* (1856), 26 L. J. Q. B. 64; 7 E. & B. 58; *Rees v. De Bernardy* (1896), 65 L. J. C. 656; (1896) 2 Ch. 437.

(d) *Plating Co. v. Farquharson* (1882), 50 L. J. C. 406; 17 Ch. D. 49.

(e) *Prosser v. Edmunds* (1835), 1 Y. & C. Ex. 481; *Hill v. Bogle* (1867), L. R. 4 Eq. 260.

(f) *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959.

(g) *Seear v. Lawson* (1880), 50 L. J. C.

139; 15 Ch. D. 426; *Guy v. Churchill* (1888), 58 L. J. C. 315; 40 Ch. D. 181.

(h) *Harrington v. Long* (1834), 2 M. & K. 590; *Hunter v. Daniel* (1815), 14 L. J. C. 194; 4 Ha. 120.

(i) *Fitzroy v. Cure* (1905), 74 L. J. K. B. 829; (1905) 2 K. B. 364.

(k) *Dickinson v. Barrell* (1866), 35 L. J. C. 371; L. R. 1 Eq. 337.

(l) *De Houghton v. Money* (1867), L. R. 2 Ch. 164.

(m) *Wilson v. Short* (1848), 17 L. J. C. 289; 6 Hare, 366.

(n) *Williams v. Frotheroe* (1829), 5 Bing. 309; 3 Y. & J. 129.

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Interest in
suit.

affected within the meaning of that section, is not a *res litigiosa*, and is therefore a valid subject matter of a contract (o).

An interest in the matter of a suit, or a *bonâ fide* belief in such interest, justifies a person in maintaining the suit in respect of his interest (p). And where several persons have a common interest, they may combine to maintain or defend that interest, though their rights and the actions against them are several; and an agreement to share the costs of litigation is not illegal (q): as the common interest of members of a trade in defending an action for infringement of a patent affecting it (r); the interest of an elector in prosecuting an election petition (s). But an interest in the matter of the suit will not justify a champertous bargain for the separate and independent interest of another litigant (t).—The interest arising from relationship by blood is sufficient to justify maintenance; but it makes no difference as to champerty (u). The relation of master and servant or principal and agent may give an interest sufficient to maintain litigation, where the cause of action is a ministerial act, or something done in, or arising out of the character of agent or servant (x). It has been held that it is maintenance for a person at whose instance another has written a pamphlet, if the pamphlet is subsequently unfavourably reviewed and the character of the author attacked, to undertake an action for libel, himself nominating the solicitor besides finding the funds (y). But in a subsequent case, in which *Alabaster v. Harness* (y) was not cited, it was held that an incorporated nursing association which employed a member of the association as editor of a newspaper, was entitled to undertake the defence of an action for libel brought against the editor, although it nominated the solicitor besides finding the funds (z). And it has been held that the motive of "charity" is a defence to an

(o) *Dawson v. Gl. North. & City Ry.* (1904), 74 L. J. K. B. 190; (1905) 1 K. B. 260.

(p) Coleridge, C. J. *Bradlaugh v. Newdigate* (1883), 52 L. J. Q. B. 458; 11 Q. B. D. 11; *British Cash & Parcel Register v. Lamson Store Service Co.* (1908), 77 L. J. K. B. 649; (1908) 1 K. B. 1006. See *Guy v. Churchill* (1888), 58 L. J. C. 345; 40 Ch. D. 481.

(q) *Findon v. Parker* (1843), 12 L. J. Ex. 414; 11 M. & W. 675. See *Prince v. Howarth* (1905), 75 L. J. K. B. 92; (1905) 2 K. B. 763.

(r) *Plating Co. v. Farquharson* (1881), 50 L. J. C. 406; 17 Ch. D. 49.

(s) *Wallis v. Portland (Duke)* (1797), 3 Ves. 600; (1798), 8 Bro. P. C. 161.

(t) *Hutley v. Hutley* (1872), 42 L. J. Q. B. 52; L. R. 8 Q. B. 112.

(u) *Hutley v. Hutley* (1872), 42 L. J. Q. B. 52; L. R. 8 Q. B. 112.

(x) See *Elborough v. Ayres* (1870), 39 L. J. C. 601; L. R. 10 Eq. 367.

(y) *Alabaster v. Harness* (1894), 64 L. J. Q. B. 76; (1895) 1 Q. B. 339.

(z) *Ircay v. Royal British Nurses Assn.* (1897), 66 L. J. C. 587; (1897) 2 Ch. 272.

action for maintenance; though there was in fact no reasonable or probable cause for the proceedings (a). CHAP. IV.

The purchase by a solicitor from his client of an interest in a pending suit is voidable by the client by reason of the fiduciary relation between them (b). A stipulation by the solicitor in a suit for payment of a certain sum of money if successful, or of a percentage upon the amount of the property recovered, besides his costs, is illegal and void (c). But he may take security upon the subject of suit for his advances and services in the prosecution of the suit, but not for anything in the nature of a bonus beyond the taxed costs (d). By the Solicitors Act, 1870 (33 & 34 Vict. c. 28), a solicitor may make an agreement in writing with his client respecting payment for his services, subject to the allowance of the taxing officer of the court; and with express exception of any purchase of the interest of his client in any suit or action, and of any agreement stipulating for payment only in the event of success (e).

Purchase by solicitor of interest in suit.

In contracts for the sale of a goodwill, or for the formation or dissolution of a partnership, or for the employment of an agent or servant in a particular trade or business, stipulations are frequently made restraining a party from trading within such limits as are reasonably required for the protection of the interest of the other party; so restricted they are valid, but any restraint of trade exceeding such limits is illegal and void (f). Upon the sale of the goodwill of a trade, in the absence of express stipulation, there is no implied restraint against the seller carrying on a similar trade and dealing with the former customers, but he must not solicit such customers in the ordinary way of business (g). And upon a compulsory sale of a trade or business in bankruptcy, or the expulsion of a partner under a clause in the articles, there is no implied restraint against the bankrupt or former partner carrying on a similar trade or soliciting his

Agreements in restraint of trade.

(a) *Harris v. Briscoe* (1886), 55 L. J. Q. B. 423; 17 Q. B. D. 501.

(b) *Wood v. Downes* (1811), 18 Ves. 129; *Simpson v. Lamb* (1857), 26 L. J. Q. B. 121; 7 E. & B. 84. See *Knight v. Boyce* (1838), 27 L. J. C. 528; 2 D. G. & J. 421; *Doris v. Forethy* (1890), 59 L. J. Q. B. 318; 24 Q. B. D. 519.

(c) *Earle v. Hopwood* (1860), 31 L. J. C. P. 217; 9 C. B. N. S. 566; *Pince v. Battie* (1863), 32 L. J. C. 731.

(d) *Anderson v. Ratcliffe* (1860), 29 L. J. Q. B. 128; E. B. & E. 819.

(e) See post, p. 535; *Re Attorneys Act*, 45 L. J. C. 47; 1 Ch. D. 573.

(f) *Mitchell v. Reynolds* (1711), 1 P. Wms. 181; 1 Sm. L. C. 391.

(g) *Trego v. Hunt* (1895), 65 L. J. C. 1; (1896) A. C. 7; *Curl Bros. v. Webster* (1904), 73 L. J. C. 510; (1904) 1 Ch. 685.

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former customers (*h*). Upon the dissolution of a partnership where the goodwill is left with the continuing partners, there is no implied restraint against the retired partner continuing to trade, but he must not solicit former customers of the firm (*i*). Upon the same principle in the employment of an agent or servant there is no implied stipulation against his carrying on the same trade or business on his own account after the termination of his employment, but he must not do anything inconsistent with the employment (*k*).

Limits of restraint.

An agreement in restraint of trade is bad unless reasonable, but it may be made reasonable by limitations of time or space; and in determining whether the restraint is reasonable or not regard must be had to all the circumstances of the case (*l*). The question of reasonableness is for the judge and not for the jury (*m*); and being a question of law, the opinion of persons in the trade is irrelevant (*n*). *Prima facie*, all contracts are made with respect to the state of circumstances existing or contemplated at the date when they are entered into, and this principle is equally applicable to contracts in restraint of trade (*o*). And where several companies were associated together for the purpose of carrying on similar businesses in various parts, the reasonableness of a restraint of trade was judged by reference to the company with which the contract of service was in fact made (*p*). There is no presumption that an agreement in restraint of trade is bad, but the court must construe the provision as it does any other, and determine upon a fair construction whether it is reasonable or unreasonable in point of law (*q*). The burden of proof is upon the party who asserts that the restraint which he has contracted to submit to is unreasonable (*r*); and evidence that a

(*h*) *Walker v. Moltram* (1881), 51 L. J. C. 108; 19 Ch. D. 335; *Dawson v. Dawson* (1883), 22 Ch. D. 501.

(*i*) *Jennings v. Jennings* (1897), 67 L. J. C. 190; (1898) 1 Ch. 378; *Gillingham v. Reddow* (1900), 69 L. J. C. 527; (1900) 2 Ch. 242.

(*k*) *Re Irish* (1889), 58 L. J. C. 279; 40 Ch. D. 49; *Robb v. Green* (1895), 61 L. J. Q. B. 593; (1895) 2 Q. B. 315.

(*l*) *Mitchell v. Reynolds* (1711), 1 P. Wms. 181; 1 Sm. L. C. 391; *Badische Anilin Fabrik v. Schott* (1892), 61 L. J. C. 698; (1892) 3 Ch. 447.

(*m*) *Dowden and Pook, Ltd. v. Pook* (1903), 73 L. J. K. B. 38; (1904) 1

K. B. 45; *United Shoe Manufg. Co. v. Brunel* (1909), 78 L. J. P. C. 101; (1909) A. C. 330.

(*n*) *Haynes v. Doman* (1899), 68 L. J. C. 419; (1899) 2 Ch. 13.

(*o*) *Mills v. Dunham* (1891), 60 L. J. C. 362; (1891) 1 Ch. 576; *Dubowsky v. Goldstein* (1896), 65 L. J. Q. B. 397; (1896) 1 Q. B. 478.

(*p*) *H. Neillham & Sons, Ltd. v. Johnston-White* (1907), 76 L. J. C. 304; (1907) 1 Ch. 322.

(*q*) *Mills v. Dunham* (1891), 60 L. J. C. 362; (1891) 1 Ch. 576; *Haynes v. Doman* (1899), 68 L. J. C. 419; (1899) 2 Ch. 13.

(*r*) *Tallis v. Tallis* (1853), 22 L. J.

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provision is unusual in a particular trade (being evidence of a fact) is admissible as evidence that it is unreasonable (*s*). Although a person cannot bind himself to an unreasonable restraint of trade, yet if he submits to the restraint stipulated for as the consideration for a promise to pay an annuity, he may claim payment whether the restraint be reasonable or unreasonable (*t*). A distinction is also drawn between stipulations in restraint of trade contained in apprenticeship deeds, and those contained in contracts of service (*u*). If a restraint be limited in point of time it is not necessarily bad if unlimited in space, if otherwise reasonable (*x*); and provisions respecting limits of space may be severable, and be held good as regards reasonable, and bad as regards unreasonable limits (*y*).—A restraint, reasonably limited in space, may be unlimited in time, and may continue during the life of either party, though the party trading ceases to carry on the business; for the continuance of the restraint may be necessary in order to secure to him or to his representatives the full value of the business by sale; but the restraint is construed as continuing during the life of the party restrained, unless a certain limit is expressed (*z*). But where the question is whether the restraint is reasonable or not in space, the duration of time may be an important consideration; for there may be degrees of restriction which are unreasonable or not, according to the time limited for their continuance (*a*).—It is now settled that, provided there is a legally valid consideration, the value or adequacy is left to the agreement of the parties, and cannot be inquired into by the court (*b*). Where the contract is partly in writing and partly verbal, the consideration may be supplied by parol

In space.

In time.

Consideration of restraint.

Q. B. 185; 1 E. & B. 391; *Rossellon v. Rossellon* (1880), 19 L. J. C. 338; 11 Ch. D. 351.

(s) See *Wm. Loe v. Loe*, *Autons* (1908), 78 L. J. C. 80; (1909) 1 Ch. 763.

(t) *Bishop v. Kitchen* 1868, 38 L. J. Q. B. 29.

(u) *Kraus v. Wace* 1892, 62 L. J. C. 256; (1892) 3 Ch. 502; *Brandy v. South* 1900, 78 L. J. K. B. 745; 1909 2 K. B. 235. See *Gidd v. Thompson* (1910), 80 L. J. K. B. 272; (1911) 1 K. B. 304.

(v) *Nordenfjeldt v. Marcen Nordenfjeldt Co.* 1891, 63 L. J. C. 908; (1891) A. C. 535.

(y) *Pier v. Green* 1817, 16 L. J. Ex. 108; 16 M. & W. 316; *Indubarsky v.*

Goldstein (1896), 65 L. J. Q. B. 397; 1896 1 Q. B. 178; *Hogues v. Loman* (1899), 68 L. J. C. 119; 1899 2 Ch. 13. 5; *Hitchcock v. Coker* 1837, 6 L. J. Ex. 266; 6 A. & E. 438; *Ellers v. Crafts* (1850), 19 L. J. C. P. 385; 10 C. B. 241; *Hogues v. Loman* 1899, 68 L. J. C. 419; 1899 2 Ch. 13; *Thomson v. Jorman* (1900), 69 L. J. C. 823; (1900) 2 Ch. 698.

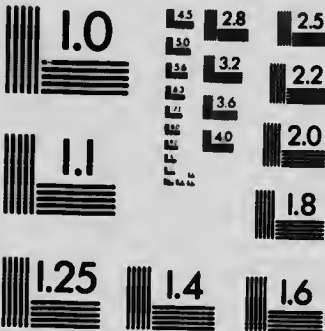
(a) *Tindal, C. J., Proctor v. Sargent* (1810), 10 L. J. C. P. 31; 2 Man. & G. 33.

(b) *Hitchcock v. Coker* 1837, 6 L. J. Ex. 266; 6 A. & E. 438; *Clarkson v. Lodge* 1861, 33 L. J. C. 143; 33 Beav. 227.



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evidence (c). The mere engagement at wages or the continuance of a person in service, though determinable at the notice or will of the employer, is a sufficient consideration for a reasonable restraint against exercising the same trade on his own account after dismissal (d). An engagement to serve exclusively, without an undertaking to employ or employment in fact, is void for want of any consideration (e). So the entering into a partnership is alone sufficient consideration for the restraint of a partner carrying on the same business after a dissolution of the partnership (f).

Reasonable restraints.

The trend of modern decisions is to give effect to agreements in restraint of trade which would formerly have been held void (g). From the more recent decisions (h) the following cases have been chosen as exemplifying the considerations upon which the courts act in deciding whether the restraint is void or enforceable: In the case of the sale of a secret process for the manufacture of a substitute for leather, against carrying on directly or indirectly business in competition with the purchaser in Europe, was held good (i); in the case of a patentee and manufacturer of guns and munitions of war, a covenant that he would not for twenty-five years, except on behalf of the purchaser, engage in the business of a manufacturer of guns and ammunition, was held good (k); in the case of manufacturers of champagne not to be concerned in the champagne trade for ten years, was held good (l); a rule that no member of an association of masters should employ former servants of other masters until after the expiration of two years from the determination of the contract of service without the consent in writing of the former master, was held bad (m); a covenant to ship and unship goods at a particular dock, and in default to pay the charges which would have been payable to the

(c) *Craper v. Southgate* (1891), 63 L. J. Q. B. 670.

(d) *Hitchcock v. Coker* (1837), 6 L. J. Ex. 266; 6 A. & E. 438; *Manford v. Gilling* (1860), 29 L. J. C. P. 105; 7 C. B. N. S. 305; *Gravelly v. Barnard* (1871), 43 L. J. C. 659; L. R. 18 Eq. 518; *Muddleton v. Brown* (1878), 47 L. J. C. 418; *Haggus v. Brown* 1899, 68 L. J. C. 418; (1899) 2 Ch. 13.

(e) *Sykes v. Dawson* (1839), 8 L. J. Ex. 102; 9 A. & E. 693.

(f) *Leighton v. Wabs* (1838), 7 L. J. Ex. 145; 3 M. & W. 515.

(g) See *Nordenfildt v. Maxim Norden-*

fildt Co. (1891), 63 L. J. C. 908; (1891) A. C. 535.

(h) See list of earlier cases in tabular form in the note to *Leary v. Langford* (1851), Kay, 667.

(i) *Leather Cloth Co. v. Lonsdale* (1860), 39 L. J. C. 86; L. R. 9 Eq. 345.

(k) *Nordenfildt v. Maxim Nordenfildt Co.* (1894), 63 L. J. C. 908; (1894) A. C. 535.

(l) *Ronsillon v. Ronsillon* (1880), L. J. C. 338; 11 Ch. D. 351.

(m) *Medical Water Society v. B...* (1887), 26 Ch. D. 465.

dock company, was held good (*n*); an agreement by a clerk and book-keeper to an importer of oils and drugs and agent for the sale of machines for the soap and perfumery trades "not to accept another situation as clerk or agent, nor to establish himself within a radius of fifteen miles from the Royal Exchange" without the written permission of the plaintiff for a period of three years after leaving the plaintiff's service, with a proviso that such permission should not be withheld if it could be proved to the satisfaction of the plaintiff that the situation sought, or the business established, was not for the sale of the same class of goods as those of the plaintiff, was held bad (*o*): by a clerk to agents and commission merchants not for five years after the determination of the service to engage "in any trade or business in the United Kingdom in connection with any goods of continental manufacture which" the plaintiffs "should have dealt in at any time previously to" the determination of the contract for service, was held good (*p*). And a similar decision was come to in a case where the traveller to a firm of antiseptic manufacturers agreed not "to call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with" customers of the plaintiffs the covenant being read as restricted to competing businesses (*q*). So where a milk carrier agreed that he would not during the continuance of the service or at any time thereafter serve, for his own benefit or the benefit of any other person, or solicit or in any way interfere with any of the customers who should at any time be served by the plaintiff in his business, the agreement was held severable and good as to persons who were customers of the plaintiff during the employment of the defendant by the plaintiff (*r*). So where the clerk and foreman of hay and straw merchants who did a large business in the United Kingdom, France, Belgium, Holland, and Canada, agreed that he would not within twelve months after the determination of his employment, carry on business of a hay and straw merchant, or enter the service of, or act as agent for, any person in that trade in any of the before-named countries, the undertaking was held good (*s*). So

n *Taff Vale Ry. v. Macneil* 1872, 12 L. J. Q. B. 153; L. R. 6 H. L. 169.
o *Fry v. Salford* 1892, 61 L. J. C. 109; 1892 2 Ch. 149.
p *Monach v. Fawcett* (1892), 61 L. J. C. 737.

q *Mills v. Dudson* 1891, 60 L. J. C. 302; 1891 1 Ch. 576.
r *Dubowski v. Goldstein* (1896), 65 L. J. Q. B. 397; (1896) 1 Q. B. 478.
s *Underwood v. Barker* 1899, 68 L. J. C. 201; (1899) 1 Ch. 300.

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an agreement by a clerk to hardware manufacturers not to work for anybody carrying on a business similar to that of his employers within a radius of twenty-five miles from his employers' works, was held good (*t*). The test in each case being whether the prohibition is or is not restricted to a competing business (*u*).—A covenant by the lesser of a brewery that he would not during the demise carry on the business of a brewer elsewhere or in any manner was held unreasonable (*x*). A covenant by the purchaser or by the lessee of a public-house against buying beer of any other person than the vendor or lessor is held reasonable and valid so long as the brewer is ready and willing to supply goods of sound quality at fair and reasonable prices (*y*). And covenants in leases restrictive of any kind of trading upon the demised premises are legal, for the protection of the property from nuisance and deterioration (*z*).

Measure of distance.

The limits of distance are presumptively to be measured in a straight line, as upon a map; and not along the practicable routes (*a*). An express provision that the distance should be measured "by the usual streets or ways of approach," was construed as meaning by any of the usual public ways and not only the most frequented ways (*b*).

Restraint partly unreasonable.

If the restraint can be construed divisibly as to the limits, it may be valid so far as they are reasonable, though void for the excess (*c*). A restraint against practising in London, or in any place in England or Scotland where the employer might have been practising, was held good as to London, but void as to the rest (*d*). And a covenant not to exercise a trade within the cities of London or Westminster, or within 600 miles of the same, was construed divisibly and held good as to London and Westminster only (*e*). Upon the same principle a covenant by the articled clerk to a solicitor, not to act for any person who had already been, or who thereafter should become, a client of the solicitor, was held to be

(*t*) *Haynes v. Doman* (1899), 68 L. J. C. 419; (1899) 2 Ch. 13.

(*u*) *Ehrmann v. Bartholomew* (1898), 67 L. J. C. 319; (1898) 1 Ch. 671.

(*x*) *Hinde v. Gray* (1840), 9 L. J. C. P. 253; 1 Man. & G. 195.

(*y*) *Cutt v. Touch* (1869), 38 L. J. C. 665; L. R. 4 Ch. 654; *Courage & Co. v. Carpenter* (1909), 79 L. J. C. 181; (1910) 1 Ch. 262.

(*z*) See *post*, Pt. VI. Chap. III.

(*a*) *Moufflet v. Cole* (1872), 42 L. J. Ex. 8; L. R. 8 Ex. 32.

(*b*) *Atkins v. Kinnier* (1850), 19 L. J. Ex. 132; 4 Ex. 776.

(*c*) *Rogers v. Maddocks* (1892), 62 L. J. C. 219; (1892) 3 Ch. 346; *Haynes v. Doman* (1899), 68 L. J. C. 419; (1899) 2 Ch. 13.

(*d*) *Mullan v. May* (1843), 13 L. J. Ex. 376; 11 M. & W. 653.

(*e*) *Price v. Green* (1847), 16 L. J. Ex. 108; 16 M. & W. 346.

unreasonably large; but valid as to persons who were clients before and during the clerk's articles (*f*). A restraint against carrying on "any business whatever" cannot be construed divisibly with reference to the particular business to be protected, and was held wholly void (*g*). A covenant by a partner, "to retire from the partnership and, so far as the law allows, from the business," was construed as imposing no definite restraint and therefore void; there being no limits fixed by the parties, nor any fixed by law (*h*).

A covenant not to carry on a trade is broken by acting as a journeyman or assistant to another person in the same trade (*i*); but a servant is not "interested in" the business in which he serves (*k*), and a shareholder in a company is not sufficiently identified therewith so as to make the business carried on by the company one which the shareholder "solely, or jointly with any other person, either directly or indirectly" carries on or is concerned or interested in (*l*). A covenant by the vendor of a medical practice, not to "enter into competition" with the purchaser, is broken by attending a former patient at his own solicitation (*m*). The selling of some articles of a trade, which are commonly sold in another trade, in the course of carrying on the latter, is or is not breach of a restraint against carrying on the former according to the construction to be put upon the contract (*n*).

Breach of restraint.

Combinations of workmen for the purpose of restricting the free disposal of labour or the free conduct of trade are illegal at common law, as operating in restraint of trade. They "cannot create any mutual obligation having the legal effect of binding each other not to work, or not to employ unless upon terms allowed by the combination" (*o*).—But a class of such combinations are now recognized and regulated, and may be registered, under the Trade Union Acts, 1871 and 1876. These Acts define a "trade union"; and the former Act, s. 2, exempts any member of such trade union

Combinations of workmen in restraint of trade.

Trade unions.

(*f*) *Nicholls v. Stetton* (1813), 7 Beav. 42; (1847), 10 Q. B. 346; *Baines v. Garry* (1887), 56 L. J. Q. B. 935; 35 Ch. D. 154.

(*g*) *Baker v. Hodgcock* (1888), 57 L. J. C. 889; 59 Ch. D. 520.

(*h*) *Baies v. Davies* 1887, 56 L. J. C. 962; 36 Ch. D. 359.

(*i*) *Jones v. Heavens* 1877, 4 Ch. D. 636; *Palmer v. Mallet* (1887), 57 L. J. C. 225; 36 Ch. D. 411.

(*k*) *Gophir Diamond Co. v. Wood* 1902, 71 L. J. C. 550; (1902) 1 Ch. 550.

(*l*) *Cory & Sons, Ltd. v. Harrison* (1906), 75 L. J. C. 714; (1906) A. C. 271.

(*m*) *Rogers v. Drury* (1888), 57 L. J. C. 501.

(*n*) *Stuart v. Diplock* 1889, 59 L. J. C. 142; 13 Ch. D. 313; *Drue v. Grog* (1894), 63 L. J. C. 547; (1894) 3 Ch. 25.

(*o*) *Hannan, J., Farrow v. Chase* (1869), 38 L. J. M. C. 132; L. R. 4 Q. B. 612.

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from criminal prosecution for conspiracy or otherwise (*p*). By the Act, 1871, s. 3, "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." But by s. 4, "nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing, or recovering damages for the breach of any of the following agreements": and certain agreements are specified, chiefly of a kind operating in restraint of trade, which are thus taken out of the Act and remain as at common law (*q*).

Combinations of traders.

Upon the same principle a combination of traders for purposes operating in unreasonable restraint of trade is illegal and void: as a by-law or rule of a trading corporation imposing restrictions upon workmen in the trade (*r*); or restraining sale of goods except to members of the corporation (*s*); or restraining the employment of persons leaving the service of members without their consent (*t*); and a bond entered into by the millowners of a district, conditioned to carry on their works, in regard to wages and the engaging of workmen and the times of work, according to the resolutions of a majority of their number, was held void (*u*). But a combination of traders for the purpose of sharing the trade equally and avoiding competition between themselves, is valid; unless accompanied with unreasonable restraints upon the parties (*x*). A combination of quarry owners, for one to tender for a contract and to buy the stone from the others, who were not to compete with his tender, was held valid; and one of them who tendered in breach of the agreement was restrained by injunction (*y*); and a combination of shipowners to give special advantages to shippers who dealt with them exclusively, and to charge freights below other shipowners for the purpose of excluding competition, whether or not invalid as between the members, was held

(*p*) See *Gibson v. Lawson*, 1891, 61 L. J. M. C. 9; (1891) 2 Q. B. 545.

(*q*) *Yorkshire Miners' Assn. v. Houlden* (1905), 71 L. J. K. B. 511; 1905 A. C. 256; *Gozney v. Bristol, W. Eng. and S. Wales Soc.*, 1909, 78 L. J. K. B. 616; (1909) 1 K. B. 901; *Russell v. Amalgamated Soc. of Carpenters and Joiners* (1910), 79 L. J. K. B. 507; (1910) 1 K. B. 506.

(*r*) *Tailors of Ipswich case* (1615), 11 Co. 53.

(*s*) *Gummakers' Co. v. Fell* (1742), Willes, 384.

(*t*) *Mineral Water Society v. Booth* (1887), 36 Ch. D. 465.

(*u*) *Hilton v. Eckersley* (1856), 25 L. J. Q. B. 199; 6 E. & B. 66.

(*x*) *Collins v. Locke* (1879), 48 L. J. P. C. 68; 4 Ap. Ca. 674.

(*y*) *Jones v. North* (1875), 44 L. J. C. 388; L. R. 19 Eq. 426.

to give no cause of action for the loss sustained by a competing shipowner (z).

In many professions and trades restrictions and regulations affecting contracts are imposed by statutes, as to the qualifications of persons and the conduct of business:—By the Solicitors Acts, a solicitor is required to be duly admitted and enrolled, and to have a stamped certificate, as conditions of acting as a solicitor (a). And by the Solicitors Act, 1874, s. 12, it is provided that, “no costs, fee, reward, or disbursement on account of any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever” (b). By this enactment the client who retained the solicitor is also deprived of his remedy for costs, though he had no notice of the disqualification (c).—By the Solicitors Act, 1870, s. 4, a solicitor may make an agreement in writing for the payment of services and disbursements as solicitor, subject, as to business in any suit or action, to allowance by the taxing officer of the court; and with a saving, sect. 11, of purchases by a solicitor of the interests of his client in any suit, and of agreements for payment only in the event of success in a suit. The direction as to writing is a condition to the validity of the agreement (d); but an agreement not to charge anything for costs need not be in writing (e). The agreement may be enforced by the solicitor, if it is signed by the client, and it is not necessary that it should also be signed by the solicitor (f). And by the same Act, sect. 16, a solicitor may take security from his client for future fees, charges and disbursements. The Solicitors’ Remuneration Act, 1881, s. 8 enables a solicitor and client to agree respecting remuneration in non-contentious business, and the section expressly provides that

Statutory restraints and regulations of professions and trades. Solicitors Acts.

(z) *Magul S.S. Co. v. Macgregor* (1891), 61 L. J. Q. B. 295; (1892) A. C. 25.
(a) 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 33 & 34 Vict. c. 65; 37 & 38 Vict. c. 68; 51 & 52 Vict. c. 65. See *Re Hope* (1872), L. R. 7 Ch. 766; *Fowler v. Monmouthshire Ry. & Canal Co.* (1879), 48 L. J. Q. B. 457; 1 Q. B. D. 331; *Re Horton* (1882), 51 L. J. Q. B. 309; 8 Q. B. D. 434.
(b) See *Verlander v. Eddolls* (1881), 51 L. J. Q. B. 55.
(c) *Fowler v. Monmouth Ry.* (1879), 48

L. J. Q. B. 457; 4 Q. B. D. 334; *Twin v. Sanger* (1888), 58 L. J. Q. B. 61.
(d) *Re Russell* 1885, 51 L. J. C. 918; 30 Ch. D. 114.
(e) *Clare v. Joseph* (1907), 76 L. J. K. B. 721; (1907) 2 K. B. 369. See *Gundey v. Sainsbury* 1910, 79 L. J. K. B. 713; (1910) 1 K. B. 645.
(f) *Re Thompson* (1893), 63 L. J. Q. B. 187; (1894) 1 Q. B. 162; *A. J. H. Jones* 1895, 64 L. J. C. 832; (1895) 2 Ch. 719; *Baker v. French* (1907), 76 L. J. C. 605; (1907) 2 Ch. 215.

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Medical Acts. By the Medical Act, 1858, s. 32, "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act." And he must prove not only that he is registered at the time of the trial, but also that he was registered when the charge accrued (*h*). This section applies to a foreigner practising in this country, and whether the patient himself or a third party is liable to pay the charge for medical attendance; but it does not apply to a charge by an unregistered assistant against his employer for his services (*i*). An unregistered person may practise medicine through the medium of registered persons, but he cannot himself practise with registered persons as assistants; nor can a registered person engage unregistered persons to practise medicine (*k*).—By the Medical Act, 1886, s. 6, "a registered medical practitioner shall be entitled to practise medicine, surgery, and midwifery in the United Kingdom and (subject to any local law) in any other part of Her Majesty's dominions and to recover any expenses, charges or fees;" unless he is a fellow of a college of physicians, the fellows of which are prohibited by by-law from recovering at law their expenses, charges or fees: in which case such by-law, so long as it is in force, may be pleaded in bar of any legal proceedings. Before these Acts a physician was presumed by custom to make no charge for his services, and his fees were presumptively gratuitous; but he was not precluded by law or custom from making a legal contract for payment (*l*). A physician is now entitled to recover his expenses, charges and fees under the above Act; subject to any by-law of a college to the contrary (*m*).

Apothecaries Act.

—By the Apothecaries Act (55 Geo. 3, c. 194), s. 14, no person can practise as an apothecary without a certificate from the Apothecaries Company; and by sect. 21, "No apothecary shall

(*g*) *Re Trappe* (1893, 62 L. J. C. 473; (1893, 2 Ch. 284; *Re Baylis* (1896, 65 L. J. C. 612; 1896, 2 Ch. 107.

(*h*) *Leaman v. Harsley* (1874), 41 L. J. Q. B. 22; L. R. 10 Q. B. 66.

(*i*) *De la Rosa v. Prieto* (1864, 33 L. J. C. P. 262; 16 C. B. N. S. 578.

(*k*) *Davies v. Mahmut* 1885, 54 L. J.

C. 1148; 29 Ch. D. 596; *Haworth v. Beasley* (1887, 56 L. J. Q. B. 543; 19 Q. B. D. 303.

(*l*) *Charley v. Boleat* (1791), 1 T. R. 317; *Vitch v. Russell* (1812), 12 L. J. Q. B. 13; 3 Q. B. 928.

(*m*) *Gibbon v. Budd* (1863, 32 L. J. Ex. 182; 2 H. & C. 92.

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be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he has obtained a certificate to practise." The Medical Act does not repeal this Act, nor dispense with the certificate required by it (*n*). And the qualification must exist at the time of the services rendered (*o*).—By the Pharmacy Act, 1868, s. 1, it is unlawful under a penalty for any person to sell or dispense poisons, or to assume the title of chemist or druggist, unless such person shall be a pharmaceutical chemist registered under the Act, and conform to such regulations as to the keeping and selling poisons as may be prescribed by the Pharmaceutical Society (*p*).—The Dentists Act, 1878, and the Veterinary Surgeons Act, 1881, contain similar provisions against the recovery of any fee or charge for acting in those professions, unless registered as a qualified practitioner. A dentist may recover the price of material, such as gold and false teeth, supplied by him to a patient although he is not registered (*q*).

Pharmacy Act.

Dentists Act.

The Pawnbrokers Act, 1872, defines the terms "pawnbrokers" and "pledges" for the purpose of the Act, and regulates the conduct of the business, the contract of pawn, the redemption of pledges and the sale of unredeemed pledges. By sect. 14, "a pawnbroker shall on taking a pledge in pawn give to the pawner a pawn ticket, and shall not take a pledge in pawn unless the pawner takes the pawn ticket." The ticket in the form provided in the schedule to the Act contains the terms of the contract. By sect. 24, a pawnbroker may make a special contract in respect of a loan of not more than five shillings, in the form therein provided. The pawnbroker has the right at common law of recovering the deficiency from the borrower, if a sale of the pledge produces less than the amount of the loan; which right is not impliedly excluded by the statutory contracts (*r*). By sect. 15, penalties are imposed on offences against the Act; but with a saving, sect. 51, of the validity of contracts of pawn and other contracts of the pawnbroker so offending.

Pawnbrokers Act.

n *Lemon v. Fletcher* (1873), 42 L. J. Q. B. 211; L. R. 8 Q. B. 319.

o *Lemon v. Housley* (1871), 41 L. J. Q. B. 22; L. R. 10 Q. B. 66.

p *Pharm. Society v. London Supply Assn.* (1880), 49 L. J. Q. B. 736; 5 Ap. C.C. 857; *Templeman v. Trafford* (1881), 51 L. J. M. C. 4; 8 Q. B. D. 397.

Pharm. Society v. Whieldon 1890, 59 L. J. Q. B. 190; 24 Q. B. D. 683.

Pharm. Society v. Morley (1909), 79 L. J. K. B. 50; 1910 1 K. B. 71.

q *Seymour v. Pickett* (1905), 74 L. J. K. B. 113; 1905 1 K. B. 715.

r *Jones v. Marshall* 1889, 59 L. J. Q. B. 123; 24 Q. B. D. 269.

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Money-lenders.

By the Money-lenders Act, 1900, the policy of the usury laws has been in part reverted to, in the case of money lent after November 1, 1900 (*g*). By the definition clause, the expression "money-lender" includes "every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business"; but does not include any pawnbroker, or friendly society, or building society, or loan society, or body corporate empowered by special Act of Parliament to lend money, or person *bonâ fide* carrying on the business of banking or insurance, or *bonâ fide* carrying on any business not having for its primary object the lending of money, or any body corporate exempted by order of the Board of Trade (*l*). The money-lending transactions struck at are where excessive interest is charged, "or where the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that in either case, the transaction is harsh and unconscionable, or" (in England, Wales or Ireland) "is otherwise such that a court of equity would give relief." In all these cases the transaction may be set aside, except as against a *bonâ fide* assignee or holder without notice, notwithstanding subsequent dealings (*n*). Where the security is taken in the registered name of a firm, one of the members of which was a mere figure head, it has been held that the security is not only invalid, but a purchaser for value of the security without notice of the defect in the registration of the firm is not within this saving, but the decision is more than doubtful (*x*). The power to grant relief under sect. 1 may be exercised in the case of "any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender" (*y*). The "existing powers or jurisdiction of any court" are saved (*z*). A person to whom the statute applies must register himself in his own or his trade name under the Act under a penalty, but if he fails to do so, money-lending contracts with him will not be void (*a*). It has been decided, by analogy to the decisions upon the Usury Acts, that where a borrower seeks to set aside a transaction, and to obtain re-delivery of securities

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(*l*) Sect. 6; *Bonnard v. Dott* (1905), W. N. 81; *Latchfield v. Dreyfus* (1906), 75 L. J. K. B. 447; (1906) 1 K. B. 581.
 (*n*) Sect. 1, *Samuel v. Newbold* (1906), 75 L. J. C. 705; (1906) A. C. 161.

(*x*) *Re Robinson* (1910), 80 L. J. C. 39; (1910) 2 Ch. 571.

(*y*) Sect. 1, sub-sect. 4.

(*z*) Sect. 1, sub-sect. 6.

(*a*) Sects. 2, 3, *Whitman v. Sudley* (1910), 79 L. J. K. B. 1050; (1910) A. C. 514.

given for a loan, upon the ground that the money-lender is not registered under the Act, he can only obtain relief upon the footing of repaying the money advanced together with interest (*b*). This decision does not apply to a claim to have a declaration that the transaction is invalid (*c*); and ignores the reading of the statute in the House of Lords, namely, that the jurisdiction conferred is a new jurisdiction, and that the decisions under the Usury Acts afford no assistance in arriving at its proper construction (*d*). It is also necessary that the transaction should be carried out at the registered address of the money-lender (*e*).

The statute 24 Geo. 2, c. 10, s. 12, "for restraining the retailing of distilled spirituous liquors," provides, sect. 12, that no person shall sue for or recover any debt for or on account of any spirituous liquors, unless such debt shall have been *bonâ fide* contracted at one time to the amount of twenty shillings or upwards *f*; also that a retailer of spirituous liquors taking a pawn or pledge for a debt for spirituous liquors shall be liable to a penalty; and that the owner may recover the pawn as if it had never been pledged. This enactment was repealed by 25 & 26 Vict. c. 38, "so far only as relates to spirituous liquors sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof in quantities not less at any time than a reputed quart." By the Licensing Consolidation Act, 1910, s. 65, a person may not sell by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. And by the County Courts Act, 1888, s. 182, "No action shall be maintainable in any court to recover any debt in respect of the sale of any ale, porter, beer, cider, or perry, which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given for the obtaining of any such ale, porter, beer, cider or perry."

Sale of spirituous liquors.

The Game Act, 1831, prohibits the sale of game birds after ten days from the day when it becomes unlawful to kill such

Sale of game

b *Lodge v. Nat. Union Ins. Co.* (1906), 76 L. J. C. 187; (1907) 1 Ch. 300.

c *Chapman v. Michelson* 1908, 78 L. J. C. 272; (1909) 1 Ch. 238.

d *Samuel v. Nabold* (1906), 75 L. J. C. 705; (1906) A. C. 361.

e *Gibbs v. Free, Union Pl.* (1909),

75 L. J. K. B. 815; (1909) 2 K. B. 353; *Jackson v. Price* 1909, 79 L. J. K. B. 131; (1910) 1 K. B. 143.

f *Scott v. Gilmore* 1810, 3 Taunt. 260; *Douglas v. Bon-* 1810, 10 L. J. Q. B. 65; 1 Q. B. 291. See *Philpott v. Jones* 1831, 5 L. J. K. B. 65; 2 A. & E. 11.

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game; and also prohibits the selling of game by an unlicensed person, or a purchase of game from him during the prohibited period (*g*). The Act does not apply to game birds killed abroad (*h*). The Ground Game Act, 1880, provides, sect. 1, that "every occupier of land shall have, as incident to and inseparable from the occupation of the land, the right to kill and take ground game thereon"; and sect. 3, that "every agreement, condition or arrangement which purports to divest or alienate the right of the occupier as declared given and reserved to him by this Act," shall be void.—The Weights and Measures Act, 1889, enacts, sect. 20, that "all coal shall be sold by weight only except as therein provided; and sect. 21, that the seller shall deliver a weight ticket in the form in the schedule to the Act with any quantity of coal exceeding two hundredweight delivered to the purchaser. The seller cannot recover the price of coals sold in violation of the statute (*i*).—The statute 6 & 7 Will. 4, c. 37, s. 1, prohibits the sale of bread in any other manner than by weight with a proviso excepting fancy bread (*k*).—The Act 32 & 34 Vict. c. 24, re-enacting 2 & 3 Vict. c. 12, s. 2, prohibits the printing and the publishing of any paper or book, on which the name and address of the printer shall not be printed; and no action will lie to recover the price of such printing (*l*).

Wages.

Contracts for the payment of wages otherwise than in money are rendered void by the Truck Act, 1831. This statute was extended by the Truck Amendment Act, 1887, so as to render void contracts by a servant to spend his wages at particular shops (*m*). And contracts respecting deductions from wages are also struck off by the Truck Acts of 1887 and 1896, and the Hosiery Manufacture (Wages) Act, 1874 (*n*).

(*g*) *Parrell v. Lock* (1855), 10 Ex. 759; *Coole v. Freeman* 1910, 80 L. J. K. B. 118; (1911) 1 K. B. 9.

(*h*) *Gosse v. Reg.* (1889), 58 L. J. M. C. 81; 23 Q. B. D. 109.

(*i*) See *Candell v. Dawson* 1817, 17 L. J. C. P. 311; 1 C. B. 376; *Smith v. Wood* 1889, 59 L. J. Q. B. 5; 21 Q. B. D. 23; *Paul v. Hogreaves* 1908, 77 L. J. K. B. 335; 1908, 2 K. B. 289; *Kyle v. Dundas* 1908, 77 L. J. K. B. 517; 1908, 2 K. B. 283.

(*k*) *L. C. C. v. Read* (1899), 69 L. J. Q. B. 39; 1900, 1 Q. B. 288; *Cox v. Bham* (1902), 71 L. J. K. B. 437; (1902) 1 K. B. 670.

(*l*) *Bousley v. Biggall* (1822), 5 B. Ald. 335; *Day v. Hemming* (1861), L. T. 113.

(*m*) See *Charnock v. Cunnings* 1811, 15 L. J. Q. B. 161; 8 Q. B. 311; *Smith v. Bolton* 1877, 47 L. J. C. P. 15; *Cox v. D.* 109; *Gould v. Hays* (1889), L. J. M. C. 9; *Hunt v. G. N. I.* (1891), 60 L. J. Q. B. 216; 1891, 1 Q. B. 601.

(*n*) See *Wallis v. Thorpe* (1874), L. J. Q. B. 137; L. R. 10 Q. B. 39; *Howlett v. Allen* (1891), 63 L. J. Q. B. 608; 1894, A. C. 183; *Williams North's Nav. Coll.* (1905), 75 L. J. K. 334; (1906), A. C. 136.

The statute 29 Car. 2, c. 7, s. 1, enacts that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted)"; and that every person offending in the premises shall forfeit a penalty. Contracts which are not in the ordinary callings of such persons are not within the statute: nor if made on Sunday are they void at common law. A farmer is not within the statute (*p*); nor is a solicitor (*q*); nor the owner of a stage coach (*r*); nor a hairdresser (*s*). It is not an offence against the statute for a baker to bake meat and pastry for customers (*t*). A party cannot sue upon a contract which he has made in violation of the statute; thus a horsedealer who has bought a horse with a warranty on Sunday cannot sue for a breach of the warranty (*u*). But a party charged with a contract cannot assert his own violation of the statute in defence, without proof that the other party knew him to be exercising his ordinary calling, or was himself exercising his ordinary calling in violation of the statute (*x*). The property in goods may pass under an executed contract within the statute; and a lien may be acquired for the price of work done under it (*y*). And a party may be charged upon a contract or promise subsequently made in respect of a transaction which is avoided by the statute (*z*).

CHAP. IV.
Sunday
trading

The Weights and Measures Act, 1878, provides imperial standards for the weights and measures to be used throughout the United Kingdom. And by sect. 19, "Every contract or dealing made or had in the United Kingdom for any work, goods or other thing which is agreed for by weight or measure shall be deemed to be made and had according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made or had shall be void" (*c*). Sect. 21

Weights and
measures

a *Dewey v. D. fountain* (1808), 1 Taunt. 131; *Scarf v. Morgan* 1838, 7 L. J. Ex. 324; 4 M. & W. 270.
b *Reg. v. Silver* (1863), 33 L. J. M. C. 79; 1 B. & S. 227.
c *Bals v. Dicken* 1831, 4 L. J. Ex. 28; 1 Cr. M. & R. 422.
d *Sandeman v. Reisch* 1827, 5 L. J. O. S. K. B. 298; 7 B. & C. 96.
e *Polair v. Sagar* 1901, 69 L. J. Q. B. 356; 1901 1 Q. B. 725.
f *Re v. Farnley* 1793, 5 T. R. 149.
g *Finnell v. Poth* 1826, 4 L. J.

O. S. K. B. 207; 5 B. & C. 106.
h *Blaxman v. Williams* 1824, 2 L. J. O. S. K. B. 224; 3 B. & C. 232.
i *Scarf v. Morgan* 1838, 7 L. J. Ex. 324; 4 M. & W. 270.
j *Smith v. Spurren* 1827, 5 L. J. O. S. C. P. 89; 1 Bing. 84; *Williams v. Paul* 1830, 8 L. J. O. S. C. P. 280; 6 Bing. 637; see *Napson v. Nicholls* 1838, 7 L. J. Ex. 117; 3 M. & W. 240, 5 M. & W. 702.
k See *Rescoe v. Colbourn* 1853, 22 L. J. Ex. 128, 8 Ex. 361; *Hughes v.*

PART III.

Coinage.

provides that the weights and measures of the metric system, and decimal sub-divisions of imperial weights and measures may be used in contracts or dealings. The measures expressed in a contract are construed presumptively to mean statutory measures, notwithstanding a local customary meaning of the terms used (*b*).—The Coinage Act, 1870, s. 6, enacts that "every contract, instrument and security for money, and every transaction whatever relating to money or involving the payment of or the liability to pay money shall be made according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless made according to the currency of some British possession, or some foreign state."

Trading with an enemy.

Trading with a public enemy is illegal at common law; and contracts involving such illegality are void (*c*). A declaration of war renders it unlawful to buy goods in the enemy's country, or to export them from a port of that country; though they were not bought from an enemy and are exported in a neutral ship; and an insurance of goods so shipped is illegal and void (*d*). A charter-party undertaking to load a cargo at a foreign port is discharged by a war breaking out with that country, because it becomes impossible to procure the cargo without illegal trading with the enemy (*e*). The insurance of an enemy's ships or goods is illegal, as tending to protect the enemy's trade; so also the insurance of ships or goods engaged in illegal trading with an enemy (*f*). The British agent who insures an enemy's property in his own name cannot recover upon the policy; although he has an interest on account of a debt due to him from the enemy (*g*). Hence an insurance of a foreign ship or goods during peace is taken as impliedly excepting a state of war supervening between the countries of the insurer and the insured (*h*). But there is nothing illegal in an insurance against a hostile seizure in anticipation of an actual

Insuring goods of enemy.

Ramphreys (1851), 23 L. J. Q. B. 356; 3 E. & B. 951; *Giles v. Jones* (1855), 21 L. J. Ex. 259; 11 Ex. 393.
Re St. Cross (Master) v. Howard de Warden (Lord) (1795), 6 T. R. 38.
Per cur. Potts v. Bell (1800), 8 T. R. 561; *Esposito v. Barden* (1857), 27 L. J. Q. B. 17; 7 E. & B. 763.
Id. Potts v. Bell (1800), 8 T. R. 548.
Esposito v. Barden (1857), 27 L. J. Q. B. 17; 7 E. & B. 763.

f. Vandepok v. Hewitt (1800), 1 East, 96; *Fuata v. Rodgers* (1802), 3 B. & P. 191.

g. Brandon v. Nesbitt (1794), 6 T. R. 23.

h. Fuata v. Rodgers 1802, 3 B. & P. 191; *Kellner v. Le Mesurier* 1803, 1 East, 396; *Gamba v. Le Mesurier* 1803, 1 East, 107; *Brandon v. Carling* (1803), 1 East, 110; *Ex p. Lee* (1806), 13 Ves. 64.

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declaration of war (*i*). And where a company incorporated in a British colony, was also incorporated in a foreign country to obviate certain legal difficulties without altering the status of the company, it was held that a policy of insurance effected by the company continued in force, notwithstanding the declaration of war between Great Britain and the foreign country in which the company was also incorporated, so as to enable it to recover for a hostile seizure made by the foreign country within its own territories (*k*). If the war supervenes after the alien has acquired a vested right under the contract, as in the case of a loss covered by the insurance, his right to recover is only suspended during the continuance of the war, and is restored with the return of peace (*l*).—The trading with an enemy or by an enemy may be licensed by the Crown, whereupon an insurance of the goods or of the ship engaged in the trade is legalised; and the British agent in whose name it is effected may then recover on the policy (*m*). Licences to trade are construed liberally, and a misdescription of a party applying, if made without fraud, does not vacate the licence or vitiate a policy effected upon it (*n*). An alien enemy domiciled in this country, and specially licensed to reside and trade, may insure and recover in his own name. "The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war, and its licence for such purpose ought to receive the most liberal construction" (*o*); but a licence to trade given to British subjects does not authorize them to trade as agents for an alien enemy (*p*); nor will it entitle other British subjects to trade under cover of the licence without connecting them together (*q*).

Licence to trade.

A wager is defined as "a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening" (*r*); and the contract

Wagering and gaming contracts.

i *Janson v. Brifontaine Mines, Ltd.* 1902, 71 L. J. K. B. 857; (1902) A. C. 181.

k *Nigel Gold Co. v. Hoade* 1901, 70 L. J. Q. B. 1006; 1901 2 K. B. 819.

l *Ex p. Boussmaker* 1806, 13 Ves. 71; *Flindt v. Waters* (1812), 15 East, 260.

m *Kensington v. Inglis* (1807), 8 East, 273.

n *Flindt v. Scott* (1814), 5 Taunt,

674; *Faulkner v. Leake* (1825), 7 Dowl. & R. 236; affg. (1824), 2 L. J. O. S. C. P. 40; 1 Bing. 473.

o *Per cur. Uspericha v. Noble* (1811), 13 East, 349.

p *Merrill v. Rankin* (1812), 15 East, 477.

q *Rush v. Bell* (1812), 16 East, 3.

r *Per cur. Hampton v. Walsh* 1875, 45 L. J. Q. B. 240; 1 Q. B. D. 192.

• PART III.

Wagers at
common law.

may be substantially a wager upon the happening of the event, though it be disguised in the form of a sale of goods or a remuneration for services (*s*).—At common law wagers concerning matters in which the only interest of the parties was that created by the bet were not *per se* unlawful, and an action might be maintained to recover the sum wagered (*t*). The exceptions were, firstly, where the result could only be determined by giving indecent evidence, or tended to disturb the peace of the individual, or of society: as in the case of a wager respecting the sex of a person (*u*); or whether an unmarried woman had a child (*x*). The second exception was where the wager arose respecting a matter prohibited by statute. Thus the legislature having prohibited horse races for a smaller sum than 50*l.*, a wager on a horse race so rendered illegal cannot be recovered (*y*); so too a wager respecting the manner of playing an illegal game was held not to be enforceable by action (*z*). The third exception was where the wager was void on the ground of public policy: as a wager between two voters before the poll began in respect of the result of a parliamentary election (*a*); a wager respecting the result of a criminal trial (*b*); a wager respecting the amount of a branch of the public revenue (*c*); a wager on the duration of life of a foreign sovereign (*d*); or a wager by a person that he would not marry within six years (*e*).

Gaming Act,
1845.

The Gaming Act, 1845, s. 18, enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be

(*s*) *Rourke v. Short* (1856), 25 L. J. Q. B. 196; 5 E. & B. 901; *Hugginson v. Simpson* (1877), 46 L. J. C. P. 192; 2 C. P. D. 76.

(*t*) *Gard v. Elliott* (1790), 3 T. R. 693.
(*u*) *Da Costa v. Jones* 1778, Cowp. 729.

(*x*) *Fitchburn v. Goldsmith* 1815, 4 Camp. 152.

(*y*) *Johnson v. Bann* (1790), 4 T. R. 1.

(*z*) *Brown v. Leson* (1792), 2 H. Bl. 43.

(*a*) *Allen v. Heath* (1785), 1 T. R. 53.

(*b*) *Evans v. Jones* (1839), 8 L. J. Ex. 173; 5 M. & W. 77.

(*c*) *Atherfield v. Board* (1788), 2 T. R. 610. See *Shirley v. Sankey* (1800), 2 B. & P. 130.

(*d*) *Gilbert v. Sykes* (1812), 16 East, 150.

(*e*) *Hartley v. Rice* (1808), 10 East, 22.

awarded to the winner or winners of any lawful game, sport, pastime or exercise."—Time bargains in stocks and shares, or agreements in the form of a sale, but with the intention of paying only the differences of prices at future times are void as wagers, and are not the less within the mischief of the statute because the alleged purchaser or seller has an option to take up or deliver the stock (*f*); and although the brokers employed for such purpose necessarily enter into real contracts, and may claim commission and charges (*g*). And a gain resulting from a gambling transaction for differences cannot form a consideration for a contract (*h*). But securities deposited as "cover" for any balance which may be found due on such an illegal transaction from the depositor are not "deposited to abide the event upon which any wager shall have been made," and may be recovered back at any time, although the result of the deal has been a loss (*i*), unless the deposit, upon the happening of the events to abide the result of which the deposit has been made, has appropriated the "cover" to the loss before the depositor has repudiated the transaction (*k*). — The proviso applies only to subscriptions and contributions for prizes at lawful games which are not wagers (*l*). A wager or bet between the players at a lawful game is not within the proviso (*m*). A subscription or contribution of a sum of money deposited by each of two persons to be awarded to the one who shall be the winner at a lawful game, as a horse race or a foot race, is a wager, and therefore not within the proviso (*n*). So money deposited by two persons to be paid to one of them if his horse trotted eighteen miles in an hour (*o*). And an agreement between two persons to race their horses upon the terms that both horses should become the property of the winner (*p*). — The above enactment against the recovery of money deposited to abide the event of any wager applies only to the claim of the winner; and not to

Recovery of money deposited.

(*f*) *Grizewood v. Blane* (1852), 11 C. B. 534; *Ex p. Trustee, Re Givver* (1899), 68 L. J. Q. B. 509; (1899) 1 Q. B. 794.

(*g*) *Thacker v. Hardy* (1879), 48 L. J. Q. B. 289; 4 Q. B. D. 685; *Ex p. Rogers* (1880), 15 Ch. D. 207.

(*h*) *Ex p. Waul* (1898), 67 L. J. Q. B. 620; (1898) 2 Q. B. 383.

(*i*) *Universal Stock Exchange v. Strachan* (1896), 65 L. J. Q. B. 429; (1896) A. C. 166.

(*k*) *Strachan v. Universal Stock Ex-*

change 1895, 65 L. J. Q. B. 178; 1895) 2 Q. B. 697.

(*l*) *Diggle v. Higgs* (1877), 46 L. J. Ex. 721; *Trotter v. Hill* (1880), 5 Ap. Ca. 342.

(*m*) *Parsons v. Alexander* (1855), 24 L. J. Q. B. 277; 5 E. & B. 263.

(*n*) *Diggle v. Higgs* (1877), 46 L. J. Ex. 721; 2 Ex. D. 422.

(*o*) *Batson v. Newman* (1876), 1 C. P. D. 573.

(*p*) *Crookes v. Dibble* (1866), 35 L. J. Ex. 167; L. R. 1 Ex. 248.

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Betting Act,
1853.

Gaming Act,
1892.

the claim of a depositor to recover his deposit, which he may reclaim at any time before it has been paid over according to the event of the wager (*q*). Under a claim made as winner of the wager, and not in repudiation of it, he is entitled to recover his own deposit (*r*). The Betting Act, 1853, ss. 1-4, renders it illegal and penal for any person to keep or use a house, office, or other place for the purpose of betting or receiving money for bets. And by sect. 5, "any money or valuable thing received by any such person as a deposit on any bet, shall be deemed to have been received for the use of the person from whom the same was received, and may be recovered accordingly." This Act does not affect the legality of betting or wagering otherwise than by prohibiting the keeping of betting-houses, and other places for the purpose of carrying it on; accordingly a direction to another to make a bet impliedly conferred an authority to pay if the principal lost (*s*). By the Gaming Act, 1892, s. 1, any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, is rendered null and void, and no action may be maintained to recover any such sum of money. Where money was paid at the express request of another in settlement of wagers, it was held to be irrecoverable, although it did not appear that the person making the payments knew that he was paying bets (*t*). So where one person advances money for the purpose of making bets on a joint account, an action will not lie to recover from the other party a proportionate share of the losses (*u*). But a principal may recover from his agent sums which the latter has received from a third party in respect of bets (*x*). Money paid by a person to a stakeholder to abide the result of a match may be recovered back before payment over to the winner (*y*). But a person who has

(*r*) *Hampden v. Walsh* (1875), 45 L. J. Q. B. 238; 1 Q. B. D. 189.

(*s*) *Shoolbred v. Roberts* (1899), 68 L. J. Q. B. 998; (1899) 2 Q. B. 560. And see *S. C.* on appeal (1900), 69 L. J. Q. B. 800; (1900) 2 Q. B. 197.

(*t*) *Bubb v. Yelverton* (1871), 19 W. R. 739; *Oldham v. Ramsden* (1875), 44 L. J. Q. P. 309; *Read v. Anderson* (1884), 53 L. J. Q. B. 532; 13 Q. B. D. 779.

(*u*) *Tatum v. Reeve* (1892), 62 L. J. Q. B. 30; (1893) 1 Q. B. 44.

(*v*) *Saffery v. Mayer* (1900), 71 L. J. Q. B. 145; (1901) 1 Q. B. 11.

(*x*) *De Mattos v. Benjamin* (1893), 63 L. J. Q. B. 218. See *Bridger v. Savage* (1885), 54 L. J. Q. B. 464; 15 Q. B. D. 363.

(*y*) *O'Sullivan v. Thomas* (1895), 64 L. J. Q. B. 398; (1895) 1 Q. B. 698. *Burge v. Ashley* (1900), 69 L. J. Q. B.

deposited money on the result of a boxing match at the request of the winner cannot recover from him the amount deposited, although he has received the total value of the stakes *z*).

By the 9 Anne, c. 19, s. 1, as amended by 5 & 6 Will. 4, c. 41, s. 1, all bills or other securities, where the whole or any part of the consideration shall be for any money or other valuable thing won by gaming, or by betting on the sides or hands of such as game, or for the repaying of any money knowingly lent or advanced for such gaming or betting, "shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." In a case where the loser had given a mortgage to the winner, and these statutory provisions were pleaded to an action on the covenant for payment, it was held to be a proper direction to the jury that if the consideration money was advanced in pursuance of a stipulation or agreement between the plaintiff and the defendant that out of it the plaintiff should be paid the money which he had won from the defendant by betting, it was a mere colourable loan and an evasion of the statute; but that if there was no such stipulation or agreement, and the plaintiff advanced the money as a loan for the defendant to dispose of as he pleased, the deed was valid, although the plaintiff expected to be paid out of the money so lent (*a*). No action can be brought upon a bill or cheque given to secure the repayment of a gaming debt, even where the security would be valid in the country where it was given, if the contract is to be performed in this country (*b*). An indorsee for value with notice that the bill or cheque was given in payment of a wager cannot recover against the acceptor or person giving the cheque (*c*). A person who had taken a promissory note to secure money lent to enable the borrower to pay a wager which he had already lost might recover the amount of the advance upon an implied promise to pay (*d*). But the Gaming Act, 1892, before referred to would render the money advanced irrecoverable, unless the money was advanced in a country where the loan would create an enforceable debt, in which event

Securities for gaming or wagering debt.

558; (1900) 1 Q. B. 744. See *Shoolbred v. Roberts* (1900), 69 L. J. Q. B. 800; (1900) 2 Q. B. 497.

(2) *Carny v. Plimmer* (1897), 66 L. J. Q. B. 415; (1897) 1 Q. B. 634.

(a) *Hill v. Fur* (1859), 4 H. & N. 359.

(b) *Montis v. Owen* (1907), 76 L. J.

K. B. 396; (1907) 1 K. B. 716.

(c) *Hay v. Aylmer* 1851, 20 L. J. Q. B. 171, 16 Q. B. 423; *Woolf v. Hamilton* (1898), 67 L. J. Q. B. 917; (1898) 2 Q. B. 337.

(d) *Ex p. Tyke* (1878), 47 L. J. Bk. 100; 8 Ch. D. 751.

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it could be recovered as a debt (e). It would seem that the Gaming Act, 1845, does not avoid securities given for a gaming debt (f); and bills of exchange or promissory notes carry the ordinary presumption of consideration in favour of a *bonâ fide* indorsee (g). Where there is a new consideration, and a fresh promise can be inferred, a cheque or bill can be used as evidence of an account stated (h).

Insurances
without
interest on
ships.

Insurance of marine risks, upon the terms of "interest or no interest," or without further proof of interest than the policy, which therefore may in effect be wagering contracts, were lawful at common law (i). By the Marine Insurance Act, 1906, ss. 4, 5 and 6, which replace the earlier statute 19 Geo. 2, c. 37, s. 1, every contract of marine insurance by way of gaming or wagering is void, and a contract is deemed to be a gaming or wagering contract (a) where the assured has not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest; or (b) where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer" (unless there be no possibility of salvage), or subject to any other like term. And an insurable interest is defined to be "where he (*i.e.* the assured) stands in any legal or equitable relation to the adventure or to any insurable property at risk therein in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof." And if a person has an insurable interest at the date of the loss, he may recover on the policy, although he had no interest at the date of the contract, and if the risk be "lost or not lost," he may recover although he had no interest until after the loss, unless at the date of effecting the insurance the assured was aware of the loss and the insurer was not (k).

(e) *Tatum v. Berr* (1892), 62 L. J. Q. B. 30; (1893) 1 Q. B. 44; *Sachy v. Falson* (1909), 78 L. J. K. B. 781; (1909) 2 K. B. 208.

(f) See *Hoy v. Ayling* (1851), 20 L. J. Q. B. 171; 16 Q. B. 423.

(g) *Fitch v. Jones* (1855), 24 L. J. Q. B. 293; 5 E. & B. 238; *Lilley v. Rankin* (1886), 56 L. J. Q. B. 248.

(h) *Higgins v. Stuart King* (1908), L. J. K. B. 794; (1908) 2 K. B. 696.

(i) *Per cur. Cousins v. Nantes* (1811), Taunt. 515.

(k) *Lucena v. Craufurd* (1802), 3 B. & P. 75; (1806), 2 B. & P. N. R. 20; (1808), 1 Taunt. 325; *Rhind v. Wilkin* (1811), 2 Taunt. 237; *Berridge v. A. On Insee.* (1886), 56 L. J. Q. B. 556.

was formerly said that "it is the duty of the court always to lean in favour of an insurable interest, if possible. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest" (*l*); and this seems to be confirmed by the Marine Insurance (Gambling Policies) Act, 1909, which restricts the inference that an insurance "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, is a gambling policy, to proceedings under that Act. The statute of George II. did not apply to foreign ships (*m*). As examples of insurable interests may be cited the following: the interest of a buyer of cargo (*n*); or of an unpaid seller (*o*); or an interest in respect of profits on goods shipped (*p*); or in respect of advances on cargo or on ship (*q*). The ship or other subject of insurance may be valued by agreement in the policy at a fixed sum; and such agreed valuation, whether in excess or in defect of the real value, is *prima facie* conclusive between the parties in adjusting the loss (*r*). An excessive over-valuation may be evidence of fraud, or of an intention of wagering, which vitiates the policy (*s*); and it is a material fact which it is necessary to disclose to the underwriter (*t*). In the case of a total loss, whether actual or constructive, the insured can recover from the underwriters the agreed value; and though that value be less than the real value he can recover no more (*u*); and the underwriters on

Valued policies.

Q. B. D. 346; *Gedye v. Royal Exchange Assn.* (1900), 69 L. J. Q. B. 306; 1900 2 Q. B. 214.

(*l*) Brett, M. R., *Stock v. Angley* (1881), 53 L. J. Q. B. 336; 12 Q. B. D. 571.

(*m*) *Nantes v. Thompson* 1802, 2 East, 385; reversed *man*, *Cousins v. Nantes* (1811), 1 Taunt. 513, on the ground that it should have appeared on the face of the policy that it was a wagering policy. See *Atkins v. Jupp* 1877, 46 L. J. C. P. 824; 2 C. P. D. 375.

(*n*) *Anderson v. Morice* (1877), 46 L. J. Q. B. 11; 1 Ap. Ca. 713; *Angley v. Stock* (1885), 54 L. J. Q. B. 582; 10 Ap. Ca. 263.

(*o*) *Seagrace v. Union Marine* (1866), 35 L. J. C. P. 172; L. R. 1 C. P. 305.

(*p*) *Barclay v. Cousins* 1802, 2 East, 511; *Mackenzie v. Whitworth* (1875), 45 L. J. Ex. 233; 1 Ex. D. 36; *Imbau S.S. Co. v. Bischoff* (1882), 52 L. J.

Q. B. 169; 1 Ap. Ca. 676.

(*q*) *Wolff v. Hornes* 1798, 1 B. & P. 316; *Esmereth v. Alliance Marine Insce.* 1873, 42 L. J. C. P. 305; L. R. 3 C. P. 596.

(*r*) Marine Insurance Act, 1906, s. 27; *Irving v. Manning* (1847), 1 H. L. C. 287; *Barclay v. Janson* (1867), 37 L. J. C. P. 105; L. R. 3 C. P. 303; *Lidgett v. Seaton* 1871, 40 L. J. C. P. 257; L. R. 6 C. P. 616.

(*s*) Marine Insurance Act, 1906, s. 27 (3); *Hugh v. De la Cour* (1812), 3 Camp. 319; *per cur.*, *Barclay v. Janson* (1867), 37 L. J. C. P. 105; L. R. 3 C. P. 303.

(*t*) Marine Insurance Act, 1906, s. 18 (2); *London v. Parker* 1874, 43 L. J. Q. B. 227; L. R. 9 Q. B. 531.

(*u*) Marine Insurance Act, 1906, ss. 27, 68; *Irving v. Manning* (1847), 1 H. L. C. 287.

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payment of the agreed value become entitled to the whole amount of salvage, or in case of loss by collision, to the whole damages recovered, notwithstanding the value in the policy is less than the real value (*x*). Where the assured effected two policies at two offices on a ship valued in each policy at 3,000*l.*, and, the ship being lost, he received on the two insurances 3,700*l.*, he was held liable to refund the excess over the valuation in the proportion of the amounts of the policies (*y*). In the case of partial loss the assured recovers the same proportion of the agreed value as the loss bears to the real value (*z*). Although a valued policy is conclusive as to the value, it leaves it open to the insurer to disprove the interest of the assured wholly or in part, or to show the nature of the risk (*a*).

Insurance on life.

Insurance of life, by the payment of a fixed annual premium in consideration of a certain sum to be paid at death, is not a contract of indemnity, and at common law might be made without any interest, pecuniary or otherwise, in the life insured (*b*). But the statute 14 Geo. 3, c. 48, enacted, sect. 1, "that no insurance shall be made by any person on the life of any person, or on any other event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made shall have no interest, or by gaming, or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever." And sect. 3, "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives, or other event or events." Upon the construction of this statute it is held sufficient if the assured had an interest in the life at the time of effecting the insurance; and he may continue the insurance and recover the value of the interest after it has ceased to exist (*c*). But if a

(*x*) Marine Insurance Act, 1906, s. 79; *McNaught v. Coulter* (1773), 4 Bro. P. C. 150; *North of England Insur. v. Armstrong* (1869), 39 L. J. Q. B. 81; L. R. 5 Q. B. 244; *Assicurazione Generale de Trieste v. Empress Assce.* (1907), 76 L. J. K. B. 980; (1907) 2 K. B. 814.

(*y*) *Irring v. Richardson* (1831), 9 L. J. O. S. K. B. 225; 2 B. & Ad. 193.

(*z*) Marine Insurance Act, 1906, ss. 69, 70, 71; *Dunoon v. Home & Colonial Assce.* (1872), 41 L. J. C. P. 162; L. R. 7 C. P.

341; *Atchison v. Lohre* (1879), 49 L. J. Q. B. 123; 4 Ap. Ca. 735; *Balmoral Co. v. Marten* (1902), 71 L. J. K. B. 819; (1902) A. C. 511.

(*a*) Marine Insurance Act, 1906, s. 75 (2); *Dunoon v. Home & Colonial Assce.* (1872), 41 L. J. C. P. 162; L. R. 7 C. P. 341; *Williams v. North China Insur.* (1876), 1 C. P. D. 757.

(*b*) *Per cur.* *Dalby v. India & London Life Assce.* (1851), 24 L. J. C. P. 5; 15 C. B. 365; 2 Sm. L. C. 262.

(*c*) *Dalby v. India & London Insce.*

person insures the same interest with several insurers, he can only recover upon the whole of the value of his interest: and upon receiving the whole value from one he is precluded from charging the others (*d*); who become liable to contribute *pro rata* to the one who has paid the whole (*e*).—A person is taken to have an unlimited insurable interest in his own life, and in that of his wife (*f*); and a wife in that of her husband (*g*); but a parent cannot insure the life of a child without having a pecuniary interest in the life (*h*); and an insurance nominally effected on the life of one person, at the instance and for the benefit of another, who has not an insurable interest in the life insured, and who is to pay the premiums, in pursuance of an arrangement between them by which the latter is to get the sole benefit of the insurance, is void (*i*). By the Married Women's Property Act, 1882, s. 11 (repealing and re-enacting the Married Women's Property Act, 1870, s. 10), "a married woman may effect a policy upon her own life or the life of her husband for her separate use;" and "a policy effected by any man on his own life, and expressed to be for the benefit of his wife, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her husband and children or any of them, shall create a trust in favour of the objects therein named: and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: provided that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy, a sum equal to the premiums so paid" (*k*).

Insurable interest in life.

A creditor has an insurable interest in the life of his debtor to the amount of the debt: and he may continue the insurance and

Interest of creditor.

(1854), 24 L. J. C. P. 6; 15 C. B. 365; 2 Sm. L. C. 262. See *Auctil v. Manufacturers' Life Insur.* (1899), 68 L. J. P. C. 123; (1899) A. C. 601.

(*d*) *Hobden v. West* 1862, 32 L. J. Q. B. 85; 3 B. & S. 579.

(*e*) See *ante*, p. 50.

(*f*) *Griffiths v. Fleming* (1909), 78 L. J. K. B. 567; (1909) 1 K. B. 805.

(*g*) *Reid v. Royal Exchange Assur.* (1795), 2 Peake, 70.

(*h*) *Hatford v. Kymer* 1830, 8 L. J. O. S. K. B. 311; 10 B. & C. 724;

Worthington v. Curtis 1875, 45 L. J. C. 259; 1 Ch. 11, 119. See *Friendly Societies Act* 38 & 39 Vict. c. 60, s. 28.

(*i*) *Shilling v. Accidental Death Insur.* (1837), 26 L. J. Ex. 266; 27 L. J. Ex. 16; 2 H. & N. 42.

(*k*) See *Clayton v. Mutual Reserve Fund* 1891, 61 L. J. Q. B. 128; (1892) 1 Q. B. 147; *Re Thornhill* (1897), 66 L. J. C. 719; (1897) 2 Ch. 415; *Re Parker's Policies* (1906), 75 L. J. C. 297; (1906) 1 Ch. 526.

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recover that amount after the debt has been paid (*l*). An insurance company in lending money may lawfully stipulate that the borrower shall insure his life to a greater amount than the debt, and assign the policy to them as security (*m*). A debtor acquires no insurable interest in the life of his creditor by reason of a promise by the creditor, made without any valid consideration, that he would not demand payment of the debt during his life (*n*). A contract of employment at a fixed salary for a certain term of years gives the employed an insurable interest in the life of the employer (*o*). And an expectancy dependent upon the life of a person is insurable at the full value, and not merely at the present value at the time of insuring (*p*). Insurances of life usually except in express terms death by suicide, unless the policy is assigned (*q*); and it seems there is an implied exception of suicide (except in a state of insanity), and of death by the felonious act of the owner of the policy (*r*). There is an implied exception of death by the infliction of the death penalty (*s*).

Insurance
against fire.

An insurance against fire is a contract of indemnity under which the insurer is entitled to be subrogated to all the rights of the assured, who is not entitled to modify the rights of the insurer by any renunciation on his part (*t*): and if made without any insurable interest is void as a wagering contract, and is also void under the above statute 14 Geo. 3, c. 48. A trustee or bailee in possession of goods which he is accountable for to the real owner has an insurable interest; as a bankrupt in the possession of goods which have vested in the trustee for the creditors (*u*). A warehouseman or wharfinger or carrier holding goods of others in the way of his business, has an interest sufficient to support an insurance to the full value in respect of his own charges, and of

(*l*) *Dunlop v. India & London Insur.* (1851), 21 L. J. C. P. 6; 15 C. B. 365; 2 Sm. L. C. 262.

(*m*) *Dowens v. Giron* (1814), 13 L. J. Ex. 159; 12 M. & W. 481.

(*n*) *Hebdon v. West* (1862), 32 L. J. Q. B. 85; 3 B. & S. 579.

(*o*) *Hebdon v. West* (1862), 32 L. J. Q. B. 85; 3 B. & S. 579.

(*p*) *Law v. London Indus. Life Co.* (1855), 24 L. J. C. 196; 1 K. & J. 223.

(*q*) See *Thift v. Schwabe* (1847), 17 L. J. C. P. 2; 3 C. B. 437; *Moore v. Wainbery* (1851), 24 L. J. Q. B. 40; 4 E. & B. 243; *Dufaur v. Professional Assce.* (1858), 27 L. J. C. 817; 25 Beav. 599; *Wigan*

v. Eng. & Scot. Life Life Assce. (1908), 78 L. J. C. 120; (1909), 1 Ch. 291.

(*r*) See *Horn v. Anglo-Australian Assce.* (1861), 30 L. J. C. 511; *Chace v. Mutual Reserve Fund* (1891), 61 L. J. Q. B. 128; (1892) Q. B. 147.

(*s*) *Amicable Insce. v. Bolland* (1830), 4 Bl. N. S. 194.

(*t*) *West of England Fire Insur. v. Isaacs* (1896), 66 L. J. Q. B. 36; (1897) 1 Q. B. 226; *Phenix Assce. v. Spooner* (1905), 74 L. J. Q. B. 792; (1905) 2 K. B. 753.

(*u*) *Marks v. Hamilton* (1852), 21 L. J. Ex. 109; 7 Ex. 323.

the surplus interest of the owners (*x*). An unpaid vendor of property has an insurable interest in respect of his lien (*y*); but after receiving payment of the price in full he retains no insurable interest (*z*); and an insurer who has paid the insured vendor for a loss by fire, upon receipt by the latter of the purchase-money in full, may recover back from him the money paid for the loss (*u*). As between several insurers of the same interest in property the loss is *primâ facie* apportionable; and the insurance money is appropriated according to the respective interests of the assured in the property (*b*). And as between conflicting interests the benefit of an insurance presumptively belongs to the person with whose money it was effected (*v*).

Restrictions on marriage are against public policy; and agreements operating in general restraint of marriage are illegal and void (*d*). A covenant not to marry anyone else than the covenantee, importing no mutual engagement of marriage was held illegal and void, because it operates simply in restraint of marriage (*e*). And a wager by a person that he would not marry within six years was held illegal and void (*f*). A covenant not to revoke a will so far as it is revocable by marriage, is void and no action will lie on such breach; but the covenant is valid as to any other mode of revocation (*g*). Upon grounds of policy, based upon morality, a promise to marry made by a married man to a person who knows that his wife is then living is void (*h*).—Particular and partial restraints on marriage, if reasonable in

Agreements
in restraint
of marriage.

Particular
restraint.

(*x*) *Waters v. Monarch Life Insce.*, 1856), 25 L. J. Q. B. 102; 5 E. & B. 870; *L. & N. W. Ry. v. Glyn* (1859), 28 L. J. Q. B. 193; 1 E. & E. 652; *Edinburgh v. Alliance Marine Insce.* (1873), 42 L. J. C. P. 305; L. R. 8 C. P. 596; compromised on appeal (1874), 13 L. J. C. P. 596. See *S. Austentia Insce. v. Randall* (1869), L. R. 3 P. C. 311.
(*y*) *Collingridge v. Royal Exchange Assce.* (1877), 47 L. J. Q. B. 32; 3 Q. B. D. 173.
(*z*) *North British Insce. v. Moffat* (1871), 41 L. J. C. P. 1; L. R. 7 C. P. 25; *Martineau v. Kitching* (1872), 41 L. J. Q. B. 227; L. R. 7 Q. B. 436.
(*u*) *Castellain v. Paxton* (1883), 52 L. J. Q. B. 366; 11 Q. B. D. 380.
(*v*) *Reynard v. Arnold* (1875), L. R. 10 Ch. 386; *North Brit. and Merc. Insce. v. London, Liverpool and Globe Insce.* (1877), 46 L. J. C. 537; 5 Ch. D. 569;

Edwards v. West (1878), 47 L. J. C. 163; 7 Ch. D. 858.

(*e*) *Seymour v. Vernon* (1852), 21 L. J. C. 133; *Wawickier v. Birchall* (1852), 23 Ch. D. 188.

(*f*) *Scott v. Tyler* (1788), 2 Bro. C. C. 131; 2 Dick. 712; 1 Wh. & T. L. C. 555. See *Billhairs v. Billhairs* (1871), 13 L. J. C. 669; L. R. 18 Eq. 510; *Jones v. Jones* (1875), 45 L. J. Q. B. 166; 1 Q. B. D. 279; *Re Whiting* (1901), 74 L. J. C. 207; (1905) 1 Ch. 96.
(*g*) *Lowe v. Peers* (1768), 4 Harr. 2225; *Wilmot's Ca.* 369. See *Cock v. Richards* (1805), 10 Ves. 137.
(*h*) *Bartley v. Rice* (1808), 10 East, 22.
(*i*) *Robinson v. Ommanney* (1885), 52 L. J. C. 440; 23 Ch. D. 285.
(*j*) *Spens v. Hunt* (1908), 77 L. J. K. B. 321; (1908) 1 K. B. 720; *Wilson v. Curlew* (1908), 77 L. J. K. B. 591; (1908) 1 K. B. 720.

PART III.

Agreements
for procuring
marriage.

extent, are not illegal; as a restraint until twenty-one or other reasonable age, or until consent of parents or guardians; a restriction to marry or not to marry a particular person; or a class of persons, as a Scotchman, or a domestic servant (*l*). Agreements for procuring marriages for reward are illegal and void, whether a particular marriage is contemplated or whether the contract is to give introductions to persons of the opposite sex (*k*). Upon the same principle a bond conferring a pecuniary benefit upon the parent of one of the spouses, as the consideration for his or her consent to the marriage, is invalid (*l*).

Illicit
cohabitation.

Agreement with a woman upon the consideration of future illicit cohabitation are illegal and void (*m*). And all agreements made with a third party for procurement of such illicit cohabitation are void (*n*). A promise made in consideration of the cessation of an illicit cohabitation, or in consideration of past illicit cohabitation, or by way of compensation for seduction, is void simply for want of consideration (*o*); so that if made in the form of a bond or a covenant under seal, there is *prima facie* a valid contract (*p*); but "if the security is of such a nature as to hold out an inducement, or constitute to either party a motive, to continue the connection, the instrument would be void" (*q*). But the general rule of law is to make every presumption in favour of validity, accordingly the mere fact of continued cohabitation after the security has been given does not necessarily lead to the inference that it was given in respect of a future cohabitation with the consequence of illegality in the consideration (*r*). But the party charged upon the security is entitled to discovery respecting the nature of the consideration (*s*).—A payment of money or transfer of property in consideration of illicit cohabitation is valid and cannot be recovered back; as a settlement made

l Thurlow, L. C., *Scott v. Tyler* (1788, 2 Bro. C. C. 431; 2 Dick. 712; 1 Wh. & T. L. C. 535; *Perren v. Lyon* 1807, 9 East. 170; *Jenn v. Turner* (1881), 50 L. J. C. 161; 1 Ch. D. 188.
k *Scrabblehill v. Brett* (1703), 4 Bro. P. C. 141; *Hermann v. Charlesworth* (1905), 71 L. J. K. B. 620; 1905 2 K. B. 123.

l *Keat v. Allen* (1707), 2 Vern. 588; *Hamilton Duke v. Mahon Lord* (1710), 1 P. Wms. 118.

m *Walker v. Perkins*, 1 W. Bl. 517; *Gray v. Mathias* 1800, 5 Ves. 286.

n See *Willyams v. Ballmore* (1863), 33 L. J. C. 461; 32 Beav. 574.

o *Brakmont v. Reeve* (1846), 15 L. J. Q. B. 141, 8 Q. B. 182.

p *Gray v. Mathias* 1800, 5 Ves. 286; *Nye v. Mosely* (1826), 6 B. & C. 133; *S. C.* in equity (1822, 1 Sim. & St. 61; 1825, 2 Sim. & St. 260; (1828, 2 Sim. 161.

q *Wigram, V.-C., Hall v. Palmer* (1811) 13 L. J. C. 582; 5 Hare, 536.

r *Re Vallance* (1881), 26 Ch. D. 553.

s *Benyon v. Nettlefold* (1850), 20 L. J. C. 186; 3 Mac. & G. 94.

by a man upon a formal marriage with his deceased wife's sister, which was held to be valid as against the settlor and his representatives (*f*).

Agreements providing for a future separation of husband and wife, whether made before or after marriage, are illegal and void (*g*). And a deed of separation executed upon an intended separation which does not take place is void (*x*). Upon the same principle conditions for the determination of an estate of husband or wife in the event of a future separation are void, and the estate remains absolute (*y*). A promise to pay money or any other consideration to a husband or wife to procure a separation is illegal; but after a separation has been agreed upon, such promise made to one of the parties in consideration of executing a proper deed of separation is valid : . Upon a separation in fact taking place, an agreement may be made regulating the terms of the separation (*a*). And terms arranged between spouses, in fact living separate, respecting a future separation will be enforced, if cohabitation was resumed upon condition of such an agreement (*b*). Agreements for a separation are ordinarily made by a deed between the husband, the wife, and a trustee for the wife. It was formerly advisable to have a trustee for the wife joined as covenantee by reason of her disability at law in respect of contract; but since the Married Women's Property Act, 1882, an agreement for separation may be effectually made between husband and wife without the intervention of a trustee (*c*). The court will decree specific performance of an agreement to execute a deed of separation with proper covenants; and will enforce the covenants of the deed when executed (*d*). Mutual covenants by the husband and the wife not to sue for the restitution of conjugal rights are lawful and usual covenants in a deed of separa-

Separation deeds.

Effect on conjugal rights.

(f) *Agrest v. Jenkins* (1873), 12 L. J. C. 692; L. R. 16 Eq. 282.

(g) *Weston v. Marry* (1831), 5 Bli. N. S. 339. See *Wilson v. Wilson* (1848), 1 H. L. C. 538; (1854), 23 L. J. C. 697; 5 H. L. C. 10; 1 Wh. & T. L. C. 577.

(x) *Bondley v. Mulloney* (1869), L. R. 7 Eq. 312.

(y) *Cartwright v. Cartwright* (1853), 22 L. J. C. 841; 3 De G. M. & G. 982; *H. v. W.* (1857), 3 K. & J. 382; *Nicholl v. Jones* (1867), 36 L. J. C. 551.

(z) *Jones v. White* 1842, 9 Cl. & F. 101.

(a) *Jee v. Threlkell* 1824, 2 L. J. O. S. K. B. 81; 2 B. & C. 517; *Jones v. White* (1842), 9 Cl. & F. 101.

(b) *Harrison v. Harrison* (1909), 79 L. J. K. B. 135; 1909, 1 K. B. 35.

(c) *McGregor v. McGregor* (1888), 57 L. J. Q. B. 591; 21 Q. B. D. 124.

(d) *Wilson v. Wilson* (1818), 1 H. L. C. 538; (1851), 23 L. J. C. 697; 5 H. L. C. 10; 1 Wh. & T. L. C. 577; *Hunt v. Hunt* 1862, 31 L. J. C. 161; 4 De G. M. & G. 221; *Atkins v. Hardway* (1870), 39 L. J. C. 374; L. R. 5 Ch. 336.

PART III.

Return to
cohabitation.

tion (e). Since the Judicature Act, 1873, a covenant not to sue for restitution of conjugal rights is a bar to a suit in the Divorce Division unless the party setting up the deed has neglected substantially to perform the stipulations on his part (f). A covenant not to sue for a declaration of nullity of marriage is also valid and affords an answer to a suit for that purpose (g). It is not an implied condition of separation deeds, in the absence of a covenant to that effect, that the parties shall not sue respecting conjugal rights (h). And it is not an implied condition of separation deeds that the parties shall live chastely during the separation, and therefore unless expressly stipulated the contract is not affected by the misconduct of either (i); nor is such a condition considered as a usual condition or covenant of a separation deed (k). There is no implied exception in separation deeds of the marriage being dissolved by a judgment of divorce; but in such case the court may revise the deed as being a "post-nuptial settlement," under the statute 22 & 23 Viet. c. 61 (l). Separation deeds are discharged by a return to cohabitation, as to all provisions of the deed which are incident to or dependent upon the continuance of separation; unless it is expressly stipulated to the contrary (m). But the wife may recover arrears of income accrued due at the time of reconciliation (n). Mere casual acts of intercourse do not necessarily amount to cohabitation so as to put an end to the deed (o). A deed expressly conditioned to become void upon a consent in writing to resume cohabitation, was held not to be avoided by a mere resumption in fact of cohabitation without the written consent (p). A provision made upon return

(e) *Wilson v. Wilson* (1848), 1 H. L. C. 338; (1854), 23 L. J. C. 697; 5 H. L. C. 40; 1 Wh. & T. L. C. 577; *Hunt v. Hunt* (1862), 31 L. J. C. 161; 4 De G. F. & J. 221. See *Hunt v. Hunt* (1897), 67 L. J. Q. B. 18; (1897) 2 Q. B. 517.

(f) *Kennedy v. Kennedy* (1906), 76 L. J. P. 31; (1907) P. 49; *Balecombe v. Balecombe* (1908), 77 L. J. P. 81; (1908) P. 176.

(g) *Aldridge v. Aldridge* (1888), 58 L. J. P. 8; 13 P. D. 210.

(h) *Jee v. Theobald* (1824), 21 L. J. O. S. K. B. 81; 2 B. & C. 517.

(i) *Gandy v. Gandy* (1882), 51 L. J. P. 41; 7 P. D. 77; *Rose v. Rose* (1883), 52 L. J. P. 25; 8 P. D. 98; *Wastneys v. Wastneys* (1900), 69 L. J. P. C. 83; (1900) A. C. 116; *Norman v. Norman* (1907), 77 L. J. P. 8; (1908) P. 8.

(j) *Hart v. Hart* (1881), 50 L. J. C. 697; 18 Ch. D. 670.

(k) *Charlesworth v. Holt* 1873, 43 L. J. Ex. 25; L. R. 9 Ex. 38; *Worsley v. Worsley* 1869, 38 L. J. P. 13; L. R. 1 P. & D. 618; *Bishop v. Bishop* (1897), 66 L. J. P. 69; (1897) P. 138.

(l) *Baleman v. Ross* (Countess) 1813, 1 Dow. 235; *Wilson v. Mashett* (1832), 1 L. J. K. B. 250; 3 B. & Ad. 743; *Nicol v. Nicol* (1886), 35 L. J. C. 437; 31 Ch. D. 521; *Re Sparks* (1901), 73 L. J. C. 259; (1904) 1 Ch. 451; compromised upon appeal (1905), 73 L. J. C. 576; (1904) 2 Ch. 121.

(m) *Macan v. Macan* (1900), 70 L. J. Q. B. 70.

(n) *Rowell v. Rowell* (1899), 69 L. J. Q. B. 55; (1900) 1 Q. B. 9.

(p) *Randall v. Gould* (1857), 27 L. J. Q. B. 57; 8 E. & B. -

CHAP. IV.

Custody of children.

to cohabitation for payment of an allowance in the event of a future separation by order of the Court is legal (*q*).

The father of a legitimate child, and the mother of an illegitimate child, are at law invested with the right of custody and control over these children, and any agreement by which the parent purports to deprive himself or herself of their respective rights is invalid; these respective rights were recognized in the Court of Chancery, subject to the qualification that in that court the interest of the child was of paramount importance (*r*). A provision in a separation deed depriving the father of his legitimate custody and control of the children of the marriage was illegal; and the court would not enforce an agreement to execute a deed containing such a provision (*s*); except so far as it might be justified by the father having proved himself by misconduct to be unfit to have the custody of the children (*t*). But by the Custody of Infants Act, 1873, s. 2, "no agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: provided always that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto" (*u*). The Guardianship of Infants Act, 1886, s. 5, which entitles the mother to apply to the court for an order regarding the custody of infants, has enabled the court to deprive the father of the custody of his children, although he may not have been guilty of such conduct as would have forfeited his rights under the old law, and the misconduct of the mother is no bar to her application, if both father and mother are equally guilty (*x*). By the Custody of Children Act, 1891, s. 5, the court may refuse to make an order for the delivery of a child when the parent has abandoned or deserted the child, or allowed

(*q*) *Harrison v. Harrison* (1909), 79 L. J. K. B. 133; (1910) 1 K. B. 35.

(*r*) *Willesley v. Willesley* (1828), 2 Br. N. S. 124; *Humphreys v. Polak* (1901), 70 L. J. Q. B. 752; (1901) 2 K. B. 385. See *Eyre v. Shaftsbury* (1722), 2 P. Wms. 103; Gilb. Eq. 172; 1 Wh. & T. L. C. 495.

(*s*) *Fanshott v. Fanshott* (1858), 27 L. J. C. 289; 2 Do G. & J. 249.

(*t*) *Swift v. Swift* (1865), 34 L. J. C.

391; 4 Do G. J. & S. 710; *Hamilton v. Hector* (1871), 40 L. J. C. 692; L. R. 6 Ch. 701.

(*u*) See *Re Besant* (1879), 48 L. J. C. 497; 11 Ch. D. 508; *Besant v. Wood* (1879), 12 Ch. D. 629; *Hart v. Hart* (1881), 50 L. J. C. 697; 18 Ch. D. 670.

(*x*) *Re A. and B.* (1897), 66 L. J. C. 592; (1897) 1 Ch. 786; *Re X.* (1899), 68 L. J. C. 265; (1899) 1 Ch. 526.

PART III.

Religion of children.

the child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, unless the parent has satisfied the court, that having regard to the welfare of the child, he is a fit person to have the custody of the child. This enactment apparently only affects the parent's right to the custody of the child, and not the right of the parent to nominate a fit person to have the custody of the child under the Guardianship of Infants Act, 1886 (*y*).—An agreement made in consideration of marriage or after marriage depriving the father of the control of the religious instruction of the children is illegal and void; and the court will support the right of the father without regard to such agreement (*z*). The court in general orders children to be educated in the religion directed by the father, or, in the absence of direction, in the religion professed by the father unless he has, by his conduct, forfeited his rights (*a*). The jurisdiction of the court may be exercised where the infants are residing out of the jurisdiction (*b*). The Guardianship of Infants Act, 1886, has apparently not altered the principles upon which the court acts (*c*); and the Custody of Children Act, 1891, s. 4, enables the court, although it refuses to give the parent the custody of the child, to give directions that the child shall be brought up in the religion in which the parent has a legal right to require that the child shall be brought up.

Agreements made for illegal purpose:—goods sold.

An agreement which is perfectly legal in its terms may be rendered void by the illegality of the purpose for which it is made (*d*). A sale of goods for an unlawful purpose is void, and the seller cannot recover the price: as a sale of goods for the purpose of shipping them in a foreign trade prohibited by statute (*e*); a sale of drugs to a brewer to be used in making beer, and the use of which is prohibited by statute (*f*); a sale of goods for the pur-

(*y*) See *Reg. v. Nash* (1883), 52 L. J. Q. B. 442; 10 Q. B. D. 454.

(*z*) *Andrews v. Salt* (1873), L. R. 8 Ch. 622; *Agar-Ellis v. Lascelles* (1878), 48 L. J. C. 1; 10 Ch. D. 49; *Re W.* (1907), 77 L. J. C. 147; (1907) 2 Ch. 557. See *F. v. F.* (1902), 71 L. J. C. 415; (1902) 1 Ch. 688.

(*a*) *Re Scanlan* (1889), 57 L. J. C. 718; 10 Ch. D. 209; *Re Newton* (1896), 65 L. J. C. 641; (1896) 1 Ch. 740.

(*b*) *Re Montagu* (1884), 54 L. J. C. 397; 28 Ch. D. 82.

(*c*) *Re McGrath* (1892), 62 L. J. C. 208; (1893) 1 Ch. 143.

(*d*) *Per cur. Waugh v. Morris* (1872), 42 L. J. Q. B. 57; L. R. 8 Q. B. 207.

(*e*) *Lightfoot v. Tenant* (1797), 1 B. & P. 551.

(*f*) *Langton v. Hughes* (1813), 1 M. & S. 593.

poses of a brothel (*g*); the hire of goods to a prostitute for the special purpose of her trade, although the agreement is made without any stipulation for payment or profit out of the proceeds of the unlawful use (*h*). A contract between British subjects for the sale and delivery of goods abroad, for the purpose of smuggling or importing them into this country without payment of duty, is illegal and void (*i*). If a foreigner residing abroad sells and delivers goods abroad for such purpose, he may recover the price though he had notice of the purpose for which the goods were bought; because the contract was complete abroad, and no country ever takes notice of the revenue laws of another (*k*). But if the foreign seller participates in the act of smuggling, as by packing the goods in a manner required for that purpose, he cannot sue for the price in the courts of this country (*l*).

Upon the same principle money lent for an illegal purpose cannot be recovered: as money lent for the purpose of settling losses on illegal stock-jobbing transactions (*m*); or for the purpose of playing at an illegal game (*n*); or for the purpose of carrying on an unlicensed theatre of which the lender was to share the profits (*o*); or money placed to the credit of a person at his bankers, with a view to obtain false answers respecting that person's credit (*p*). If the loan is void by reason of the illegal purpose, all the securities given for the loan are also void (*q*). Trustees who lend money in breach of trust may recover it back, the loan under such circumstances being merely unauthorised but not illegal (*r*). If money is lent in a foreign country for the purpose of playing at a game lawful there, and the money lent is recoverable in that country, it may be recovered in the courts of this country (*s*); but if a security (as a bill or cheque) is given for the debt which gives rise to an independent cause of action

Money lent for illegal purpose.

(*g*) *Hamilton v. Granger* (1859), 5 H. & N. 40.

(*h*) *Pearce v. Brooks* (1866), 35 L. J. Ex. 134; L. R. 1 Ex. 213.

(*i*) *Biggs v. Lawrence* (1789), 3 T. R. 451; *Clogus v. Pampeluna* (1791), 1 T. R. 166.

(*k*) *Pellecat v. Angell* (1835), 4 L. J. Ex. 326; 2 Cr. M. & R. 311. See *Sharp v. Taylor* (1849), 2 Phill. 816.

(*l*) *Wynmell v. Reed* (1794), 5 T. R. 599.

(*m*) *Cannan v. Bryce* (1819), 3 B. & Ald. 179.

(*n*) *McKinnell v. Robinson* (1838), 7

L. J. Ex. 119; 3 M. & W. 434; *Foot v. Baker* (1813), 5 Man. & G. 335.

(*o*) *De Bequis v. Acemistend* (1833), 2 L. J. C. P. 214; 10 Bing. 107. See *Ewing v. Osbaldiston* (1836), 6 L. J. C. 161; 2 M. & Cr. 53.

(*p*) *Re Gt. Berlin Steamboat Co.* (1884), 54 L. J. C. 68; 26 Ch. D. 616.

(*q*) *Cannan v. Bryce* 1819, 3 B. & Ald. 179; *Hill v. Fox* (1859), 4 H. & N. 359.

(*r*) *Re Collman* (1881), 51 L. J. C. 3; 19 Ch. D. 64.

(*s*) *Sazby v. Fulton* (1909), 78 L. J. K. B. 781; 1909; 2 K. B. 268.

PART III.

Money paid
for illegal
purpose.

in this country, an action cannot be maintained upon the security if vitiated by illegality according to English law (*t*).

Money paid by a person at the request of another in execution of an illegal contract or for an illegal purpose will not create any debt or contract for the repayment of the amount (*u*). And an indemnity for payments, or for liabilities incurred, in carrying out illegal contracts or purposes is void (*x*). But money paid at the request of a person in execution of a contract which is merely void, and not illegal, may be recovered; as money paid in discharge of a wagering contract upon shares, which is rendered simply void by the Gaming Act, 1845, s. 18 (*y*); or money paid by a broker upon contracts for the purchase of shares which were illegal by statute, though sanctioned by the custom of the Stock Exchange (*z*). And an agent cannot recover from his principal money paid for an illegal purchase of goods or for any other illegal services (*a*).

Land demised
for illegal
purpose.

A demise of land for the express purpose of carrying on an illegal trade is void; and the lessor cannot recover rent under the reservation or upon the covenant of the lessee or for breach of any of the covenants (*b*). So if a house or land be let for the purpose of being used in a manner to create a nuisance (*c*); or if rooms be let for the purpose of delivering blasphemous lectures (*d*); or if a house or lodgings be let for immoral purposes (*e*). And a guarantee for the rent of premises which were let for the purpose of the lessee selling excisable liquors without a licence was held void (*f*). A covenant to secure the purchase-money of land which had been sold for the purpose of being resold by means of an illegal lottery was held void (*g*).

Insurance of
illegal risk.

The insurance of an illegal voyage or undertaking is void, and

t *Moulis v. Owen* (1907), 76 L. J. K. B. 396; (1907) 1 K. B. 746.

(*u*) *Cannan v. Bruce* (1819), 3 B. & Ald. 179; *Amory v. Meneath* (1824), 2 L. J. O. S. K. B. 111; 2 B. & C. 573; *Re Parker* (1882), 52 L. J. C. 159; 21 Ch. D. 408.

(*x*) See *Thacker v. Hardy* (1878), 48 L. J. Q. B. 289; 4 Q. B. D. 687.

(*y*) *Thacker v. Hardy* (1878), 48 L. J. Q. B. 289; 4 Q. B. D. 685; overridden by Gaming Act, 1892, *ante*, p. 546.

(*z*) *Perry v. Barnett* (1885), 54 L. J. Q. B. 466; 15 Q. B. D. 388.

(*a*) *Ex p. Mather* (1797), 3 Ves. 373.

(*b*) *Gas Light & Coke Co. v. Turner*

(1810), 9 L. J. Ex. 336; 6 Bing. N. C. 324.

(*c*) *Flight v. Clarke* (1844), 13 L. J. Ex. 309; 13 M. & W. 155.

(*d*) *Cowan v. Milbourn* (1867), 36 L. J. Ex. 121; L. R. 2 Ex. 230.

(*e*) *Crisp v. Churchill* (1794), cited in *Lloyd v. Johnson* (1798), 1 B. & P. 340; *Uphill v. Wright* (1910), 80 L. J. K. B. 251; (1911) 1 K. B. 1; *Smith v. White* (1866), 35 L. J. C. 454; L. R. 1 Eq. 626.

(*f*) *Ritchie v. Smith* (1848), 18 L. J. C. P. 9; 6 C. B. 462.

(*g*) *Bridges v. Fisher* (1854), 23 L. J. Q. B. 276; 3 E. & B. 642.

the assured cannot recover a loss; as an insurance of a ship or goods for the purpose of trading with an enemy (*h*); an insurance of contraband of war for carriage into a belligerent port (*i*); an insurance of a voyage with a deck cargo prohibited by statute (*k*). If the underwriter was party to the illegality his subscription would be illegal, and if not his subscription would be void: in either case he could not charge the premium (*l*). If the assured paid the premium in ignorance of the illegality, as where a war had been proclaimed abroad before the insurance was made, he may recover it back (*m*). If the master of the ship renders the voyage illegal, as by loading a deck cargo, or carrying passengers without having a certificate, the insurance will be vitiated or remain in force according as the owner knows or has participated in the illegality (*n*).

A knowledge of the illegal purpose is presumptively sufficient to deprive a party of the benefit of the contract, though he has not stipulated for any share of the proceeds or profits of the illegality (*o*); nor is it material to the validity of the contract that the illegal purpose is not carried into effect (*p*). If the contract is in itself illegal, as a charter-party for the importation of prohibited goods, it is void, though the parties were ignorant of the illegality; but if a contract can be performed in a legal manner, the intention to perform it in an illegal manner or for an illegal purpose must be proved in order to invalidate it (*q*).—A party to a contract, upon discovering that it is intended to apply it to an illegal purpose, may refuse to complete it; as upon an agreement to let premises, which the lessee intends to use for an unlawful purpose (*r*). But an executed contract cannot be rescinded in consequence of an illegal use; as where a lease of premises is granted and possession given, though the lessee in-

Participation
in illegal
purpose.

(*h*) See ante, p. 512.

(*i*) *Hobbs v. Henning* (1834), 34 L. J. C. P. 117; 17 C. B. N. S. 791; *Seamarc v. London and Port Marine Insur.* (1871), 41 L. J. C. P. 198.

(*k*) *Cornard v. Hyde* (1859), 29 L. J. Q. B. 6; 2 E. & E. 1.

(*l*) *Jenkins v. Power* (1817), 6 M. & S. 282.

(*m*) *Oom v. Bruce* (1810), 12 East, 225.

(*n*) *Wilson v. Rankin* (1861), 34 L. J. Q. B. 62; 6 B. & S. 208; *Didgson v. Frembridge* (1874), 43 L. J. Q. B. 229;

L. R. 9 Q. B. 531.

(*o*) *Lightfoot v. Troughton* (1796), 1 B. & P. 541; *Langton v. Hughes* (1813), 1 M. & S. 598; *Parce v. Brooks* (1866), 35 L. J. Ex. 134; L. R. 1 Ex. 213; *Upfill v. Wright* (1910), 80 L. J. K. B. 254; (1911) 1 K. B. 1.

(*p*) *Gas Light & Coke Co. v. Turner* (1840), 9 L. J. Ex. 336; 6 Bing. N. C. 321.

(*q*) *Wagh v. Morris* (1872), 42 L. J. Q. B. 57; L. R. 8 Q. B. 202.

(*r*) *Cowan v. Milbourn* (1867), 36 L. J. Ex. 121; L. R. 2 Ex. 230.

PART III.

tended an unlawful use of the premises (*s*). A lease of premises for the purpose of storing cartridges with a covenant by the lessor to keep them in a proper condition for that purpose, was held not to imply a warranty of the continued legality; nor was the lease avoided by the law subsequently prohibiting the use of the premises for that purpose (*t*).

Contracts in fraud of third parties

Contracts made for the purpose of defrauding or injuring third parties are illegal and void: as a contract to publish a book with a title-page containing a false statement of the authorship, in fraud of the public (*u*); the sale of a fictitious patent right for the purpose of the buyer promoting a company to work it, as being a fraud upon the intended shareholders (*x*); or the sale of mining and other properties at fictitious prices for the purpose of forming companies to buy them (*y*); or an agreement between two or more persons by means of fictitious purchases to induce intending buyers, contrary to the fact, to believe that there is a market for shares, and that the shares are of greater value than is really the case (*z*). An agreement between directors and a shareholder that shares allotted should be paid for at a discount was held to be a fraud upon the company; and the shareholder was held liable to calls for the full amount (*a*).

Compositions in fraud of creditors.

Upon this principle in compositions between a debtor and creditors, whether statutory or not, any agreement made for the preference of one creditor is illegal and void as being a fraud upon the other creditors. "Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the insolvent in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void" (*b*). "Such transactions are necessarily *uberrimæ fidei*, and no engagement can stand which has been

(*s*) *Frost v. Hill* (1851), 23 L. J. C. 185; 15 C. B. 207.

(*t*) *Norby v. Sharpe* (1878), 47 L. J. C. 617; 8 Ch. D. 39.

(*u*) *Post v. Marsh* (1880), 50 L. J. C. 287; 16 Ch. D. 395. See *Wright v. Tallis* (1845), 14 L. J. C. P. 283; 1 C. B. 893.

(*x*) *Begbie v. Phosphate of Lime Co.*

(1875), 41 L. J. Q. B. 233; 1 Q. B. D. 679.

(*y*) *Re Ambrose Lake Co.* (1880), 49 L. J. C. 457; 14 Ch. D. 399.

(*z*) *Scott v. Brown* (1899), 61 L. J. Q. B. 738; (1892) 2 Q. B. 724.

(*a*) *Odessa Tramways Co. v. Mendel* (1878) 47 L. J. C. 505; 8 Ch. D. 235.

(*b*) *Erle, J., Mallison v. Hodgson* (1831), 20 L. J. Q. B. 347; 16 Q. B. 711.

withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know" (c). The composition which is obtained by the fraudulent preference of a creditor is also void as against all the other creditors, who may repudiate the composition and revert to their original rights and remedies against the debtor (d). A bond, bill, or other security given to a compounding creditor for the balance of his debt (e): or as an additional security for the amount of the composition (f); and whether given by the debtor himself or by a third party (g); is illegal and void as being a fraud upon the other creditors. And if a security is originally void as a preferential agreement, any security subsequently given for the same is also void (h). A preferential agreement is not rendered valid by the preferred creditor standing surety for the composition to all the other creditors (i); unless such stipulation is part of the agreement with the other creditors (k). A creditor who procures a fraudulent preference cannot recover the amount of the composition, because the whole agreement with his debtor is vitiated by the fraud (l). And if he sues for his original debt, his debtor may plead a satisfaction or discharge under the composition; the validity of which the creditor is then estopped from denying by reason of his participation in the fraud (m). Upon this principle, a creditor who has obtained a conveyance of a bankrupt's property which is afterwards set aside as fraudulent, cannot prove for the consideration actually paid (n). Nor, on the other hand, can the debtor charge the preferred creditor upon the deed of composition; as by suing him upon a covenant of indemnity against the debts compounded for (o).—A payment made to a creditor to induce him to enter into the composition may be

Preferential security.

Preferential payment.

(c) *Best, C. J., Britten v. Hughes* (1829, 7 L. J. O. S. C. P. 188; 5 Bing. 169).

(d) *Daughesh v. Tennant* (1856), 36 L. J. Q. B. 10; L. R. 2 Q. B. 49; *Ex p. Milner* (1885), 54 L. J. Q. B. 425, 15 Q. B. D. 605.

(e) *Cockshot v. Bennett* (1788), 2 T. R. 763; *Jackman v. Mitchell* (1807), 13 Ves. 581; *Mare v. Sandford* (1859), 1 Giff. 288.

(f) *Howden v. Haigh* (1840), 9 L. J. Q. B. 198; 11 A. & E. 1033.

(g) *McKee v. Sanderson* (1875), 44 L. J. C. 447; L. R. 20 Eq. 65; *Ex p. Milner* (1885), 54 L. J. Q. B. 425; 15 Q. B. D. 605.

(h) *Greene v. Marr* (1863, 33 L. J. Ex. 50; 2 H. & C. 339).

(i) *Wood v. Barker* (1865), 35 L. J. C. 276; L. R. 1 Eq. 139.

(k) *Bissell v. Jones* (1868, 38 L. J. C. B. 2; L. R. 4 Q. B. 49; *Ex p. Nicholson* (1870), L. R. 5 Ch. 342).

(l) *Knight v. Hunt* (1829), 7 L. J. O. S. C. P. 165; 5 Bing. 432; *Howden v. Haigh* (1840), 9 L. J. Q. B. 198; 11 A. & E. 1033.

(m) *Mallalieu v. Hodyson* (1840), 20 L. J. Q. B. 339; 16 Q. B. 689.

(n) *Ex p. Myers* (1908, 77 L. J. K. B. 386; (1908) 1 K. B. 941).

(o) *Hoggan v. Pitt* (1849), 18 L. J. Ex. 488; 4 Ex. 312.

PART III.**Discharge by composition.**

recovered back by the debtor, because, though *particeps criminis*, he is not *in pari delicto* (*p*). And if the debtor is compelled to pay the value of bills which he has given to the creditor, and by him negotiated to *bonâ fide* holders, he may recover back amount so paid (*q*). But a payment made after the composition is complete and the pressure removed is a voluntary payment which he cannot recover back (*r*).—A compounding creditor is bound by the statement of his debts, and cannot afterwards recover in respect of any debts or parts of debts which he has not entered as chargeable (*s*). And if he executes the composition without stating the debts, he is taken as executing for the whole amount then due to him (*t*). A creditor may compound for part of his debts, with the consent of all the other creditors (*u*); and some of the creditors may agree to compound for their debts apart from the others; unless there is an express or implied condition that all shall join (*x*). A secured creditor who joins in a composition for the full amount of his claim thereby discharges his security (*y*); and if he puts a value upon his security and compounds for the balance of his claim, he is bound by that valuation, and if the security realises a larger amount he must account to the debtor for the surplus over the amount of the valuation and interest upon the assessed value, from the date of assessment to realisation (*z*).

Effect of illegality in avoiding agreement.

The effect of illegality in the matter or purpose of an agreement is to render it wholly void of legal effect; no claim or defence can be maintained, which requires to be supported by allegation or proof of an illegal agreement (*a*). Either party may repudiate

p) *Atkinson v. Denby* (1862), 31 L. J. Ex. 362; 7 H. & N. 934; *Re Lenzberg's Policy* (1878), 47 L. J. C. 178; 7 Ch. D. 650.

q) *Smith v. Cuff* (1817), 6 M. & S. 160; *Horton v. Ribey* (1843), 13 L. J. Ex. 31; 11 M. & W. 492.

r) *Wilson v. Roy* (1839), 8 L. J. Q. B. 224; 10 A. & E. 82.

s) *Britten v. Hughes* (1829), 7 L. J. O. S. C. P. 188; 5 Bing. 40; *Blackstone v. Wilson* (1857), 26 L. J. Ex. 229. *t*) *Harshy v. Wall* (1817), 1 B. & All. 103.

u) *Woods v. De Mattos* (1866), 36 L. J. Ex. 64; L. R. 1 Ex. 91.

x) *Carey v. Barrett* (1879), 4 C. P.

D. 379; *Levita's Claim* (1894), 64 L. J. C. 13; (1894) 3 Ch. 365.

y) *Cullingworth v. Loyd* (1839), 9 L. J. C. 218; 2 Beav. 385; *Re Bathurst* (1878), 45 L. J. Bk. 156; 3 Ch. D. 488.

z) *Soc. Gin. de Paris v. Gen* (1883), 53 L. J. C. 153; 8 Ap. Ca. 606. See *Ex p. Schofield* (1879), 48 L. J. Bk. 122; 12 Ch. D. 337; *Ex p. Norris* (1886), 56 L. J. Q. B. 93; 17 Q. B. D. 728.

a) *Taylor v. Chester* (1869), 38 L. J. Q. B. 227; L. R. 4 Q. B. 314; *Odessa T. amways Co. v. Mindel* (1878), 47 L. J. C. 505; 8 Ch. D. 235. See *Hyams v. Stuart King* (1908), 77 L. J. K. B. 795; (1908) 2 K. B. 696.

CHAP. IV.

the agreement, with or without alleging a reason, and may afterwards justify on the ground of the illegality (*b*). "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law, there the court says he has no right to be assisted" (*c*). Illegality which will avoid a contract as against a party will avoid it also as against his representative (*d*). And the effect of illegality is the same in equity as at law. A contract or instrument which fails in a court of law by reason of its illegality cannot be enforced in equity; although money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a court of equity as it is in a court of law (*e*).—A bond or covenant or other security subsequently given for a debt originating in an illegal consideration or transaction, or for a prior security for such debt, is vitiated by the same illegality (*f*): as a bill given to a broker for his charges in effecting an illegal insurance (*g*); a bill in renewal of a bill given for a gaming debt (*h*); a security given to a compounding creditor by way of illegal preference (*i*); a bond given to the holder of a note which had been given for an illegal purpose and indorsed to the holder when overdue (*k*). A guarantee of an illegal debt is illegal and void; but a guarantee of a debt which is merely void and not illegal, as the loan of a company in excess of their borrowing powers, is valid (*l*).

Effect in equity.

Security for illegal debt

(*b*) *Cowan v. Milbourn* (1867), 36 L. J. Ex. 124; L. R. 2 Ex. 230.

(*c*) *Mansfield, C. J., Holman v. Johnson* (1775), 1 Cowp. 343.

(*d*) *Phillipotts v. Phillipotts* (1850), 20 L. J. C. P. 11; 10 C. B. 85.

(*e*) *Thomson v. Thomson* (1802), 7 Ves. 470; *Re Cork and Yonghal Ry.* (1869), 39 L. J. C. 277; L. R. 4 Ch. 748. See *Chapman v. Michelson* (1908), 78 L. J. C. 272; (1909) 1 Ch. 238.

(*f*) *Fisher v. Bridges* (1854), 23 L. J. Q. B. 276; 3 E. & B. 612.

(*g*) *Ex p. Mather* (1797), 3 Ves. 373.

(*h*) *Wynne v. Callander* (1826), 1 Russ. 293.

(*i*) *Geere v. Mave* (1863), 33 L. J. Ex. 50; 2 H. & C. 339.

(*k*) *Avery v. Mervinweather* (1824), 2 L. J. O. S. K. B. 111; 2 B. & C. 573.

(*l*) *Yorkshire Waggon Co. v. Maclure* (1881), 51 L. J. C. 253; 19 Ch. D. 478.

PART III.

Extrinsic evidence of illegality.

The effect of illegality is the same, in whatever form the contract is framed, whether in the form of a simple contract or of a contract under seal, or of a bond with an illegal condition (*m*); and though the contract is apparently valid in form and matter, extrinsic evidence is always admissible in variance of or in addition to the contract in order to show that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal (*n*). The facts showing illegality, either by statute or common law, must be pleaded; they cannot be proved under a bare denial of the contract (*o*); but where the illegality appears from the plaintiff's own evidence (as in the case of a criminal conspiracy to create a market by fictitious dealings in shares, it is the duty of the court to take judicial notice of the fact, and to give judgment for the defendant although the illegality is not raised by the pleadings (*p*). The courts will grant discovery in aid of the defence of illegality unless there are special circumstances of exemption (*q*).

Money paid under executory illegal agreement.

Money deposited with stakeholder.

Notice of claim.

Money paid in consideration of an executory contract or purpose which is illegal, upon repudiation of the transaction may be recovered back, as upon a total failure of consideration; but it cannot be reclaimed after the happening of the event (*r*).—Money deposited with a stakeholder upon a wagering contract may be reclaimed and recovered back after the event, at any time before the money has been actually paid over (*s*); but not if the stakeholder has paid it over according to the event before his authority is revoked (*t*).—The party seeking to recover money paid upon an illegal contract or purpose must give notice that he repudiates the transaction before it is executed, and re-claim the money, in order to entitle him to maintain an action; and merely bringing the action is not sufficient notice (*u*).

See *Re Collman* (1881), 51 L. J. C. 3; 19 Ch. D. 64.

(*m*) *Co. Lit.* 206 b; *Ducresquier v. Feltoles* (1828), 7 L. J. O. S. C. P. 15; 5 Bing. 248; (1830), 8 L. J. O. S. K. B. 270; 10 B. & C. 826; (1832), 1 Cl. & F. 45.

(*n*) *Collins v. Blanton* (1767), 2 Wils. 341; 1 Sm. L. C. 355.

(*o*) Ord. XIX. rr. 15, 20. See *Willis v. Lovick* (1911), 70 L. J. K. B. 556; (1901) 2 K. B. 195.

(*p*) *Scott v. Brown* (1892), 61 L. J.

Q. B. 738; 2 Q. B. 724.

(*q*) *Bryson v. Neethfold* (1850), 20 L. J. C. 186; 3 Mac. & G. 94.

(*r*) *Taylor v. Bowers* (1876), 46 L. J. Q. B. 39; 1 Q. B. D. 21; *Wilson v. Strugnell* (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620; (1905) 2 K. B. 123.

(*s*) *Ante*, p. 545.

(*t*) *Howson v. Hancock* (1800), 8 T. R. 575.

(*u*) *Busk v. Walsh* (1812), 1 Tampt.

Money paid
under
executed
illegal
agreement.

After the execution of the illegal contract or purpose money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies that "*in pari delicto melior est conditio possidentis*" (x). The rule applies where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part (y); and where it has been executed as far as possible, and further execution has become impossible (z). The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party (a). But in the case of purely equitable remedies, the court may refuse its assistance to a *particeps criminis*, who does not rely upon any part of the illegal transaction, as a person invoking the jurisdiction of the Court of Chancery must come into Court with clean hands (b). Accordingly money lost fairly at illegal gaming or wagering, and paid, cannot be recovered back (c). So with money paid or accounted for as the price of goods sold and delivered under an illegal contract of sale (d). And money paid to induce a person to become bail for another cannot be recovered back, after the purpose is completed by acceptance of the bail, whether the principal makes default or not (e). Where money was deposited with a company's banker for the purpose of giving the company a fictitious credit, it was held that after an order was made for winding up the company the money could not be recovered back (f). Upon this principle a premium paid upon an illegal insurance, after the risk has determined, is not recoverable,

290; *Fulghat v. Luckin* 1817, 6 M. & S. 290.

(x) *Per cur.* *Taylor v. Chester* (1869),

38 L. J. Q. B. 227; L. R. 4 Q. B. 313.

(y) *Kearley v. Thomson* (1890), 59 L. J.

Q. B. 288; 21 Q. B. D. 712.

(z) *Re Great Berlin Steamboat Co.*

(1884), 51 L. J. C. 68; 26 Ch. D. 616.

(a) *Simpson v. Boss* (1816), 7 Taunt.

246; *Taylor v. Bowers* (1876), 46 L. J.

Q. B. 39; 1 Q. B. D. 291; *Hyams v.*

Stuart King (1908), 77 L. J. K. B. 796;

(1908) 2 K. B. 696.

(b) *Agrest v. Jenkins* (1873), 12 L. J.

C. 690; L. R. 16 Eq. 275.

(c) *Houson v. Hancock* (1800), 8 T. R.

575; *Thistlewood v. Cracroft* (1813), 1 M.

& S. 500; *Fulghat v. Ackland* (1830), 9

L. J. O. S. K. B. 3.

(d) *Covens v. Denton* (1835), L. J.

Ex. 68; 1 Cr. M. & R. 711.

(e) *Hecatt v. Jeuchee* (1885), 51 L. J.

Q. B. 340; 15 Q. B. D. 561. See *Consolidated*

Explication Co. v. Masgrave

(1899), 69 L. J. C. 11; (1900) 1 Ch. 37;

which is perhaps to be supported upon

the ground that the transfer of shares

was *ultra vires*, and the transferee a

trustee for the company. See *ante*,

p. 119.

(f) *Re Great Berlin Steamboat Co.*

(1884), 51 L. J. C. 68; 26 Ch. D. 616.

PART III.**Property
passing under
illegal
agreement.****Payment to
agent.**

though the underwriter cannot be compelled to pay the loss (*g*). But if the premium is paid, such case has been paid or secured by a bill only, there is no remedy on the bill, being the security for an illegal debt (*h*). So an underwriter having paid the loss under an illegal insurance cannot recover it back; and though he has only paid it to the broker of the insured, who has not paid it over (*i*). Upon the same principle goods or other property delivered under an illegal agreement or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. Where goods were delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounded with his creditors, it was held that he might repudiate the transaction before the composition had been carried out, and recover the goods from the pretended buyer, or from a subvendee to whom they had been delivered with notice of the illegal transaction (*k*). But if the contract is executed and a property either general or special has passed thereby, the property must remain; and upon this ground a lien for work done upon a chattel, though under an illegal contract, is valid (*l*). Upon the same principle a conveyance of property executed upon trust for the absolute use of a woman, cannot be set aside upon the ground that it was executed in consideration of illicit cohabitation (*m*). And where a father took out an insurance upon his son's life, for his own benefit and at his own expense, and the office paid the insurance though it was illegal for want of interest in the life, it was held that the father was entitled to keep the money, as against the estate of his son (*n*).

Payment to an agent is equivalent in the above respect to payment to the principal, and though paid upon an illegal account cannot be recovered back; nor can the agent resist the claim of the principal upon the ground of any illegality in the transaction on account of which the payment was made; as in the case of a broker receiving from the underwriter the amount of loss under

(*g*) Marine Insee. Act, 1906, s. 81; *Voudry v. Hewitt* (1800), 1 East, 97; *Atkins v. Jupp* (1877), 46 L. J. C. P. 821; 2 C. P. D. 375; *Harve v. Pearl Life Assoc.* (1901), 73 L. J. K. B. 373; (1904) 1 K. B. 558.

(*h*) *Ex p. Mather* (1797), 3 Ves. 373.

(*i*) *Tenant v. Elliott* (1797), 1 R. & P. 3.

(*k*) *Taylor v. Bowers* (1876), 46 L. J. Q. B. 39; 1 Q. B. D. 291.

(*l*) *Scarf v. Morgan* (1838), 7 L. J. Ex. 324; 1 M. & W. 270.

(*m*) *Arcist v. Jenkins* (1873), 40 L. J. C. 690; L. R. 16 Eq. 275. See *Thellpotts v. Thellpotts* (1850), 20 L. J. C. P. 11; 10 C. B. 85.

(*n*) *Worthington v. Curtis* (1876), 45 L. J. C. 259; 1 Ch. D. 419.

an illegal insurance (*o*); or of a broker or agent receiving the price of goods sold by him for his principal, though the sale was illegal and could not have been enforced against the buyer (*p*); or in the case of a betting agent receiving payment of bets made by him for his principal (*q*). Where a person upon the sale of a ship to a foreign government authorised his agent to apply a portion of the price in bribing the agents of the government to effect the sale, it was held that after the price was paid to his agent he might revoke the authority to pay the bribes, and recover from him the whole amount, except so much as had been already so applied (*r*). - Upon the same principle, although the court will not order an account of profits of an illegal partnership or business (*s*), yet where two British subjects had purchased and repaired an American built ship on a joint speculation, with a view of employing her in trade between the two countries, until an opportunity should occur for reselling her to advantage, for which purpose they procured her to be registered in the United States in the name of a third person, who was a citizen of that country, upon a false declaration that she was *bona fide* his property; the court directed an account of realised profits of the speculation, including freight earned, notwithstanding the employment of the ship was contrary to the English statutes then in force regarding the importation of goods (*t*). No claim can be allowed for compensation or contribution between persons engaged in an illegal transaction (*u*). Where two persons had joined in an illegal wager which they won, and one of them advanced to the other his share of the winnings, which the loser failed to pay; it was held that he could not recover back the sum so advanced, because he could not maintain such claim except through the illegal contract (*x*).

An exception to the rule, that money paid in execution of an illegal contract cannot be recovered back, is made where the party who paid the money acted under an *im* pressure or influence on the part of the receiver, and therefore was not *in pari delicto*

Exception of parties not *in pari delicto*.

(*o*) *Tenant v. Elliott* (1797), 1 B. & P. 3.

(*p*) *Furness v. Russell* (1798), 1 B. & P. 296.

(*q*) *Bridge v. Savage* (1885), 54 L. J. Q. B. 464; 15 Q. B. D. 363; *De Mattos v. Benjamin* (1891), 63 L. J. Q. B. 218.

(*r*) *Bone v. Eklens* 1869, 29 L. J. Ex. 138; 5 H. & N. 925.

(*s*) *Kearles v. Haughton* 1805, 11 Ves. 168; *Ewing v. Osbaldeston* (1837), 6 L. J. C. 161; 2 M. & Cr. 53.

(*t*) *Sharp v. Taylor* (1819), 2 Phill. 801.

(*u*) *Jessel, M. R., Spies v. Readon* (1819), 48 L. J. C. 522; 11 Ch. D. 197.

(*x*) *Simpson v. Bloor* (1810), 7 Taunt. 246.

PART III.

with the latter (*y*). And this rule has been applied to money extorted by an abuse of legal proceedings; as where a party paid a sum of money to obtain his release from an arrest under a colourable legal process (*z*). Another exception is, where a statute has been passed with the object of protecting a particular class of persons, the members of that class may recover payments made by them. Thus the fees of a sheriff are fixed by statute, and an overpayment may be recovered (*a*). And where the agent of a candidate had settled accounts with a returning officer, the candidate was allowed to recover from the returning officer a proportionate part of the amount disallowed on a subsequent taxation under the Parliamentary Elections (Returning Officers) Act, 1875, at the instance of the other candidate (*b*). So money paid in excess of the legal interest allowed by the statutes against usury could be recovered back (*c*); as now is the case where a moneylender charges a higher rate of interest than the court sanctions in an application under the Moneylenders Act, 1900 (*d*). And so could money paid in contravention of the Lottery Acts (*e*).

**Illegality in
part of con-
sideration.**

If part of the consideration is illegal, and the promise is not divisible and apportionable to the several parts, the whole contract is void: as a contract for the hiring of a housekeeper made partly in consideration of illicit cohabitation (*f*); or an indemnity against the costs of an action given in consideration of publishing a libel and defending the action for the publication (*g*); or a bond given on the understanding that the obligor should not be proceeded against criminally although there was no actual threat of criminal proceedings (*h*). A contract to pay a fixed sum for the purchase of the business of law stationer, together with the office of distributor of stamps and collector of taxes, was held

(*y*) *Loucy v. Boudieu* (1780), 2 Dougl. 168; *Williams v. Bayley* (1866), 35 L. J. C. 717; L. R. 1 H. L. 200; *Jones v. Merionethshire Peerm. Bur. Soc.* (1891), 61 L. J. C. 138; (1892) 1 Ch. 173.

(*z*) *De Cadeval (Duke) v. Collins* (1836), 5 L. J. K. B. 171; 1 A. & E. 858.

(*a*) *Wongate v. Knatchbull* (1787), 2 T. R. 148; *Dew v. Parsons* (1819), 2 B. & A. 562.

(*b*) *Martin v. Tomkinson* (1893), 62 L. J. Q. B. 400; (1893) 2 Q. B. 121.

(*c*) *Ashley v. Reynolds* (1731), 2 Stra.

915; *Bromley v. Holland* (1802), 7 Ves. 3.

(*d*) *Samuels v. Newbald* (1804), 7 L. J. C. 120; (1905) 1 Ch. 260; *affd. nom. Samuel v. Newbald* (1906), 75 L. J. C. 705; (1906) A. C. 461.

(*e*) *Choke v. Sear* (1774), 1 Cowp. 197.

(*f*) *Rex v. Northcuffield (Inhab.)* (1831), 9 L. J. O. S. M. C. 57; 1 B. & Ad. 912.

(*g*) *Shackell v. Rosier* (1836), 5 L. J. C. P. 193; 2 Bing. N. C. 631.

(*h*) *Laurd v. Grimmauld* (1888), 57 L. J. C. 725; 39 Ch. D. 605.

wholly illegal as involving the purchase of a public office; the price not being apportionable (*i*). And where a bill was given for the balance of a debt, part of which was for an illegal consideration, it was held that the amount was not apportionable and the bill wholly void (*k*).

Where a contract contains several promises, or a promise to do several matters, some of which are illegal, a promise which can be separated from the illegality may be valid. "The general rule is that where 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" (*l*). So a bond may be good, though the condition is good in part and illegal in part (*m*). An agreement to assign all offices of which the party should be possessed, was held good as to all offices which might be legally assigned (*n*). A covenant in a lease to pay rent "clear of all taxes whatsoever," was held good, except as to the property tax and such taxes as could not be legally paid by the tenant (*o*). A contract which operates in part as an unreasonable restraint of trade may be construed divisibly as to the limits of restraint, and held valid within reasonable limits (*p*).—Contracts of service impliedly import that the service must be lawful and used for a lawful purpose. A printer engaged to print a work may refuse to print libellous matter, and may charge for printing the rest of the work (*q*).—Upon the same principle a conveyance of property which as to part of the subject is illegal, may be supported as to so much of the subject as can be legally conveyed, though the consideration may not be apportionable: as the grant of an advowson, with next presentation, of a vacant benefice, which is valid as to the advowson, though illegal and void as to the next presentation (*r*). So a mortgage or charge of property with a covenant for payment, though illegal and void as to the security

Illegality in part of promise.

(*i*) *Hopkins v. Prescott* (1847), 16 L. J. C. P. 259; 4 C. B. 578.

(*k*) *Scott v. Gilmore* (1810), 3 Taunt. 226.

(*l*) Willes, J., *Prentiss v. Ilfracombe Ry.* (1868), 37 L. J. C. P. 123; L. R. 3 C. P. 250; *Kearney v. Whitcharton Coll. Co.* (1893), 62 L. J. M. C. 129; (1893) 1 Q. B. 700.

(*m*) *Newman v. Newman* (1815), 4 M. & S. 66.

(*n*) *Harrington v. Kloppe* (1781, 2 Br. & B. 678, n.; *Sturges v. Chilton* (1850) 19 L. J. C. P. 237; 9 C. B. 110.

(*o*) *Gaskell v. King* (1809), 11 East, 165.

(*p*) *Bramley v. Smith* (1909), 78 L. J. K. B. 745; (1909) 2 K. B. 235.

(*q*) *Clay v. Yates* (1836), 25 L. J. Ex. 237; 1 H. & N. 73.

(*r*) *Greenwood v. London (Bp.)* (1814), 5 Taunt. 727.

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given, may be valid as to the personal covenant (*s*). And a mortgage deed by a corporation, which was *ultra vires* as a charge upon property, was held valid as to the covenant (*t*). But in the case of bills of sale of personal chattels given by way of security and not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, the deed is void *in toto*, and no action can be maintained on the covenant for payment (*u*). This provision, however, does not affect a collateral security, such as a promissory note (*x*). And if a bill of sale includes property to which the statute does not apply and the provisions of the deed are severable, the security will be valid as to that property (*y*).

Effect of
illegality
supervening.

A contract may be discharged by illegality supervening after it is made. Thus the engagement of a seaman to serve on board a foreign ship is put an end to by a subsequent declaration of war if the seaman is not a member of one of the belligerent States, and the completion of his contract would amount to a breach of neutrality (*z*). "The difference where an Act of Parliament will amount to a repeal of a covenant and where not is this: Where a man covenants not to do a thing which was lawful for him to do, and an Act of Parliament comes after and compels him to do it, there the Act repeals the covenant; and *vice versa*, if he 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. But where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an Act makes it lawful, the Act does not repeal the covenant" (*a*). A covenant by the tenant of land to pay rent without any deduction of taxes was held to extend to taxes of a like kind imposed by a subsequent Act, authorising but not compelling a tenant to deduct them, and there-

(*s*) *Gibbons v. Hooper* (1831), 9 L. J. O. S. K. B. 69; 2 B. & Ad. 734.

(*t*) *Payne v. Brecon* (1858), 27 L. J. Ex. 495; 3 H. & N. 572; *Pickering v. Hfricouche Rn.* (1868), 37 L. J. C. P. 123; L. R. 3 C. P. 235.

(*u*) *Davies v. Rees* (1886), 55 L. J. Q. B. 363; 17 Q. B. D. 408.

(*x*) *Monetary Advance Co. v. Cater* (1888), 57 L. J. Q. B. 463; 20 Q. B. D. 784.

(*y*) *Ex p. Byrne* (1888), 57 L. J. Q. B. 263; 20 Q. B. D. 310; *Cochrane v. Entwistle* (1890), 59 L. J. Q. B. 418; 25

Q. B. D. 116. See *Ex p. Mason* (1894), 64 L. J. Q. B. 191; (1895) 1 Q. B. 133.

(*z*) *Burton v. Pankerton* (1867), 36 L. J. Ex. 137; L. R. 2 Ex. 340; *O'Neil v. Armstrong* (1895), 65 L. J. Q. B. 7; (1895) 2 Q. B. 418. See *Austin Evans & Co. v. Strack* (1905), 74 L. J. K. B. 683; (1905) 2 K. B. 315.

(*a*) *Holt, C. J., Brewster v. Kitchen* (1697), 1 Salk. 198; 1 Ld. Raym. 321; *Newington Loc. Bd. v. Cottingham Loc. Bd.* (1879), 48 L. J. C. 226; 12 Ch. D. 725.

fore leaving the covenant in full force (*b*); but if the Act compelled the deduction, as with the property tax, the deduction would be unlawful, and the covenant would be so far repealed (*c*). Where premises were let "with the right and liberty to store cartridges therein," and an Act was afterwards passed making it illegal to do so; it was held that there was no breach of the covenant for quiet enjoyment by the lessor, nor ejectionment from the premises; nor was there any implied warranty or condition in the lease that such use of the premises should continue lawful (*d*). A contract with the promoters of a projected company to pay all the costs of obtaining their Act, was held not to be affected by the usual clause in the Act that the company should pay the costs of obtaining it; for the effect of the contract was to leave no costs upon which the clause could operate (*e*). Where an Act of Parliament repeals a prior covenant by rendering the performance illegal, there is no right to compensation as for a breach, otherwise than may be provided in the Act (*f*).—Illegality supervening by the law of a foreign country in which the contract is to be performed does not, in general, excuse a breach of the contract; the foreign law may render it impossible in fact to perform the contract, but affords no excuse for non-performance, unless expressly or impliedly excepted from the contract (*g*).

Foreign law.

(*b*) *Brewster v. Kitchin* (1697), 1 Salk. 198. See *Cha'oner v. Bolckow* (1878), 47 L. J. C. P. 562; 2 Ap. Ca. 933.

(*c*) *Gaskell v. King* (1809), 11 East, 1. (*d*) *Newby v. Sharpe* (1877), 17 L. C. 17; 8 Ch. D. 39.

(*e*) *Stam v. Hoylelake Ry.* (1865), 3 L. J. Ex. 52; L. R. 1 Ex. 9. See

Shaw's claim (1875), 41 L. J. C. 670; L. R. 10 Ch. 177.

(*f*) *Per cur. Wynn v. Shropshire Union* (1850), 5 Ex. 120. See *East Freethe (Corp.) v. Annis* (1901), 71 L. J. 39; (1902) A. C. 213.

(*g*) See *ante*, p. 510.

(1894),
B. 133.
36 L. J.
P. Noel v.
(1895)
SS. Co.
B. 683;

Kitchin
m. 321;
am Loc.
Ch. D.

CANADIAN NOTES.

Illegality.

In *Leggatt vs. Brown*, 29 O. R., 530; 30 O. R., 225, the manager of the business of an insolvent firm was arrested and imprisoned on the charge of having procured the firm, while in insolvent circumstances, to transfer property to another person with intent to defraud creditors. After he had been released on bail an offer was made in writing by his wife and her son to the creditors to pay a certain percentage of their claims in addition to the dividends and to withdraw certain actions and procure the abandonment of certain claims upon conditions set out in the offer, one of which was that any creditor accepting the offer should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. The offer was accepted by the plaintiff and a number of other creditors. After it was made the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage.

It was held that, although not so stated in express terms, one object of the defendants in making their offer was to procure the stifling of the prosecution of the charge against the husband, and that it was in accordance with the concluded agreements made by the defendants with plaintiff and other creditors that no evidence was offered on the pending charge, and that the notes sued upon, having been given on an illegal agreement, could not be enforced.

In the above cited case the principle was applied that as part of the consideration for the agreement was illegal, the whole was bad.

In the case of *Kitching vs. Hicks*, 6 O. R., 739, the principle that if the legal part of a contract in question can be severed from that which is illegal the former can stand good, whether the illegality exists by statute or common law, was applied to the case of a bill of sale or chattel mortgage, partly for stock in trade and partly for book-debts. It was held, reversing the decision of Proudfoot, J., that, so far as the book-debts were

concerned, as to which registration was unnecessary, the agreement was valid and binding against the creditors. The Court per Osler, J., referring to the case of *Holroyd vs. Marshall*, 10 H. L. C., 191, make the following observations: "The Court, however, express the opinion, entitled to the greatest respect, that as to the timber to be afterwards manufactured, and of which, in the nature of things possession could not have been changed, the deed could not be upheld, because it was in consequence of its non-registration made absolutely void by the statute. 'It is a statute that makes this void, and not merely a principle of the common law, and it is a maxim that in such cases the deed must be taken to be altogether void and not merely as to that part to which the objection of its illegality applies.' Later authorities, however, show that this rule has been relaxed in modern times and that, if the legal part of the contract can be severed from that which is illegal, the former shall stand good, whether the illegality exist by statute or at common law."

In *Smith vs. Haughn*, 38 N. S. R., 153, the defendant agreed to pay plaintiff the sum of \$150 as wages or compensation for his services on a sealing voyage, and afterwards induced him to sign articles as a sharesman for the purpose of inducing other men to join the vessel as sharesmen. It was held that the plaintiff was not debarred by the fact of signing the articles from shewing that that was not the real contract made between himself and the defendant, but that it was made for another and different purpose. Per Russell, J.: "The plaintiff makes out his whole case on the verbal and valid contract between himself and the defendant without having to prove any fact shewing fraud or illegality. He must, therefore, succeed in his action on that contract. The defendant at best proves that, after that contract was entered into, the plaintiff agreed to sign, and did sign articles, not as a memorandum of a contract, but as a piece of machinery to be used for the purpose of deceiving others as to the nature and terms of the actual contract between the plaintiff and the defendant. It is the defendant that finds himself hampered in his defence by the fact that it involved an illegality to which he was a party. He must fail in that defence for the same reason that would cause the plaintiff to fail in his action if he could not prove his case without exposing an illegal transaction to which he was a party. The defendant has to admit

that he was a deceiver. His defence at the best consists in proving that the plaintiff was as unconscientious as he was himself, but it was never a defence to an action on a contract to prove that the plaintiff was a wicked person."

In *Smith vs. Benton*, 20 O. R., 344, the action was for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to a vote for the repeal of the Act and the remainder subsequently to a successful vote for its repeal, but before the order-in-council bringing the Act into force had been revoked. It was held that the price of those sold before the vote was not recoverable, but that the price of those sold after the vote could be recovered.

In *Brown vs. Moore*, 32 S. C. R., 93, it was held that an agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect. The head-note adds: "The imposition of a penalty for contravention of a statute avoids a contract entered into against the provisions of the statute." These words are taken from the oral judgment delivered by the Chief Justice, Sir Henry Strong, but they should not be taken without qualification. The distinction between penalties that render a contract void and those that do not is given in the author's text at pages 516, 517.

In *Hooper vs. Coombs*, 4 Man., 35, it was held that, although it was illegal to import whiskey into the North-West Territories except by permission of the Lieutenant-Governor, yet a contract made in Manitoba for the sale and purchase of whiskey was not illegal, even though the vendor was aware that the purchaser intended to smuggle it into the Territories, but this decision was reversed on appeal, and it was held that, as a matter of public policy, courts should refuse to enforce contracts entered into in violation of Dominion legislation, although that legislation may not apply to the province in which the contract is made or is sought to be enforced. 5 Man., 65.

In *Doran vs. Chambers*, 20 N. S. R., 309, it was held that a contract to run a race on the Wentworth Road, being a public street within the limits of the Town of Windsor, was tainted

with illegality and incapable of being enforced, as being in violation of the provisions of the Statute of Nova Scotia, R. S., ch. 48, sec. 7, which made it penal to drive a horse at full speed on the public street or highway of any town or village.

In *American Hotel Supply Company vs. Fairbanks*, 41 N. S., 444, plaintiff company, a company incorporated under the laws of Illinois, and having its head office in Chicago, in that state, sought to recover damages against defendant for breach of a contract made at Halifax, in the Province of Nova Scotia. Under the provisions of the Revised Statutes of that province, ch. 127, sec. 18, 1900, it is provided that every company not incorporated in the province shall appoint a resident manager or agent, and that such company, before beginning business in the province, shall transmit to the Provincial Secretary a statement under oath, giving certain particulars, including the situation of the head office, the amount of capital stock authorized, subscribed and paid up, etc. Every company failing to comply with the provisions of the statute is made liable to a penalty of ten dollars per day during the continuance of such default. It was held that non-compliance with the provisions of the statute did not render invalid the contract entered into by the company within the province or prevent the company from recovery thereon.

In *The Association of St. Jean Baptiste vs. Brault*, 30 S. C. R., 598, it was held that the provincial legislature has no jurisdiction to permit the operation of lotteries forbidden by the Criminal Statutes of Canada. A contract in connection with a scheme for the operation of a lottery forbidden by the Criminal Statutes of Canada is unlawful and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the parties against whom it is asserted, and it is the duty of the courts *ex mero moto* to notice the nullity of such a contract at any stage of the case and without pleading.

In *MacDonald vs. Riordan*, 39 S. C. R., 619, on appeal, the Supreme Court affirmed the judgment of the Court of Queen's Bench of Quebec by which it was held that where a contract is prohibited by statute such a contract is void, although the

statute may not actually declare its nullity, but merely impose a penalty on the offender, and that where the president of a railway company secretly entered into a partnership with contractors for the construction of the road he could not maintain an action against his partner to enforce the agreement with them.

In *Spears vs. Walker*, 11 S. C. R., 113, the contractors for the erection of a building in the City of St. John claimed to have been prevented by respondent from carrying out their contract. By the terms of the contract the building when erected would not have conformed to the provisions of a by-law of the city passed under the authority of an Act of the legislature two days after the contract was signed. It was held that the by-law of the city made the contract illegal, and, therefore, the plaintiffs could not recover. The case was considered to be concluded by the judgment of the Supreme Court in *Walker vs. MacMillan*, 6 S. C. R., 241, in which one Spears contracted to erect a proper and legal building for Walker on his land in the City of St. John. Two days after a by-law was passed under the authority of an act of the legislature prohibiting the erection of buildings such as the one contracted for and declaring them to be nuisances. While the building was in the course of erection the centre wall, having been built on an insufficient foundation, fell, carrying with it the party wall common to Walker and MacMillan, his neighbour. An action was brought by MacMillan against Spears and Walker to recover damages for the injury, and it was held that at the time of the injury complained of the contract for the erection of Walker's building being in contravention of the provisions of a valid by-law of the City of St. John, the defendant, Walker, his contractor, and his agent, Spears, were all equally responsible for the consequences of the improper building of the illegal wall which caused the injury to MacMillan charged in the declaration.

Compounding Crime.

In *Ballard vs. Pope*, 3 F. C. Q. B., 317, a party suspected of stealing a horse was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected

individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner, the prosecutor, but before doing so took a bond of indemnity. It was held that the bond was not necessarily void as contrary to the general policy of the law.

In *The People's Bank of Halifax vs. Johnson*, 20 S. C. R., 541, a bond was executed by Johnson to secure an indebtedness of Locke to the plaintiff bank. The evidence shewed that Locke, who had married an adopted daughter of Johnson, was agent of the bank, and had embezzled the bank funds, and that the bond was given in consideration of an agreement not to prosecute. It was held, affirming the judgment of the Supreme Court of Nova Scotia, that the consideration for the bond was illegal and that the defendant was not liable thereon.

Agreements With Immoral Objects.

In *Moon vs. Clarke*, 30 V. C. C. P., 417, defendant set up as a plea to an action of ejectment for land an agreement based upon the immoral consideration of his marriage with the daughter of plaintiff's testator who, as he was aware, was already married, and claimed a lien on the land for improvements. It was held that the agreement could not be enforced nor could there be any lien for the improvements.

In *Clarke vs. Hagar*, 22 S. C. R., 510, it was held that a contract for transfer of property with intent by the transferor and for the purpose that it will be applied by the transferee to the accomplishment of an illegal or immoral purpose is void, and cannot be enforced. But mere knowledge of the transferor of the intention of the transferee so to apply it will not avoid the contract unless from the particular nature of the property and the character and occupation of the transferee a just inference can be drawn that the transferor must also have so intended.

The foregoing paragraph is the third proposition set out by Gwynne, J., as deduced from the cases on the subject which are fully discussed and at considerable length. There is a dissenting opinion of Taschereau, J., in line with that of Meredith, C. J., in the court below. 20 O. A. R., 207.

Agreements Contemplating Fraud.

In *Bonistock vs. Saylor*, 17 O. A. R., 505, the plaintiff purchased from an alleged company fifteen bushels of hulless oats, paying ten dollars a bushel, and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats by promising to sell for him sixty bushels at the same price. The scheme was a fraudulent one, the oats not being worth more than ordinary oats, and plaintiff and defendant were aware that these transactions could not be carried out without someone else being induced to enter into a similar transaction by which their own could be completed and a loss probably suffered by their successors. The defendant, having been sued on his notes for the purchase of the thirty bushels, it was held that that purchase could not be treated as an isolated transaction, but must be regarded as part of a scheme which was clearly contrary to the well-being of the public, and therefore illegal.

Public Policy, Champerty, Etc.

In *Waddell vs. McCabe*, 4 U. C. Q. B., O. S., 191, it was held that an agreement to pay money on a party's not bidding at a sheriff's sale was not void as being contrary to public policy when the party making the agreement thereby ensured a withdrawal of a claim from the land.

In *Footl vs. Bullock*, 4 U. C. Q. B., 480, it was held that a bond given to secure a sheriff a certain fixed salary or otherwise to be paid by his deputy was void.

In *Langlois vs. Baby*, 11 Grant's Ch., 21, a conveyance made for the purpose of enabling an irresponsible person to justify as special bail was held to be a transaction against good conscience and morality.

In *Kerr vs. Brunton*, 24 U. C. Q. B., 390, the plaintiffs, having recovered a judgment against a firm, agreed with the defendant that if the judgment, or any portion of it, should be realized from property to be pointed out by the defendant, the latter should have one-third of the amount so realized and all costs

that might be incurred in endeavouring to make the money should be payable by the defendant if unsuccessful. Goods were pointed out and seized, but were found, on an interpleader issue, to be those of a claimant, whereupon the plaintiffs sued the defendant on the agreement for their costs in the interpleader proceedings. It was held that, if the agreement extended to these costs, it was illegal, as being contrary to public policy, if not within the definition of champerty.

In *Craig vs. Thompson*, 42 N. S. R., 150, plaintiff, who had been a shareholder and secretary of a mining company for a number of years and had charge of its books and an intimate knowledge of its details, entered into an agreement in writing with defendant, the principal shareholder of the company, to give him certain assistance for the purpose of enabling him to win a suit then pending between defendant and another shareholder in relation to an option upon an adjoining property, originally held by the company, but which defendant had had transferred to himself. In consideration of the proposed assistance defendant agreed to pay plaintiff a sum of money in cash in the event of his winning the suit, and a further sum when a sale of the property was effected. At the time of the agreement plaintiff had ceased to be a shareholder, and had been paid his salary as secretary, and no interest, either legal or equitable, was shewn to justify his interference in the litigation. It was held allowing defendant's appeal, with costs, that the contract was illegal, on the ground of maintenance, and the plaintiff could not recover.

Byron vs. Tremaine, 29 S. C. R., 445, was an action for money claimed as a proportionate sum received by a solicitor for stilling proceedings involving publicity in connection with a divorce suit by plaintiff's husband against her. The defendant held part of the money for his costs in the divorce suit and divided the balance, according to an agreement between him and the husband and wife. The Supreme Court of Nova Scotia decided that it could not lend assistance in the enforcement of the immoral agreement, and vacated the judgment of the trial judge. McDonald, C. J., who held that there was a cause of action, but that the evidence was insufficient to justify a judgment for plaintiff, and dismissed the plaintiff's action, with costs to the

defendant. The Supreme Court of Canada agreed with the trial Judge that the evidence was insufficient, and dismissed the appeal, with costs; but the decision of the Supreme Court of Nova Scotia was not attacked on the appeal. That decision was that the suit was one which could not be entertained by the Court, and that the action should be dismissed without costs to either party.

In *Consumers' Cordage Company vs. Connolly*, 31 S. C. R., 244, in an action to recover advances, with interest, under an agreement in respect to the manufacture of binder twine at the Central Prison, at Toronto, it was held, per Sedgewick, King and Girouard, J.J., that the evidence disclosed a conspiracy, and that, although under the provisions of the Civil Code the monies so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely required that the parties should be replaced in the position they respectively occupied before the illegal transaction took place. It was also held that the laws of public order must be judicially noticed by the Court *ex proprio motu*, and that, in the absence of any proof to the contrary, the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.

Restraint of Trade.

In *Wicher vs. Darling*, 9 D. R., 311, the defendant, on entering into the employ of the plaintiff as an agent in vending tea, covenanted not to engage in the sale or delivery of tea or coffee in the City of Toronto, either for himself or as agent for any other person, for at least two years after leaving plaintiff's employ. It was held that the covenant was binding, notwithstanding the consideration for it might have been inadequate, and that the covenant was not invalid on the ground of public policy.

In *McCausland vs. Hill*, 23 O. A. R., 738, a mutual covenant with each other by persons engaged in the same trade throughout Canada not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose should continue to carry it on, was held to be good.

In *The Ontario Salt Company vs. Merchants' Salt Company*, 18 Grant's Ch., 540, several incorporated companies and individuals engaged in the manufacture and sale of salt entered into an agreement to combine and amalgamate under the name of the Canadian Salt Association, providing that all the parties to the agreement should sell all salt manufactured by them to the trustees of the association and should sell none except to the trustees. It was held that this was not void as contrary to public policy or as tending to a monopoly or an undue restraint of trade. (1871.)

In *Suan vs. Scott*, 23 U. C. Q. B., 434, a medical practitioner and an apothecary purchased the good-will of the defendant's practice as a medical man, the defendant agreeing not to practice within eight miles of the place. It was held that there was nothing illegal in the plaintiffs entering into partnership, that no intention could be inferred that the apothecary should practice medicine contrary to the statute, and that, therefore, the fact of his not being licensed could form no defence.

In *Mossop vs. Mason*, 18 Grant's Ch., 453, a covenant in an agreement for the sale of the good-will of the business of an innkeeper that the vendor should pay \$4,000 in the event of his carrying on business as an innkeeper for ten years was held void as an undue restraint of trade. The operation of the covenant was not restricted to any particular place.

In *Cook vs. Shaw*, 25 O. R., 124, on the purchase of a manufacturing business from the plaintiff by the defendant, the vendors entered into a covenant that they would not engage, directly or indirectly, in the manufacture and sale of bamboo-ware and furniture, either as principal, agent or employer, at any place in the Dominion of Canada for a term of ten years, but the clause was restricted to wholesale or jobbing business, and did not restrain the vendees from entering into and engaging in the retail business of bamboo-ware and furniture selling. It was held that, as the restraint was partial only, and confined to the wholesale and jobbing business and to the manufacturing of certain articles, and there was no evidence upon which it could be held to be unreasonable, and the interests of the public were not interfered with, the agreement was not contrary to public policy.

In *Fiskew vs. Rutherford*, 8 Grant's Ch., p. 9, on a sale of goods upon credit to a trader, the purchaser covenanted with a clerk in the employ of the vendors to buy all his goods from them, and that the clerk, at any time thereafter during the time such business might be carried on should be at liberty to enter into the place of business and take possession of the goods and premises and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount, in pursuance of the agreement.

The head-note states that the covenant not to purchase elsewhere was held not to be binding on the purchaser, but Estlin, V. C., said that, if the deed had contained a covenant on the part of the plaintiffs to supply such goods as the purchaser might require for the conduct of his business, it would not have been open to the objection that has been made to it, but would have been perfectly good, and, instead of being in restraint, would have been in furtherance of trade. It was true that the deed contained no such covenant, and the covenant in question, being founded on no consideration, might be void as being in restraint of trade, but he doubted whether it was, because the question in such cases was whether the restraint was reasonable, and, certainly, in the present case it was very reasonable, as it enabled the defendant to obtain capital of which he was quite destitute, and to commence and conduct a considerable business; but, supposing the covenant to be void and that the defendant could have purchased where he pleased, it did not necessarily follow that the whole deed was void, and the purchaser, having received goods under the agreement, the plaintiff was entitled to the remedies given by the deed.

In *Pratt vs. Tapley*, 3 Pugsley (N. B.), 163, an agreement was entered into between the proprietor of sixteen tug-boats respecting the towage of vessels according to what was known as the regular turn system. By this they agreed among other things that every tug-boat should take its regular turn in order, that every ship coming into the harbour should count as such turn, and that such tug should be entitled to all her towage till she went to sea; that on arrival of a vessel at Partridge Island the tug whose turn it might be must be prepared to attend the vessel; that if more than one vessel arrived the tug whose turn

it might be should have the option of choosing the largest vessel, the next in turn to choose from the remainder; that all new vessels up or down the Bay of Fundy beyond Quaco or Musquash should be towed on special terms to Partridge Island, and, on arrival there, should be towed into the harbour by the steam tug and should in falling to such tug's general turn count as such, but if the vessel did not fall to said tug's general turn, then it should be allowed to said tug as a general turn ahead, etc. It was held that this agreement was contrary to public policy and in restraint of the freedom of trade, the parties having restricted themselves from carrying on their business at their own choice and bound themselves to do so according to the will of others, and that the interest of the public, particularly of ship owners, would be prejudiced by giving effect to such an agreement.

In *Canadian Pacific Railway Company vs. Western Union Telegraph Company*, 17 S. C. R., 151, the facts were that in 1869, the E. N. A. Railway Company, owning the road from St. John, N.B., westward to the United States boundary, made an agreement giving the Western Union Telegraph Company exclusive right for ninety-nine years to construct and operate the line of telegraph over its road. The latter company was incorporated in the State of New York for the purpose of constructing and operating telegraph lines in the United States. Its charter neither allowed it to engage nor prohibited it from engaging in business outside of the States. It was held that the exclusive right granted to the Western Union Telegraph Company was not void as against public policy nor as being a contract in restraint of trade.

PART IV.

THE DISCHARGE OF CONTRACTS.

CHAPTER I.

RESCISSION BY NEW AGREEMENT.

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THE discharge of contracts, including in that term all modes of determining the liability, involves different considerations as it occurs before, at the time, or after the performance has become due. A contract may be discharged before it is due by events happening which are expressly or impliedly excepted from the liability, or which operate as conditions subsequent determining the liability. These modes of discharge are provided in the contract itself and have been already noticed as exceptions and conditions of the contract (a). A contract may also be discharged before it is due by a new agreement of the parties rescinding or altering the terms; so that the claim to performance of the original contract may be met by the new agreement; and if the contract has been put in writing, it may be practically discharged under certain circumstances by the cancellation or alteration or by the loss of the deed or instrument that embodies the terms.—When

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Discharge of
contracts.

(a) See ante, pp. 481 et seq.

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the contract is duo, it may be discharged by exact performance of the terms; or by tender of such performance, if the other party refuses to accept it. A breach of the contract also discharges it in the sense that, to the extent of the breach, it converts the contract into a claim for damages in compensation for the defective performance: or, at least, a claim to have the contract performed with such equitable qualification as may be necessitated by the default. The claim or right of action arising upon a breach of contract can no longer be satisfied by a performance or tender of the debtor without the agreement of the creditor to accept it in satisfaction; but it may be discharged by an accord and satisfaction made with the creditor; or by a release given by him; or by a judgment recovered by him. It may also become barred by lapso of time under the Statutes of Limitation; or it may be met by a claim of set-off; or by a discharge in bankruptcy. The modes of discharge above noticed form the subjects of the several Chapters of this Part.

Rescission of contract.

A contract may be discharged at any time before the performance is due by a new agreement validly made, having the effect of altering the terms of the original agreement, or of rescinding it altogether (*b*); but it is for the party asserting an alteration or rescission of the original agreement to prove the assent of the other party to the new contract (*c*). Mutual promises to marry are discharged at any time before a breach by a mutual agreement to rescind the promises (*d*); with the consequence that a settlement made in contemplation of the marriage is rendered inoperative by the rescission (*e*). A separation deed between husband and wife is rescinded by their return to cohabitation, as to all the provisions of the deed which depend upon the separation (*f*). If a contract is rescinded by agreement after a part performance or part payment of the consideration, any claim in respect of the part performance or part payment must be referred to the agree-

(*b*) *Maule, J., Meniaeff v. Read* (1849), 7 C. B. 139.

(*c*) *Dursley (Earl) v. L. C. & D. Ry.* (1867), 36 L. J. C. 404; L. R. 2 H. L. 43; *Jas. Nelson Ltd. v. Nelson Line (Liverpool) Ltd.* (1908), 77 L. J. K. B. 456; (1908) A. C. 108.

(*d*) *King v. Gillett* (1840), 10 L. J. Ex. 164; 5 M. & W. 55.

(*e*) *Esery v. Cowbird* (1884), 53 L. J.

C. 661; 26 Ch. D. 191; *Bond v. Walford* (1886), 55 L. J. C. 667; 32 Ch. D. 238.

(*f*) *Bateman v. Rosa (Countess)* (1813), 1 Dow. 235; *Wilson v. Mussett* (1832), 1 L. J. K. B. 250; 2 B. & Ad. 743; *Nicol v. Nicol* (1886), 55 L. J. C. 437; 31 Ch. D. 524; *Re Sparks* (1901), 73 L. J. C. 259; (1904) 1 Ch. 451; compromised upon appeal (1904), 73 L. J. C. 576; (1904) 2 Ch. 121.

ment of rescission; and in general no such claim can be made, unless expressly or impliedly reserved upon the rescission (*g*).—The subsequent agreement may affect parts only of the former contract, leaving the original contract in other respects to stand; and consequently the new agreement may have to be construed with reference to the original contract (*h*); and so far as the later agreement is inconsistent with the former contract it must be taken to rescind it (*i*). Where a contract was made for building to be completed by a fixed day under penalties for delay, a subsequent agreement for additional work which rendered it impossible to complete within the time, was held to operate as a waiver of the former stipulation as to time and a discharge of the penalties (*k*).—The subsequent agreement may operate as a conditional discharge of the original agreement, so that the later agreement failing the former contract is restored to its full effect (*l*). Thus the acceptance of a new lease by a tenant operates as a surrender in law of his existing lease; but it is conditional upon the new lease being valid (*m*).

Alteration of contract.

Conditional rescission.

Non-performance for a considerable lapse of time, or under such circumstances as manifest the intention of abandoning it, may be treated as a rescission of the contract (*n*). Thus mutual promises to marry were held to be rescinded by three years' cohabitation of the parties without marriage (*o*). Where an agreement had been made between a mortgagor and mortgagee for the former to give up possession and release all his interest to the mortgagee, which was not acted upon, and twelve years afterwards the mortgagee sold under his power as mortgagee, it was held that the agreement had been abandoned and that the mortgagor retained the equity of redemption and was entitled to the surplus of the purchase-money (*p*). Where land had been sold in lots, subject to covenants with the vendor not to carry on the trade of a beer-

Implied rescission.

(*g*) See *ante*, p. 40; *Putnare v. Colburn* (1834), 3 L. J. Ex. 314; 1 Cr. M. & R. 65.

(*h*) *Hunt v. S. E. Ry.* (1875), 45 L. J. C. P. 87; *Lewis v. Lucas* (1878), 9 Ch. D. 98.

(*i*) *Dawson v. Brinckman* (1850), 3 Mac. & G. 53; *Sanderson v. Graves* (1875), 44 L. J. Ex. 210; L. R. 10 Ex. 234.

(*k*) *Thornhill v. Nests* (1860), 8 C. B. N. S. 831; *Padd v. Churton* (1897), 66 L. J. Q. B. 477; (1897) 1 Q. B. 562.

(*l*) *Firth v. Midland Ry.* (1875), 44

L. J. C. 313; L. R. 20 Eq. 100.

(*o*) *Roe v. York (Abp.)* 1805, 6 East, 86; *Doe v. Courtney* (1818), 17 L. J. Q. B. 113; 11 Q. B. 702; *Doe v. Poole* (1848), 17 L. J. Q. B. 151; 11 Q. B. 713.

(*n*) *Davis v. Baconford* (1860), 30 L. J. Ex. 139; 6 H. & N. 21.

(*o*) *Bond v. Walford* (1886), 55 L. J. C. 667; 32 Ch. D. 238.

(*p*) *Rushbrook v. Lawrence* (1869), 39 L. J. C. 93; L. R. 5 Ch. 3.

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shop, and the vendor afterwards suffered beershops to be opened and himself supplied them with beer, he was held to have waived and rescinded the covenants over all the lots (*q*). Where a buyer of specific goods in a deliverable state for future delivery gave notice to the seller of his insolvency, it was held that the seller was justified in presuming an offer to abandon the contract and in accepting the abandonment, in the absence of any notice by the buyer of his intention to maintain the contract (*r*).

**Novation by
acceptance of
new debtor.**

**Transfer of
policies of
insurance.**

The discharge of a contract by a new agreement may occur with the intervention of a third party, who undertakes the liability of the contract and is accepted by the creditor in place of the original debtor; a mode of discharge which is designated by the term *novation* (*s*).—Questions of novation have arisen upon the transfer of business between insurance companies, with reference to the assent of the policy-holders. This assent must now be signified by some writing signed by the policy-holder, or by his agent, by force of sect. 7 of the Life Assurance Companies Act, 1872. Prior to this enactment a company, by the terms of their constitution, might have the power to transfer their business and liabilities without the consent of the policy-holders; in which case the holders were bound by a transfer duly made, and the company was discharged (*t*). Where the company had no such power and a transfer was made, it became a question of fact whether a policy-holder had adopted the transfer to the extent of discharging the transferring company or not. The mere payment of the premiums to the new company, and taking receipts in their name by direction of the transferring company, though sufficient payment to keep up the policy, was not, without special circumstances, an acceptance of the new company by the policy-holder sufficient to operate as a discharge (*u*). But procuring an indorsement by the new company of their liability (*x*): payment of premiums

(*q*) *Kelsey v. Dodd* (1882), 52 L. J. C. 34.

(*r*) *Morgan v. Bain* (1874), 44 L. J. C. P. 47; L. R. 10 C. P. 15. See Sale of Goods Act, 1893, s. 18 (r. 1).

(*s*) Selborne, L. C., *Scarf v. Jardine* (1882), 51 L. J. Q. B. 612; 7 Ap. Ca. 351.

(*t*) *Holt's case*, *Grain's case* (1875), 45 L. J. C. 321; 1 Ch. D. 367; *Harman's case* (1875), 45 L. J. C. 321; 1 Ch. D.

326; *Dow's case* (1876), 46 L. J. C. 402; 3 Ch. D. 384.

(*u*) *Re Manchester and London Assoc.* (1870), 39 L. J. C. 595; L. R. 5 Ch. 640; *Griffith's case* (1871), 40 L. J. C. 464; L. R. 6 Ch. 374; *Comquest's case* (1875) 45 L. J. C. 334; 1 Ch. D. 334.

(*v*) *Ex p. Blood* (1870), 39 L. J. C. 395; L. R. 9 Eq. 316; *Frost's claim* (1873), L. R. 16 Eq. 354; *Miller's case* (1876), 3 Ch. D. 391.

and taking receipts of the new company for fifteen years after notice of the transfer (*y*); accepting a *bonus* from the new company (*z*); claiming the policy money against the new company (*a*); was sufficient to constitute novation. In the case of annuities granted by an insurance office the mere acceptance by the grantee of payment by the new office is not a novation (*b*).

Questions of novation also arise upon changes occurring in partnerships, with reference to the consent of customers to accept the new firm as debtors instead of the old. A customer who continues to deal with a firm after notice of a change in the partners is presumed to accept the new firm as his debtors (*c*). If he continues to deal with the firm without having notice of the change, he credits the original partners; but on receiving notice of the change he may charge the partners who in fact incurred the debt in the name of the firm as being the real principals; and if he elects to charge them, he cannot afterwards charge the original partners; but if he deals with the firm after notice of the change, he cannot charge the retired partners with the new debts (*d*). Where a servant or agent of a partnership upon a change in the partners accepts employment under the new firm, he must be taken to discharge the old firm (*e*). Upon the same principle, where a party to a contract takes a third party into partnership, the other party to the contract may elect to bind the party who has contracted with him or the firm, and the liability will be fixed according to his election (*f*).

Change in firm of partners.

The new agreement in rescission or alteration of a prior contract must in general satisfy all the requirements of an independent contract.—The rescission or variation of a former agreement, so long as it remains executory, will in general form a sufficient consideration for a subsequent agreement (*g*). But where a

Form and requirements of new agreement. Consideration.

(*y*) *Cooker's case* (1876), 45 L. J. C. 822; 3 Ch. D. 1.

(*z*) *Spencer's case* (1871), 40 L. J. C. 455; L. R. 6 Ch. 362.

(*b*) *Ex p. Fleming* (1870), 39 L. J. C. 250; L. R. 9 Eq. 306.

(*c*) *Re Family Endowment Soc.* (1870), 39 L. J. C. 206; L. R. 5 Ch. 118; *Re Todd and London Assoc.* (1872), 41 L. J. C. 661; L. R. 7 Ch. 651.

(*d*) Partnership Act, 1890, s. 17 (3); *Keruan v. Keruan* (1831), 3 L. J. Ex. 187; 2 Cr. & M. 617; *Hart v. Alexander* (1837), 6 L. J. Ex. 129; 2 M. & W.

484; *Ex p. Gibson* (1839), 38 L. J. C. 673; L. R. 4 Ch. 662; *Bethborough v. Holmes* (1877), 46 L. J. C. 416; 5 Ch. D. 255.

(*e*) Partnership Act, 1890, s. 36; *Searf v. Jarline* (1882), 51 L. J. Q. B. 612; 7 Ap. Ca 345.

(*f*) *Hobson v. Cowley* (1858), 27 L. J. Ex. 205.

(*g*) *British Homes Assoc. v. Piterson* (1902), 71 L. J. C. 872; (1902) 2 Ch. 404.

(*h*) *Per cur. Foster v. Dauber* (1851), 20 L. J. Ex. 385; 6 Ex. 851.

PART IV.

Consent of
both parties.

person, being indebted on a promissory note payable on demand with interest, agreed to pay the amount by quarterly payments with interest, it was held that such agreement was a mere voluntary forbearance by the creditor, which afforded no answer to an action upon the note (*h*).—The consent of both parties must be given to the new agreement (*i*). A person who has contracted to sell goods and deliver them at a future date cannot discharge his liability by giving notice to the buyer that he will be unable or unwilling to deliver the goods, unless the buyer assents to such notice in rescission of the contract (*k*). Nor can the buyer anticipate or discharge his liability by giving notice to the seller of his intended refusal to accept delivery, unless the seller accepts the notice as a rescission (*l*). In the case of lands acquired compulsorily, a complete contract arises where the notice to treat is given; accordingly undertakers who had given notice to take 20 perches of land were not allowed to withdraw that notice and give another requiring one perch only, against the wish of the landowner (*m*).

Contracts in
writing.

If the original contract was put in writing merely by agreement of the parties, and not in pursuance of any statutory requirement, the new agreement in alteration or discharge is not required to be in writing, and may be proved by parol evidence. "By the general rules of the common law, if there be a contract which has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement" (*n*).—A new agreement in writing may require a new or additional stamp, without which

New
agreement
requiring
stamp.

(*h*) *M'Manus v. Bark* (1869), 39 L. J. Ex. 65; L. R. 5 Ex. 65.

(*i*) *Heinecke v. Earle* (1858), 28 L. J. Q. B. 79; 8 E. & B. 410; *Darby v. Earl* v. L. C. & D. Ry. (1867), 36 L. J. C. 404; L. R. 2 H. L. 43; *Baily v. British Equit. Ass.* (1903), 73 L. J. C. 240; (1904) 1 Ch. 374. See *Harington v. Scudall* (1903), 72 L. J. C. 396; (1903) 1 Ch. 921.

(*k*) *Lough v. Paterson* (1818), 8 Taunt.

510; *Brown v. Muller* (1872), 41 L. J. Ex. 214; L. R. 7 Ex. 319.

(*l*) *Phillipotts v. Evans* (1839), 9 L. J. Ex. 33; 5 M. & W. 175; *Fitt v. Cassant* (1842), 12 L. J. C. P. 70; 4 Man. & G. 898.

(*m*) *Towney v. Lynn & Ely Ry.* (1847), 16 L. J. C. 282.

(*n*) *Ter enc. Goss v. Nugent* (Lord, 1833), 2 L. J. K. B. 127; 5 B. & Ad. 64.

it cannot be put in evidence; as a policy of insurance which had been altered by the parties, pending the risk, from "ship and outfit" to "ship and goods" (o); but it was held that the alteration apparent upon the face of the policy was effectual to discharge the original contract, though the altered policy could not be charged for want of a stamp (p). And generally in an action upon a contract, if it appears that a subsequent agreement has been made affecting the contract charged, it becomes necessary to prove the later agreement in order to show that the former remains in force; which cannot be done if it wants a stamp. "The court may, in all cases, so far allow parol evidence of a written agreement as to ascertain that it relates to the subject-matter in discussion. If, indeed, the plaintiff gets through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped" (q).

In the case of bills of exchange, by the law merchant, the holder of a bill might discharge the liability of the acceptor or any other party, before or after the maturity of the bill, by an express renunciation of his right; without writing, and without consideration, and without delivery of the bill (r). The Bills of Exchange Act, 1882 (which by sect. 89 applies to promissory notes), now enacts, sect. 62, sub-sect. 1, "When the holder of a bill at or after maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."—Sub-sect. 2, "The liabilities of any party to a bill may in like manner be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."—A promissory note payable on demand is "at maturity" from its date within this enactment (s). The writing must express an absolute and unconditional renunciation of right; and a memorandum expressing an intention and direction "to destroy the note as soon as found" was held not to be such (t).

Bills of
exchange.

(o) *Hill v. Patten* (1867), 8 East, 373.

(p) *French v. Patten* (1808), 9 East, 351.

(q) *Littledale, J., Reid v. Ince* (1827), 7 B. & C. 261; *Sweeting v. Halse* (1829), 7 L. J. O. S. K. B. 156; 9 B. & C. 365.

(r) *Foster v. Dauber* (1851), 20 L. J.

Ex. 385; 6 Ex. 839. See *Cook v. Lister*, (1862), 32 L. J. C. P. 121; 13 C. B. N. S. 543.

(s) *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627.

(t) *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627.

PART IV.

Contracts
within the
Statute of
Frauds.

Operation of
the statute
in equity.

The Statute of Frauds requires that certain contracts shall be evidenced by writing and signature; a new agreement altering the terms of such a contract, or discharging it in part only, is also within the statute and must satisfy the statutory requirements whether it relates to land or goods; and no action can be brought upon a written contract within the statute with a parol variation (*u*). The new agreement not satisfying the statute, so long as it remains executory, is not allowed to be good as a contract, and the original contract remains in force (*x*). But if the new agreement is carried into execution, whatever is done under it is referable to that agreement, and not to the original contract (*y*).—There is no difference in this respect between terms of the original contract which are within the statute and terms which, taken alone, are not; an alteration of the contract in any term must be made in writing (*z*). And for this purpose "everything for which the parties stipulate as forming part of the contract must be deemed to be material" (*a*). Accordingly, under a contract in writing for the sale of land, it is not admissible to prove a subsequent verbal agreement to waive the title as to part of the land (*b*); or to substitute a different day for completion (*c*); or of a different mode of paying the purchase-money (*d*). Under a written contract for the sale of goods, within the statute, a verbal agreement to extend the time for delivery (*e*); or to vary the place or the mode of delivery (*f*) cannot be proved. Under a written contract of service for more than a year at an annual salary, it was not admitted to prove a subsequent verbal agreement that the salary should be paid quarterly (*g*). Under a lease within the statute, stipulating that the straw should be taken at a valuation, the mode of valuation cannot be varied without writing (*h*).—The application of the statute in equity is the

(*u*) *Flourens v. Inarning* (1876), 45 L. J. C. P. 695; 1 C. P. D. 220; *Facey v. Roshleigh* (1904), 73 L. J. C. 422; (1901) 1 Ch. 634.

(*x*) *Noble v. Ward* (1866), 36 L. J. Ex. 91; L. R. 2 Ex. 135.

(*y*) *Stoddart v. Gares* (1875), 44 L. J. Ex. 210; L. R. 10 Ex. 231.

(*z*) *Harvey v. C. Sham* (1836), 5 L. J. K. B. 225; 5 A. & E. 61.

(*a*) *Parke, B.* (1840), 9 L. J. Ex. 126; *Marshall v. Lyon*, 6 M. & W. 109.

(*b*) *Cossey, Nagent (Lord)* (1833), 2 L. J. K. B. 127; 5 B. & Ad. 58.

(*c*) *Stowell v. Robinson* (1837), 6 L. J. C. P. 326; 3 Bing. N. C. 28.

(*d*) *Cairns, L. C., Hussen v. Horne-Payne* (1879), 48 L. J. C. 816; 4 Ap. Ca. 320.

(*e*) *Flourens v. Inarning* (1876), 45 L. J. C. P. 695; 1 C. P. D. 220.

(*f*) *Moore v. Campbell* (1851), 25 L. J. Ex. 310; 10 Ex. 323; *Noble v. Ward* (1866), 36 L. J. Ex. 91; L. R. 2 Ex. 135.

(*g*) *Giraud v. Richmond* (1846), 15 L. J. C. P. 180; 2 C. B. 835.

(*h*) *Harvey v. Graham* (1836), 5 L. J. K. B. 225; 5 A. & E. 61.

same in this respect (*i*). A written contract for the sale of a house, with a subsequent verbal agreement for a restrictive covenant as to the use of the house, cannot be enforced against the objection of the statute (*k*). And a written contract to grant a lease cannot be varied by evidence of a subsequent parol agreement (*l*); as where there is an agreement in writing for a lease for a certain term, and a subsequent verbal alteration of the commencement of the term (*m*).—"Variations verbally agreed upon are not sufficient to prevent the execution of a written agreement; the situation of the parties in all other respects remaining unaltered" (*n*). But part performance of the verbal agreement may take it out of the statute, and admit it to proof in answer to the claim to execution of the original written agreement (*o*). And a plaintiff having claimed upon the written agreement is not entitled to fall back upon the variation so proved, unless the defendant consents (*p*). Where a plaintiff claims specific performance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the court will decree specific performance with the variations if the defendant is willing to accept them; and if not, according to the original contract (*q*).

Effect of
parol
variations.

A total rescission and discharge of the written contract on both sides may be effectually made by a mere verbal agreement to that effect, though the original contract is one within the statute; for all that the statute enacts is that no action shall be brought upon such contract unless it is in writing; and "as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing" (*r*). But a parol agreement in variation or substitution of a written contract, which cannot take

Parol
rescission.

(*i*) *Traro, L. C., Ennot v. Derkurst* (1851), 21 L. J. C. 197; 3 Mac. & G. 597; *May v. Platt* (1900), 69 L. J. C. 357; (1900) 1 Ch. 616.

(*k*) *Swelling v. Thomas*, 43 L. J. C. 506; L. R. 17 Eq. 383.

(*l*) *Vezey v. Rushbrogh* (1901), 73 L. J. C. 422; (1901) 1 Ch. 631.

(*m*) *Jordan v. Starkes* (1791), 1 V. & Jun. 42.

(*n*) *Grant, M. R., Price v. Dyer* (1810), 17 Ves. 3-4. See *Woolham v. Hearn*

(1802), 7 Ves. 211; 2 Wh. & T. L. C. 513.

(*o*) *Olley v. Fisher* (1886), 56 L. J. C. 208; 51 Ch. D. 367.

(*p*) *Charles v. Huggins* (1813), 1 V. & B. 524.

(*q*) *Robinson v. Page* (1826), 3 Russ. 121.

(*r*) *Per cur. Goss v. Nugent* (1802) (1833), 2 L. J. K. B. 178; 5 B. & Ad. 65; *Goman v. Salisbury* (1681), 1 Vern. 240.

PART IV.**Dispensation
of perform-
ance.**

effect as a new contract for want of writing, will not operate in rescission of the former, unless intended and expressed to do so absolutely (s).

There is a distinction between an alteration in a written contract, and a dispensation or variation of performance needed to by one party at the request of the other, without any binding agreement to that effect, which may be proved by parol evidence as being equivalent to performance. Thus if the seller of goods, being ready and willing to deliver according to the contract, forbears the delivery at the request of the buyer, there is no variation of the contract, but a dispensation of performance by the buyer to the extent of the delay (t). But if the seller requests delay in delivery, and the buyer assents, the seller can no longer rely upon the original contract because he is not ready and willing to deliver according to the terms; and he can bring no action upon the contract with the variation, unless it is proved in writing (u). So if the buyer, being ready and willing to accept the goods, forbears his claim at the request of the seller, he performs the contract as against the seller, who is precluded by his request from objecting to the delay (x). In such cases the original contract is unaltered, and the arrangement has reference only to the mode of performance; but the consequence is that the measure of damages for non-delivery or non-acceptance of the goods depends upon the value at the time the contract is put in force, instead of the time appointed in the contract (y). Similarly where a charter-party excepted Sundays and holidays from the computation of time for loading, and the charterers in fact loaded upon two holidays, but there was no evidence of the terms upon which the loading took place, the charterers were held entitled to claim expedition money (z). Upon the same principle the seller of goods may discharge the contract on his part by delivering the goods at a different place or by different

(s) *Edwin v. Pegg* (1826), 3 Russ. 121; *Noble v. Ward* (1866), 36 L. J. Ex. 91; L. R. 2 Ex. 135; *Fryer v. Lushleigh* (1801), 73 L. J. C. 122; 1901 1 Ch. 631.

(t) *Coff v. Pann* (1813), 1 M. & S. 21; *Hickman v. Haynes* (1875), 41 L. J. C. P. 358; L. R. 10 C. P. 588.

(u) *Stead v. Daubler* (1839), 9 L. J. Q. B. 101; 10 A. & E. 57; *Peters v.*

Dunning (1876), 45 L. J. C. P. 495; 1 C. P. D. 220.

(v) *Ogle v. Funn* (1867), 37 L. J. Q. B. 77; L. R. 3 Q. B. 272.

(w) *Ogle v. Funn* (1867), 37 L. J. Q. B. 77; L. R. 3 Q. B. 272; *Hickman v. Haynes* (1875), 41 L. J. C. P. 358; L. R. 10 C. P. 588.

(z) *Nelson & Sons, Ltd. v. Nelson Ltd.* (1907), 77 L. J. K. B. 97; 1907 2 K. B. 705.

means than is originally provided, with the buyer's consent, which need not be in writing (a).

CHAP. I.

By a technical rule of the common law a contract contained in a deed under seal could not be rescinded or varied by an agreement not under seal (b).—But a bond or covenant might be effectually varied or discharged by a subsequent deed under seal referring to the former; and the two deeds were then read and construed together according to their terms (c). A parol agreement in discharge or alteration of a contract under seal might be effectual at common law for all purposes extrinsic to the deed. It might operate as a distinct contract giving a substantive cause of action for a breach (d). Thus, an agreement to take goods in payment of money due under a deed would be valid as regards a warranty of the goods so delivered, though invalid in law in discharge of the deed (e). And forbearance of rights under a deed is a good consideration for a promise, though ineffectual in altering the deed unless contracted under seal (f). After a breach of contract has been committed a parol agreement duly performed may discharge the right of action by way of accord and satisfaction (g).—The above technical rule of law was disregarded in equity, and an injunction would be granted to restrain an action upon a deed in breach of the terms of a subsequent agreement. Now under the Supreme Court of Judicature Act, 1873, a valid parol agreement may be pleaded in answer to any proceeding upon the original deed; and the rule of the common law that a contract under seal cannot be varied or discharged by a parol agreement is thus practically superseded (h).

Contracts under seal.

Parol agreement in variation of deed.

Effect in equity.

A new agreement with the debtor in variation or discharge of a former contract generally operates in discharge of a surety who has guaranteed its performance; and he is not affected with new liability in respect of the substituted contract, unless with full knowledge of all the circumstances he consents to continue surety

Effect of new agreement in discharge of surety.

(a) *Leather Cloth Co. v. Harman* (1874), 11 L. J. Q. B. 51; L. R. 10 Q. B. 110.

(b) *Kaye v. Waghorn* (1809), 1 Tonn. 428; *Nash v. Armstrong* (1861), 30 L. J. C. P. 286; 19 C. B. N. S. 259.

(c) *Georg v. Tibbot* (1823), 2 B. & C. 179.

(d) *Per cur. Beadlock v. Thompson*

(1807), 8 East, 196.

(e) *Nash v. Harman* (1874), 20 L. J. Ex. 232.

(f) *Nash v. Armstrong* (1861), 30 L. J. C. P. 286; C. B. N. S. 259.

(g) *Nash v. Harman* (1874), 20 L. J. Ex. 107; 3 E. & B. 81. See also, p. 11.

(h) *Steds v. Steds* (1874), 58 L. J. Q. B. 302; 22 Q. B. D. 57.

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PART IV.

under it (*i*); and his assent to continue surety under the altered liability may be inferred from the circumstances (*k*). If the creditor by a new contract with the debtor, without the consent of the surety, enlarges the time of payment, or suspends the remedy, the surety is discharged (*l*); and if a power of enlarging the credit is given by the contract, it must be exercised before the original credit has expired, otherwise the surety will be discharged (*m*); but where the completion of two ships was guaranteed by one document, it was construed as if it were two separate guarantees, and the surety was not discharged in respect of a failure to complete one ship within the time stipulated, although the time had been enlarged without his privity in respect of the other ship (*n*). So too the surety will be discharged if the creditor advances money to the debtor upon shorter credit than stipulated for (*o*); or if he discharges or dispenses with any of the securities for the debt whether stipulated for in the contract or not (*p*). Payment to a contractor for instalments of work before the stipulated time discharges a guarantee of the contract (*q*). And if the surety expressly stipulates for certain conditions, the non-performance of them discharges his liability, irrespectively of their value; as a condition to insure the work guaranteed as it proceeds (*r*); or to enforce the debt against the principal within a certain time (*s*). The court will not entertain the question of the materiality of the variation in the contract guaranteed; and unless it is self-evident that it is not material or prejudicial to the surety, he is left to the sole judge whether he will consent to remain liable (*t*). A discharge of the surety by any of the above means discharges also any security which the surety may have given (*u*).—But consent

(*i*) *Nash v. Armstrong* (1861), 30 L. J. C. P. 286; 10 C. B. N. S. 259. See *Preru v. Nat. Prov. Bk. of England* (1910), 79 L. J. C. 509; (1910) 1 Ch. 464.

(*k*) *Wandeeck v. Oxford & Worcester Ry.* (1853), 1 Drew. 521.

(*l*) *Rex v. Perington* (1795), 2 Ves. jun. 540; 2 Wh. & T. L. C. 561.

(*m*) *Croydon Gas Co. v. Dickinson* (1876), 46 L. J. C. P. 157; 2 C. P. D. 43.

(*n*) *Harrison v. Symour* (1866), 35 L. J. C. P. 264; L. R. 1 C. P. 518.

(*o*) *Bowser v. Cox* (1843), 13 L. J. C. 260; 6 Beav. 110.

(*p*) *Bowser v. Cox* (1813), 13 L. J. C. 260; 6 Beav. 110; *Polak v. Everett* (1876), 46 L. J. Q. B. 218; 1 Q. B. D.

669; *Campbell v. Rothwell* (1877), 17 L. J. Q. B. 141. See *Taylor v. New S. Wales Bank* (1886), 55 L. J. P. C. 47; 11 Ap. Ca. 596.

(*q*) *Calvert v. London Dock Co.* (1838), 7 L. J. C. 90; 2 Keen, 638; *General Steam Nav. v. Rolt* (1859), 6 C. B. N. S. 551.

(*r*) *Watts v. Shuttleworth* (1861), 7 H. & N. 353.

(*s*) *Laurence v. Walmsley* (1862), 31 L. J. C. P. 143; 12 C. B. N. S. 799. See *Price v. Kirkham* (1864), 34 L. J. Ex. 35; 3 H. & C. 437.

(*t*) *Holme v. Brunsell* (1878), 47 L. J. Q. B. 610; 3 Q. B. D. 495.

(*u*) *Bolton v. Salmon* (1891), 60 L. J. C. 237; (1891) 2 Ch. 48.

CHAP. I.

of a creditor to the discharge of the debtor in bankruptcy, or by liquidation or composition under the Bankruptcy Acts, does not have the effect of discharging a surety; because the discharge in such cases is effected by operation of law (*x*). And an agreement with a third party to give time to the principal debtor has no effect in discharging a surety (*y*).—Although the creditor has originally dealt with the surety as a principal, as in taking a joint note or security of the debtor and surety, without notice of the suretyship; yet if he afterwards receives notice of the relation between them, any subsequent variation of the debt or contract guaranteed, without the consent of the surety, will discharge the latter from liability (*z*).

Notice of suretyship.

Upon the same principle where the surety guarantees the due performance of an office or employment, any material alteration in the office or duties guaranteed, without the consent of the surety, discharges the guarantee: as the substitution of a different office for that guaranteed (*a*); a re-appointment to the same office upon its expiration, as in the case of an annual office (*b*), unless the guarantee is expressly extended to a continuance in the office (*c*); an enlarging of the duties of the office, as by the statutory extension of the duties of a County Court bailiff (*d*); and a change in the salary of the office, if the amount of salary is made a material stipulation in the guarantee (*e*). And if the guarantee stipulates that the office shall be determinable at a certain notice, an agreement to extend the notice discharges the surety (*f*). But the undertaking of additional or other duties not included in the guarantee, and not materially affecting the duties guaranteed, does not discharge the guarantee, unless the surety has expressly stipulated against such additional undertakings (*g*).

Guarantee of office.

(*x*) *Ellis v. Wilmut* (1871), 41 L. J. Ex. 10; L. R. 10 Ex. 10; *Simpson v. Henning* (1875), 41 L. J. Q. B. 143; L. R. 10 Q. B. 406.

(*y*) *Foster v. Jordan* (1857), 26 L. J. Q. B. 288; 8 E. & B. 303; *Clarke v. Birley* (1889), 58 L. J. C. 616; 41 Ch. D. 422.

(*z*) *Poolley v. Harradine* (1857), 26 L. J. Q. B. 156; 7 E. & B. 431; *Oriental Finance Corp. v. Overend & Co.* (1875), L. R. 7 H. L. 348; *Rouse v. Bradford Banking Co.* (1894), 63 L. J. C. 890; (1891) A. C. 586.

(*a*) *Mulling v. Graham* (1869), 39 L. J. C. P. 74; L. R. 5 C. P. 204.

(*b*) *Arlington (Lord) v. Merricke* (1673),

2 Wms. Saund. 813; *Cambridge (Corp.) v. Dennis* (1858), 27 L. J. Q. B. 174; E. B. & E. 660.

(*c*) *Orwell v. Benwick (Corp.)* (1856), 25 L. J. Q. B. 383; 5 H. L. C. 856; *Dartmouth v. Sully* 1856, 26 L. J. Q. B. 30; 7 E. & B. 97. See *Portsea Island Union v. Whalley* (1860), 29 L. J. Q. B. 150; 2 E. & E. 755.

(*d*) *Pybus v. Gibb* (1856), 26 L. J. Q. B. 11; 6 E. & B. 902.

(*e*) *L. & N. W. Ry. v. Whithury* (1851), 23 L. J. Ex. 261; 10 Ex. 77.

(*f*) See *Sanderson v. Aston* (1873), 42 L. J. Ex. 64; L. R. 8 Ex. 73.

(*g*) *Stallott v. Fletcher* (1867), 36 L. J. C. P. 206; L. R. 2 C. P. 469.

CANADIAN NOTES.

Rescission by New Agreement.

In *Morrison vs. Gale*, 1 Pugsley (N. B.), 203, defendant agreed with the plaintiff in March, 1863, to carry deals from the plaintiff's mill at Fredericton to St. John during the whole of the coming season at 2s. 6d. per thousand, and if plaintiff was obliged to give 2s. 9d. per thousand to others he was to give that sum to the defendant. The plaintiff had made a contract for the delivery of deals in St. John, which he afterwards assigned to T. & P., lumber merchants, together with the defendant's contract, and he also agreed to saw lumber by the thousand for T. & P., and did saw for them under such contract from the beginning of the season till October. At the opening of the season the defendant went with his boats to defendant's mill, but no deals were offered to him, and he heard that plaintiff had sold his mill. In consequence of this he agreed with T. & P. to carry their deals for 55 cents per thousand, and continued to carry them from the plaintiff's mill, where they were sawed, till the latter part of September, when the mill stopped. It was held that there was evidence of the rescission of the contract between the parties and of the substitution of the new contract with T. & P., which should have been left to the jury.

In *Farquhar vs. Zwicker*, 42 N. S., 525, it was held that the burden was on a party seeking to establish a case of novation to prove with a reasonable degree of certainty all the elements necessary to establish his case. The assent of all parties to the creation of new rights whereby the party sought to be charged became liable to pay and the original debtor was discharged must be distinctly shewn, and if left in doubt or uncertainty the plaintiff must fail. Mental determination on the part of plaintiff to discharge the original debtor cannot, nor can entries in his books which it is claimed he caused to be made, be regarded to shew that that essential element of novation was, in fact, agreed upon by the parties. There must be something to shew that the creditor consented or agreed to take the defendant as his new debtor and sole security and to relinquish his claim against the party originally liable.

In *Penman Manufacturing Company vs. Broadhead*, 21 E. C. R., 713, the respondent was the patentee of a machine called the Windsor Loom, for making skirtings and so on, and in 1884 she

agreed to supply the appellant company with a loom on which they were to manufacture goods and pay a royalty of one cent a square yard, the minimum royalty to be fifty dollars a month. The patent was to expire in 1891. Prior to this agreement, in 1882, Broadhead had granted to the head of the company a license to manufacture blankets under another patent, for a like royalty. These agreements were carried out until 1887. In the meantime the respondent had patented another device for manufacturing blankets, and, after some correspondence, the company agreed to take both patents for a year, paying therefor a specified royalty, which she accepted. At the end of the year she claimed that the original agreement was still in force, and brought action for the royalty. It was held, reversing the Court of Appeal for Ontario, that the correspondence and other evidence shewed that the agreement made in 1887 was in substitution for and superseded the original agreement, and the respondent had no right to claim any royalty under the latter.

In *Molson vs. Bradburn*, 25 U. C. Q. B., 457, the declaration was that the defendant agreed to sell and deliver to plaintiff within one week certain wheat, and the plaintiff advanced \$600 on account, but the defendant failed to deliver. The plea was that before breach it was agreed that the plaintiff should, and he did, waive the delivery within one week and extended the time for delivery. This plea was held bad, for no subsequent delivery was alleged, nor that the extended time had not elapsed.

In *McClarty vs. McClarty*, 19 U. C. C. P., 311, the defendant agreed with his son that if he would remain and work with him so as to assist in paying for a lot of land which he had purchased he should be paid for his services by the property being divided with him. The son remained, worked upon the land for several years, and died. After his death defendant stated that he "had a conversation in his family and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons." It was held that neither this conversation nor a subsequent offer on defendant's part to pay plaintiff as administratrix of the son eight hundred dollars in satisfaction of the action amounted to a repudiation or rescission of the only bargain between the father

and the son, which was to divide the land, and that, therefore, *indebitatus assumpsit* for the son's work and labour would not lie.

Per Hagarty, C. J.: "In the absence of direct proof of a repudiation on defendant's part, I think we cannot in any view of the case hold that *indebitatus assumpsit* can be maintained. The defendant can justly say that he never promised to pay or was liable to pay money. He may be ready to carry out the original bargain, and we cannot say that he will set up the Statute of Frauds or other technical defence. The case cited, *Hoskin vs. Mitchison*, 14 F. C., 551, is in point. Goods were sold as so much cash paid by plaintiff on account of some lots of land which defendant had verbally agreed to sell to plaintiff, and which he declared he was ready to convey as agreed. Plaintiff contended that, as the bargain was void under the Statute of Frauds, he could sue for the price in money. Sir J. Robinson said: 'No implied *assumpsit* arose to pay for them in money. It is quite true that plaintiff seems to hold no valid contract from defendant to convey him these lots, nothing that he can enforce, but that is his own neglect. If plaintiff had called upon defendant to execute an agreement and he had declined or had tendered a balance of purchase money and applied in vain for a deed, he might, no doubt, have sued for the value of his goods in money, but he has no right to assume that defendant will disregard the verbal agreement because it is not binding in law, and, without putting him to the proof, treat him as if he had done so.'"

In *O'Donnell vs. Hugill*, 11 F. C. Q. B., 441, it was held that while an agreement is open between the parties and the time for performance has not arrived, a new agreement may be substituted for it, postponing the period for performance, and the original consideration will be regarded as imported into such new agreement and will support it. Per Robinson, C. J.: "As to the objection that there is no consideration stated for accepting the substituted agreement, this plea follows in that respect the usual form. The original consideration is regarded as continuing and applicable to the last agreement. In other words, the party entered into the agreement with its modification upon the same inducement which actuated him in the first instance. The one agreement, though modified in some particulars, is still the consideration of the other. It may be assumed that it was for

mutual convenience that an agreement is substituted, as might well be the case in the present instance, because, although the period of performance by the defendant is, or at least might be, postponed by the new agreement, on the other hand, he might well be willing to assent to that, as it would at the same time postpone to the same extent the time when he would have to make his payments. One can easily understand that the change might be of advantage to both."

In *Gaskin vs. Counter*, 6 U. C. C. P., 99, to a declaration upon a sealed agreement to build a vessel for plaintiff of a certain size and according to a certain model by a certain day, etc., the defendant pleaded that he procured materials and before breach of the agreement he was ordered by plaintiff to build a vessel of larger size, and that, in pursuance of plaintiff's direction and by his order and request he did erect and build such larger vessel, and was consequently compelled to take a longer time, which was the breach complained of. It was held that this was no answer to the declaration.

Per Draper, C. J.: "I think this plea is bad on the exception taken. It sets up the discharge of an agreement under seal to build a vessel by a certain day by a parol agreement to build a different vessel, for such, I think, is the only construction we can give to the plea: for, although at the end of it the breach is excused by the averment that it was caused by the plaintiff's own direction, yet in the commencement it is said that such direction was given before breach, and was obeyed by defendant, which is, in effect, stating that plaintiff and defendant made another agreement different from that declared on and in substitution of it. The authorities are clear that this is no answer. Perhaps accord and satisfaction might have been pleaded successfully, but this plea is not of that character."

In *Ville de Maisonneuve vs. Banque Provinciale*, 33 S. C. R., 418, it was held that the provisions of article 1691 of the Civil Code of Lower Canada do not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; the contract must, under that article, be either cancelled *in toto* or not at all. The article of the Code is as follows:

"The owner may cancel the contract for the construction of a building or other works at a fixed price, although the works

have been begun, on indemnifying the workman for all his actual expenses and labour and paying damages according to the circumstances of the case."

In *Leonard vs. Northy*, 22 U. C. C. P., 11, the declaration was on a contract by a testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time and delivered it unfinished and not according to specifications, etc. One of the pleas stated that, after testator's contract and promise, it was agreed between him and plaintiff in his lifetime that he should not perform them, but that, instead, testator should deliver to plaintiff, who was to accept a different boiler and engine, larger and more valuable, requiring a longer time for construction, and afterwards, before action, testator in his lifetime and defendant as executor did make and deliver to plaintiff, who accepted the same upon such terms and paid the price thereof. This was held a bad plea. Per Hagarty, C. J.: "There is no averment whatever that the substituted boiler, etc., answered the contract or anything as to its quality or character. The boiler and engine actually made and delivered may have been open to all the complaints set out in the declaration. If we assume the new agreement to be before breach it ought to have been pleaded as laid down in *Dobson vs. Estey*, in exoneration or discharge of performance, and then might be an answer to their non-delivery or to a delivery after the appointed time. Here, whatever is meant by it, it professes to answer the whole declaration. If it is to be read as after breach I think it bad as not averring an acceptance in satisfaction or discharge of the breaches or causes of action. Plaintiff may have accepted a different, larger and more valuable boiler and engine without waiving his right in other respects as to kind of boiler, etc., required. There is a review of the authorities on this point in *MacFarlane vs. Ryan*, 24 U. C. R., 477."

In *Fawcett vs. Anderson*, Contée's Digest, 348, W. sold land under power of sale and F. became purchaser, and paid ten per cent of the price, the balance to be paid in notes. Shortly after A. brought a deed to F. and demanded the note. The deed was left with F. on his delivering to A. a writing as follows: "Re-

ceived from E. A. a deed given by W. for land bought at auction. The above-mentioned deed I received only to be examined and, if lawfully and properly executed, to be kept; if not lawfully and properly executed, to be returned to E. A. When the said deed is lawfully and properly executed to the satisfaction of my attorney, I will pay the amount of balance due on said deed, \$572, provided I am given a good warranty deed and a mortgage which is on record is properly cancelled if required." The deed was not returned to A., and he brought action for the \$572. It was held, reversing the judgment appealed from, Strong, J., dissenting, that the memorandum did not constitute a new contract between plaintiff and defendant to pay the purchase money to the plaintiff, who was merely the agent of W., and therefore the verdict for defendant should stand.

In *The Robb Engineering Company, Limited vs. Rines*, 39 N. S. R., 274, plaintiff delivered to defendant a boiler, engine, shingle machine, etc., under an agreement in writing reserving the right of property to plaintiff until payment of the purchase price. Before the purchase money was all paid the building in which the machinery was set up was destroyed by fire. The shingle machine was repaired by plaintiff at a cost of \$200 and redelivered to defendant with another boiler and engine under a new agreement, which, omitting any mention of the shingle machine, conditioned the vesting of the property in defendant upon payment of the balance due under the first agreement, as well as the further amount payable for the new machinery. On non-payment of the amount payable under the second agreement the whole of the property was replevied by the plaintiff.

It was held that the first agreement was not cancelled by the second and that, the repairs having become an inseparable part of the machine to which they were made, plaintiff's claim was rightly allowed by the trial Judge.

In *Harold vs. Ferguson*, 25 O. R., 565, it was held that where services had been performed by one person for the benefit and at the request of another, and which had been charged to the latter, the fact that a third person had subsequently agreed to pay for such services and had had judgment recovered against him therefor by the person rendering them would not prevent the latter recovering in an action against the person liable in the

first instance unless the subsequent agreement amounted to a novation.

In *Gildersleeve vs. Stewart*, 2 Ont. Pr. Rep., 114, the managers of certain steamboats running in opposition referred to arbitration the terms on which the opposition should cease. The arbitrators awarded that each party should run one boat at different hours, and that one of them should pay the other one hundred and fifty pounds. Afterwards the latter and some of the owners of the steamer for which the other party was agent entered into an agreement respecting the two boats which the award allowed to run, which agreement stated that the parties had agreed to settle the dispute between them on certain terms set out, but it was expressly declared that this agreement was without prejudice to any demand which the party to whom the payment had been awarded might have upon the other. It was held that the right to the amount awarded was not affected by the agreement.

In *Port of Whithy, etc. vs. Dumble*, 32 U. C. Q. B., 36, to an action for breach of contract between plaintiff and defendant that defendant would build plaintiff's railway to be completed by a day named, defendant pleaded equitably that the plaintiffs, with the consent of the defendant, agreed with another to finish said railway, and defendant, before breach, abandoned the said contract, and the substituted party entered upon and took possession of the work of the said railway and continued the same with the plaintiff's consent. The replication was that by the agreement mentioned the plaintiff's rights against the defendant were expressly reserved. It was held on demurrer that this replication was good, but that the plea was bad, as not shewing that the alleged substituted contract contained all the essentials requisite to make it a complete discharge and release of the original one. See also 22 C. P., 36.

In *Tyrell vs. Annis*, 1 U. C. Q. B., 299, Smith being indebted to the plaintiff and Annis to Smith, Annis, the defendant, promised to pay plaintiff the said sum so due by him to Smith in consideration that the plaintiff would discharge Smith from the debt so due and owing by him. Smith was no party to the agreement, but it was held that the agreement was binding on the defendant and that plaintiff could maintain a special *assumpsit* against him for its non-performance.

Robinson, C. J., states the case as follows: "The question involved is this. One Smith being indebted to Tyrell and Annis being indebted to Smith, can Tyrell and Annis, without the assent or knowledge of Smith, agree that Annis shall pay Tyrell the debt due him by Smith on condition that Tyrell shall discharge Smith?" He answers it by saying: "It can admit of no doubt, in my opinion, that as between Tyrell and Annis such a contract is binding, though, of course, Smith's rights cannot be affected by any such arrangement made without his consent."

In *Corby vs. Cotton*, 7 F. C. C. P., 209, the declaration was on a bond conditioned to convey to the plaintiff within three months a certain steamboat and for quiet possession of the same, assigning as breaches, among other things, an eviction by one O. S. G. under the power in a mortgage, and also that the steamboat was not delivered within three months. To the latter breach it was pleaded that the steamboat was mortgaged to J. H. C. at the time of the execution of the bond for the same amount as plaintiff had agreed to pay defendant, and that defendant had handed him the notes given him by plaintiffs for the price, and that the said J. H. C. held the mortgage only as security for the due payment thereof, and plaintiff thereupon discharged defendant from securing such conveyance. To the other alleged breach defendants, after stating a similar agreement, alleged the transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignee. Both pleas were held bad on demurrer, the plaintiffs engaging to apply their payment towards an encumbrance not amounting to a waiver of their rights to a conveyance from the vendors.

In *Edinburgh Life Assurance Company vs. Town of St. Catharines*, 10 Grant Ch., 379, it appeared that a contract which had been entered into between the corporation and a contractor had been dissolved. On production of the contract in court it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the Court required a formal cancellation of the contract to be made

as a condition of dissolving an injunction, the propriety of dissolving which depended upon the rescission of the contract, referred to. It was treated as a doubtful question whether there was a necessity for any more formal rescission of the contract and the course adopted was taken simply in order to avoid any question.

In *Elmore vs. Hind*, 24 U. C. Q. B., 136, the plaintiff was the owner of a magazine and defendant the editor. The plaintiff alleged that, although defendant was allowed by mutual agreement to absent himself until the 27th of January, 1864, yet he did not after that day return to his duties as editor. To this defendant pleaded that, before any breach, by a memorandum under seal between him and the plaintiff it was agreed that the defendant should go to Europe to try to sell the magazine, and that during his absence the editorial department should be provided for by the plaintiff; that it was nowhere stipulated in such agreement that the defendant should return by the 27th of January or any other day; that he was necessarily absent on such journey until March following, and on his return was ready to resume his duties, but before his service were required, the plaintiff discontinued the publication.

This was held on demurrer a bad plea, because it was not averred that the agreement pleaded contained the whole contract as to defendant's absence, and there might have been a collateral independent agreement that he should return by a specified day. The judgment is that of the Queen's Bench Division, per Hagarty, J.

Time Given Principal—Discharge of Surety.

In *McLaughlin Carriage Company vs. Oland*, 34 N. S., 193, the plaintiff company entered into an agreement in writing with E. H. Oland for the sale of carriages manufactured by the plaintiff, by the terms of which he was required to obtain from the purchaser of each vehicle on delivery his note or cash in settlement and in all cases where notes were taken to guarantee the payment of and endorse said notes. The defendant became surety on a bond given by E. H. Oland to the plaintiff that he would well and truly abide by and perform the conditions in the agreement, and would pay and satisfy all notes and other

securities which remained outstanding on the termination of said agreement. Some of the notes taken by Oland having become overdue during the course of the business, plaintiff company drew drafts on him for the amounts, which he accepted but failed to pay. To an action on the bond after the termination of the agreement defendant pleaded, among other things, that defendant was aware of default and breaches of agreement by E. H. Oland, and gave him time to make payments, and that defendant was thereby released. It was held that, as defendant was not liable until after the termination of the agreement, and as the time given had elapsed before the liability of the defendant accrued, the giving of the time did not prevent plaintiff from looking to defendant as security; and also that if in any case time was given, so as clearly to discharge the surety, the amount as to which he was so discharged was severable from the rest of the transaction, and the discharge would only operate *pro tanto*. It was held, also, that as by the terms of the bond the taking and renewal of notes was contemplated the surety was not prejudiced by the drawing of drafts as a means of collecting the notes. It was also held, as to the taking by E. H. Oland of notes in a different form from that stipulated, that it must be shewn that plaintiff company by their conduct prevented the thing from being done or connived at its omission or enabled him to do what he ought not to do, and that but for such conduct on the part of the plaintiff the omission or commission would not have happened, and that the mere reception by plaintiff of notes taken by E. H. Oland in a different form from that required was not within this principle.

CHAPTER II.

ALTERATION AND LOSS OF WRITTEN INSTRUMENT.

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If a contract under seal (*a*), or a contract in writing (*b*), is altered in a material part by the promisee, without the consent of the promiser, as by interlineation, addition, erasure, or drawing a pen through a line or a word, it is so far avoided by the alteration, that the promisee is deprived of all benefit of it, as ground either of action or of defence. Any alteration of a written instrument, not authenticated by both parties, may create a difficulty of proof and thereby prejudice the remedy; but the penalty of forfeiture of his rights under the instrument has been introduced, with the object, it is said, of deterring parties from attempting fraud by such means; and is incurred though the original words of the contract remain legible (*d*). It sometimes happens that one instrument carries out several distinct objects, which might be contained in separate instruments. Where this is the case, it would seem that alteration in one particular should not invalidate the instrument so far as it deals with other distinct matters (*e*).

Alteration of written contract by promisee.

(*a*) *Pigot's case* (1615), 11 Co. 27 a; Sheppard's Touchstone, 68.

(*b*) *Master v. Miller* (1791), 4 T. R. 320; (1793), 2 H. Bl. 140; 1 Sm. L. C. 747.

(*c*) *Kenyon, C. J., Master v. Miller* (1791), 4 T. R. 329.

(*d*) *Pigot's case* (1615), 11 Co. 27 a.

(*e*) See *Parrell v. Edmunds* (1810), 12 East, 6; *Collins v. Prosser* (1823), 1 L. J.

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Alteration by
a stranger.

If a deed or contract in writing be altered in a material part by a stranger to the contract, whilst the instrument is in the custody of the promisee, though without his knowledge, it is thereby avoided as to his rights under it; upon 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" (*f*); and he is equally affected by an alteration made while the instrument is in the custody of an agent holding it for him (*g*). Where a guarantee was given to a banking company by some of the directors, and was materially altered by the secretary whilst in his possession, it was held that the possession of the secretary was that of the bank as against the individual directors, and that they were discharged by the alteration (*h*). But an alteration by a stranger whilst the instrument is not in the custody of the promisee or of his agent does not affect the validity, beyond creating a difficulty of proving its original condition (*i*). Thus where an award duly made and signed by the umpire, and notified to the parties as ready for delivery, was afterwards altered by the umpire in the sum awarded; it was held that the alteration by the umpire after his authority had ceased was the same as if made by a stranger, and the award remained good for the original sum (*k*).

Alteration by
accident.

Mistake.

A contract is not affected by an alteration caused by mere accident; but the party claiming under it must prove the accident and the original state of the instrument; as in the case of the seal of a deed being torn off by a child, or eaten off by rats (*l*).—So an alteration may be explained to have been made by mistake, without any intention of affecting the contract: as where the indorsement of a bill was struck out by mistake (*m*); or the acceptance was cancelled by mistake (*n*). But an alteration intentionally made by one party without consent of the other, under a mistake only as to the legal effect of the instrument, will avoid it; though made in furtherance of the supposed intention (*o*).

O. S. K. B. 212; 1 B. & C. 682; *Roots v. Porter (Lord)* (1822), 4 B. & Ad. 77; *Harrison v. Seymour* (1846), 35 L. J. C. P. 264; L. R. 1 C. P. 518.

(*f*) *Davidson v. Cooper* (1844), 13 L. J. Ex. 276; 13 M. & W. 343.

(*g*) *Fallman v. Luchley* (1875), 44 L. J. Ex. 180; L. R. 10 Ex. 330.

(*h*) *Bank of Hindustan v. Smith* (1867), 36 L. J. C. P. 241.

(*i*) *Wagh v. Russell* (1814), 5 Taunt. 707.

(*k*) *Hofree v. Bromley* (1805), 6 East. 369.

(*l*) *Aggell (Lady) v. Cheney* (1622), Palm. 403; *Bolton v. Carlisle (Bp.)* (1793), 2 H. Bl. 263.

(*m*) *Wilkinson v. Johnson* (1824), 3 L. J. O. S. K. B. 58; 3 B. & C. 428.

(*n*) *Roper v. Bulbeck* (1812), 15 East. 17; *Freese v. Oriental Bk.* (1878), 47 L. J. P. C. 42; 3 App. Cas. 325.

(*o*) *Bank of Hindustan v. Smith* (1867), 36 L. J. C. P. 241.

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Material alterations.

The alteration must in all cases be material in order to avoid the contract (*p*). A material alteration is one which affects the contract or any rights or remedies under it; or which affects the use of the instrument for its proper purpose (*q*): as an alteration in a sale note of goods by the seller adding a stipulation, that damaged goods should be taken at an allowance by valuation (*r*); or by the buyer adding to a sale of goods "by sample" the words "of their own manufacture," such alteration being material whether the words referred to the bulk of the goods, or to the sample only (*s*); an alteration of a written contract by adding a seal to the signature so as to make it appear to be a contract under seal (*t*). A deed of composition between a debtor and the creditors named in the schedule was held to be materially altered by the addition of the schedule after execution (*u*). But a like deed, purporting to include as parties all the creditors, and duly executed by a majority sufficient to bind all, was held not to be materially altered by the addition of names of creditors in the schedule, as the addition was within the terms of the deed (*x*). In policies of insurance, an alteration by inserting a new subject of insurance (*y*); or by altering the time of sailing warranted (*z*); or by altering the port of destination (*a*), is material, and discharges the underwriters who subscribed before the alteration was made.

Immaterial alterations.

Alterations or additions which only express what the law would otherwise imply as to the effect or construction of the instrument are immaterial to the validity: as adding to a promissory note which expressed no time for payment the words "on demand" (*b*); or altering a general indorsement into a special indorsement in favour of the holder (*c*). The addition of a mere description to a

(*p*) *Collins v. Pinner* (1823), 1 L. J. O. S. K. B. 232; 1 P. & C. 682; *Abbott v. Cornwell* (1868), 37 L. J. Q. B. 201; L. R. 3 Q. B. 573.

(*q*) *Saffell v. Bk. of England* (1882), 51 L. J. Q. B. 401; 9 Q. B. D. 555; *Crediton (Bp.) v. Exeter (Bp.)* (1902), 71 L. J. C. 697; (1905) 2 Ch. 155. See *Lease v. Fox* (1887), 56 L. J. Q. B. 180; 12 Ap. Ca. 206.

(*r*) *Bovell v. Dwyer* (1812), 15 East, 29. (*s*) *Mallett v. Wackerbarth* (1817), 17 L. J. C. P. 47; 5 C. B. 181.

(*t*) *Darwin v. Gance* (1841), 13 L. J. Ex. 276; 13 M. & W. 33.

(*u*) *Sellin v. Price* (1867), 36 L. J. Ex. 93; L. R. 2 Ex. 189.

(*x*) *Ward v. Slack* (1868), 37 L. J. Q. B. 139; L. R. 3 Q. B. 379. See *Ex p. M'Intosh* (1859), 58 L. J. Q. B. 333; 22 Q. B. D. 685.

(*y*) *Langhorn v. Colgan* (1812), 4 Taunt. 330.

(*z*) *Farlow v. Christie* 1817, 7 Taunt. 116.

(*a*) *Laird v. Robertson* (1791), 1 Bro. P. C. 188; *Campbell v. Christie* (1817), 2 Stark. 64.

(*b*) *Utans v. Cornwell* (1868), 37 L. J. Q. B. 201; L. R. 3 Q. B. 573.

(*c*) *Clark v. Eggert*, 1 Salk. 126; 12 Mod. 193. See *Herschfield v. Smith* (1866), 35 L. J. C. P. 177; L. R. 1 C. P. 310.

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party, as that of "sheriff" in a bond given to a person as sheriff, is immaterial (*d*). The insertion of a word which has manifestly been omitted, and which the construction of the instrument requires to be read in, is immaterial (*e*); and the correction of a name or number which is obviously necessary in the application of the instrument (*f*); and the addition of a word in explanation which adds nothing to, nor alters the meaning (*g*); as the insertion of the Christian name of the party intended in a blank left for that purpose (*h*). In the case of a tenancy from year to year upon the terms of a written agreement for a lease, in which it appeared that the term of years had been altered from seven to fourteen; it was held that the agreement was admissible to prove the terms of the tenancy without explaining the alteration, because it was immaterial to the tenancy from year to year (*i*).

**Effect of
alteration as
between the
parties.**

The alteration, as regards the party who made it or is responsible for it, vitiates the instrument altogether; and "it is no answer to the objection to say that the alteration is not made in respect of the duty of the breach of which the plaintiff complains" (*k*). "If a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto* avoids the whole deed; for although they are several covenants, yet it is but one deed. If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both" (*l*). But where by the same deed several persons bind themselves severally, and not jointly, it is the same as several deeds written upon one and the same piece of parchment, and the breaking off the seal of one avoids his liability only without affecting the others (*m*). The rights of a party who is not responsible for the alteration are not affected by it; except that the alteration or erasure may cause difficulty

(*d*) *Pigot's case* (1615), 11 Co. 26 b.

(*e*) *Wagh v. Russell* (1814), 5 Taunt. 707.

(*f*) *Trew v. Burton* (1833), 2 L. J. Ex. 236; 1 C. & M. 533; *Hutchins v. Scott* (1837), 6 L. J. Ex. 186; 2 M. & W. 809; *Re Haugate and Osborn* (1902), 71 L. J. C. 279; (1902) 1 Ch. 451.

(*g*) *Sanderson v. Symonds* (1819), 1 Br. & B. 426.

(*h*) *Eagleton v. Gutteridge* (1843), 12 L. J. Ex. 359; 11 M. & W. 465.

(*i*) *Fulmonth (Earls v. Roberts)* (1842), 11 L. J. Ex. 180; 9 M. & W. 469.

(*k*) *Maule, J., Mollett v. Wackerbarth* (1847), 17 L. J. C. P. 47; 5 C. B. 193.

(*l*) *Pigot's case* (1615), 11 Co. 28 b.

(*m*) *Collins v. Prosser* (1823), L. J. O. S. K. B. 212; 1 B. & C. 682.

in proving the original state of the instrument and explaining the alteration (n).

The alteration of a negotiable instrument avoids the instrument as against prior parties, although the transferee took it for value and *bonâ fide* and without notice of the alteration (o). His remedy is confined to recovering the consideration for the bill, as between himself and the party from whom he received it; and each prior holder in succession has a similar remedy until the party is reached through whose fraud or *laches* the alteration was made (p). The party responsible for the alteration cannot recover against his indorser, even the consideration paid, because he has destroyed the remedies of the latter against prior parties (q). But as between original parties to the instrument the alteration would not extinguish a debt or liability on account of which it was given; because the party primarily liable, having no remedies over, is not prejudiced (r). As regards bills of exchange, promissory notes or cheques, the law has been modified by the Bills of Exchange Act, 1882, s. 64, sub-s. 1, which confirms the general law, but provides that "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." And by sub-s. 2 the following alterations are material, namely, "any alteration of the date (s), the sum payable (t), the time of payment (u), the place of payment, and where a bill has been accepted generally, the addition of the place of payment without the acceptor's assent" (x). But it is probable that the section will not apply to alterations made in correction of mistakes (y).

Alterations in negotiable instruments.

Bills of Exchange Act.

Material alterations.

(n) *Wagh v. Bussell* (1811), 5 Taunt. 707.

(o) *Master v. Miller* (1791), 4 T. R. 320; 1793, 2 H. Bl. 110; 1 Sm. L. C. 717; *Saffell v. Bank of England* (1882), 51 L. J. Q. B. 401; 9 Q. B. D. 555.

(p) *Re cur. Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; 3 E. & B. 687.

(q) *Atkinson v. Lowndes* (1832), 1 L. J. K. B. 273; 3 B. & Ad. 669.

(r) *Atkinson v. Haddon* (1831), 1 L. J. K. B. 85; 2 A. & E. 628.

(s) *Master v. Miller* (1791), 4 T. R. 320; (1793), 2 H. Bl. 110; 1 Sm. L. C. 747; *Vance v. Lowther* (1876), 45 L. J.

Ex. 200; 1 Ex. D. 176.

(t) *Hall v. Fuller* (1826), 4 L. J. O. S. K. B. 297; 5 B. & C. 750; *Scholfield v. Lonsborough* (Earl) (1886), 65 L. J. Q. B. 503; (1896) A. C. 511.

(u) *Hirschman v. Fidd* (1873), 42 L. J. Ex. 113; L. R. 8 Ex. 171.

(v) *Tidmarsh v. Grover* (1813), 1 M. & S. 735; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; 3 E. & B. 683. And see sect. 63, as to cancellation of bills.

(y) Bills of Exchange Act, 1882, s. 67, 2. See *Jacob v. Hart* (1817), 6 M. & S. 142; *Ryem v. Thompson* (1839), 9 L. J. Q. B. 26; 11 A. & E. 31.

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avoiding a bill or note: the insertion of a special rate of interest (*z*), inserting in a foreign bill a fixed rate of exchange (*a*), cutting off the signature of one of the parties to a joint and several note (*b*), procuring an additional party to sign a joint and several note (*c*), adding to a joint note the words "jointly and severally" (*d*). An alteration in the sum stated in figures in the margin of a bill or note is immaterial, because the sum written in the body of the bill determines the amount (*e*). A Bank of England note being by law part of the currency, though in form a promissory note, an alteration in the number of the note is held material (*f*). A banker having paid a cheque of which the amount has been altered cannot charge the drawer with a greater sum than that for which it was originally drawn (*g*).

Effect as to
past operation
of instrument.

The alteration or cancellation of a deed or agreement, though it may render it void as an executory instrument, does not affect the past operation upon any estate right or title vested under it; as where the seals are cut off a deed by which an estate has passed (*h*). The alteration or cancellation of a lease after entry may avoid the covenants contained in it, but does not divest the term granted subject to the rent reserved, or the rent incident to the reversion (*i*). A bill of sale of goods may effectually pass the property, though altered after execution; and a copy of such bill of sale in its original form may be effectually registered after the alteration (*k*). An alteration in a deed of settlement of a company did not affect the position of a person as shareholder, with a consequent liability for calls made upon him (*l*). A deed of transfer was held to have effectually passed shares and to entitle the transferee to registration; though the agent of the seller fraudulently kept the purchase-money and

(*z*) *Warrington v. Early* (1853), 23 L. J. Q. B. 47; 2 E. & B. 763.

(*a*) *Hirschfeld v. Smith* (1866), 35 L. J. C. P. 177; 1 L. R. 1 C. P. 310.

(*b*) See *Mason v. Bradley* (1843), 12 L. J. Ex. 425; 11 M. & W. 593.

(*c*) *Gardner v. Walsh* (1855), 21 L. J. Q. B. 285; 5 E. & B. 83.

(*d*) *Perring v. Wee* (1826), 5 L. J. O. S. C. P. 33; 4 Bing. 28.

(*e*) *Garrard v. Lewis* (1882), 10 Q. B. D. 30.

(*f*) *Suffell v. Bank of England* (1882), 51 L. J. Q. B. 401; 9 Q. B. D. 555.

Leeds Bank v. Walker (1883), 52 L. J. Q. B. 590; 11 Q. B. D. 84.

a Hall v. Fuller (1826), 1 L. J. O. S. K. B. 297; 5 B. & C. 750.

(*b*) *Doe v. Bingham* (1821), 4 B. & Ald. 672; *Doe v. Pickering* (1823), 2 L. J. O. S. K. B. 9; 3 D. & R. 497; *West v. Stearns* (1815), 14 M. & W. 47.

(*c*) *Roe v. Abp. York* (1805), 6 East, 86; *Hutchins v. Scott* (1837), 6 L. J. Ex. 186; 2 M. & W. 809; *Ward v. Lumley* (1860), 29 L. J. Ex. 322; 5 H. & N. 656.

(*k*) *Green v. Attenborough* (1861), 34 L. J. Ex. 88; 3 H. & C. 468.

(*l*) *Agriculturist Cattle Insur. v. Fitzgerald* (1851), 20 L. J. Q. B. 244; 16 Q. B. 432.

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cancelled the deed by tearing off the signature (*m*).—Upon this principle where the consideration of a contract has been executed, no claim can be made for it except under the contract, though the contract has been vitiated by an alteration made by the other party: and where a builder had done work under a written contract for payment upon the architect's certificate, and it appeared that the architect who had possession of the contract for his employer made a material alteration in its terms, it was held that though the alteration might avoid the rights of the employer, the builder could make no claim without producing a certificate (*n*).

The party producing a written agreement which appears to have been altered in any material part is required to explain the alteration, so far as is necessary to support the issue which it is produced to prove (*o*). But he is not bound to explain alterations in parts of the instrument not material to the issue (*p*). The fact of an alteration may be discovered by mere inspection of the instrument; in the case of a deed an erasure or interlineation is to be presumed to be made prior to execution; because "a deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong," but could be shown in evidence to have been made thereafter; but in the case of a bill of exchange or promissory note there is no such presumption, and the alteration must be explained (*q*). In pleading under the Judicature Act it seems that the party relying on an alteration should plead it in all cases, whether the instrument is charged in its original or in its altered form (*r*).

Party producing instrument must explain alteration.

Pleading the alteration.

An alteration made in a contract with the consent of both parties becomes a new contract and supersedes the original terms (*s*). But where an agreement has been drawn contrary to the intention

Alteration by consent of parties.

(*m*) *Ex p. Shaw* (1877), 16 L. J. Q. B. 394; 2 Q. B. D. 163.

(*n*) *Pattinson v. Luckley* (1875), 14 L. J. Ex. 180; L. R. 10 Ex. 330.

(*o*) *Hennen v. Dickinson* (1828), 7 L. J. O. S. C. P. 68; 5 Bing. 183; *Clifford v. Parker* (1811), 10 L. J. C. P. 227; 2 Man. & G. 969. See *Filgate's case* (1865), 2 De G. J. & S. 456.

(*p*) *Falmouth Earl v. Roberts* (1812), 11 L. J. Ex. 180; 9 M. & W. 169;

Agricultural Insee. v. Fitzgerald (1851), 20 L. J. Q. B. 214; 16 Q. B. 432.

(*q*) Bills of Exchange Act, 1882, s. 61. *Doe v. Catmore* (1851), 20 L. J. Q. B. 361; 16 Q. B. 745.

(*r*) Ord. XIX. rr. 4, 15. See as to former practice, *Hirschman v. Budd* (1873), 12 L. J. Ex. 113; L. R. 8 Ex. 171.

(*s*) See *ante*, p. 576.

PART IV

Alteration
requiring
new stampAlterations
in correction
of mistake.

of the parties by mistake or accident, and it is afterwards altered by consent to make it conform with the original intention, there is no new contract. In the former case if the agreement is of a kind requiring a stamp, a new stamp is necessary; in the latter case the original stamp covers the corrected agreement, unless the correction itself makes a different stamp necessary (*t*).—The alteration of a bill of exchange, drawn and accepted according to the intention of the parties, by substituting a later date, made after it has been issued, makes it a new bill, and requires a new stamp (*u*).—And the alteration of a promissory note by substituting a less rate of interest, upon consent of the payee to accept the reduction in future, requires a new stamp (*x*). A promissory note altered by inserting the specific consideration given in substitution for the general expression “value received” was held to require a new stamp (*y*). The addition by the acceptor of a bill of a place of payment, at the request of the payee, is not such an alteration as requires a new stamp, because it does not qualify the general acceptance (*z*); but such alteration if made without the consent of the acceptor is material and discharges the acceptor or indorser (*a*).—The alteration of the date of a bill by consent of all parties, in correction of a mistake, to the date originally intended does not make it a new bill or require a new stamp (*b*). So the alteration of the sum stated in the body of the bill in correction of a mistake and to accord with a less sum stated in the acceptance (*c*). And the correction of a bill or note, after indorsement, by supplying the words “or order” omitted by mistake *d*.—A mistake in a policy of insurance in the subject of insurance may be rectified without a new stamp; but the substitution or introduction of a new subject of insurance by subsequent agreement would require a new stamp as upon a new policy (*e*). Upon the same principle with contracts requiring a signature under the Statute of Frauds, an

(*t*) *Cole v. Parkin* (1807), 12 East, 471;

Batke v. Taylor (1812), 15 East, 412.

(*u*) *Batke v. Taylor* (1812), 15 East, 412; *Daumes v. Richardson* (1822), 5 B. & Ald. 671.

(*v*) *Sutton v. Toomer* (1827), 6 L. J. O. S. K. B. 49; 7 B. & C. 416.

(*y*) *Knoll v. Williams* 1809, 10 East, 431.

(*z*) *Walter v. Cuddey* (1833), 3 L. J. Ex. 2; 2 Cr. & M. 151.

(*a*) Bills of Exchange Act, 1882,

s. 64 (2); *Tidmarsh v. Grover* (1813), 1 M. & S. 735; *Paychiff v. Moore* (1854), 2 L. J. Q. B. 261; 3 E. & B. 683.

(*b*) *Jacob v. Hart* (1817), 6 M. & S. 112.

(*c*) *Hawlin v. Bruck* (1846), 15 L. J. Q. B. 343; 9 Q. B. 306.

(*d*) *Baron v. Thompson* (1830), 9 L. J. Q. B. 26; 11 A. & E. 31.

(*e*) *Hill v. Patten* (1807), 8 East, 373; *Hubbard v. Jackson* (1811), 4 Taunt. 169; *Robinson v. Touray* (1813), 1 M. & S. 217.

alteration made by consent of the parties in correction of a mistake does not require a new signature (*f*). CHAP. II.

An alteration in the terms before final agreement becomes part of the original contract; and as the stamp is not in use until the contract is complete, any such alteration within the scope of the stamp does not render a new stamp necessary. If a deed after sealing by one of the parties is altered and re-executed before delivery, or after delivery and before acceptance by the other party, the deed is operative only in its final form; and the stamp remains available and sufficient, unless the alteration has changed the nature of the deed to requiring a larger or a different stamp (*g*). A deed between several parties, after execution by some of them, may be altered by consent of the others before they execute it, provided the alteration is in a matter which concerns them only, and is not material to the parties who previously executed (*h*). If a deed is drawn with blanks left for the insertion of names, or dates, or sums of money or the like, these must all, so far as they are material, be filled in before execution; or if filled in afterwards, there must be a re-execution or some acknowledgment from which it may be inferred (*i*). Upon the same principle with contracts within the Statute of Frauds, a memorandum or proposal of terms signed by one of the parties may be altered on either side in the course of negotiation until a final agreement, which will operate as a sufficient acknowledgment of the original signature; and parol evidence is admissible to show the state of the document at the time of final agreement (*k*).—The liability on bills of exchange and promissory notes is not complete until issue or delivery to a person entitled to recover upon them; until then they may be altered in any manner consistent with the existing stamp (*l*). A bill accepted and delivered to the drawer is in general complete for this purpose, though not negotiated; as upon a mutual interchange of acceptances (*m*). But a mere accommodation bill is

Alterations
before final
agreement.

Bills and
notes before
issue.

(*f*) *Black v. Gompertz* (1852), 21 L. J. Ex. 278; 7 Ex. 862.

(*g*) *Matson v. Booth* (1816), 5 M. & S. 223; *Jones v. Jones* (1833), 2 L. J. Ex. 249; 1 Cr. & M. 721.

(*h*) *Doe v. Bingham* (1821), 4 B. & Ald. 672; *Hall v. Chandless* (1827), 4 Bing. 123.

(*i*) *Hudson v. Revett* (1829), 7 L. J.

O. S. C. P. 145; 5 Bing. 368; *Adsett v. Hares* 1843, 33 Beav. 52.

(*k*) *Stewart v. Eldon* 1871, 43 L. J. C. P. 201; L. R. 9 C. P. 311.

(*l*) *Dunn v. Richardson* (1822), 5 B. & Ald. 674.

(*m*) *Cardwell v. Martin* (1808), 9 East, 190.

PART IV.

not considered as issued until negotiated; and until such issue it may be altered by the parties without a new stamp (*n*).

Loss of
written
instrument.

The loss or accidental destruction of a deed or written agreement does not in general affect the rights depending upon it, further than occasioning a difficulty in proving the contents. Upon sufficient proof being given of the original existence of the instrument and of the loss, secondary evidence of the contents becomes admissible (*o*). And under such circumstances parol evidence becomes admissible of contracts which are required by statute to be proved by writing, as a debt barred by the Statute of Limitations (*p*).—An exception to the general rule occurred with bills of exchange, payment of which, according to the custom of merchants, could not be claimed without producing and offering to deliver up the bill (*q*). This rule applied though the instrument when lost was in a non-negotiable state, as a bill or note payable to order but which had not been indorsed (*r*); but it did not apply to a non-negotiable instrument, as a bill or note drawn payable to the payee only and not to his order (*s*). The rule has since been modified by statute as hereafter mentioned. A creditor having lost a negotiable bill given for a debt, as a bill given for the price of goods sold, cannot recover the debt or consideration for which it was given, so long as the debtor would remain at the risk of liability on the outstanding bill (*t*); but if the bill can be traced back to the possession of the debtor without payment, he remains liable for the debt (*u*). So money paid to a banker for circular notes was held not to be recoverable upon the mere ground that the notes had been lost; the banker not being liable to refund the money without receiving a sufficient indemnity against possible claims (*x*). Upon finding the lost bill or note the remedy is revived, notwithstanding a tender of payment made conditional upon its delivery, during the loss (*y*).

Loss of bill
or note.

(*n*) *Dunnes v. Richardson* 1822, 5 B. & Ald. 671; *Torkton v. Shogher* (1849), 7 C. B. 812.

(*o*) *Kensington v. Inglis* (1807), 8 East, 273; *Brewster v. Sewell* (1820), 3 B. & Ald. 296; *Doe v. Willecomb* (1853), 1 H. L. C. 431.

(*p*) *Haydon v. Williams* 1830, 9 L. J. O. S. C. P. 16; 7 Bing. 163; *Road v. Price* (1909), 75 L. J. K. B. 1137; (1909) 2 K. B. 724.

(*q*) *Hansard v. Robinson* (1827), 5 L. J.

O. S. K. B. 212; 7 B. & C. 90.

(*r*) *Rauenz v. Croni* (1817), 16 L. J. Ex. 280; 1 Ex. 167.

(*s*) *Wain v. Bailey* (1839), 10 A. & E. 616.

(*t*) *Croft v. Clay* 1851, 23 L. J. Ex. 150; 9 Ex. 601.

(*u*) *Widdis v. Gorton* (1857), 26 L. J. C. P. 165; 1 C. B. N. S. 576.

(*x*) *Corflans Quarry Co. v. Parker* (1867), 37 L. J. C. P. 51; L. R. 3 C. P. 1.

(*y*) *Dent v. Dunn* (1812), 3 Camp 296.

CHAP. II.

Relief
against loss
of instrument.

The Courts of Chancery gave relief against the loss of a negotiable instrument by compelling payment after tender of an indemnity against any future claims; and common law courts were invested with a similar power to grant relief by the Common Law Procedure Act, 1854, s. 87 (2). The provisions of the Common Law Procedure Act, 1854, are now embodied in the Bills of Exchange Act, 1882, s. 69, "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so" (a).—And by sect. 70, "In any action or proceeding upon a bill the court or a judge may order that the loss of such instrument shall not be set up, provided an indemnity be given, to the satisfaction of the court, or judge, against the claims of any other person upon the instrument in question." If the indemnity is not tendered before action, it will be made to include the costs of the defendant in setting up the loss, as a condition of giving the order (b). In the case of a bill proved to have been destroyed, the common law courts would have allowed proceedings, notwithstanding the non-production of the instrument, and the Court of Chancery would not entertain any action for the payment of the bill upon an indemnity being given (c).—The Life Assurance Companies (Payment into Court) Act, 1896, enables moneys payable under a life policy to be paid into court, where "In the opinion of the directors, no sufficient discharge can otherwise be obtained" (d).

Life
insurance.

(2) See *Noble v. Bank of England* 1863, 33 L. J. Ex. 81; 2 H. & C. 355; *King v. Zimmerman* 1870, 40 L. J. C. P. 278; L. R. 6 C. P. 166.

(a) See *Thurlewell v. G. N. Ry.* 1910, 79 L. J. K. B. 921; (1910 2 K. B. 509).

(b) *King v. Zimmerman* 1870, 40 L. J.

C. P. 278; L. R. 6 C. P. 166.

(c) *Wright v. Masterson* 1855, 24 L. J. C. 623; 1 K. & J. 701; *Evans v. Bunford* 1862, 31 L. J. C. 805; 31 Beav. 247.

(d) *Harrison v. Alliance Assoc.* 1902, 72 L. J. K. B. 115; 1903 1 K. B. 181.

CHAPTER III.

PERFORMANCE OF CONTRACT.

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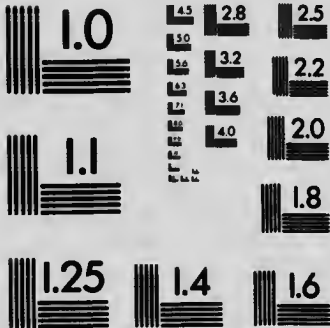
WHEN a contract is due, it may be discharged by performance according to the terms. A promise may be capable of performance, independently of any act or concurrence on the part of the promisee, or it may be incapable of complete performance without some act or concurrence on his part; "in every contract in which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or payment is to be made; without acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount only to a tender" (*a*). So the party bound to accept or receive cannot complete his performance without a tender of delivery or payment (*b*). Where the performance is dependent upon the concurrence of the promisee, the promiser is not responsible for the promisee withholding his concurrent act; and in such case the promiser discharges his liability by a tender or offer of perform-

(*a*) Rolfe, B., *Startup v. Macdonald* (1843), 12 L. J. C. P. 477; 6 Man. & G. 610. (*b*) Fry, J., *Edwick v. Hawkes* (1881), 50 L. J. C. 577; 18 Ch. D. 199.



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PART IV. ance, so far as it can be completed on his part (*c*). Where the performance is independent of the concurrence of the promisee, the promiser is bound for its complete performance at all events, though it may depend upon the concurrence of a third party over whom the promiser has no control (*d*).

Performance according to the contract.

The performance necessary to discharge a contract must be in strict accordance with the terms, unless excused by the circumstances (*e*). A contract for the insurance of a ship was held to be broken by failing to keep the ship insured for three days, though the usual slip for the insurance had been delivered by the underwriters, in accordance with which the policy was afterwards executed (*f*). A covenant by a lessee to insure the demised premises in the name of the lessor is broken if they are left uninsured in any part or for any time, or if an insurance is effected in the joint names of the lessor and lessee (*g*); and a covenant to insure in the joint names is not performed by the lessee insuring in his own name only, but is satisfied by insuring in the name of the lessor who would thereby obtain the full benefit of the covenant (*h*). In an action for a breach of covenant in a farming lease in selling manure off the premises, the plea that the tenant brought back a greater quantity and of better quality in place of that carried off was held bad as substituting a different performance from that contracted for without the consent of the coveantee (*i*). A contract to deliver up a deed is not performed by delivering it up in a mutilated condition (*k*).

Substituted performance.

An alteration or modification of the performance at the request of the other party may be equivalent to the performance stipulated for, so far as to preclude the latter party from objecting to its sufficiency. Where the buyer voluntarily extends the stipulated time for delivery of the goods sold at the request of the seller; or the seller forbears delivery from time to time at the request of the buyer; in either case the delay is excused and the deferred delivery

(*c*) See *post*, p. 627.

(*d*) See *ante*, p. 490.

(*e*) *Baily v. De Crespigny* (1869), 38

L. J. Q. B. 98; L. R. 4 Q. B. 180;

Mills v. East London Union (1872), 42

L. J. C. P. 46; L. R. 8 C. P. 79;

New Windsor (Corp.) v. Storell (1884), 54

L. J. C. 113; 27 Ch. D. 665.

(*f*) *Perry v. Great Ship Co.* (1863),

33 L. J. Q. B. 41; 4 B. & S. 556.

(*g*) *Pennill v. Harbome* (1817), 17

L. J. Q. B. 94; 11 Q. B. 368.

(*h*) *Dee v. Gladwin* (1845), 14 L. J.

Q. B. 189; 6 Q. B. 953; *Harens v.*

Middleton (1853), 22 L. J. C. 746; 10

Ha. 641.

(*i*) *Leigh v. Little* (1860), 30 L. J. Ex.

25; 6 H. & N. 165.

(*k*) *Richardson v. Barnes* (1849), 18

L. J. Ex. 468; 4 Ex. 128.

or acceptance is equivalent to punctual performance in discharging the contract (*l*). So also with a delivery at a different place at the request of either party (*m*). But in such cases neither party can insist upon the delay or alteration in performance, without a new binding agreement to that effect; which must satisfy all the requirements necessary for an alteration of the original contract, whether it be under seal, or within the Statute of Frauds, or a simple verbal contract (*n*).—After the performance is due a substituted performance may be accepted by the party entitled, which, if so intended and agreed, may operate in discharge of the liability under the contract by way of "accord and satisfaction" (*o*).—So contracts for the payment of money consist strictly in the debtor paying the creditor at the time and in the manner stipulated. But the creditor may agree to accept other considerations, either in payment or in satisfaction of non-payment of the money due: as a set-off in account of his own debt, or the delivery of a bill of exchange, or a banker's cheque, or a promissory note, or the delivery of goods instead of money (*p*).

Contracts to pay money.

In contracts of sale of goods the seller does not perform his part of the contract by delivering a larger quantity which he insists upon the buyer accepting (*q*); or by delivering a larger quantity, leaving the buyer to select (*r*); or by delivering the goods mixed up with other goods, whether the buyer may or may not be able to separate them (*s*); and under such circumstances the buyer is entitled to refuse the whole. So if the contract is entire, and the seller delivers a smaller quantity than contracted for, he cannot claim the price under the contract, and the buyer may refuse acceptance (*t*). But if the buyer accepts or retains for his own use the goods delivered, or part of them, he becomes liable to pay for the value of the goods which he in fact retains (*u*).

Sale of goods—performance as to quantity.

(*l*) *Osh v. Fane Lord* (1867), 37 L. J. Q. B. 77; L. R. 3 Q. B. 272; *Therins v. Downing* (1876), 45 L. J. C. P. 695; 1 C. P. D. 220.

(*m*) *Leather Cloth Co. v. Hurdis* (1874), 44 L. J. Q. B. 34; L. R. 10 Q. B. 140.

(*n*) See *ante*, pp. 582, 585.

(*o*) See *post*, Pt. IV., Chap. VI.

(*p*) See *post*, p. 619.

(*q*) Sale of Goods Act, 1893, s. 30 (2); *Cross v. Eglin* (1831), 9 L. J. O. S. K. B. 145; 2 B. & Ad. 106.

(*r*) Sale of Goods Act, 1893, s. 30 (3); *Hart v. Mills* (1846), 15 L. J. Ex. 200;

15 M. & W. 85; *Coolidge v. Harrison* 1851, 20 L. J. Ex. 325; 6 Ex. 903.

(*s*) Sale of Goods Act, 1893, s. 30 (3); *Levy v. Green* (1859), 28 L. J. Q. B. 319; 1 E. & E. 969.

(*t*) Sale of Goods Act, 1893, ss. 30 (1), 31; *Waddington v. Officer* (1865), 2 B. & P. N. R. 61; *Rout v. Sala* (1879), 18 L. J. C. P. 492; 4 C. P. D. 239.

(*u*) Sale of Goods Act, 1893, s. 30; *Goodale v. Wetherell* (1829), 7 L. J. O. S. K. B. 264; 9 B. & C. 386; *Hart v. Mills* (1846), 15 L. J. Ex. 200; 15 M. & W. 85.

PART IV.
Margin of
quantity.

Expressions may be used admitting a margin of quantity, as "about," or "more or less," within which the seller may deliver the goods according to the circumstances of each case (*x*). Where the goods are otherwise ascertained or identified such expressions are construed as an expectation or estimate only, and not as a warranty of quantity (*y*). But expressions respecting quantity may import an absolute undertaking to deliver at least or not in excess of that quantity (*z*). Evidence of usage is not in general admissible to explain these or the like terms in a contract; because they are terms of ordinary use and meaning (*a*). But under a contract to deliver a certain quantity of goods from a warehouse, the giving of a delivery order for "about" the quantity was held sufficient, according to evidence admitted of a local usage of warehousemen not to accept delivery orders in any other form (*b*). A charter-party requiring that the charterer should "load a full and complete cargo, say about 1,100 tons," was construed as providing for a reasonable excess in the capacity of the ship; and 3 per cent. being held to be a fair estimate of such excess the charterer was not bound to supply a fuller cargo (*c*).

Delivery by
instalments.

Under a contract to deliver goods in instalments, a default in delivering one instalment may justify the buyer refusing that instalment; but it does not justify refusing future instalments unless there is an express or implied condition that the whole shall be delivered according to contract. So a default, which does not amount to a repudiation of the contract, in accepting or paying for one instalment does not discharge the seller from future deliveries, unless it is so stipulated (*d*). A contract to supply a cargo of goods of a stated measurement is not performed by supplying goods from part of a larger cargo; the difference between a

(*x*) *Cross v. Eglin* (1831), 9 L. J. O. S. K. B. 145; 2 B. & Ad. 106; *Bourne v. Signeur* (1855), 24 L. J. C. P. 202; 16 C. B. 337. See *Miller v. Bonner* (1900), 69 L. J. Q. B. 429; (1900) 1 Q. B. 691.

(*y*) *Barker v. Woulfe* (1856), 25 L. J. Q. B. 349; 6 E. & B. 675; *Gibbs v. Grey* (1857), 26 L. J. Ex. 286; 2 H. & N. 22; *McConnell v. Murphy* (1873), L. R. 5 P. C. 203.

(*z*) *Laming v. Snaith* (1851), 20 L. J. Q. B. 164; 16 Q. B. 275; *Tamvaco v. Lucas* (1859), 28 L. J. Q. B. 301; 1 E. & E. 581.

(*a*) *Cross v. Eglin* (1831), 9 L. J. O. S.

K. B. 145; 2 B. & Ad. 106. See *ante*, p. 134.

(*b*) *Moore v. Campbell* (1853), 23 L. J. Ex. 310; 10 Ex. 323.

(*c*) *Morris v. Levison* (1876), 45 L. J. C. P. 409; 1 C. P. D. 155. See *Carnegie v. Connor* (1889), 59 L. J. Q. B. 122; 21 Q. B. D. 15; *Miller v. Bonner* (1900), 69 L. J. Q. B. 429; (1900) 1 Q. B. 691.

(*d*) Sale of Goods Act, 1893, s. 31 (2); *Hawk v. Muller* (1881), 50 L. J. Q. B. 529; 7 Q. B. D. 92; *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497; 9 Ap. Ca. 434. See *G. N. Ry. v. Harrison* (1852), 22 L. J. C. P. 49; 12 C. B. 576.

CHAP. III.

cargo and part of a cargo being in many respects material to the buyer (e). A contract for delivery of goods "during the months of June, July, August and September" was construed not to import delivery in equal monthly quantities, but the whole within the whole time; and the buyer was bound to accept the tender of reasonable quantities from time to time (f). A like contract for "shipment by steamer or steamers during February" was construed to admit of shipment in parcels, and therefore the buyer was bound to accept a parcel shipped in one steamer within the time, though the rest was not shipped in time (g). A like contract for goods "to be shipped during the months of March, and/or, April," that is, during those two months or either of them, is construed according to the literal meaning in the absence of custom of trade to the contrary, and therefore goods partly shipped in February for which bills of lading were then signed were held not to satisfy the contract (h).

In a sale by description the seller must deliver goods answering to the kind and quality contracted for; or the buyer may refuse to accept them. And there is a generally implied condition in such sales that the goods delivered must be of such quality and in such state as to be merchantable under the description by which they are sold; and that they shall be fit for the particular purpose, if any, for which such goods are generally used, or for which they are understood to be sold. And though sold by sample or with warranty, the goods must answer to the description and be merchantable in all other respects than those covered by the sample or warranty (i). And if there is a sale "with delivery as required," the acceptance of one instalment does not preclude the buyer from rejecting later instalments for defects in quality (l). If a seller sells as a manufacturer only, he is presumptively bound to deliver goods of his own manufacture (m). —The seller must also deliver the goods in a manner

Performance as to description of goods.

Opportunity for inspection.

(e) *Kremer v. Blanch* (1870), 39 L. J. Ex. 169; L. R. 5 Ex. 179; *Barranman v. Deighton* (1876), 46 L. J. Ex. 273; 2 Ex. D. 15.

(f) *Cole v. Douglas Iron Co.* (1878), 4 L. J. Q. B. 575. And see *Coddington v. Paleologo* (1867), 36 L. J. Ex. 78; L. R. 2 Ex. 193.

(g) *Brant v. Lawrence* (1876), 46 L. J. Q. B. 237; 1 Q. B. D. 311. See *Ryder v. Sals* (1879), 48 L. J. C. P. 492; 4 O. P. D. 239.

(h) *Rivers v. Shand* (1877), 46 L. J. Q. B. 531; 2 Ap. Cl. 155.

(i) *Sale of Goods Act*, 1893, ss. 13, 14. See *ante*, p. 239; *Jones v. Pugh* (1880), 59 L. J. Q. B. 261; 21 Q. B. D. 650.

(k) *Sale of Goods Act*, 1893, ss. 13, 14. See *ante*, p. 257.

(l) *Jackson v. Rotter Motor and Cycle Co.* (1910), 80 L. J. K. B. 38; (1910) 2 K. B. 937.

(m) *Johnson v. Rytton* (1881), 50 L. J. Q. B. 753; 7 Q. B. D. 438.

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See *ante*,
23 L. J.

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See *Car-*
J. Q. B.
v. *Baner*
(1900) 1

, s. 31 (2);
L. J. Q. B.
Steel Co. v.
B. 497; 9
v. Harrison
12 C. B.

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to give the buyer an opportunity of inspecting them, if he has not already done so; and the buyer is allowed a reasonable time for inspection before acceptance (*n*). If the goods delivered do not answer to the contract, the buyer may return them; but he is not bound to do so, and it is sufficient for him to give clear notice that the goods are not accepted, and remain at the risk of the seller (*o*). But if he exercises any act of ownership over them he is taken to accept them under the contract; subject to any claim for breach of warranty (*p*). A tender of goods not answering the description is not a final breach of the contract, as the seller may still tender other goods answering the contract before the time of completion has elapsed (*q*).

Sale of
specific
chattel.

A contract of sale of a specific chattel transfers the property in the chattel, and is performed by delivery of that chattel, whatever may be the defects in it; the seller not being responsible for defects, unless he has fraudulently concealed them, or warranted against them. Fraud may entitle the buyer to rescind the contract; but a mere breach of warranty does not entitle him to refuse or return the chattel, unless he has stipulated in the contract to do so, or has made the contract conditional upon the warranty, the remedy being to set up the breach of warranty in diminution or extinction of the price or to sue for damages for the breach of warranty; but he may be precluded, by the terms of the contract, from recovering any damages (*r*). A contract for the manufacture and delivery of an article for a particular purpose, such purpose being the essential matter of the contract, binds the seller to supply an article reasonably fit for the purpose, and the buyer may refuse to accept an article which fails. But a contract for an article of a specific kind, though intended and expected to serve a certain purpose, is satisfied by the delivery of such article though it is found to be unsuccessful; unless the success is made a condition of the contract (*s*).

Delivery to
carrier.

The contract of the seller is discharged by delivery according to

(*n*) Sale of Goods Act, 1893, s. 31; *Isherwood v. Whitmore* (1842), 12 L. J. Ex. 318; 11 M. & W. 347.

(*o*) Sale of Goods Act, 1893, s. 36; *Lynch v. Moullet* (1859), 29 L. J. Ex. 110; 5 H. & N. 233; *Grimoldby v. Wells* (1875), 44 L. J. C. P. 203; L. R. 10 C. P. 391.

(*p*) Sale of Goods Act, 1893, s. 35; *Parker v. Palmer* (1821), 4 B. & Ald. 387;

Perkins v. Bell (1892), 62 L. J. Q. B. 91 (1893) 1 Q. B. 193.

(*q*) *Barnard v. Free* (1878), 48 L. J. Q. B. 65; 4 Q. B. D. 500.

(*r*) Sale of Goods Act, 1893, s. 53; *Hallid, Son & Wells v. Pratt & Haynes* (1910), 79 L. J. K. B. 1013; (1910) 2 K. B. 1003. See *ante*, p. 263.

(*s*) Sale of Goods Act, 1893, s. 14. See *ante*, p. 266.

the directions of the buyer; as by delivering the goods to a common carrier on his behalf and at his request express or implied (*t*). The seller in contracting with a carrier presumptively acts merely as agent for the buyer, who is the owner of the goods; and the subsequent risk and the remedy against the carrier for loss or damage rests with the buyer only (*u*). If the seller expressly contracts with the carrier to retain the possession and carry the goods on his account, there is no delivery to the buyer; as where the seller ships the goods under a bill of lading stating that they are shipped on his account and to be delivered to his order (*x*).

"In contracts for the sale of real estate an agreement to make a good title is always implied" (*y*). It is sufficient to make a good title to the equitable estate, with the power to get in the legal estate and procure a conveyance to the purchaser by the time appointed for completion (*z*). It is not sufficient for a vendor to offer a title to a third party in performance of his contract to make a title in himself: as where he contracts to sell under a power as trustee, and offers a title from a tenant for life under the powers of the Settled Land Act (*a*); but he may compel a purchaser to accept a valid title from him (the vendor), although a different one to that stipulated for, even where the vendor had no title at the date of the contract: as where the deed which was to have been the root of title was found to be invalid the purchaser was compelled to accept a conveyance from the vendor who had acquired a title under the Statute of Limitations by twelve years' possession after the date of the contract, but before action brought (*b*). The fact that conveyances under which the vendor claims contain no covenants for title is no objection to title, but the purchaser is entitled to require that the usual covenants for title required by the circumstances of the sale shall be

Contract of
sale of land—
Title.

(*t*) Sale of Goods Act, 1893, s. 32; *Dutton v. Solomonson* (1803), 3 B. & P. 582; *Ex p. Pearson* (1868), 37 L. J. C. 554; L. R. 3 Ch. 413; *Leather Cloth Co. v. Hieronimus* (1875), 41 L. J. Q. B. 51; L. R. 10 Q. B. 140. See *Clarke v. Hutchins* (1811), 14 East, 475.

(*u*) *Davies v. Peck* (1799), 8 T. R. 330. See *G. W. Ry. v. Bagg* (1885), 51 L. J. Q. B. 599; 15 Q. B. D. 625.

(*x*) *Turner v. Liverpool Docks* (1851), 20 L. J. Ex. 393; 6 Ex. 543.

(*y*) *Per cur. Ellis v. Rogers* (1885), 29

Ch. D. 670; *Re Highett & Birt* (1902), 72 L. J. C. 220; (1903) 1 Ch. 287.

(*z*) *Esdale v. Stephenson* (1822), 6 Madd. 366; *Re Baker & Salmon* (1906), 76 L. J. C. 235; (1907) 1 Ch. 268. See *Halkett v. Dudley (Earl)* (1907), 76 L. J. C. 330; 1907) 1 Ch. 590.

(*a*) *Re Bryant and Barningham* (1890), 59 L. J. C. 636; 44 Ch. D. 3; *Re Head's Trusts and Macdonald* (1900), 59 L. J. C. 604; 45 Ch. D. 310.

(*b*) *Games v. Bonnor* (1885), 54 L. J. C. 517.

PART IV.

Doubtful title.

Abstract of title.

Length of title.

Conditions restricting title.

entered into (c).—The court will not compel a purchaser to take a title depending upon a doubtful question of fact: as a doubtful heirship (d); or a doubt whether the vendor has previously sold the property to another (e). If the title depends upon a doubtful question of general law, it is the duty of the court to decide the validity and enforce the contract according to their decision (f), though the decision binds only the parties before the court (g). But the court will not compel a purchaser to take a title depending upon the doubtful construction of a will or other private instrument (h); or upon the doubtful construction of a general statute which has not been settled by any authoritative decision (i).—The vendor is required to deliver at his own expense to the purchaser an abstract of title, showing a good title to convey (k); and he must verify the abstract by the title deeds, or if they are lost by satisfactory secondary evidence (l). The delivery of the title deeds is not equivalent to the delivery of an abstract of title, unless accepted as such (m).—By the Vendor and Purchaser Act, 1874, s. 1, it is enacted that "subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required" (n).

The conditions of sale may restrict the purchaser's right to title and may bind him to accept such title as the vendor can give (o), or to take a qualified title commencing from a certain deed or

(c) *Re Smeur and Baring* (1884), 53 L. J. C. 1101; *Re Scott and Alvarez* (1895), 64 L. J. C. 378, n.; (1895) 1 Ch. 596.

(d) *Jeakes v. White* (1852), 21 L. J. Ex. 265; 6 Ex. 873.

(e) *Simmons v. Heseltine* (1859), 28 L. J. C. P. 129; 5 C. B. N. S. 554.

(f) *Binder v. Carter* (1869), 38 L. J. C. 283; L. R. 4 Ch. 230; *Alexander v. Mills* (1870), 40 L. J. C. 73; L. R. 6 Ch. 124.

(g) *Jessel, M. R., Osborne to Rowlett* (1880), 49 L. J. C. 310; 13 Ch. D. 781.

(h) *Tyke v. Waddingham* (1852), 10 Hare, 1.

(i) *Selborne, L. C., Palmer v. Locke*, 51 L. J. C. 124; 18 Ch. D. 383; *Re Thackuray and Young* (1888), 58 L. J.

C. 72; 40 Ch. D. 39.

(k) *Dee v. Stacion* (1836), 5 L. J. Ex. 253; 1 M. & W. 655; *Re Johnson and Tustin* (1885), 51 L. J. C. 89; 30 Ch. D. 12.

(l) *Bryant v. Buck* (1827), 4 Russ. 1; *Moulton v. Edwards* (1859), 29 L. J. C. 181; 1 De G. F. & J. 246; *Re Italy, Commercial Bank and Wood* (1896), 7 L. T. 556; 47 W. R. 194.

(m) *Hone v. Wingfield* (1811), 10 L. J. C. P. 295; 3 Man. & G. 33.

(n) *Jacobs v. Revell* (1900), 69 L. J. C. 879; (1900) 2 Ch. 858.

(o) *Hume v. Purck* (1866), 35 L. J. C. 731; L. R. 1 Ch. 379; *Best v. Haman* (1879), 48 L. J. C. 503; 12 Ch. D. See *Scott v. Alvarez* (1895), 64 L. J. C. 821; (1895) 2 Ch. 603.

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certain date (*p*), in which case he is not precluded from taking objections to the qualified title shown, whether appearing upon the face of the title or from other sources, nor from objecting to suppressions in the prior title (*q*). The purchaser may be bound by a condition of sale to assume certain statements as facts without further evidence, as that a person was entitled at a certain date; or that a person died intestate and without an heir; but he is not thereby precluded from showing that the statements are erroneous (*r*). The purchaser may also be compelled by a condition to make objections or requisitions within a certain time; but he is not thereby precluded from objecting after the time that the vendor has failed to show any title (*s*).

The vendor must convey property answering to the description contracted for in estate, tenure, quantity, and identity; but may impose upon the purchaser the burden of assuming the truth of facts, and thus limit his right to strict proof of tenure (*t*). A contract for sale of land presumptively imports an estate in fee simple (*u*), and free from incumbrances (*x*); except so far as the purchaser knew of the interest of the vendor, or of the existence of incumbrances, in which case the contract may be effectual to pass such interest as the vendor has; and subject to the known incumbrances, unless the purchaser has expressly stipulated against them (*y*). Under a contract for freehold land the purchaser cannot be compelled to take copyhold (*z*); nor under a contract for copyhold, to take freehold (*a*). Under a sale of freehold the purchaser cannot be compelled to take leasehold, for however long term of years (*b*). Under a sale of leasehold for a term of years the purchaser cannot be compelled to take a sub-

Property
conveyed.

(*p*) *Sellick v. ...*, 12 L. J. Ex. 401; 11 M. 22; *Phillips v. Caldwell* (1868), 38 L. J. Q. B. 68; L. R. 4 Q. B. 159.

(*q*) *Smith v. Robinson* (1879), 49 L. J. C. 20; 13 Ch. D. 148; *Re Marsh and Graville (Earl)* (1883), 53 L. J. C. 81; 24 Ch. D. 11; *Re Cox and Nye*, (1891) 2 Ch. 109; *Scott v. Alvarez* (1895), 64 L. J. C. 821; (1895) 2 Ch. 603.

(*r*) *Re Sandbach and Edmondson* (1890), 60 L. J. C. 60; (1891) 1 Ch. 99; *Scott v. Alvarez* (1895), 64 L. J. C. 821; (1895) 2 Ch. 603; *Re Haedicke and Lipski* (1901), 70 L. J. C. 811; (1901) 2 Ch. 666.

(*s*) *Went v. Stallibrass* (1873), 42 L. J. Ex. 108; L. R. 8 Ex. 175.

(*t*) *Blalberg v. Keves* (1906), 75 L. J. C. 464; (1906) 2 Ch. 175.

(*u*) *Hughes v. Parker* (1841), 10 L. J. Ex. 297; 8 M. & W. 214; *Bower v. Cooper* (1842), 11 L. J. C. 287; 2 Hare, 408; *Baynes v. Wood* (1869), 38 L. J. C. 183; L. R. 8 Eq. 424.

(*x*) *Ungley v. Ungley* (1877), 46 L. J. C. 851; 5 Ch. D. 887.

(*y*) *Cato v. Thompson* (1882), 9 Q. B. D. 616; *Re Gloag and Miller* (1883), 52 L. J. C. 655; 23 Ch. D. 320; *Ellis v. Rogers* (1885), 29 Ch. D. 661.

(*z*) *Turquand v. Rhodes* (1868), 37 L. J. C. 830. See *Price v. Maccallay* (1852), 2 De G. M. & G. 339.

(*a*) *Ayles v. Cox* (1852), 16 Beav. 23.

(*b*) *Brewer v. Corp* (1804), 9 Ves. 368.

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stantially shorter term than contracted for (c); or a term subject to determination at option of lessor (d); nor can he be compelled to take an underlease, however small the difference of term (e), unless the purchaser has notice in the particulars of sale or otherwise that an underlease only was intended (f). Under a contract for the sale of land in fee simple in possession the purchaser cannot be compelled to take a reversion in fee expectant upon a lease for a life at a low rent (g). Under a contract for specific land described as of a certain quantity, the purchaser is not bound to take an undivided share of that quantity of the land (h). The vendor must convey the entire property contracted for; thus upon the sale of property described by reference to a coloured portion of a plan, it is not competent to show by parol evidence knowledge of the purchaser through his agent that the vendor had previously sold a portion of the property (i); and upon a sale of a wharf with a jetty necessary for the use of the wharf, the purchaser is not bound to take the wharf without the jetty (k). So upon a sale of a house with a yard essential to the enjoyment of the house, the purchaser is not bound to accept the house, with a tenancy from year to year only of the yard (l). And upon the sale of a public-house and going concern, the vendor is bound to have a valid and existing licence, upon which the purchaser may found an application for a transfer and interim protection (m).—Also, the property must be identified with that described in the contract of sale, subject to any conditions restrictive of the identification (n); as in the case of a house identified by the name of the street and the number (o). Upon a sale of land as “partly freehold and partly leasehold” the purchaser is entitled to the land defined by reference to several tenures (p). By the contract for sale the vendor becomes

(c) *Erskine*, L. C., *Halsey v. Grant* (1806), 13 Ves. 77; *Belworth v. Hassell* (1815), 4 Camp. 140; *Nash v. Woodroffe* (1885), 52 L. T. 49; 33 W. R. 301.

(d) *Weston v. Savage* (1879), 48 L. J. C. 239; 10 Ch. D. 736.

(e) *Re Beyfus and Masters* (1888), 39 Ch. D. 110. See *Waring v. Scotland* (1838), 57 L. J. C. 1016.

(f) *Camberwell Bg. Soc. v. Holloway* (1880), 19 L. J. C. 361; 13 Ch. D. 754.

(g) *Collier v. Jenkins* (1831), Young, 295.

(h) *Re Arnold* (1880), 14 Ch. D. 279.

(i) *May v. Platt* (1900), 69 L. J. C. 357; (1900) 1 Ch. 616.

(k) *Piers v. Lambert* (1844), 7 F. 516.

(l) *Dobell v. Hutchinson* (1835), 4 K. B. 201; 3 A. & E. 355.

(m) *Tulcaster Brewery Co. v. W* (1897), 66 L. J. C. 402; (1897) 1 705.

(n) *Flower v. Hartopp* (1843), 12 C. 507; 6 Beav. 476; *Nicholl v. Ch* (1851), 21 L. J. C. P. 54; 11 C. B.

(o) *Leach v. Mullett* (1827), 3 C. P. 115; *White v. Bradshaw* (1851) Jur. 738; *Stanton v. Tattersall* (185) Sm. & G. 529.

(p) *Monro v. Taylor* (1852), 21 L. 525; 3 Mac. & G. 713.

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a trustee of the property sold for the purchaser, and must preserve the property, and is responsible for any subsequent deterioration in the property (*g*) unless it arises from accidental or natural causes (*r*).

The vendor is presumptively bound to convey the land sold free from reservations, rights or incumbrances: as rents, and title if the land is sold title free (*x*); rights of mining and taking minerals (*t*); but an unexpired lease of minerals under which they have all been worked out before the sale is no incumbrance (*u*). So with easements of any kind, as rights of drawing water or of drainage (*x*); or rights of way (*y*), unless obvious, and the purchaser has inspected the property (*z*).—The vendor must also convey the property free from any restrictive covenants as to the mode of use or occupation, which run with the land or affect it in equity by notice (*a*). A purchaser cannot in general object to incumbrances and covenants affecting the property sold, of which he had notice at the time of the sale (*b*). But an express stipulation for a good title covers all defects, whether he had notice or not *c*. Incumbrances and covenants of the above kind are matters of title and not of description, and must be so taken in construing the conditions of sale *d*).

Incumbrances.

Restrictive covenants.

Notice of incumbrances.

Performance with compensation.

Where the difference or deficiency in any of the above respects between the property contracted for and that tendered for conveyance is ascertainable in money and is slight in value, and not otherwise important or material to the enjoyment of the property, or in inducing the contract, the court will enforce the contract with compensation in value or indemnity against risk of incumbrances; as in the case of a slight deficiency in a long term of years, or in

(*g*) *Philleps v. Silvester* (1872), 42 L. J. Ch. 225; L. R. 8 Ch. 173.

(*r*) *Paive v. Meller* (1801), 6 Ves. 349; *Rayner v. Preston* (1881), 50 L. J. C. 472; 18 Ch. D. 1.

(*u*) *Binks v. Rokby* (Lord) (1818), 2 Swanst. 222; *Smith v. Tolcher* (1828), 4 Russ. 302.

(*t*) *Upperton v. Nickolson* (1871), 40 L. J. C. 401; L. R. 6 Ch. 436; *Bellamy v. Debenham* (1850), 60 L. J. C. 166; (1891) 1 Ch. 412.

(*x*) *Spoar v. Green* (1874), 43 L. J. Ex. 57; L. R. 9 Ex. 93.

(*y*) *Shackleton v. Sutcliffe* (1847), 1 De G. & S. 609; *Hegwood v. Mallatieu* (1884), 53 L. J. C. 492; 25 Ch. D. 357.

(*z*) *Dykes v. Blaks* (1838), 7 L. J. C. P. 282; 4 Bing. N. C. 463. See *Ashburner*

v. Sewell (1891), 60 L. J. C. 784; (1891) 3 Ch. 405.

(*a*) *Oldfield v. Round* (1800), 5 Ves. 508.

(*b*) *Flight v. Booth* (1834), 4 L. J. C. P. 66; 1 Bing. N. C. 370; *Re Davis & Carey* (1888), 58 L. J. C. 143; 40 Ch. D. 601; *Re Ebsworth & Tidy* (1889), 58 L. J. C. 665; 42 Ch. D. 23; *Re Cox & Neve*, (1891) 2 Ch. 109. See *Hepworth v. Pickles* (1899), 69 L. J. C. 55; (1900) 1 Ch. 108.

(*c*) *Ellis v. Rogers* (1885), 29 Ch. D. 67.

(*d*) *Cato v. Thompson* (1882), 9 Q. B. D. 616; *Re Gloag and Miller* (1883), 52 L. J. C. 654; 23 Ch. D. 320.

(*e*) *Ashburner v. Sewell* (1891), 60 L. J. C. 784; (1891) 3 Ch. 405.

PART IV. the quantity of land; or in the case of a small quit rent or title. Contracts of sale frequently contain an express condition 'to the effect that any misdescription, mistake, or error shall not avoid the sale, but shall be matter of compensation; in which case the condition is met by the condition, provided the purchaser gets substantially what he contracted for; but if not, he is not bound to take compensation, and may repudiate the purchase (f). The condition of compensation remains operative after the conveyance is completed unless restricted to errors discovered before completion (g). A condition of sale expressly excluding any compensation for error was construed as applying only to small unintentional errors, and not to substantial errors due to carelessness (h). A condition providing for compensation for misdescription does not apply to the case of a defect of title (i).

Contracts for
grant or
sale of lease.

The principle that a vendor is presumptively bound to make good title was applicable to contracts to grant, or to sell and a lease, including the lessor's title to demise (k). But it is now enacted by the Vendor and Purchaser Act, 1874, s. 2, that subject to any stipulation to the contrary, "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall be entitled to call for the title to the freehold." And by the Conveyancing Act, 1881, ss. 3, 13, under a contract to sell or grant a term of years derived out of a leasehold interest in land the intended assign or lessee shall not have the right to call for the title to the leasehold reversion." The above enactments put the purchaser or lessee in the same position as a condition of sale against the production of title; but do not protect him from constructive notice of the title and of the contents of deeds (l). The purchaser may prove that the title of the lessor is bad (m), and in support of a definite objection to the title the enactments

(e) *Mortlock v. Buller* (1804), 10 Ves. 306; *Halsey v. Grant* (1806), 13 Ves. 77; *Casamajor v. Strode* (1834), 2 M. & K. 706; *Rudd v. Laucelles* (1900), 69 L. J. C. 396; (1900) 1 Ch. 815.

(f) *Re Fawcett and Holmes* (1889), 50 L. J. C. 763; 42 Ch. D. 150; *Re Puckett and Smith* (1902), 71 L. J. C. 666; (1902) 2 Ch. 258.

(g) *Palmer v. Johnson* (1884), 53 L. J. Q. B. 345; 13 Q. B. D. 351.

(h) *Whittemore v. Whittemore* (1868), 38 L. J. C. 17; L. R. 8 Eq. 603.

(i) *Re Bryfux and Masters* (1888), 39

Ch. D. 113; *Dobson v. St. John* (1901), 70 L. J. C. 525; (1901) 98.

(k) *Sonter v. Drake* (1831), 1 K. B. 31; 5 B. & Ad. 992; *Hall v. Hall* (1842), 11 L. J. C. P. 256; 4 M. & C. 410.

(l) *Patman v. Harland* (1891), 60 L. J. C. 642; 17 Ch. D. 353; *Leake v. Oakshette* (1897), 66 L. J. Q. B. 218.

(m) *Waddell v. Woolfe* (1874), 43 Q. B. 138; L. R. 9 Q. B. 515.

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Sale of
agreement
for lease.

not perhaps preclude him from the ordinary right to a production of deeds (*n*). But an express condition of sale may preclude the purchaser from making any objection to the title, and bind him to take the lease, whatever the title may be (*o*). In a contract for the sale and assignment of an agreement for a lease, in the absence of express stipulation, there is no implied guarantee of the lessor's title; the assignee being entitled only to the rights under the agreement (*p*); but it is implied that the agreement is valid, otherwise there is no consideration for the contract; and where the agreement offered was voidable at the will of a third party, it was held that the purchaser might repudiate the contract (*q*).

Time of
performance.

Performance must be completed at or within the time stipulated; performance accepted after the time operates not in pursuance of the contract but in satisfaction of the breach (*r*). Where the contract admits of several days for performance, it is sufficient if the performance is completed before the end of the last day; and where the performance is to be by or before a certain day, it is sufficient if completed at any time before the end of the preceding day (*s*). Where no time is fixed the law implies that the performance must be completed within a reasonable time with reference to the circumstances, including the usage of any market (*t*). A contract to marry, no time being fixed, is a contract to marry within a reasonable time; and it is said that "people who agree to marry, not having the means, agree with the implied condition to wait till they have them: the legal expression of which is, that their engagement is to marry within a reasonable time" (*u*).

Reasonable
time.

A bill or note payable at a certain date may be paid at any time on the day on which it falls due, including the extension of time known as days of grace where they are to be included in the com-

Bills of
exchange
and notes.

(*n*) *Jones v. Watts* (1890), 43 Ch. D. 574.

(*o*) *Spratt v. Jeffery* (1829), 8 L. J. O. S. K. B. 114; 10 B. & C. 249; *Hume v. Bentley* (1852), 21 L. J. C. 760; 5 De G. & Sm. 520.

(*p*) *Kintrea v. Preston* (1856), 25 L. J. Ex. 287; 1 H. & N. 357.

(*q*) *Brewer v. Broadwood* (1882), 52 L. J. C. 136; 22 Ch. D. 105.

(*r*) *Post*, Part IV., Chap. VI.

(*s*) *Sheppard's Touch*, 378.

(*t*) Sale of Goods Act, 1893, s. 29 (2); *Ford v. Colenuth* (1870), 39 L. J. Q. B. 188; 1 L. R. 5 Q. B. 544; *Postlethwaite v. Freeland* (1880), 49 L. J. Ex. 630; 5 Ap. Ca. 599; *De Wail v. Adler* (1886), 46 L. J. P. C. 25; 12 Ap. Ca. 141; *Carlton Co. v. Castle Mail Co.* (1898), 67 L. J. Q. B. 795; (1898) A. C. 486.

(*u*) *Bramwell, B., Hall v. Wright* (1859), 29 L. J. Q. B. 47; E. B. & E. 765.

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putation of time. The holder may also demand payment at any time on that day within business hours, and if then refused may treat the bill as dishonoured and give notice of dishonour to prior parties; but after such refusal the acceptor may tender payment within the day and thereby avoid the dishonour and notice (x). A bill or note not expressing any time for payment, or expressing to be payable on demand, is considered as due and payable by the acceptor or maker from the time of issue without demand; but it is not considered as overdue until a demand and refusal; and interest does not accrue, unless expressly stipulated, until demand made (y). A bill or note payable at a certain time after demand is not due and payable until a demand made and the time elapsed; but payment of interest is evidence of demand having been made and of the bill being overdue, unless the interest is expressly payable during the currency of the bill (z). A bill of exchange which is expressed to be payable at a fixed period after date, and which is issued undated, is construed as dated on the day of issue; and any holder may insert therein the true date of issue, and the bill is payable accordingly (a).

Sale of goods.

A contract for the sale and delivery of goods on a certain day or within certain days is performed by a delivery completed before the end of the day or of the last of the days appointed; or by tender of delivery, however late, provided time is left to complete the delivery and acceptance before the end of that day; but the buyer would not be bound to attend at the place of delivery for accepting the goods beyond a reasonable hour according to the usual course of business (b). Under a contract for delivery "in all December," the seller was held to have the whole month for delivery; and as there was no breach until the last day of the month, the damages were measured by the value of the goods on that day (c). A contract not fixing any time for delivery implies that the delivery must be made within a reasonable time, depending

(x) Bills of Exchange Act, 1882, ss. 14, 45, 47, 48; *Leftly v. Mills* (1791), 4 T. R. 170; *Ex p. Moline* (1812), 19 Ves. 216; *Hine v. Allely* (1833), 2 L. J. K. B. 105; 4 B. & Ad. 624. See *Kennedy v. Thomas* (1894), 63 L. J. Q. B. 761; (1894) 2 Q. B. 759.

(y) Bills of Exchange Act, 1882, ss. 10, 36; *Brooks v. Mitchell* (1841), 11 L. J. Ex. 51; 9 M. & W. 15; *Aldous v. Cornwell* (1868), 37 L. J. Q. B. 201; L. R. 3

Q. B. 573; *Re George* (1890), 59 L. J. 709; 44 Ch. D. 627.

(z) Bills of Exchange Act, 1882, s. 3; *Re Rutherford* (1880), 49 L. J. C. 65; 14 Ch. D. 687.

(a) Bills of Exchange Act, 1882, s. 1; *Giles v. Bourne* (1817), 6 M. & S. 73.

(b) Sale of Goods Act, 1893, s. 29 (1); (4); *Startup v. Macdonald* (1843), 12 L. Ex. 477; 6 Man. & G. 593.

(c) *Leigh v. Paterson* (1818), 8 Taunt. 540.

ing on the place and the condition in which the goods are, or are represented to be (*d*). Delivery is not impliedly deferred merely by reason that payment is expressly deferred to a future time, but the sale is then presumptively for delivery within a reasonable time on credit (*e*). But under such a contract evidence was admitted of a usage of trade that delivery could not be claimed before the time of payment (*f*). A contract of sale not mentioning any time of payment would be presumptively for payment in ready money upon delivery, but this presumption may be rebutted by the terms of the contract, under which the seller may be entitled to payment before delivery or before appropriation of the goods (*g*). And a sale of goods "to be delivered and paid for in fourteen days" was construed to import that the delivery and payment were to be concurrent acts within the fourteen days (*h*).

In contracts fixing a time for delivering an abstract, making a title, and the other steps in the performance of a sale of land, the courts of common law required strict adherence to the contract; and if the vendor was not ready and willing to perform his part at the times appointed he was liable to an action: nor could he afterwards maintain an action against the purchaser, upon his becoming able to make a title and convey the land after the time appointed (*i*). But the Court of Chancery in administering the remedy of specific performance acted upon the principle that in the sale and purchase of land "time is not of the essence of the contract"; and if there was no other objection than lapse of the appointed time, the court directed an inquiry into the title, and granted specific performance if the vendor could show a title upon such inquiry, unless from the nature of the property or other circumstances it would have been inequitable to do so (*k*). The right of the mortgagee of land to redeem after the day fixed by the proviso for redemption has been referred to this principle (*l*);

Time not of
essence of
contract.

(*d*) Sale of Goods Act, 1893, s. 29 (2); *Ellis v. Thompson* (1838), 7 L. J. Ex. 185; 3 M. & W. 445.

(*e*) *Spartali v. Bencke* (1850), 19 L. J. C. P. 293; 10 C. B. 212; *Staunton v. Wood* (1851), 16 Q. B. 638.

(*f*) *Field v. Lelean* (1861), 30 L. J. Ex. 168; 6 H. & N. 617.

(*g*) Sale of Goods Act, 1893, ss. 28, 49; *Ford v. Yates* (1841), 10 L. J. C. P. 117; 2 Man. & G. 549; *Workman, Clark & Co., Ltd. v. Lloyd Brazilleno* (1908), 77 L. J. K. B. 953; (1908) 1 K. B. 968.

(*h*) *Godts v. Ross* (1855), 25 L. J. C. P. 61; 17 C. B. 229. See *Woolfe v. Horne* (1877), 46 L. J. Q. B. 534; 2 Q. B. D. 355.

(*i*) *Wilde v. Fort* (1812), 4 Taunt. 334; *Noble v. Edwards* (1877), 5 Ch. D. 378.

(*k*) *Seton v. Slade* (1802), 7 Ves. 265; 2 Wh. & T. L. C. 475; *Parkin v. Thorold* (1852), 22 L. J. C. 170; 16 Beav. 59; *Roberts v. Berry* (1853), 22 L. J. C. 398; 3 De G. M. & G. 284.

(*l*) *Eldon, J.C., Seton v. Slade* (1802), 7 Ves. 265; 2 Wh. & T. L. C. 475.

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but having regard to the practice of courts of equity to re-open foreclosure (*m*), it seems safer to rest this right upon relief granted in cases of forfeiture (*n*). And it is now enacted by the Judicature Act, 1873, s. 25 (7), that "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" (*o*).

Time made
essential by
agreement.

But time may be made essential by express agreement of the parties; or impliedly by the nature of the property or the circumstances of the case (*p*). The condition that the vendor shall deliver an abstract of title within a certain time is presumptively not of the essence of the contract (*q*). And the purchaser is taken to waive any objection to delay in delivering the abstract, if he accepts it when delivered (*r*). The condition that all objections and requisitions to the title shall be sent within a fixed time from the delivery of the abstract makes the time of the essence of the contract (*s*). But it is waived or extended by delay of the vendor in delivering the abstract (*t*): or by delivering an incomplete abstract (*u*): or by accepting the objections and requisitions sent in after the time (*x*). An express provision for the payment of interest on the purchase-money until completion is construed as showing an intention not to consider the time essential (*y*). A condition for delivery of possession on a certain day is not considered essential unless special circumstances render the possession material (*z*).—The nature of the

Time
impliedly
essential.

(*m*) *Campbell v. Holyland* (1877), 47 L. J. C. 145; 7 Ch. D. 166.

(*n*) *Peachy v. Somerset (Duke)* (1721), 1 Stra. 447; *Sloman v. Walter* (1784), 1 Bro. C. C. 418; 2 Wh. & T. L. C. 250.

(*o*) See *Noble v. Edwards* (1877), 5 Ch. D. 378; *Patrick v. Milner* (1877), 46 L. J. C. P. 537; *Reuter v. Sala* (1879), 48 L. J. C. P. 492; 4 C. P. D. 239.

(*p*) *Cairns, L. C., Tilley v. Thomas* (1867), L. R. 3 Ch. 67; *Nokes v. Kilmorey (Lord)* (1847), 1 De G. & Sm. 444.

(*q*) *Roberts v. Berry* (1853), 22 L. J. C. 398; 3 De G. M. & G. 284.

(*r*) *Seton v. Slade* (1802), 7 Ves. 265; 2 Wh. & T. L. C. 475; *Hipwell v. Knight* (1835), 4 L. J. Ex. Eq. 52; 1 Y. & C. Ex. 401.

(*s*) *Oakden v. Pike* 1865, 34 L. J. C.

620; *Rosenberg v. Cook* (1881), 51 L. J. Q. B. 170; 8 Q. B. D. 162.

(*t*) *Upperton v. Nickolson* (1871), L. R. 6 Ch. 436.

(*u*) *Blacklow v. Laus* (1842), 2 Hare 40; *Oakden v. Pike* (1865), 34 L. J. C. 620; *Went v. Stallibrass* (1873), 42 L. J. Ex. 108; L. R. 8 Ex. 175.

(*x*) *Cutts v. Thoday* (1842), 13 Sim. 206; affirmed (1844), 1 Coll. 223, n.

(*y*) *Webb v. Hughes* (1870), 39 L. J. C. 606; L. R. 10 Eq. 281; *Patrick v. Milne* (1877), 46 L. J. C. P. 537; 2 C. P. D. 342; *Hatten v. Russell* (1888), 57 L. J. C. 425; 38 Ch. D. 334.

(*z*) *Boehm v. Wood* (1820), 1 J. & W. 419. See *Tilley v. Thomas* (1867), L. R. 3 Ch. 61.

property sold may impliedly make time essential: as leasehold property held for a short term which is running out pending completion of the sale (*a*); a building agreement which is subject to forfeiture if the building is not completed by a certain day (*b*); a lease for lives (*c*); a covenant for the renewal of a lease before the expiration of the term (*d*); land to be taken at a valuation price (*e*); contracts giving an option to purchase (*f*); life annuities (*g*); reversionary interests (*h*); patent rights (*i*); and other subjects of fluctuating value (*k*). So with property sold for immediate use in manufacture or trade; as a public house sold as a going concern (*l*); and property sold for immediate residence (*m*). But the court cannot consider the intention of the purchaser as to the use of the property, unless it is expressed in the contract, or known to the vendor (*n*).

Where the condition of time was not originally essential, and where such condition has been waived, time may afterwards be made essential, as regards the claim to specific performance, by either party requiring completion within a fixed time and giving notice to that effect (*o*). The notice must give a reasonable time for completion with reference to the circumstances (*p*); and it is said that "such a notice ought to fix the longest time that could be reasonably required for the performance of the acts which remain to be done" (*q*). If it is intended to rescind the contract for any further delay, it must be unequivocally so expressed in the notice (*r*); and the notice may be waived by con-

Time made
essential by
notice.

(*a*) *Hudson v. Temple* 1861, 30 L. J. C. 251; 29 Peav. 536.

(*b*) *Burday v. Messenger* (1874), 43 L. J. C. 449.

(*c*) *Wheeler v. D'Este* (1811), 2 Dow. 359.

(*d*) *Nicholson v. Smith* (1882), 42 L. J. C. 191; 22 Ch. D. 640. See *Carter v. Ely (Dean)* (1835), 4 L. J. C. 132; 7 Sim. 211.

(*e*) *Merse v. Merest* (1821), 6 Madd. 26.

(*f*) *Ranelagh (Lord) v. Melton* (1864), 34 L. J. C. 227; 2 Dr. & Sm. 278.

(*g*) *Wuthy v. Cottle* (1823), T. & R. 78. See *Pritchard v. Grey* (1820), 1 J. & W. 396.

(*h*) *Newman v. Rogers* (1793), 4 Bro. C. C. 391; *Lery v. Stogdon* (1898), 68 L. J. C. 19; (1899) 1 Ch. 5. See *Robertson v. Skeiton* (1850), 19 L. J. C. 561; 13 Beav. 91.

(*i*) *Payne v. Banner* (1843), 15 L. J. C. 227.

(*k*) *Doloret v. Rothschild* (1824), 2 L. J.

O. S. C. 125; 1 Sim. & S. 590; *Macbride v. Weekes* (1856), 29 Beav. 533.

(*l*) *Coslake v. Till* (1826), 1 Russ. 376; *Coches v. Gale* (1871), L. R. 7 Ch. 12; 41 L. J. C. 14. See *Farnham Brewery Co. v. Hunt* (1893), 68 L. T. 440.

(*m*) *Tilley v. Thomas* (1867), L. R. 3 Ch. 61. See *Webb v. Hughes* (1870), 39 L. J. C. 600; L. R. 10 Eq. 281.

(*n*) *Boehm v. Wood* (1820), 1 J. & W. 422; *Nokes v. Kilmercy (Lord)* (1847), 1 De G. & Sm. 444.

(*o*) *Benson v. Lamb* (1846), 15 L. J. C. 218; 9 Beav. 502; *Parkin v. Thorold* 1852, 22 L. J. C. 170; 16 Beav. 59.

(*p*) *Green v. Serin* (1879), 49 L. J. C. 166; 13 Ch. D. 589; *Compton v. Bagley* (1891), 61 L. J. C. 113; (1892) 1 Ch. 313.

(*q*) *Fry, J., Crawford v. Toogood* (1879), 49 L. J. C. 108; 13 Ch. D. 158.

(*r*) *Reynolds v. Nelson* (1821), 6 Madd. 18.

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Extension of time.

tinuing the transaction after the time therein fixed (*s*).—Where time is of the essence of the contract an extension by request or agreement only substitutes the extended time for the time originally fixed without further waiving the condition (*t*). And the time is extended in fact by continuation of negotiations for completion (*u*); provided the negotiation is continued *bonâ fide* and not merely for the purpose of gaining time, as in the case of a purchaser who is not prepared with the purchase-money (*x*). A continued possession under an agreement for a lease is presumptively referable to the agreement only, and therefore waives any delay in completing the agreement during the continuance of the term (*y*). After negotiations have ceased, or after one of the parties has refused completion, any further delay may disentitle a claimant to specific performance, although not amounting to abandonment of the contract (*z*).

Construction of terms relating to time.

The terms "forthwith," "directly," and the like, are construed to mean as soon as practically possible; admitting of such reasonable time as may be required for the performance, having regard to the circumstances (*a*). A covenant to insure a life "forthwith" is satisfied by insuring within the reasonable time required for effecting the insurance (*b*). A covenant in a composition deed to deliver bills to the creditors "forthwith" requires a reasonable time for ascertaining the amount due to each creditor for which the bills are to be drawn (*c*). In a contract for the performance of certain acts "forthwith," with a condition that mutual bonds should be given within ten days to secure the performance, it was held that giving the bonds was a condition precedent to charging any liability (*d*). A condition for the repayment of money advanced "immediately on demand," or upon notice given, cannot be put in force without allowing the

(*s*) *King v. Wilson* (1843), 6 Beav. 124.

(*t*) *Bavelay v. Messenger* (1874), 43 L. J. C. 449.

(*u*) *Wood v. Bernal* (1812), 19 Ves. 220; *Webb v. Hughes* (1870), 39 L. J. C. 606; L. R. 10 Eq. 281; *Brunner v. Moore* (1904), 73 L. J. C. 377; (1904) 1 Ch. 305.

(*x*) *Gee v. Pearce* (1848), 2 De G. & Sm. 325.

(*y*) *Sharp v. Milligan* (1856), 22 Beav. 606; *Shepherd v. Walker* (1875), 44 L. J. C. 648; L. R. 20 Eq. 659. See *Mills v. Haywood* (1877), 6 Ch. D. 196.

(*z*) *Southcomb v. Exeter (Bp.)* (1847), 16 L. J. C. 378; 6 Hare, 213; *McMurray v. Spicer* (1868), 37 L. J. C. 505; L. R. 5 Eq. 527; *Cornwall v. Henson* (1900), 69 L. J. C. 581; (1900) 2 Ch. 298.

(*a*) *Duncan v. Topham* (1849), 18 L. J. C. P. 310; 8 C. B. 225; *Stanton v. Wood* (1851), 16 Q. B. 638.

(*b*) *Hyde v. Watts* (1843), 13 L. J. Ex. 41; 12 M. & W. 254.

(*c*) *Ex p. Sullivan* (1866), 36 L. J. Bk. 1.

(*d*) *Roberts v. Brett* (1865), 34 L. J. C. P. 211; 11 H. L. C. 337.

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debtor a reasonable time after demand or notice to get the money, and to find the creditor or some one authorised to receive it (e). A contract by a manufacturer to execute an order for goods "as soon as possible" means as soon as he reasonably can, having regard to the capacity of his works and to orders already on hand, but without regard to defects in the works; and he is not bound to supply the goods from other works (f).

In the computation of a given time "from" or "after" a certain act or event, the day of the act or event is presumptively to be excluded, and the last day of the given time included (g). A lease for a term of years from a certain day presumptively excludes that day, and includes the corresponding day in the last year of the term (h); and a term of years or months "from the death" of a person is exclusive of the day of the death (i). "Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment" (k). Upon a sale of goods to be paid for in a month, the time is computed exclusive of the day of sale (l).—A notice required as a condition precedent to any right or claim, as a month's notice of action, or a week's notice to quit is computed exclusively of the day of the notice (m); and a notice to be given "within" a certain time after an event is presumptively exclusive of the day of the event (n).—A policy of insurance on a ship during a voyage to certain ports "and during thirty days' stay in her last port of discharge" is construed to mean thirty days exclusive of the day of arrival in port (o). And a policy of insurance against accidents "for twelve calendar months from the 24th November," was held

Computation of time; "from," "after," &c.

Time of notice.

Duration of insurance.

(e) *Toms v. Wilson* (1863), 32 L. J. Q. B. 382; 4 B. & S. 455; *Moore v. Shelley* (1883), 52 L. J. P. C. 35; 8 Ap. Ca. 285.

(f) *Attwood v. Emery* (1856), 26 L. J. C. P. 73; 1 C. B. N. S. 110; *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670.

(g) *Robinson v. Waddington* (1849), 18 L. J. Q. B. 250; 13 Q. B. 753; *S. Staffs. Tram. v. Sickness Assoc.* (1890), 60 L. J. Q. B. 47; (1891) 1 Q. B. 402. See *Ex p. Hasluck* (1895), 64 L. J. Q. B. 694; (1895) 2 Q. B. 264.

(h) *Ackland v. Lutley* (1839), 8 L. J. Q. B. 161; 9 A. & E. 879.

(i) *Lester v. Garland* (1808), 15 Ves.

257; *Gorst v. Lowndes* (1811), 10 L. J. C. 161; 11 Sim. 434.

(k) Bills of Exchange Act, 1882, s. 14. See ante, p. 613.

(l) *Webb v. Fairmaner* (1838), 7 L. J. Ex. 140; 3 M. & W. 473.

(m) *Freeman v. Read* (1863), 32 L. J. M. C. 236; 4 B. & S. 174; *Siddebotam v. Holland* (1894), 64 L. J. Q. B. 200; (1895) 1 Q. B. 378.

(n) *Radclyffe v. Bartholomew* (1891), 61 L. J. M. C. 161; (1892) 1 Q. B. 161.

(o) *Mercantile Marine Insur. v. Titherington* (1864), 34 L. J. Q. B. 11; 5 B. & S. 765.

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Meaning of
"at,"
"on," &c.

Date of
instrument.

Reference to
date.

to apply to an accident which happened on the 24th November following (*p*).

The words "at," "on," "upon," "until," a certain time or event, or like terms used in relation to time, may mean *before*, or *simultaneously with*, or *after* the act or event, according to the reasonable construction of the context (*q*). A policy of insurance for six months "from 14th February until 14th August" was construed as inclusive of 14th August, on which day a fire happened for which the insurers were held liable (*r*). Under a bill of lading making the freight payable "on right delivery of the cargo," the delivery of the cargo and payment of freight are concurrent acts, requiring a concurrent readiness to perform them (*s*). A term or period of time commencing "on" a given day presumptively includes that day; and if terminating "on" the day, excludes it; and if terminating "with" the day, includes it (*t*). A contract of service commencing from a stated day is presumptively exclusive of the day; and a service commencing on a day is inclusive of it; but the construction may be made to conform with the apparent intention of the parties (*u*).

Deeds and all other instruments, as bills of exchange, agreements, and letters, are presumed to have been executed or signed and issued at the time they bear date (*x*); but the time of execution or signature, being an extrinsic fact, may be alleged and proved according to the fact (*y*); and the instrument may be construed and operate according to the contents, with reference to the time of execution and not of the date (*z*). Where reference is made in a deed to the date, it presumptively means the date on the deed and not the time of delivery; but if the deed bears no date, or a void or impossible date, as the 30th February, it may be construed to mean the time of delivery in order to give effect

(*p*) *S. Staffs. Tram. v. Sick &ss Assoc.* (1890), 30 L. J. Q. B. 47; (1891) 1 Q. B. 402.

(*q*) *Per cur. Reg. v. Arkwright* (1848), 18 L. J. Q. B. 86; 12 Q. B. 970; *Backhouse v. Mellor* (1859), 28 L. J. Ex. 141; 4 H. & N. 116.

(*r*) *Isaacs v. Royal Insce.* (1870), 39 L. J. Ex. 189; L. R. 5 Ex. 296.

(*s*) *Paynter v. James* (1867), L. R. 2 C. P. 348; affirmed (1868), 18 L. T. 449; 16 W. R. 768.

(*t*) *Grove, J., Campbell v. Strangeways* (1877), 47 L. J. M. C. 6; 3 C. P. D. 105; *Sidebotham v. Holland* (1894), 64

L. J. Q. B. 200; (1895) 1 Q. B. 378.

(*u*) *Wilkinson v. Gaston* (1846), 15 L. J. Q. B. 339; 9 Q. B. 137.

(*v*) *Sinclair v. Baggaley* (1838), 7 L. J. Ex. 305; 4 M. & W. 312; *Anderson v. Weston* (1840), 9 L. J. C. P. 194; 6 Bing. N. C. 296; *Potez v. Glossop* (1848), 2 Ex. 191; Bills of Exchange Act, 1882, ss. 12, 13.

(*y*) *Hall v. Cazenove* (1804), 4 East, 477; *Steele v. Mart* (1825), 4 B. & C. 272.

(*z*) *Jayne v. Hughes* (1854), 24 L. J. Ex. 115; 10 Ex. 430.

to the deed (*a*). A lease for a term of years to commence "on" or "from" a named date is computed exclusively of that day (*b*). But a lease for a term to commence "from the day of the date," executed under a power to grant leases in possession and not in reversion, was construed as including the day of the date, in order to effectuate the intention of granting a lease in possession (*c*). A lease expressed to commence on the 25th March next after the date, but executed in fact after that 25th March, was held a good lease in possession, because it took effect from the execution (*d*). A lease for a term to commence "from henceforth" or "from the making hereof," or without expressly fixing the commencement, is computed from the delivery and not from the date, and including the whole day of delivery as part of the term; but a lease "from the day of making thereof" or "from the day of delivery," is exclusive of that day (*e*). A lease dated 25th March, Lady-day, for a term "from Lady-day now last past," and executed after the date, was construed to create a term commencing from the Lady-day next before the execution, that is, from the date of the lease, and not from the Lady-day next before that date (*f*).

Fractions of a day are not in general considered in law, unless Day. it becomes necessary to determine which of two events happened first (*g*). Where two deeds concerning the same matter are dated the same day, they take priority according to the time of execution; subject to the intention appearing as to the order of operation, as in the case of debentures of a company, sealed and numbered consecutively, which were held to take effect *pari passu* as one charge, and not in the order of execution (*h*). In the case of a charter-party, the meaning of the parties must be ascertained from the context, and the word "day" or "days" may, according to the circumstances, include fractions of a day or mean working days, or running days, and therefore exclude or include Sun-

(*a*) *Stykes v. Wandle* (1825), 4 L. J. O. S. K. B. 81; 4 B. & C. 908.

(*b*) See *Ackland v. Lintley* (1839), 8 L. J. Q. B. 161; 9 A. & E. 879; *Sidobotham v. Hulland* (1891), 64 L. J. Q. B. 200; (1895) 1 Q. B. 378.

(*c*) *Fugh v. Leeds (Duke)* (1777), 2 Cowp. 714.

(*d*) *Doe v. Day* (1809), 10 East, 427.

(*e*) Co. Lit. 46 b; *Clayton's case* (1586), 5 Co. 1. See *Doe v. Benjamin* (1839), 8 L. J. Q. B. 117; 9 A. & E. 644.

(*f*) *Steele v. Mart* (1825), 4 B. & C. 272.

(*g*) *Campbell v. Strangeways* (1877), 47 L. J. M. C. 6; 3 C. P. D. 195; *Clarke v. Bradlaugh* (1881), 50 L. J. Q. B. 678; 8 Q. B. D. 63; *Tabernacle Bg. Soc. v. Knight* (1892), 62 L. J. Q. B. 50; (1892) A. C. 298; *Ex p. Hasluck* (1895), 64 L. J. Q. B. 694; (1895) 2 Q. B. 264.

(*h*) *Garbide v. Silkstone Coal Co.* (1882), 51 L. J. C. 828; 21 Ch. D. 762.

PART IV. days (*i*). Despatch money agreed in charter-party at so much an hour of time saved in loading and unloading is computed on the whole time saved, and not on working hours only (*k*). Bills of exchange falling due on Sunday, Christmas-day, and Good Friday become due and payable on the preceding business day; bills falling due on a bank holiday under the Bank Holidays Act, 1871, are due and payable on the succeeding business day (*l*).—The term “month,” at common law means a lunar month, unless the context shows that it was intended to mean a calendar month; in the case of mercantile instruments, “month” also means lunar month, unless there be a usage in a particular trade, business, or place, or context, by which the word means calendar month, in which event it is construed as having that secondary meaning (*m*). “Six months’ notice” to determine a tenancy by agreement *prima facie* means six lunar months (*n*). But the half-year’s notice impliedly required to determine a tenancy from year to year means a customary half-year measured by the usual quarter days (*o*). The term “twelve-month” includes a whole year (*p*).—A lease by deed or writing to commence at Michaelmas or Martinmas means New Michaelmas or New Martinmas under the Act of Parliament altering the style; and extrinsic evidence of intention is not admissible (*q*). But under a parol lease commencing from Lady-day, evidence of the custom of the country was admitted to show that old Lady-day was intended (*r*). So in a parol theatrical contract the word year was construed in reference to a custom to mean the time during which the theatre was open for performances (*s*).—A covenant to pay a sum of money with interest “on the 29th day of February now next ensuing” was construed literally to refer to the next 29th day of February, and not to the next February,

(*i*) *Commercial S. S. Co. v. Benton* (1875), 44 L. J. Q. B. 219; L. R. 10 Q. B. 346; *The Katy* (1895), 64 L. J. P. 49; (1895) P. 56; *Yeoman v. Regem* (1904), 73 L. J. K. B. 904; (1904) 2 K. B. 429; *Houlder v. Weir* (1905), 74 L. J. K. B. 729; (1905) 2 K. B. 267. See *Nelson & Sons v. Nelson Line* (1907), 77 L. J. K. B. 456; (1908) A. C. 108.

(*k*) *Laing v. Holliday* (1878), 47 L. J. Q. B. 512; 3 Q. B. D. 437.

(*l*) Bills of Exchange Act, 1882, ss. 14, 92.

(*m*) *Simpson v. Margitson* (1847), 17 L. J. Q. B. 81; 11 Q. B. 23; *Bruno v. Moore* (1903), 73 L. J. C. 377; (1904) 1 Ch. 305.

(*n*) *Rogers v. Kingston-upon-Hull Dock* (1865), 34 L. J. C. 165. See *Barlow v. Teal* (1885), 54 L. J. Q. B. 564; 15 Q. B. D. 501.

(*o*) *Morgan v. Davies* (1878), 3 C. P. D. 260. See *Sidebotham v. Holland* (1894), 64 L. J. Q. B. 200; (1895) 1 Q. B. 378.

(*p*) *Catesby's case* (1607), 6 Co. 62 a.

(*q*) *Doe v. Lea* (1809), 11 East, 312; *Smith v. Walton* (1832), 1 L. J. C. P. 85; 8 Bing. 235.

(*r*) *Doe v. Benson* (1821), 4 B. & Ald. 588; *Denn v. Hopkinson* (1823), 3 D. & R. 507.

(*s*) *Grant v. Maddox* (1846), 16 L. J. Ex. 227; 15 M. & W. 737.

which was not in a leap year (*t*). Bills of exchange drawn at one month on the 28th or any following day in January become due, excluding the days of grace, on 28th February, or in leap year on the 29th (*u*).

CHAP. III.

Under a contract to pay money at a certain place, if an exact time is fixed, the debtor must tender at that place and time; and the creditor must attend there and then to receive the money. If a day or other period of time is allowed, the debtor has until the last convenient time of the day or period for payment at the place appointed; and the creditor is not required to be there to receive the money until that time; but if the parties meet at the place at any time during the day the debtor may then make a tender (*x*). If no time is fixed and the debtor may pay at any time during his life at a certain place, he must give reasonable notice of the time of payment, and the creditor must then attend at the place to receive it (*y*). Where two places are named for payment or performance the choice lies presumptively with the creditor or promisee, who must give notice of the place as a condition of charging the debtor or promisor as being in default (*z*).

Place of performance—payment of money.

If no certain place is appointed, the debtor is bound to find the creditor and tender him the money, provided he is within the realm; but if a certain place is appointed it is the duty of the creditor to attend at the place named to receive payment *a*. This rule applies in the case of a mortgage debt; or a bond conditioned for the payment of money; or a composition with creditors upon the terms of the debtor giving promissory notes for the amount of composition to each creditor (*b*). If the creditor by going abroad prevents payment or tender being made the debtor is excused (*c*). But the same rule does not apply to foreign contracts; and if the contract is for payment abroad, the absence

Where no place appointed.

(*t*) *Chapman v. Beecham* (1842, 12 L. J. Q. B. 42; 3 Q. B. 733.

(*u*) *Dennan, J., Migotti v. Colvill* (1879), 48 L. J. M. C. 50; 4 C. P. D. 236; Bills of Exchange Act, 1882, s. 14.

(*x*) *Wade's case* (1602), 5 Co. 114.
(*y*) Co. Lit. 211 a; *Sheppard's Touch.* 136.

(*z*) *Ripplinghall v. Lloyd* (1834), 5 B. & Ad. 742.

(*a*) *Robey v. Snacfell Co.* (1887), 57

L. J. Q. B. 134; 20 Q. B. D. 152; *Thorn v. City Rice Mills* (1888), 58

L. J. C. 297; 40 Ch. D. 357. See *Duval & Co. v. Gans* (1904), 73 L. J. K. B. 907; (1904) 2 K. B. 685.

(*b*) *Crauley v. Hillary* (1813), 2 M. & S. 120. See *Gyles v. Hall* (1726), 2 P. Wms. 377; *Cox v. Watson* (1877), 47 L. J. C. 263; 7 Ch. D. 196.

(*c*) Co. Lit. 210 b; *Sheppard's Touch.* 378.

PART IV. of the creditor abroad is no excuse for not tendering him the money (*d*).

Payment of bills or notes.

Upon the same principle in the case of a bill, the acceptor is bound to find the holder when the instrument is due and to tender payment; and he is not entitled to notice of indorsement; or to presentment, unless the payment is expressly conditioned upon presentment at a particular place (*e*). But a bill so drawn must be presented according to its terms in order to charge the drawer or indorser for non-payment by the acceptor (*f*). And a promissory note need not be presented for payment unless it is in the body of it made payable at a particular place, in which case it must be duly presented there for payment (*g*).

Payment of rent reserved.

Where rent is reserved upon a lease without appointing a place of payment, it is sufficient for the tenant to be ready upon the land, at the most notorious place, a sufficient time before sunset for payment, so far as to protect himself from an action of debt upon the reservation, or from a forfeiture under a condition, or from a distress; because, as the rent issues out of the land, the lessor ought to be there ready to receive it; and it is necessary at common law for the lessor, in order to entitle himself to re-enter for a forfeiture, to make a demand at the same time and place (*h*). The Common Law Procedure Act, 1852, s. 210, enables a landlord to proceed in ejectment upon his right of entry without a formal demand of the rent, if a half-year's rent is due before service of the writ and no sufficient distress is to be found on the demised premises countervailing the arrears there due (*i*). Under an express covenant to pay rent, if no place is appointed, the covenantor, as in other cases, must find the covenantee and tender him the money when due; and it is not sufficient merely to be ready to pay the money on the land (*k*). He may discharge the covenant

Covenant to pay rent.

(*d*) *Fessard v. Mugnier* (1861), 31 L. J. C. P. 126; 18 C. B. N. S. 286. See *Cumby v. Leyland* (1898), 67 L. J. Q. B. 884; (1898) A. C. 524.

(*e*) Bills of Exchange Act, 1882, ss. 19, 52, 54; *Turner v. Hayden* (1825), 4 B. & C. 1; *Peole v. Tunbridge* (1837), 6 L. J. Ex. 74; 2 M. & W. 223; *Halstead v. Skelton* (1843), 13 L. J. Q. B. 177; 5 Q. B. 92. See *Meuer v. De Croix* (1891), 61 L. J. Q. B. 205; (1891) A. C. 520.

(*f*) *Gibb v. Mather* (1832), 1 L. J. Ex. 87; 8 Bing. 214; *Saul v. Jones* (1838),

28 L. J. Q. B. 37; 1 E. & E. 59.

(*g*) Bills of Exchange Act, 1882, ss. 87, 88; *Emblin v. Dartnell* (1844), 13 L. J. Ex. 255; 12 M. & W. 830; *Vanderdonckt v. Thellusson* (1840), 19 L. J. C. P. 12; 8 C. B. 812.

(*h*) *Duppi v. Mayo* (1669), 1 Wms. Saund. 434, n. (11); *Tinckler v. Pringle* (1812), 4 Taunt. 549.

(*i*) *Do v. Wandlass* (1797), 7 T. R. 117; *Thomas v. Latham* (1895), 61 L. J. Q. B. 720; (1895) 2 Q. B. 400.

(*k*) *Haldane v. Johnson* (1853), 22 L. J. Ex. 264; 8 Ex. 689.

by payment or tender to the lessor at any convenient time before midnight of the last day for payment, if he can be met with, on or off the land (l). CHAP. III.

The contract of a carrier to deliver goods at a certain place is performed by carrying the goods to their destination and holding them there ready for delivery; if the goods are not claimed within a reasonable time after notice of their arrival, the liability of the carrier as an insurer of their safety ceases, and his liability is that of a warehouseman only, for damage due to negligence, while the goods remain in his possession (m). A charter-party contracting for the arrival of the ship at a certain port, certain perils and accidents excepted, is not discharged by accidents not excepted; and delay from excepted accidents, though excused by the exception, does not discharge subsequent performance (n). If the charter-party contracts for the arrival of the ship at the port of discharge "or so near thereto as it can safely get," the charterer is bound to take delivery from the latter place; and he is chargeable with the lighterage necessary for discharging cargo at that place (o). The shipper or consignee of the goods may dispense with completion of the voyage and accept delivery of the goods at a place short of the destination contracted for, which will in effect be equivalent to performance (p).—A contract of sale of goods, not appointing a place for delivery, is discharged by delivery at the seller's place of business, if he have one, and if not, at his residence (q). Under a contract to deliver goods, not appointing a place for delivery the promiser may require the promisee to appoint a proper place or mode of delivery, and will be discharged by a delivery according to his instructions (r).

A contract is presumptively construed and regulated, as to performance and its incidents, by the law and usages of the place of Lex loci solutionis.

(l) Parke, B., *Startup v. Macdonald* (1843), 12 L. J. Ex. 477; 6 Mun. & G. 625.

(m) *Bourne v. Gatliffe* (1844), 11 Cl. & F. 45; *G. W. Ry. v. Crouch* (1858), 27 L. J. Ex. 345; 3 H. & N. 183; *Shepherd v. Bristol & Exeter Ry.* (1868), 37 L. J. Ex. 113; L. R. 3 Ex. 189; *Hough v. L. & N. W. Ry.* (1870), 39 L. J. Ex. 48; L. R. 5 Ex. 51; *Chapman v. G. W. Ry.* (1880), 49 L. J. Q. B. 420; 5 Q. B. D. 278.

(n) *Schilizzi v. Derry* (1855), 24 L. J. Q. B. 193; 4 E. & B. 873; *Metcalf v.*

Britannia Ironworks Co. (1877), 46 L. J. Q. B. 413; 2 Q. B. D. 42; *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (1908), 77 L. J. K. B. 977; (1908) A. C. 406.

(o) *Hayton v. Irwin* (1880), 5 C. P. D. 130; *Dahl v. Nelson* (1881), 50 L. J. C. 411; 6 Ap. Ca. 33.

(p) *Houlder v. Merchants' Innes* (1886), 55 L. J. Q. B. 420; 17 Q. B. D. 354. See *Leather Cloth Co. v. Hieronimus* (1874), 44 L. J. Q. B. 54; L. R. 10 Q. B. 140.

(q) *Sale of Goods Act*, 1893, s. 29

(r) *Co. Lit.* 210 b.

PART IV.*Lex loci contractus.*

performance, *lex loci solutionis* (s); and as a corollary to this rule contracts relating to land are governed by the *lex loci rei sitæ* (t). Foreign bills of exchange, that is, bills drawn for payment abroad, are regulated as regards the incidents of acceptance, indorsement, presentment, payment, notice of dishonour, and protest, by the law of the place of payment (u). Upon the same principle an authority given to an agent to act in another country must be valid and must be executed according to the law of that country (x).—This rule operates in exception of the more general rule that a contract is to be construed and regulated *prima facie* by the law of the place where made, *lex loci contractus* (y).

(s) *Robinson v. Bland* (1760), 2 Burr. 1077; *Moulis v. Owen* (1907), 76 L. J. K. II 396; (1907) 1 K. B. 746.

(t) *Waterhouse v. Stansfield* (1851, 1852), 21 L. J. C. 881; 9 Ha. 234; 10 Ha. 251; *Bank of Africa v. Cohen* (1909), 78 L. J. C. 767; (1909) 2 Ch. 129.

(u) Bills of Exchange Act, 1882, s. 72; *Rouquette v. Overmann* (1875), 44 L. J. Q. B. 221; L. R. 10 Q. B. 525; *Horne*

v. Rouquette (1878), 3 Q. B. D. 514; *Alcock v. Smith* (1891), 61 L. J. C. 161; (1892) 1 Ch. 238; *Embaricos v. Anglo-Austrian Bk.* (1905), 74 L. J. K. B. 326; (1905) 1 K. B. 677.

(x) *Chateaugay v. Brazilian Tel. Co.* (1890), 61 L. J. Q. B. 295; (1891) 1 Q. B. 79.

(y) See *ante*, p. 135.

CANADIAN NOTES.

Performance.

In *Mayer vs. The Queen*, 21 S. C. R., 454, the contract with the Dominion Government for the building of a bridge called for timber of a special kind, which the contractor could only procure in North Carolina. The timber has, to be treated in a special manner to the satisfaction of the proper officer in that behalf. By another term of the contract it was declared that 'the express covenants and agreements therein should be the only rights upon which any claim against the Crown should be founded. Immediately after entering upon the execution of his contract the suppliant notified the proper officer that he intended to procure the timber at a certain place and have it treated there before shipment. The officer approved of the proposal and promised to appoint a suitable person to inspect at that place, but the inspector was not appointed until after a considerable delay, which obliged the suppliant to pay a higher rate of freight on the timber than otherwise.

It was held that the Crown was not bound under the contract to pay the inspection made at any particular place, and that, in view of section 98 of the Government Railways Act, 1881, and the express terms of the contract, the officer had no power to vary or add to its terms or bind the Crown by any new promise.

In *Taylor vs. The Postmaster-General*, 33 F. C. Q. B., 264, the plaintiff contracted with a Mr. Hartney, as clerk of the Joint Committee of both Houses of Parliament, to do the printing for both Houses at schedule prices. Later, in the same year, plaintiff contracted with Her Majesty for all the printing required for the several departments, including the Postmaster-General's, at schedule prices, which were lower than those under the first contract, and were so tendered for, as alleged by the plaintiff, because he expected in cases where similar matter was required under both contracts to use the same type for both. When the contracts were entered into the custom was for the annual report of the department to be printed on the order of and paid for by such department, and the copies required for Parliament were ordered and paid for separately by the clerk of the Joint Committee on Printing, but afterwards, by resolution of the committee, concurred in by the House, it was directed that the

annual reports should be printed on the order of the committee under the first contract, including a sufficient number for the use of the department with which the department should be charged.

It was held that the plaintiff had no right to charge under the second contract for the extra number required for the department and for the composition as if reset for the department.

In *Lakin vs. Nuttall*, 3 S. C. R., 685 Lakin agreed "to run according to his best art and skill a tunnel of two hundred feet for the sum of four dollars per running foot; that \$150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." He made five tunnels, none of which were two hundred feet, but claimed he had done in all two hundred and four feet. In addition to the count for a balance due on the agreement the plaintiff's declaration contained the common counts for work and labour. It was held that there was not a sufficient fulfilment of the agreement, and, inasmuch as Lakin had given no particulars nor any evidence under the indebitatus counts, the rule absolute of the Court below, ordering judgment to be entered for the defendant, should be affirmed and the appeal dismissed.

The suppliant's contract also contained a clause providing that the contractor should have no claim by reason of any delay in the progress of the work arising from the acts of any of Her Majesty's agents. This clause was held by the Exchequer Court to cover the case of delay of the Government's engineer in causing an inspection to be made of material whereby the suppliant suffered loss. *Mayes vs. The Queen*, 2 Ex. C. R., 403.

In *Bélanger vs. Bélanger*, 24 S. C. R., 678, two partners who had published a newspaper as partners or joint owners entered into an agreement by which one of them assumed all the debts and became sole proprietor, binding himself to continue his publication, and in case he wished to sell out to give the other the preference, the latter becoming editor and director at a sum specified. The paper was published for some time under this agreement as a supporter of the Liberal party, when the editor, without instruction from or permission from the sole proprietor, wrote editorials violently opposing the candidate of that party, and was dismissed. It was held that the agree-

ment he had become the employee of the proprietor and had no right to change the political colour of the paper without the owner's consent, and was rightly dismissed.

In *Great Western Railway Company vs. Desjardins Canal Company*, 9 Grant's Ch., 503, two incorporated trading companies agreed by writing, the one to construet certain works for the other, which, on completion, were to be inspected by engineers on behalf of each of the contracting parties. The work having been performed by one of the companies and notice given to the other to appoint an engineer to inspect, the request was not complied with, and subsequently a portion of the works contracted for was destroyed. It was held that the delay in naming an engineer did not preclude the contracting party from obtaining an inspection of the works, but that such inspection and approval must, under the circumstances, be had by reference to a master.

In *Fisher vs. Cassady*, 14 Ont. P. R., 577, where the defendants in British Columbia offered by letter to sell to the plaintiffs in Ontario a cargo of lumber according to sample previously furnished and the plaintiff accepted the offer by letter, and it was agreed between the parties that the lumber was to be shipped at Vancouver and delivered at Toronto, to be then paid for by means of a draft, it was held that the purchaser had the right to make the inspection of the bulk at Toronto before accepting or paying.

In *Thomson vs. Matheson*, 30 S. C. R., 357, a contract for the sale of lumber was made wholly by correspondence, and a letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here, viz., at Windsor, by a competent inspector, to be agreed upon between buyer and seller, and his inspection to be final." It was held that it was not essential for the parties to agree upon an inspector before the inspection was begun and the party chosen having inspected the lumber, and before his work was completed, the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties.

In *Reynolds vs. Shuter et al.*, 3 U. C. Q. B., 377, the defendants were taken by the plaintiff to a quantity of timber already made upon the ground, and, having seen the timber, contracted with the plaintiff to draw it out and well and truly deliver it to the plaintiff on the bank of a river, plaintiff having agreed with the proprietor of the land to purchase from him all the standing trees that would make merchantable timber of a certain description. The defendants, to suit their convenience in drawing out the timber, cut it in two without permission of the plaintiff, and drew it to the river in that altered state, which was held not to be a delivery with the meaning of the contract.

In *Becher vs. The Town of Amherstburgh*, 23 U. C. C. P., 602, it was questioned whether when a contract was to pay at a particular place named in a declaration the general averment that the defendant did not pay was not sufficient, and whether any contention as to the plaintiff not being at the place named to receive the money, or that the defendant was there ready to pay must not arise by way of defence.

Performance to Earn Commission.

In *McDonald vs. Manning*, 19 S. C. R., 112, plaintiff agreed to become surety for McDonald & Shields by endorsing their promissory note, and they on their part agreed to transfer certain property to him as security, to do everything necessary to realize the securities, protect him against loss and pay him a commission. The note was made and endorsed and the securities transferred, but McDonald & Shields were unable to discount the note at the bank where it was made payable, and, having afterwards quarrelled with each other, never used the note.

It was held that plaintiff, having done everything on his part to be done to earn the commission, and having no control over the note, and being in no way responsible for the failure to discount it, was entitled to his commission.

Promisee Entitled to Strict Performance.

In *Bingham vs. MacMurray*, 30 S. C. R., 159, by contract under seal, M. agreed to sell to B. & S. the patent for an acetylene gas machine, for which he had applied and a caveat had been filed, and also all improvements and patents for such machine

that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. & S. The latter received an assignment of a Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat, and they refused to pay the balance, and in an action by M. to recover the same they demanded by counter-claim a return of what had been paid on account. It was held that the agreement was not satisfied by an assignment of any patent that M. might thereafter obtain, that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement and that, as the evidence showed the variation therefrom in the American patent to be most material and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover; but it was held, further, that, as B. & S. had accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked it for their own profits and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use.

Substantial Performance.

In *Adams vs. McGreevy*, 17 Man., 115, in a contract to put in a system of steam-heating the work was found to have been done in a satisfactory manner and within reasonable time, but the plaintiffs had omitted to provide floor sealing plates around the pipes. These were shewn to cost about ten cents each and about four dollars in all. It was held that the omission of these plates should be considered so trifling that the plaintiffs should not thereby be deprived of the whole consideration of a contract substantially completed, and that the plaintiffs were entitled to recover.

Waiver.

In *Town of Richmond vs. LaFontaine*, 30 S. C. R., 155, a contract for the construction and maintenance of a system of water-works, required them to be completed in a manner satisfactory to the corporation, and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the

expiration of the time for the completion of the work the corporation served a protest upon the contractor, complaining in general terms of the unsatisfactory construction of the work, without specifying particular defects, but made use of the works complained of for about nine years, when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under the conditions of the contract. It was held that after the long delay, when the contractors could not be placed in the original position, the complaint must be deemed to have been waived by the acceptance and use of the water-works, and it would, under the circumstances, be inequitable to rescind the contract. It was held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action, and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default.

In *Sanders vs. Sutcliffe*, 38 N. S. R., 352, in answer to a letter from defendant complaining of delay in the commencement of the work and stating that on plaintiff's assurance he had promised the prospective tenant that the work would be completed by the 1st of March, plaintiff took the ground that the contract called for security, and offered to proceed with the work as soon as satisfactory security was given. There was nothing about security in the letters containing the offer and acceptance which constituted the contract, but defendant acquiesced and furnished the security asked for. It was held that, while defendant might have refused to give security and have insisted on the prosecution of the work in accordance with the terms of the contract, he could not, after assenting to and acting on plaintiff's requirements, claim that there was any breach of agreement on the 1st of March.

The judgment of the court deals with another question connected with the defendant's counterclaim for damages for loss of a tenant who had agreed to take a five years' lease. "To recover on this counterclaim the defendant must show that there was a contract by plaintiff to complete the vault by a specified date, and that he was so far aware of the agreement between the defendant and his proposed tenant that he must be taken to have contracted to bear the loss occasioned by the repudiation of the tenancy. Mere notice or knowledge of the special circum-

stances or purposes of one of the parties in making the contract does not render the other party liable for the special consequences of the breach or for the failure of the special purpose unless he has expressly or impliedly contracted upon the basis of such special circumstances and undertaken to be bound for the consequences. In order that the notice may have any effect it must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss." The citation is from this work and the author cites *Horne vs. Midland R'y.*, L. R. 8 C. P., 131, *infra*, page 767.

Contracts With Carriers of Goods.

In *Lake Erie and D. R. Railway Company vs. Sales*, 26 S. C. R., 663, the statement of claim set out that the respondents, plaintiffs, had purchased goods from parties in Toronto and elsewhere, to be delivered some to the Grand Trunk Railway Company and the rest to the Canadian Pacific and other companies, by the several said companies to be transferred to the Lake Erie, etc., Company for carriage to Merlin, and on the receipt by the Lake Erie Company it became their duty to carry the goods safely to Merlin and deliver them to plaintiffs. There was also an allegation of a contract by the Lake Erie Company for storage of the goods and delivery to the plaintiff when requested and of lack of proper care, whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Company at Merlin. It was held, reversing the decision of the Ontario Court of Appeal, that, as to the goods delivered to the Grand Trunk Railway to be transferred to the Lake Erie, as alleged, if the cause of action was one arising *ex delicto*, it must fail, as the evidence shewed that the goods were received from the Grand Trunk Railway for carriage under the terms of a special contract contained in the bill of lading and shipping notes given by the Grand Trunk Railway to the consignors; and if it was a cause of action founded on contract it must also fail, as the contract under which the goods were received by the Grand Trunk Railway provided, among other things, that the company would not be liable for the loss of goods by fire, that goods stored should be at the sole risk of the owners, and that the provision should apply to and for the benefit of every carrier. It was held, further, that, as to the goods delivered to the companies other than the Grand

Trunk Railway to be transferred to the Lake Erie Company, the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the Grand Trunk Railway, giving subsequent carriers the benefit of their provisions.

It was also held that as to goods carried on a bill of lading issued by the Lake Erie Company there was an express provision therein that owners should incur all risks of loss of goods in charge of the company as warehousemen, and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

In *Wilson vs. Canadian Development Company*, 33 S. C. R. 432, the head-note is as follows: "Conditions in a shipping receipt relieving the carrier from liability for loss or damages arising out of the safe-keeping and carriage of the goods, even though caused by the carelessness, negligence or want of skill of the company officers, servants or workmen, without the actual fault or privity of the carrier, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. A shipping receipt with terms as above was for carriage of goods by the defendants and other connecting lines of transportation, and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff, but delivered the receipts to his agent at the point of shipment, with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of nonpayment of freight, by one of the companies in control of a connecting line, to which the goods had been delivered by the defendants. It was held that the plaintiff's agent at the shipping point had no authority as such to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale so made at the intermediate point amounted to a wrongful conversion of the goods by the defend-

ams, and that they were not exempted from liability in respect thereof at their full value under the terms of the shipping receipt."

In *Grand Trunk Railway Company vs. MacMillan*, 16 S. C. R., 543, one of the conditions in a contract to carry goods to a place beyond the terminus of the company's line provided that the company should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them if such loss, misdelivery, damage or detention occurred after said goods arrived at the stations or places on their line nearest to the points or places which they were consigned to or beyond their said limits. It was held that this condition would not relieve the company from liability for loss or damage occurring during transit, even if such loss occurred beyond the limits of the company's own line. Strong and Taschereau, JJ., held that the loss having occurred after the transit was over and the goods delivered at the place designated and the liability of the carriers having ceased, this condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in custody of the company on whose line the place was situate as bailee for the shipper. Fournier and Gwynne, JJ., dissenting.

In *Northern Pacific Railway Company vs. Grant* 24 S. C. R., 546, a party in British Columbia being about to purchase goods from one in Ontario, signed, on the request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to the latter, asking him to ship goods via Grand Trunk Railway and Chicago and N. W., care Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to the vendor and wrote to him: "I enclose you card of advice, and if you will kindly fill it up when you make the shipment and send it to me I will trace and hurry them through and advise you of delivery to consignee." The vendor shipped the goods as suggested by the letter, deliverable to his own order in British Columbia. It was held, affirming the judgment appealed from, that, on arrival of the goods at St. Paul, the Northern Pacific

Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage, that they were in the care of said company from St. Paul to British Columbia, that the freight agent at Toronto had authority so to bind the company, and that the company was liable to the vendor for the value of the goods, which were delivered at British Columbia without an order from the vendor and not paid for.

In *Van Buskirk vs. The North River Lumber Company*, 40 N. S. R., 532, it was held that where a charter party provided that a steamer was to be loaded with the greatest possible despatch day and night, but there was no provision as to the time and manner of unloading, the law implied an obligation to discharge with all reasonable diligence, having regard to the situation and circumstances existing and the appliances in use at the time at the port of discharge. It was held, also, that it was a misdirection to instruct the jury that the provision in the contract that the steamer was to be loaded with all possible despatch, night and day, was an element to be taken into consideration in determining what was reasonable diligence.

In *Larned vs. McRae*, 1 U. C. Q. B., 100, where defendant agreed to return a steamer chartered on a certain day in good repair, dangers of the lake excepted, a plea that before the day arrived the plaintiff took the boat from defendant without his consent and kept her was held sufficient though not in express terms confessing and avoiding the fact of not returning the boat.

Carriers of Passengers.

In *Alexander vs. Toronto and Nipissing Railway Company*, 33 U. C. Q. B., 474, the declaration was that A was lawfully on the platform on a station on defendant's railway, and the defendant, by negligence in driving their engine and carriages, struck and killed him. To this a plea was held good that A. was a newsboy in the employ of parties named vending papers on defendant's train under an agreement between his employers and the company, which provided that the company should carry the newsboys on their trains and should not be liable for any injury to their persons or property, whether occasioned by

defendant's negligence or otherwise, without alleging that the newsboy was a party to or aware of the agreement.

Time for Performance—Delay.

In *Grange vs. McLennan*, 9 S. C. R., 385, the plaintiff agreed to sell a farm to the defendant, then a minor, for \$1,200, of which \$500 was paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at seven per cent., defendant to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed if instalments were paid as they became due; but, if defendant failed to make such payment, he was to forfeit all right to the deed and all monies paid, which then would be considered as rent, the agreement in such case to be null and void and the parties to be considered lessor and lessee. The defendant became of age and left the country without ratifying the sale. He paid none of the instalments, and plaintiff regained possession of the farm. Some time afterwards defendant returned, tendered the balance of the price and claimed the farm. It was held that the condition of the promise of sale not having been complied with within the time specified in the contract, the terms of the contract placed the plaintiff *en demeure* without the necessity for any formal demand, immediately upon failure in the performance of the condition, when *ipso facto* the relation of the parties became changed from that of vendor and vendee to lessor and lessee.

In *Nixon vs. Logic*, 4 Man., 366, there was great delay on the part of a vendor who was seeking performance of a contract for purchase of land. The transaction was one of a speculative character, speculation being described by one of the witnesses as being very wild at the time. As it appeared clear that the vendor could not have made a clear title at the time the purchase money was payable, nor for three years thereafter, the court declined to enforce the contract at the suit of the vendor against the purchaser.

Provisions as to Delay, Etc.

In *Mangan vs. The Town of Windsor*, 24 O. R., 675, a contract for the construction of a sewer was made between the plaintiff and defendant, payment to be made according to

schedule prices, and providing for completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion at the cost of the plaintiff, and, by the specifications which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension, exercised the power conferred. It was held that under the contract the power so conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications it could be exercised thereafter, and, therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specification.

When Time is of the Essence.

In *Dairty vs. Vidal*, 13 O. A. R., 47, the plaintiff was the lessee of certain premises, the lease having nearly a year to run, when he was applied to about the 13th of January on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested he did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as the principal ground for refusal the non-delivery by the day named. It was held that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed upon.

In *Barlow vs. Williams*, 16 Man., 164, time was made the essence of the contract, but it was held that the intention of the

parties must nevertheless be looked at, and that where the circumstances shewed that it was not the real intention of the vendors to insist upon the contract being strictly carried out, the stipulation was only in the nature of a penalty which the Court of Equity should relieve against.

Contract of Hiring and Service.

In *Bain vs. Anderson & Co.*, 28 S. C. R., 481, it was held that where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case. A business having been sold, the foreman who was engaged for a year was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages, claiming that his retention for the month was a re-engagement for another year on the same terms.

It was held, affirming the judgment appealed from, that, as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reduction of expenses in salary, as he had been informed that the contract with the employees had not been assumed by the purchaser, and as, upon his own evidence, there was no hiring for any definite period, but merely a temporary arrangement until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed.

In *Dogbe vs. Wurtzburg*, 32 N. S., 107, plaintiff and defendant entered into a contract in writing for the hiring of plaintiff by defendant, the term of hiring to commence on the 25th of April and defendant reserving to himself, if he had cause, the right to discharge plaintiff at any time during the engagement, paying him up to the day of his discharge. On the 7th of April defendant wrote plaintiff that, as the season was going to open much earlier than usual, they would have to start before the appointed time, and requested plaintiff to report himself at Halifax on

Tuesday next, April 12. Plaintiff reported himself as requested and was discharged the following day by defendant, who tendered him a sum sufficient to cover his time and expenses up to the time of his discharge. It was held that the plaintiff was employed under the terms of the written agreement at the time of his dismissal, and also that, under the reservation in the contract, defendant had the right to discharge plaintiff at any time provided he acted *bona fide* and without malice.

In *Griggs vs. Billington*, 27 F. C. Q. B., 520, the defendant hired the plaintiff to make for him certain machines and superintend their use in his manufactory for five years unless before terminated as thereafter provided, and in case of failure of the plaintiff to perform fully the agreement it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to the defendant in damages for such failure, and in case any dispute should arise as to the sufficiency of the machine or plaintiff's performance of the agreement, the same should be referred to arbitration. To an action by the plaintiff for wrongful dismissal defendant pleaded termination by him of the agreement by written notice because of the plaintiff's failure to perform it in certain particulars specified. It was held that the defendant was bound to establish the ground mentioned in his notice for terminating his agreement.

In *Teal vs. Clarkson*, 4 F. C. Q. B., O. S., 372, the defendant purchased land, for which he gave in payment notes payable in work at fixed prices. It was held that it was incumbent upon him to tender the work to the plaintiff, and that an action would be sustained to recover the amount of such notes in money, without proving a specific demand of work or a refusal by the defendant to perform such work on demand made.

In *Whitlaw vs. Riverview Realty Company*, 19 Man., 746, there was a provision in an agreement for the sale of land to the plaintiff that in case the purchaser should at any time make default in any of the payments to be made by him, etc., the vendor should be at liberty after such default, with or without notice, to either cancel the contract or proceed to another sale of the land. Time was in the agreement declared to be the essence of it. Notice was accordingly given that by reason of

default in the payments of two instalments due September, 1907, and September, 1908, the vendors thereby cancelled the agreement and declared the same void.

It was held that the contract was not rescinded by the notice. Howell, C. J., dissenting, held that the plaintiff had been guilty of such laches and unexplained delay that he was not entitled to any relief.

The cases in which a decree for specific performance will be granted, notwithstanding that time has been made of the essence of the contract, will be found collected in the Canadian Notes to Fry on Specific Performance, page 550.

In *The King vs. Stewart*, 32 S. C. R., 483, it had been held in the Exchequer Court, 7 Ex. C. R., 55, as follows: "There may be some question as to whether *Walter vs. The London and North-Western Railway Company*, L. R. 1, 1; C. P. D., 518, should be accepted as establishing a general proposition, that if in contracts creating a forfeiture for not proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date, but at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must with reference to such reasonable time for completion make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide having regard to a time that in the opinion of the Court is reasonable, and the contractor is to have notice of his decision." It was held by the Supreme Court that, inasmuch as it was not competent to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands or that, in case the engineer had done so, he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration.

Lex Fori.

In *Canadian Fire Insurance Company vs. Robinson*, 31 S. C. R., 488, it is laid down that the *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different.

CHAPTER 7.

TENDER.

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“WITHOUT acceptance on the part of him who is to receive, the act of him who is to deliver or pay can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made” (a). Accordingly, “the principle of the plea of tender is, that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance, by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*), but must be accompanied by a *profert in curiam* of the money tendered,” or according to the present practice, by payment into court (b).

Tender of
payment of
debt.

“With respect to the averment of *toujours prêt*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore if

Continued
readiness
to pay.

(a) Rolfe, B., *Startup v. Macdonald* (1843), 12 L. J. C. P. 477; 6 Man. & G. 610.

(b) *Per cur.* *Dixon v. Clark* (1847), 16 L. J. C. P. 237; 5 C. B. 377; Ord. XXII. r. 3.

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Payment
into court.

he can show that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea" (c). But a tender is not avoided by a demand of a larger sum than is due on account of the debt; for the refusal to pay the larger sum is no evidence of an unwillingness to pay the due amount (d). The money paid into court, and taken out by the plaintiff, is not to be considered as money recovered in the action, because the defence shows that it might have been recovered without action; and therefore it cannot be reckoned towards the amount for which the plaintiff would be entitled to sue in the superior courts instead of the county courts, or for which he would be entitled to have his costs taxed upon the higher scale (e). A mortgagee, although entitled to his costs as a matter of contract, upon refusal of a sufficient sum tendered to him for his principal, interest and costs, may be made to pay the costs of a redemption suit (f). But a tender which is refused is not equivalent to payment in discharging mortgaged property, as in the case of a pledge of chattels at common law (g).

Tender of
delivery of
goods.

A contract to deliver goods is completely discharged by tendering the goods for acceptance according to the contract; and if acceptance is refused there is no further obligation to continue ready to deliver (h). "If a man be bound in 200 quarters of wheat for delivery of a 100 quarters, if the obligor tender at the day a 100 quarters, he shall not plead *uncore prist*, because albeit it be parcel of the condition, yet they be *bona peritura*, and it is a charge to the obligor to keep them" (i).

Time of
tender:—
Debts
payable on
day certain.

If the debt is payable on a day certain, tender must be made on that day. Tender *ante diem* of a debt accruing due, unless accepted, is void of effect: as tender of the amount of a bill before it is due which, if accepted, operates as a purchase of the bill, and not as payment (k).—A plea by the acceptor of a bill,

Tender
post diem.

(c) *Per cur.* Dixon v. Clark (1847), 16 L. J. C. P. 237; 5 C. B. 365.

(d) *Brandon v. Newington* (1842), 12 L. J. Q. B. 20; 3 Q. B. 915.

(e) *James v. Vane* (1860), 29 L. J. Q. B. 169; 2 E. & E. 883.

(f) *Harmer v. Priestley* (1853), 22 L. J. C. 1041; 16 Beav. 569; *Hosken v. Sincock* (1855), 34 L. J. C. 445; *Greenwood v. Sutcliffe* (1891), 61 L. J. C. 59; (1892)

1 Ch. 1.

(g) *Bank of New S. Wales v. O'Connor* (1889), 58 L. J. P. C. 82; 14 Ap. Ca. 273.

(h) See *ante*, p. 479.

(i) Co. Lit. 207 a.

(k) Bills of Exchange Act, 1882, s. 59; *Bowen, L. J., Richardson v. Harris* (1869), 22 Q. B. D. 275. See *Fletcher v. Henington* (1759), 2 Burr. 944.

or the maker of a note, of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender, but also from the time when the bill or note became payable (*l*); for the drawer or indorser must pay immediately upon receipt of notice of dishonour (*m*). A covenant to pay on a certain day can be discharged only by actual payment or tender on that day; though if the party afterwards chooses to receive the money, the payment may operate and be pleaded by way of accord and satisfaction (*n*). Payment *post diem* discharges a money bond by force of the statute 4 & 5 Anne, c. 16, s. 12; but this enactment does not enable the obligor to tender *post diem*, and the obligee may refuse a tender so made (*o*). Where there is a margin of time for performance, tender may be made and repeated, if necessary, within the limit of time; thus, where a seller tendered goods in discharge of his contract, which were refused, and upon arbitration were adjudged insufficient, it was held that he might tender other sufficient goods within the time limited by the contract (*p*).

Debts may be contracted with indefinite credit, which the creditor may terminate at any time by demanding payment, or by commencing an action; and which the debtor may terminate by tender. A promissory note payable on demand is presumptively due immediately on demand; and the right of the creditor is so far complete at the date of the note that the Statute of Limitation runs against him from that date (*q*). But such a note is not considered as overdue so as to affect an indorsee with its equities (*r*); nor does it charge an indorser without presentment for payment (*s*); and a tender of the amount due upon the note may be made at any time before an actual

Debts of
indefinite
credit.

(*l*) *Dobie v. Larkan* (1855), 10 Ex. 776.

(*m*) Bills of Exchange Act, 1882, ss. 47 (2), 55; *Siggers v. Lewis* (1834), 3 L. J. Ex. 312; 1 Cr. M. & R. 370.

(*n*) *Parke, B., Poole v. Timbridge* (1837), 6 L. J. Ex. 74; 2 M. & W. 226.

(*o*) *Forrell v. Forrest* (1670), 2 Wms. Saund. 144, n. (1). And see *Giddings v. Giddings* (1756), 1 Ld. Ken. 335.

(*p*) *Borrowman v. Free* (1878), 48 L. J. Q. B. 65; 4 Q. B. D. 500.

(*q*) *Norton v. Ellam* (1837), 6 L. J. Ex. 1; 2 M. & W. 461; *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627.

(*r*) *Barrough v. White* (1825), 3 L. J. O. S. K. B. 227; 4 B. & C. 325; *Brooks v. Mitchell* (1841), 11 L. J. Ex. 51; 9 M. & W. 15; *Glasscock v. Balls* (1889), 59 L. J. Q. B. 51; 24 Q. B. D. 13.

(*s*) *Chartered Merc. Bank of India v. Dickson* (1871), L. R. 3 P. C. 574.

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demand, or an action brought upon it (*t*).—Where money is lent or goods are sold and delivered without any defined terms of credit, or where money is received to be accounted for and paid over, with or without interest, there arises an immediate debt payable without demand, but which the debtor may tender at any time whilst the credit continues (*u*). In such cases, unless the credit has been put an end to by a previous demand, the tender may be made at any time before process has actually issued for recovery of the debt: and the debtor is not bound to tender or pay the costs of the creditor in employing a solicitor to demand the money and issue a writ (*x*). Where goods were pledged to secure a loan of money lent for an indefinite time upon interest payable monthly, it was held that a demand of a sum exceeding the amount then due for principal and interest was ineffectual to terminate the credit, and to justify the lender in selling the pledge upon default in payment (*y*).

Mode of making tender.

A tender must be made at a time and in a manner reasonably sufficient for the receiver to ascertain whether it satisfies the contract. A tender of goods is not properly made by an offer to deliver closed casks said to contain the goods, the contents of which are not allowed to be seen and examined (*z*); or by offering goods at so late an hour of the appointed day that the buyer has not time to inspect them (*a*).—A tender of money in payment must be made with an actual production of the money; a mere statement of the debtor that he is ready to pay is not sufficient; unless, the debtor having it ready and offering to pay, the creditor expressly or impliedly dispenses with the production (*b*). If the creditor claim a larger amount and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced (*c*). Money locked up in a box, which the creditor cannot open, is not a good tender; but a tender

Production of the money.

(*t*) *Norton v. Ellam* (1837), 6 L. J. Ex. 121; 2 M. & W. 461; *Cotton v. Godwin* (1841), 10 L. J. Ex. 243; 7 M. & W. 147.

(*u*) *Kington v. Kington* (1843), 12 L. J. Ex. 248; 11 M. & W. 235; *Smith v. Manners* (1859), 28 L. J. C. P. 220; 5 C. B. N. S. 632.

(*x*) *Moffatt v. Parsons* (1814), 5 Taunt. 307; *Caine v. Coulson* (1862), 32 L. J. Ex. 97; 1 H. & C. 764.

(*y*) *Pigot v. Cudley* (1864), 33 L. J. C. P. 134; 15 C. B. N. S. 701.

(*z*) *Isheewood v. Whitmore* (1843), 12 L. J. Ex. 318; 11 M. & W. 347.

(*a*) *Startup v. Macdonald* (1843), 12 L. J. C. P. 77; 6 Man. & G. 693.

(*b*) *Finch v. Brook* (1834), 4 L. J. C. P. 1; 1 Bing. N. C. 253; *Ex p. Danks* (1852), 22 L. J. Bk. 73; 2 De G. M. & G. 936.

(*c*) *The Norcay* (1865), 3 Moo. P. C. N. S. 247.

of a large sum of money in bags which the creditor may open, is good, provided the sum is correct (*d*). CHAP. IV.

The money tendered must be current coin of the realm (*e*). By the Coinage Act, 1870, s. 4, "A tender of payment of money in coins issued by the mint in accordance with this Act shall be a legal tender—in the case of gold coins for a payment of any amount; in the case of silver coins for a payment of an amount not exceeding forty shillings, but for no greater amount; in the case of bronze coins for a payment of an amount not exceeding one shilling, but for no greater amount.—Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender" (*f*).—By the Colonial Branch Mint Act, 1866, power is given to the Crown by proclamation to declare that gold coins made at colonial branch mints are to be a legal tender for payments within any part of the British dominions specified in such proclamation.

By 3 & 4 Will. 4, c. 98, s. 6, "A tender of the note or notes of the governor and company of the Bank of England expressed to be payable to the bearer on demand shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin."—A tender in country bank notes or by a cheque on a banker may be good, if the creditor objects only to the amount and not to the quality of the tender (*g*).

A tender may be made of a greater sum of money than the debt; and the creditor ought to accept so much of it as is due (*h*). Where the debtor tenders a greater sum with a demand of exchange it is not a good tender, if the creditor refuses to give exchange, and objects to take the money for that reason (*i*); but if the creditor refuses the money upon other grounds, as that the amount is insufficient, or that another account should also be satisfied, the

(*d*) *Wade's case* (1602), 5 Co. 114 a.
(*e*) *Hough v. May* (1836), 5 L. J. K. B. 186; 4 A. & E. 951; *Gordon v. Strange* (1847), 1 Ex. 477; *Re Steam Stoker Co.* (1875), 44 L. J. C. 386; L. R. 19 Eq. 416.

(*f*) See sect. 6, *ante*, p. 542. And see the Coinage Act, 1889.

(*g*) *Polyglass v. Oliver* (1831), 1 L. J. Ex. 5; 2 Cr. & J. 15; *Jones v. Arthur* (1840), 8 Dowl. 442.

(*h*) *Douglas v. Patrick* (1790), 3 T. R. 683; *Dean v. James* (1832), 2 L. J. K. B. 94; 1 B. & Ad. 546.

(*i*) *Robinson v. Cook* (1815), 6 Taunt. 336.

Coin of the realm.

Bank notes.

Cheque or postal order.

Tender of greater or less sum than due.

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tender will be good (*k*).—Tender of a less sum than is due in payment of a single entire claim is void, the creditor not being bound to accept less than his whole debt (*l*); but he may accept such tender in part payment without precluding himself from claiming the residue, unless it is a condition of the tender that it be accepted in discharge of the whole (*m*). A tender must include all interest due upon the debt; but a tender duly made prevents the accruing of future interest (*n*). The debtor cannot apply a set-off in reduction of his debt, and tender the residue; a set-off, in the absence of agreement, being available only by way of plea or counterclaim in an action by the creditor (*o*).

Tender of part of claim.

A tender may be pleaded to part of a general claim, as a claim for goods sold and delivered or for money received, which may be composed of several distinct debts; and the plea may be met by a replication that the tender was made to a distinct debt and is insufficient (*p*).—A debtor who is indebted upon several distinct accounts may tender payment of any one separately; but if he tenders a sum to the whole without appropriating any portion to a particular debt, and it is not sufficient to cover all, it is not a good tender to any (*q*); unless the objection is waived, as by insisting that more is due (*r*).

To one of several claims.

Conditional tender.

A tender made upon a condition which the creditor has a right to object to is not a good tender (*s*); as the tender of a sum upon condition that the creditor shall admit that no more is due on the same account (*t*); but the mere tender of a sum of money as being all that is admitted to be due, does not impliedly import such a condition; and the creditor may accept it without precluding himself from claiming a larger sum (*u*). A tender of a

(*k*) *Calman v. Lubbock* (1822), 5 D. & R. 289; *Brown v. Rens* (1839), 8 L. J. Ex. 263; 5 M. & W. 306.

(*l*) *Dixon v. Clark* (1847), 16 L. J. C. P. 237; 5 C. B. 365.

(*m*) *Bowen v. Owen* (1847), 17 L. J. Q. B. 5; 11 Q. B. 130.

(*n*) *Patke, B., Norton v. Ellam* (1837), 6 L. J. Ex. 121; 2 M. & W. 464.

(*o*) *Swales v. Sadgrove* (1855), 25 L. J. Q. B. 15; 5 E. & B. 639; *Phillpotts v. Clifton* (1861), 10 W. R. 135.

(*p*) *Tyler v. Bland* (1842), 11 L. J. Ex. 257; 9 M. & W. 338; *Robinson v. Ward* (1846), 15 L. J. Q. B. 271; 8 Q. B. 920.

(*q*) *Strong v. Hawrey* (1825), 4 L. J. O. S. C. P. 57; 3 Bing. 304; *Hardingham v. Allen* (1848), 17 L. J. C. P. 198; 5 C. B. 793.

(*r*) *Black v. Smith* (1791), 1 Peake, 121.

(*s*) *Foord v. Noll* (1842), 12 L. J. C. P. 2; 2 Dowl. N. S. 617; *Re Steam Stoker Co.* (1875), 44 L. J. C. 386; L. R. 19 Eq. 416.

(*t*) *Eckstein v. Reynolds* (1837), 6 L. J. K. B. 198; 7 A. & E. 80.

(*u*) *Henwood v. Oliver* (1841), 10 L. J. Q. B. 153; 1 Q. B. 409; *Bourn v. Owen* (1847), 17 L. J. Q. B. 5; 11 Q. B. 130.

quarter's rent coupled with a demand of a receipt to a particular day, it being disputed whether one or two quarters' rent was due, was held not to be a valid tender (*x*).—An offer to pay the money upon condition of the creditor giving a receipt is not a good tender; but a mere request for a receipt is not a condition; and if the creditor refuses the money because insufficient in amount, he cannot afterwards object that a receipt was required (*y*). Upon payment of a debt amounting to two pounds or upwards a person refusing to give a receipt duly stamped is liable to a penalty (*z*).—A tender made "under protest" does not impose a condition on acceptance of the money, but merely prevents the offer operating as an admission of the claim by the person tendering, and is, therefore, effectual (*a*).

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Demand of receipt.

Tender under protest.

Tender of the debt may be made by an agent of the debtor; or by anyone professing to act on his behalf, if the tender is afterwards adopted and ratified by him (*b*). And tender may be effectually made to an agent unless the person tendering has notice that he is not authorised to receive payment of the debt (*c*).—Tender to one of several joint creditors, or by one of several joint debtors, is a valid tender, and may be pleaded as a tender to or by all (*d*).

Tender by or to agent

Joint debtor or creditor.

(*x*) *Finch v. Miller* (1818), 5 C. B. 428.
 (*y*) *Jones v. Arthur* (1840), 8 D. P. C. 442; *Richardson v. Jackson* (1841), 10 L. J. Ex. 304; 8 M. & W. 298.
 (*z*) Stamp Act, 1891, ss. 101, 103 (2).
 (*a*) *Scott v. Urbridge Ry.* (1866), 35 L. J. C. P. 293; L. R. 1 C. P. 596; *Sireny v. Smith* (1869), 38 L. J. C. 446; L. R. 7 Eq. 324; *Greenwood v. Sutcliffe* (1891), 61 L. J. C. 59; (1892) 1 Ch. 1.

(*b*) *Read v. Goldring* (1813), 2 M. & S. 86; *Finch v. Brook* (1834), 4 L. J. C. P. 1; 1 Bing. N. C. 253.
 (*c*) *Kirtan v. Braithwaite* (1836), 5 L. J. Ex. 165; 1 M. & W. 310; *Finch v. Bowing* (1879), 4 C. P. D. 143.
 (*d*) *Douglas v. Patrick* (1790), 3 T. R. 683; *Black v. Smith* (1791), 1 Peake, 88; *Strong v. Harvey* (1825), 4 L. J. O. S. C. P. 57; 3 Bing. 304.

CHAPTER V.

BREACH OF CONTRACT.

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A BREACH or default in performance discharges a contract in the sense that it converts it into a right of action for damages or pecuniary compensation; and any subsequent performance of the terms affords no defence to such action, but operates only by way of reparation and in mitigation of the damages (*a*).—At common law the right of action for damages was the only remedy. But the Court of Chancery exercised the jurisdiction of compelling specific performance of the contract upon equitable terms, in those cases which admitted of such remedy, and where the contract could still be substantially performed notwithstanding the breach. The courts now constituted under the Judicature Acts administer either remedy which is appropriate to the case, and to which the party may appear entitled. But actions for specific performance are assigned primarily to the Chancery Division of the High Court; and an action in which specific performance is advanced by way of counterclaim may be transferred to that division (*b*).—The performance of contracts has been treated in a former chapter; and any default in performance as there explained constitutes a direct breach (*c*). It remains here to notice some cases which are regarded in law as equivalent to a breach of contract, and have a like effect in giving a right of action:—namely, where, before the time appointed for performance, the promiser disables himself from performance; and where, before the time for performance, he absolutely renounces the intention to perform.

Breach of contract.

Remedies.

Acts equivalent to breach.

(*a*) *Callander v. Hawkins* (1877), 2 C. P. D. 592. See *Bastin v. Bidwell* (1881), 18 Ch. D. 238.

(*b*) Judicature Act, 1873, s. 34:

London Land Co. v. Harris (1884), 53 L. J. Q. B. 536; 13 Q. B. D. 540.

(*c*) See *ante*, p. 601.

PART IV.

Breach by
promiser
disabling
himself from
performance.

An act of the promiser which disables him from performance may be equivalent to a breach in giving an immediate cause of action. Where performance is due at a certain future time, disability is in general no breach until the time has arrived; but where performance is due upon a contingency which may happen at any time, and which therefore requires a continuing ability and readiness, the promiser by disabling himself becomes presently liable to an action for breach of contract. As if a person contracts to sell or lease land to another upon a request made, or upon a payment of money, or other discretionary condition, he must continue ready to do so; and if he disables himself by conveying or demising the land to a third party, he thereby dispenses with request or tender or any other condition precedent, and becomes liable to an immediate action for breach (*d*). So upon a sale of specific goods to be delivered upon request, if the seller sells and delivers them to a third party, he is at once liable to an action for breach of contract without request, because he has disabled himself from delivering them (*e*). Upon this principle a promise of marriage is broken immediately by marriage with another party: all conditions precedent under the contract, as a request, or the lapse of an appointed or a reasonable time, are thereby dispensed with; and it is immaterial that the marriage becomes dissolved by death or otherwise before such conditions are satisfied (*f*). A contract of employment in a business for a certain term at a fixed salary is broken by the employer abandoning or selling the business: and the salary for the whole term may be claimed immediately: but no claim can be made for prospective commission or profits on business which the employer might carry on or not as he pleased (*g*). But where the servant is to be remunerated by a commission on orders or sales, it is an implied term that, during the period fixed for the duration of the employment, the master will do everything on his part to enable the servant to earn his commission, and may include the carrying on of business (*h*). So

(*d*) *Ford v. Tiley* (1827), 5 L. J. O. S. K. B. 169; 6 B. & C. 325; *Lovelock v. Franklyn* (1816), 15 L. J. Q. B. 146; 8 Q. B. 371.

(*e*) *Bowdell v. Parsons* (1808), 10 East, 359.

(*f*) *Short v. Stone* (1846), 15 L. J. Q. B. 113; 8 Q. B. 358; *Cuives v. Smith* (1846), 15 L. J. Ex. 106; 15 M. & W. 189.

(*g*) *Maclure's case* (1870), 39 L. J. C.

685; L. R. 5 Ch. 737; *Rhodes v. Forwood* (1876), 47 L. J. Ex. 396; 1 Ap. Ca. 256. See *Hamlyn v. Wood* (1891), 60 L. J. Q. B. 734; (1891) 2 Q. B. 488; *Devonald v. Rosser* (1906), 75 L. J. K. B. 688; (1906) 2 K. B. 728.

(*h*) *Re Patent Floor Cloth Co.* (1872), 41 L. J. C. 476; *Turner v. Goldsmith* (1891), 60 L. J. Q. B. 247; (1891) 1 Q. B. 544.

an offer to divide a bonus amongst customers may entitle a customer who has complied with the conditions on which the offer is based to damages if the business is transferred (*i*). The compulsory winding-up of a company operates as a dismissal of the manager and other agents of the company, and entitles them to prove for compensation as for a breach of contract, but a voluntary winding-up has not this effect (*k*). And the same result follows from the transfer of the business to another company (*l*); and from the appointment of a manager and receiver who takes over the business for creditors (*m*). The winding-up of an insurance company operates as an immediate breach of the contract with policyholder; it exonerates him from further payment of premiums and entitles him to an immediate claim for damages, the measure of which is the sum required to procure a similar policy of the same amount (*n*).

If before the time appointed for performing the contract one party gives notice to the other of his intention not to perform it, he may be charged in an immediate action as for a breach; in which action the other party may claim prospectively such damages as would be caused by a breach at the appointed time subject to any circumstances which may operate in mitigation of the damages (*o*). The notice for this purpose must express an absolute and unequivocal intention of renouncing and repudiating the contract (*p*). A mistaken construction of the contract or an imperfect tender which may be amended in time, or an expression of present disability to perform it, is not sufficient (*q*). And a party has no right before performance is due to demand and have a distinct notice whether the other party intends to perform the contract or not (*r*); and upon a similar principle where a charter-

Breach by
renunciation
of contract.

(*i*) *Thyden's Ltd. v. Nelson* (1905), 74 L. J. K. B. 433; (1905) A. C. 109.

(*k*) *McDowall's case* (1886), 55 L. J. C. 620; 32 Ch. D. 366; *Midland Cos. Bk. v. Atwood* (1904), 74 L. J. C. 286; (1905) 1 Ch. 357.

(*l*) *Stirling v. Maitland* (1864), 34 L. J. Q. B. 1; 5 B. & S. 840.

(*m*) *Reid v. Explosives Co.* (1887), 56 L. J. Q. B. 388; 19 Q. B. D. 264.

(*n*) *Holtick's case* (1873), 42 L. J. C. 612; L. R. 14 Eq. 72.

(*o*) *Hochster v. De la Tour* (1853), 22 L. J. Q. B. 455; 2 E. & B. 678; *Pross*

v. Knight (1872), 41 L. J. Ex. 79; L. R. 7 Ex. 111.

(*p*) *Jones v. Gibbons* (1853), 22 L. J. Ex. 317; 8 Ex. 920; *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497; 9 Ap. Ca. 434; *Cornwall v. Henson* (1900), 69 L. J. C. 581; (1900) 2 Ch. 298.

(*q*) *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497; 9 Ap. Ca. 434; *Barracoman v. Free* (1878), 48 L. J. Q. P. 65; 4 Q. B. D. 500; *Johnstone v. Milling* (1885), 55 L. J. Q. B. 167; 16 Q. B. D. 460.

(*r*) *Ripley v. Metlure* (1849), 18 L. J. Ex. 419; 4 E. 345.

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party gave the charterer an option to cancel the contract if the ship were not an "arrived ship" at a named port by a named date, the shipowner cannot call upon the charterer to exercise his option although the day fixed for arrival be passed (s). The renunciation does not operate as a rescission of the contract, because one party to a contract cannot alone rescind; but the other party may adopt such renunciation with the effect that the contract is at an end, except for the purpose of bringing an action for the damages consequent upon the renunciation (t).—Where a person engaged a courier from an appointed future day for three months certain at a monthly salary, and before the appointed day wrote to decline his services, it was held that an action would lie as for a breach of the contract without waiting for the time appointed to commence the employment (u). So with a contract for the sale and delivery of goods at a future time, or in instalments at future times, a notice by the seller to the buyer of his intention not to deliver may be accepted and acted upon as an immediate breach; and the buyer is *prima facie* entitled to damages measured by the difference between the contract price and the market price at the appointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms; or if the time for delivery has not elapsed when the damages are assessed, the future damages must be estimated prospectively (x). Where a shipowner repudiated a contract for the carriage of goods to be shipped on a certain date, as having been made by an agent without authority, it was held that the owner of the goods was entitled to accept such repudiation as a breach of the contract and to maintain an action for damages; though the shipowner when the time arrived, and before any new arrangement had been made, offered to take the goods and perform the contract (y). Upon the same principle where a man promised to marry a woman upon the death of his father, and afterwards, whilst his father was living, announced to her his intention of not fulfilling his promise; it was held that she

(s) *Mael Teyran Ship Co. v. Andrew Weir & Co.* (1910), 79 L. J. K. B. 898; (1910) 2 K. B. 844.

(t) *Johnstone v. Mulling* (1885), 55 L. J. Q. B. 167; 19 Q. B. D. 160; *Gen. Bill-Factoring Co. v. Atkinson* (1908), 78 L. J. C. 77; (1909) A. C. 118. See *Measures Bros. v. Measures* (1910), 59 L. J. C. 707; (1910) 2 Ch. 248.

(u) *Hochster v. De la Tour* (1853), 22 L. J. Q. B. 15; 2 E. & B. 678.

(x) *Bevan v. Muller* (1872), 41 L. J. Ex. 214; L. R. 7 Ex. 319; *Roper v. Johnson* (1872), 42 L. J. C. P. 65; L. R. 8 C. P. 167.

(y) *Danube Ry. v. Xenos* (1862), 31 L. J. C. P. 281; 13 C. B. N. S. 825.

was entitled immediately to treat the announcement as a breach of contract, without waiting for the death of the father (z).

CHAP. V.

Renunciation of the contract will operate as a present breach only if accepted and acted upon as such by the other party: who may, if he pleases, disregard it and insist upon performance according to the terms. "The promisee may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it" (a). If the seller of goods for delivery at a future day gives notice of his intention not to deliver, or if the buyer gives notice of his intention not to accept, in either case the other party may abide by the contract and await the appointed day; and if the contract be not then performed, he may claim full compensation according to the market price at that day (b). And where the charterer of a ship gave notice to the shipowner that he should be unable to provide a cargo, and requested him to leave the port; but the shipowner insisted upon having a cargo in fulfilment of the charter-party; and whilst the days allowed for loading were still unexpired, a declaration of war put an end to the charter-party; it was held that the charterer was thereby discharged (c).

Renunciation
not accepted.

Renunciation of the contract, if not accepted by the other party as a present breach, may be withdrawn at any time before the performance is due; but if not in fact withdrawn it is evidence of continued intention to the same effect (d).—Therefore it operates as a continuing waiver and discharge of all conditions precedent to the liability for the performance; such as a demand of performance, the lapse of a reasonable time or an appointed time, the tender of money or goods, or the like (e). Where a contract was

Renunciation
withdrawn.

Effect in
waiving
conditions
precedent.

(z) *Frost v. Knight* (1872, 41 L. J. Ex. 78; L. R. 7 Ex. 111).

(a) *Per cur. Frost v. Knight* (1872, 41 L. J. Ex. 79; L. R. 7 Ex. 112; *Johnstone v. McIntosh* (1885), 55 L. J. Q. B. 167; 16 Q. B. D. 460).

(b) *Leigh v. Paterson* (1818), 8 Taunt. 540; *Phillipotts v. Evans* (1839), 9 L. J. Ex. 33; 5 M. & W. 175; *Michael v.*

Hart & Co. (1902, 71 L. J. K. B. 265; (1902) 1 K. B. 482).

(c) *Avery v. Bowden* (1856), 26 L. J. Q. B. 3; 6 E. & B. 953.

(d) *Ripley v. McClure* (1849), 18 L. J. Ex. 419; 4 Ex. 345.

(e) *Ripley v. McClure* (1849), 18 L. J. Ex. 419; 1 Ex. 345.

PART IV. made for the manufacture and supply of goods to be delivered in certain quantities monthly, and the buyer after accepting a portion of the goods gave notice to the seller that he had no occasion for more and would not accept or pay for them; it was held that the seller might claim for a breach of the contract without manufacturing or tendering the rest of the goods (*f*).

Bankruptcy
or insolvency
of promiser.

Bankruptcy or insolvency is not alone such an incapacity to perform a contract as to entitle the other party at once to treat it as broken and to claim damages; as it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract, and the representatives of his estate may be authorised to do so (*g*). Thus, where a banking company, after giving a letter of credit undertaking to accept bills to be drawn against bills of lading, stopped payment before it was used; it was held that there was no breach for which the holder of the letter could prove damages in the winding-up; because there had been no refusal to accept bills, and the liquidator might be authorised to carry out the contract and accept them (*h*). Nor does bankruptcy or insolvency alone entitle the other party to rescind the contract; but a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind, which the other party may accept; and it would, at least, justify a refusal on his part to complete the contract, unless the insolvent or his representatives should prove their ability and readiness to complete on their part (*i*).

Discharge of
right of
action for
breach.

The claim or right of action arising from a breach of contract, in common with rights of action arising from wrongs of other kinds, may be discharged by proceeding to judgment in the ordinary course of legal procedure, thus merging the original cause of action; and the judgment may be satisfied and discharged by execution. The law of Practice and Procedure, regulating the course of proceedings in actions, is not within the scope of the present work. But besides the ordinary course of legal procedure, there are some other modes of discharging rights of action, which, so far as they apply especially to those arising from contract, may be considered to require notice here; and they are therefore treated in the following chapters.

(*f*) *Cort v. Ambergate Ry.* (1851), 20 L. J. Q. B. 460; 17 Q. B. 127.

(*g*) *Ex p. Stapleton* (1878), 10 Ch. D. 586. See *post*, Pt. VI., Chap. VI.

(*h*) *Ex p. Tondeur* (1868), 37 L. J. C. 121; L. R. 5 Eq. 160.

(*i*) *Ex p. Chalmers* (1872), 42 L. J. Bk.

37; L. R. 8 Ch. 294; *Morgan v. Bain* (1874), 44 L. J. C. P. 47; L. R. 10 C. P. 15; *Re Phoenix Bessemer Steel* (1876), 46 L. J. C. 115; 4 Ch. D. 108. See Sale of Goods Act, 1893, ss. 18. r. 1, 42; and see *post*, Pt. VI., Chap. VI.

CANADIAN NOTES.

Breach.

In *Auchterlone & Co. vs. Arms*, 25 U. C. C. P., 403, an action was brought on a judgment recovered in Scotland for breach of defendant's agreement to deliver sewing machines to plaintiff. Defendant pleaded that plaintiffs were to be defendant's sole agent for the sale of his sewing machines in Great Britain, and to be paid for all machines sent to the plaintiff after plaintiff had sold and received payment for the same; that defendant was to furnish a specified number of machines per month and plaintiffs were to furnish a monthly statement to defendant of the machines sold by them and remit the price of the machines so sold and paid for at a certain rate which the defendant guaranteed; and the defendant averred that he delivered the machines in accordance with the agreement and in all things performed it until the plaintiffs neglected and refused to furnish such statement and remit the money received by them as aforesaid, and that defendant's refusal to send any further machines was solely by reason of plaintiff's said breach of agreement. The plea was held bad as not showing either that the performance of plaintiff's covenant was a condition precedent to performance by the defendant or shewing any fact from which it might be inferred that the plaintiff's breach entitled the defendant to consider the contract as abandoned and to rescind it; and that the defendant's remedy was by cross-action.

Breach Before Time for Performance.

In *Sanders vs. Baby*, 5 U. C. C. P., 441, the defendant agreed to sell to the plaintiff the net profits for two years of certain shares in a mining company. Shortly after, the company sold and assigned to another company certain tracts of land in the conveyance described, and all tools, engines and so on for a large sum, to which sale the defendant assented. It was held that the defendant, having disposed of his stock, which represented his interest in the mine, before the time at which he was to sell the profits to the plaintiff, had placed it out of his power to fulfil his agreement, and plaintiff was immediately entitled to sue for the breach.

In *Dullea vs. Taylor*, 34 U. C. Q. B., 12, the declaration was that the plaintiff agreed to sell and defendant to buy certain

lands in Oshawa adjoining the lands of the plaintiff for \$325, the money to be paid and the conveyances executed on demand; that defendant should in eighteen months put up a factory thereon of specified dimensions, and that, in case he should not do this, he would at the expiration of eighteen months reconvey the land and receive back the purchase money. The plaintiff was ready to convey, but defendant did not pay the plaintiff or complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement. There was a plea upon equitable grounds that the defendant made the agreement on behalf of himself and others who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of securing said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement, and, before any demand by the plaintiff for payment and before any conveyance of the said land, the defendant and others decided not to carry on the business, and gave notice to the plaintiff thereof, and that they would not require said lands, and that the plaintiff was released and defendant did not otherwise abandon the said agreement. It was held that the declaration was good and that the plea was no answer to it, following the case of *Hochster vs. La Tour*, 2 E. and B., 678.

Breach, Where Committed.

In *Offord vs. Bresse*, 16 Ont. P. R., 332, the defendant, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to a contract of hiring entered into in Quebec between the parties. It was held in an action for wrongful dismissal that the breach of the contract was made in Quebec and not where the letter was received.

In *Bell vs. Villeneuve*, 16 Ont. P. R., 413, it was questioned whether, where a contract of hiring was ended by a letter sent from another province, this indicated that the breach complained of was out of the province.

Pleadings.

In *Leonard vs. Northy*, 22 U. C. C. P., 11, the declaration was on a contract by testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by the testator

before his death and a promise by the defendants, his executors, to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished and not according to the specifications. The defendants pleaded, among other pleas, that the testator and the defendants, since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of the plaintiff or his agents. This was held bad, because, among other reasons, leave and license could not be pleaded to a breach of contract, but a plea, as to so much of the declaration as referred to alleged imperfections of material and workmanship, that, after the occurrence thereof and before suit, the boiler and engine were taken by the plaintiff from the defendants as executors whereby and by force of the contract set out in the declaration the defendants ceased to be liable in damages in respect to the cause of the action to which the plea was pleaded was held good.

In *Abel vs. Leonard*, 12 U. C. R., 192, the action was on a contract to make and furnish a steam engine and boiler, the breach being that the boiler furnished was not made of good and sufficient materials, and was not reasonably fit and proper for the said engine. The plea that the said boiler was made of good and sufficient materials was held bad, as not answering the whole breach.

In *MacNamara vs. Skain*, 23 O. R., 103, under a building contract in writing, the contractor agreed that, subject to any extension of time by the architect, the building should be finished by a named day, with liquidated damages in default. It was also provided that all extras, etc., should form part of the contract if authorized by the architect, who was first to fix the price and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike. The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract. Although some extras were done and there was evidence as to delay by strike, the architect was not asked for and he did not grant any extension of time. It was held that the contract must govern, and that the defendants were entitled to recover by way

of counter-claim the sum provided for by the contract as liquidated damages.

Breach Not Discharging Promisor.

In *Campbell vs. McLeod*, 24 N. S. R., 66, the defendant agreed to furnish all the stone required to ballast a pier, to be paid \$400 in instalments of \$100 as the work progressed. It was held that the failure to pay the first instalment did not discharge the defendant from his obligation to perform the rest of the work.

In *Mattinson vs. Hewson*, 43 N. S., 339, plaintiffs sued before justices of the peace for work done and materials supplied in connection with the building of an addition to a cottage owned by defendant, and the defendant relied upon certain defects in the workmanship. It was held that the implied contract that the work should be done in a workmanlike manner was not one going to the essence of the contract, but that the defendant was entitled to an abatement of the price on account of the defects shewn to exist. Per Graham, E. J., citing the remarks of Tindal, C. J.: "If it were a condition precedent to the plaintiff's remuneration (that the work should be done in a workmanlike manner) a little deficiency of any sort would deprive the plaintiff of all claim for payment, but under such circumstances a jury may say what the plaintiff really deserves to have."

In *Brown vs. Nelson*, 7 O. R., 90, the plaintiff agreed to purchase from the defendant 76 shares of the stock of the Globe Printing Company, and gave the defendant his note, payable in two years, for the price of the shares. At the defendant's request he then pledged these shares and forty-four other shares of his own to a bank, which discounted the note for the defendant. It was found by the jury that it was a condition of the purchase that the defendant, who had a large interest in the company, should keep the plaintiff in the position which he occupied as managing director of the company at a fixed salary. The defendant, at the maturity of the note, retired it, and took an assignment to himself of 120 shares. The plaintiff having been afterwards dismissed from his position, brought an action for the return of the 44 shares, on the ground that the purpose for which they had been pledged had been fulfilled, and for a return of the note, and to be relieved from the purchase of the 76

shares, on the ground that the condition of the purchase, namely, his being retained in office, had not been fulfilled, but had been broken by the defendant's procuring his dismissal. It was held that, as there had been a partial performance of the defendant's agreement by retaining the plaintiff in office for the period within which the 76 shares were to have been paid for, there could be no rescission of the whole contract, but that the plaintiff was entitled to a return of the 44 shares, and the defendant to judgment for the price of the 76 shares, and that the plaintiff's remedy, if any, for wrongful dismissal was by independent action. It was held, also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office.

In *McLellan vs. Winston*, 12 O. R., 431, it was held that, in order to recover in an action for non-performance of a contract to do work, the plaintiff must show a willingness and readiness on his part to perform and on the defendant's part a distinct and unequivocal and absolute refusal, and that such refusal was treated and acted upon by the plaintiff, for if after refusal he continued to urge or demand compliance with the contract he must be deemed as considering it as not at an end. In the case cited the plaintiffs set up a contract made with defendant to cut and lay down on the defendant's limits a quantity of ties, that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and the way of forwarding the same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur and claimed that defendant neglected and refused to give such instructions and refused to carry out the contract, but the evidence was held to disclose that the plaintiff himself was not ready and willing to perform the contract, and, further, if a refusal to perform by defendant was proved, that it was not treated and acted upon by plaintiff as such, but thereafter he continued to treat the contract as still subsisting. It was held, therefore, that the action failed.

In *Cowan vs. Fisher*, 31 O. R., 426, an agreement for the sale of a machine provided that the inventor should personally inspect the placing and setting of it in operation. The machine

was delivered, but the inventor refusing to go, the vendor sent another competent person to set it up. It was held that the vendors were nevertheless entitled to recover the price, on the principle that the stipulation alleged did not go to the whole root and consideration of the contract, and, therefore, was not to be considered as a condition precedent, but as a distinct covenant, the breach of which could be satisfied by damages.

CHAPTER VI.

ACCORD AND SATISFACTION.

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A RIGHT of action for a breach of contract cannot be discharged by any performance or tender without the consent and acceptance of the promisee; for the promisee after breach is entitled to the damages or compensation provided through the process of law, and is not bound to accept any other satisfaction of his legal right. But he may agree to accept satisfaction; and an agreement to that effect, accompanied by the delivery or performance of what is so agreed upon, discharges his right of action. This mode of discharge is called in technical language an accord and satisfaction. Accord and satisfaction.

An accord or agreement before breach, in variance of the terms of a contract under seal, was ineffectual at common law, unless made in the like form of a deed under seal (*a*). Accord and satisfaction after breach discharges the right of action, whether the contract was made by parol or by deed, or in writing; for it does not involve any variation of the terms of the contract (*b*). But at common law, a single bond or a covenant to pay a present money debt could not be discharged without an acquittance under seal after breach (*c*). But to an action upon a covenant to repair, as the covenant alone did not give any Contracts under seal.

(*a*) *Spence v. Healey* (1853), 22 L. J. Ex. 249; 8 Ex. 668; *Nash v. Armstrong* (1861), 30 L. J. C. P. 286; 10 C. B. N. S. 259.

(*b*) See *Smith v. Trowsdale* (1854), 23 L. J. Q. B. 107; 3 E. & B. 83.

(*c*) *Preston v. Christmas* (1759), 2 Wils. 86; *Rogers v. Payne* (1768), 2 Wils. 376.

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cause of action, but the non-repair of the house in breach of the covenant, an accord and satisfaction was a good plea (*d*). Accord and satisfaction or payment was available in equity in answer to an action for money due under a bond or covenant without an acquittance under seal; and since the Judicature Act the rule of equity prevails in all Divisions of the High Court (*e*).

Consideration of accord.

Accord and satisfaction may be supported by any legal consideration agreed upon by the parties for that purpose (*f*). Payment of a debt or liquidated money claim after it is due operates by way of accord and satisfaction; payment of the debt at the time of falling due operates by way of performance of the contract (*g*).—The intrinsic value of the consideration is immaterial; it is settled by agreement of the parties to be the equivalent of the right of action (*h*). But in the case of payment in satisfaction of a money debt of ascertained amount, the acceptance of a smaller sum is no satisfaction of a debt of larger amount, without a release of the residue or some additional consideration for abandoning it (*i*). And the consideration of the accord must be something presently done or agreed to be done in satisfaction, and not something already done and past; for any past matter would not constitute a consideration sufficient to support it (*k*).—There must be an agreement of both parties as to the satisfaction. Where after a breach of contract the promiser sent a cheque "in full of all demands," and the promisee kept the cheque and returned a receipt "on account"; it was held that the keeping of the cheque was not conclusive in law that there was an agreement or accord that it should be taken in satisfaction (*l*).

Adequacy of the consideration.**Agreement of both parties.****Accord without satisfaction.**

An accord alone is in the nature of an offer which the parties may respectively refuse or withdraw until the consideration to

(*d*) *Blake's case* (1605), 6 Co. 43 b.

(*e*) *Steed v. Steeds* (1889), 58 L. J. Q. B. 302; 22 Q. B. 11, 507.

(*f*) *Cooper v. Paiker* (1855), 24 L. J. C. P. 68, 15 C. R. 822.

(*g*) See ante, p. 601; post, p. 647.

(*h*) *Curlewis v. Clark* (1849), 18 L. J. Ex. 144; 3 Ex. 375. See *Bolton v. Madden* (1873), 43 L. J. Q. B. 3; L. R. 9 Q. B. 55; *Curditt v. Curthois Swoke Ball Co.* (1892), 62 L. J. Q. B. 257; (1893) 1 Q. B. 256.

(*i*) *Cumbr v. Wane* (1719), 1 Stra. 420; 1 Sm. L. C. 35; *Fuakes v. Bar* (1844), 54 L. J. Q. B. 109 Ap. C. 605; *Underwood v. Underwood* (1844), 63 L. J. P. 100; (191) P. 204.

(*k*) *Strad v. Payer* (1840), 14 L. J. C. P. 201; 1 C. B. 782.

(*l*) *Day v. McLea* (1889), 58 L. J. Q. B. 293; 22 Q. B. 160. See *Re W. H. Lunn & Co.* (1905), 74 L. J. C. 188; (1905) 1 Ch. 307.

be performed or given and accepted in satisfaction is completely executed, in which event only it is an answer to an action for the original claim; "a plea of accord, to be a good plea, must show an accord which is not executory at a future day, but which ought to be executed, and has been executed, before the action brought" (*m*). A tender of execution, which the creditor refuses to accept, is not a good plea; nor is a part execution of the accord (*n*). The accord not amounting to a contract, therefore does not require the formalities of a contract; it may be proved by parol evidence for the purpose of supporting the execution in satisfaction, although it involves matter which, as the subject of an executory contract, would be within the Statute of Frauds (*o*). And as the accord alone without execution does not discharge or affect the right of action, the Statute of Limitations continues to run from the time the right of action first accrued (*p*).—Accordingly, an agreement to give and take payment of a debt in goods affords no answer to an action for the debt, unless the goods have been actually delivered and accepted in satisfaction (*q*). An agreement by a buyer to accept other timber than that contracted for, is no answer to an action on the original contract, unless there has been an acceptance (*r*). So an agreement that the creditor should collect debts due to the debtor and apply the amount in satisfaction, or an agreement to execute upon demand a mortgage to secure the debt (*t*), affords no answer to the original cause of action while the contract remains in any part executory.

The consideration of the accord may be a new contract which is made and accepted in satisfaction; so that if the new contract is not performed the only remedy is by action for the breach, without any recourse to the original debt or right of action (*u*). Thus a

New contract accepted in satisfaction.

(*m*) *Wegg Prosser v. Evans* (1894), 64 L. J. Q. B. 1; (1895) 1 Q. B. 108; *Bailey v. Homan* (1847), 6 L. J. C. P. 309; 3 Bing. N. C. 915.

(*n*) *Carter v. Wormald* (1847), 16 L. J. Ex. 281; 1 Ex. 81; *Gabriel v. Dresser* (1855), 24 L. J. C. P. 81; 15 C. E. 622.

(*o*) *Massey v. Johnson* (1847), 17 L. J. Ex. 182; 1 Ex. 241; *Lavery v. Turley* (1861), 30 L. J. Ex. 49; 6 H. & N. 239.

(*p*) *Reeves v. Harne* (1836), 5 L. J. Ex. 156; 1 M. & W. 323.

(*q*) *Wray v. Mablestone* (1839), 5 M. &

W. 21; *Collingbourne v. Mantell* (1839), 8 L. J. Ex. 251; 5 M. & W. 289.

(*r*) *Gabriel v. Dresser* (1855), 24 L. J. C. P. 81; 15 C. E. 622.

(*s*) *Gifford v. Whitaker* (1844), 13 L. J. Q. B. 325; 6 Q. B. 249.

(*t*) *Allies v. Probyn* (1835), 4 L. J. Ex. 227; 2 Cr. M. & R. 408.

(*u*) *Henderson v. Stobart* (1850), 19 L. J. Ex. 135; 5 Ex. 99; *Bulder v. Bridges* (1857), 57 L. J. C. 360; 37 Ch. D. 406.

PART IV. bill of exchange or promissory note may be given and accepted in absolute satisfaction and discharge of a debt, and not merely as a conditional payment defeasible by dishonour of the instrument (x). Where an agreement was made that certain actions then pending should be settled, and all proceedings therein stayed, and that the defendant should pay to the plaintiff a certain sum for the costs and damages; it was held not to be a mere executory accord, but that there was sufficient consideration in the settlement of the actions to support the promise to pay the money (y).

Composition
with
creditors.

Upon this principle a composition between debtor and creditors operates in satisfaction of the debts, and affords an answer to an action by one of the creditors upon the original liability; for such an agreement there is a good consideration to each creditor, namely, the undertaking by the other compromising creditors to give up a part of their claim (z). "At common law, where a body of creditors accept a composition they may either agree to take the promises of the debtor, with or without a surety, in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him" (a). So if bills or notes given in the composition are dishonoured, the creditor is remitted to his original debt (b). But the composition agreement affords a good answer to an action for the debt, until default is made in payment under it (c). Payment of the composition to a trustee appointed

(x) *Sibree v. Tripp* (1846), 15 L. J. Ex. 318; 15 M. & W. 23.

(y) *Crowther v. Farrer* (1850), 20 L. J. Q. B. 298; 15 Q. B. 677.

(z) *Good v. Cheesman* (1831), 9 L. J. O. S. K. B. 234; 2 B. & Ad. 328; *Lewin v. Leonard* (1880), 10 L. J. Ex. 308; 5 Ex. D. 165. See *Couldery v. Hartum* (1881), 51 L. J. C. 265; 19 Ch. D. 394; *Mendelssohn v. Ratchiff* (1904), 73 L. J. K. B. 1027; (1904)

A. C. 456.

(a) *Melli-h, L. J., Re Hatton* (1872), 42 L. J. Bk. 12; L. R. 7 Ch. 726. See *Newell v. Inn Prangh* (1873), 43 L. J. C. P. 94; L. R. 9 C. P. 96; *Ex p. Gilbey* (1877), 47 L. J. Bk. 49; 8 Ch. D. 248.

(b) *Edwards v. Hancher* (1875), 1 C. P. D. 111.

(c) *Slater v. Jones* (1873), 42 L. J. Ex. 122; L. R. 8 Ex. 186.

to receive it on behalf of the creditors operates in satisfaction of the debt, though the trustee do not afterwards pay it over to the creditors (*d*). CHAP. VI.

The liability of a third party may be accepted in satisfaction of the debt of the original debtor, under a valid agreement of all the parties to that effect, which gives the creditor a remedy against the third party (*e*). Such an agreement before breach constitutes what is called "novation," as already noticed; and the original contract is then rescinded by the new agreement (*f*). But the agreement may in terms provide, that on the failure of the third person to fulfill the conditions on his part, the creditor shall be remitted to his original rights against the debtor (*g*). So, the separate liability of one or more of joint debtors may be accepted in satisfaction and discharge of the joint liability of all; as frequently occurs upon the retirement of a partner from a firm, and a continuance of the credit to the remaining partners (*h*).—Where the creditor is himself indebted to a third party, the debtor, by agreement of all parties to that effect, may take upon himself the debt of his creditor in satisfaction and discharge of his own debt to him; the transaction then operates in effect as an assignment of the debt by the creditor in payment of his own debt (*i*). Liability of third party accepted in satisfaction.

Accord and satisfaction made with one of several joint creditors discharges the debtor as against all in respect of the claim, because the satisfied creditor would be incapable of joining as co-plaintiff with the other creditors; but in equity creditors of the same debt are presumptively entitled as tenants in common in equal shares, and satisfaction to one would then operate upon his share only, and would be no satisfaction to the others (*k*). Accord and satisfaction made by one of several parties jointly liable, or jointly and severally liable to the same creditor for the same debt, dis-

Accord and satisfaction with or by a joint creditor or debtor.

(*d*) *Campbell v. Im Thurn* (1876), 45 L. J. C. P. 482; 1 C. P. D. 267.

(*e*) *Crowfoot v. Gurney* (1832), 2 L. J. C. P. 21; 9 Bing. 372; *Henderson v. Stobart* (1850), 19 L. J. Ex. 135; 5 Ex. 99.

(*f*) See *ante*, p. 578.

(*g*) *Ex p. Burden* (1881), 16 Ch. D. 675.

(*h*) *Hart v. Alexander* (1837), 6 L. J. Ex. 129; 2 M. & W. 481; *Lyth v. Auld*

(1852), 21 L. J. Ex. 217; 7 Ex. 669.

(*i*) *Israel v. Douglas* (1789), 1 H. Bl. 239; *Price v. Easton* (1832), 2 L. J. K. B. 51; 4 B. & Ad. 433; *Cochrane v. Green* (1860), 30 L. J. C. P. 97; 9 C. B. N. S. 448.

(*k*) *Wallace v. Kelbull* (1840), 10 L. J. Ex. 12; 7 M. & W. 264; *Sterda v. Sterda* (1859), 58 L. J. Q. B. 302; 22 Q. B. D. 537; See *Powell v. Brodhurst* (1901), 70 L. J. C. 587; (1901) 2 Ch. 160.

PART IV. charges the claim of the creditor against all (l). Accord and satisfaction by joint debtors discharges their several liability, if any; but a composition under the bankruptcy law of a joint debt, as in the case of such a composition by a firm of partners, whether the creditor concur or not, does not discharge their several liabilities for the same debt (n).—Accord and satisfaction of a debt made by an agent of the debtor, or by a person professing to act for the debtor without actual authority, may be adopted by the debtor with the effect of discharging his liability (n).

By agent.

(l) *Nicholson v. Revill* (1835), 5 C. & D. 311; 11 A. & E. 311; 10 K. B. 89; 4 A. & E. 675; *Re* [unintelligible] (1849), 8 L. J. (1901), 70 L. J. K. B. 810; (1842) 10 B. & C. 329; K. B. 642.
 (m) *Simpson v. Henning* (1841), 11 A. & E. 311; 10 K. B. 143; L. R. 10 Q. B. 100.
 (n) See *Gay v. Bell* (1811), 3 Taunt. 1; *Pay v. Bell* (1849), 8 L. J. (1901), 70 L. J. K. B. 810; (1842) 10 B. & C. 329; K. B. 642.

CANADIAN NOTES

Proof of Accord and Satisfaction.

In *Weldon vs. Vaughan*, 5 S. C. R., 35. W., a part-owner, before the Common Law Practice Act, 1873, New Brunswick, sued B. & Co., merchants and ship-brokers in England, complaining that, while he had entire charge of the vessel as ship's husband, they, being his agents, refused to follow his directions and committed a breach of agreement not to charter or send the vessel on any voyage except as ordered by W., or with his consent. E. V. had obtained from W. a one-fourth share in the vessel, the purchase being effected by V. & Co. On arrival of the vessel at Liverpool, V. & Co. incurred a large expense in coppering her, contrary to directions, and sent her on a voyage of which W. disapproved. W. wrote complaining and protesting, and V. & Co. replied that there could be no cause of complaint against their management, and that they would not have purchased a fourth in the vessel if they were not to have the management and control on the other side of the Atlantic. Correspondence ensued, and finally W. wrote, referring to eternal bickerings, reasserted his right to control, stated in detail his grounds of complaint against them, and closed with the words: "To end the matter, if your brother, E. V., will dispose of his quarter, I will purchase it, say, for \$4,200 in cash." This amount was accepted and the transfer made to W. The defendants filed amongst other a plea of accord and satisfaction, and the trial Judge, considering it established by the letter last referred to, entered a nonsuit.

It was held on appeal that the onus of proof of accord and satisfaction was upon the defendants, and should have been passed upon by the jury; that, in the letter, the expression "to end the matter" might be construed as applying to bickering as to the future management, and that there had not been an accord and satisfaction. It was also held that the agreement having been made between W. and V. & Co. only, and being a contract of agency, apart from any question of ownership, the action was properly brought by W. in his own name.

CHAPTER VII.

PAYMENT IN SATISFACTION.

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PAYMENT or tender after a breach of contract does not operate in performance of the contract, and may be refused; but, if accepted, it operates in satisfaction of the breach. Payment at the time appointed is performance of the contract and operates in denial of a breach (a). Payment or tender before the debt is due, if accepted, operates in rescission of the contract before any breach (b).

Payment in satisfaction of breach.

(a) Parke, B., *Kington v. Kington* (1844), 12 L. J. Ex. 248; 11 M. & W. 234; Williams, J., *Chambers v. Miller*

(1862), 32 L. J. C. P. 33; 13 C. B. N. S. 134.

(b) See *ante*, p. 626; *Richardson v. Harris* (1889), 22 Q. B. D. 268.

PART IV.

Damages for
detention of
debt.

The debtor, by wrongfully detaining a debt after it is due, does not render himself liable for any damages which may happen to the creditor for want of the money by reason of special circumstances not contemplated in the original contract. The damages for mere detention of the debt are what are called "nominal damages,"—"a sum of money that may be spoken of, but that has no existence in point of quantity." But the right to nominal damages in point of law was formerly material, because it entitled a creditor, in certain cases, to stand upon his strict right to bring an action, and to recover the costs of suit (c). Since the Judicature Act the court may give costs to an unsuccessful defendant against a plaintiff who only recovers a nominal sum, even when the action is tried before a jury (d).—By Order XXII. r. 1, "where any action is brought to recover a debt or damages, any defendant may pay into court a sum of money by way of satisfaction"; and with or without a defence denying liability. And by rr. 6, 7, "the plaintiff may accept in satisfaction of the claim or cause of action the sum so paid in."

Payment
into Court.

Debts on
bonds, cove-
nants, and
judgments.

Payment
post diem.

By a technical rule of common law a debt acknowledged as presently due under seal, as a single bond, or a bond with a condition after forfeiture, or a covenant to pay a present money debt, could not be discharged after it had become due by mere payment in satisfaction; but only by matter of as high a nature, as by an acquittance under seal (e). The same rule applied to contracts of record, as judgment debts (f).—By 4 & 5 Anne, c. 16, s. 12, it was enacted that in any action upon a single bond, or upon a judgment, payment of the money due (g) upon such bond or judgment may be pleaded in bar of such action; and in an action upon a bond conditioned for the payment of a lesser sum at a day or place certain, payment of the principal and interest due by the condition of such bond, though not made strictly according to the condition may be pleaded in bar, and shall be as effectual as if the money had been paid at the day and place according to the condition, and had been so pleaded. This enact-

(c) *Nosotti v. Page* (1850), 20 L. J. C. P. 81; 10 C. B. 643; *Joule v. Taylor* (1851), 21 L. J. Ex. 31; 7 Ex. 58; *Cook v. Hopewell* (1856), 25 L. J. Ex. 71; 11 Ex. 555.

(d) *Harris v. Petherick* (1879), 48 L. J. Q. B. 521; 4 Q. B. D. 611; *Dicks v.*

Brooks (1880), 49 L. J. C. 812; 15 Ch. D. 22. See *Sprange v. Lee* (1908), 77 L. J. C. 274; (1908) 1 Ch. 424.

(e) See *ante*, p. 641.

(f) Co. Lit. 291a.

(g) *Husband v. Davis* (1851), 20 L. J. C. P. 118; 10 C. B. 645.

ment does not enable the obligor to discharge his liability by tender of payment *post diem*, if refused by the obligee (*h*). A set-off may be pleaded to the amount due (*i*); or the sum due may be paid into court (*k*). A bond for payment of interest is within this statute (*l*).—Bonds with special conditions are regulated by 8 & 9 Will. 3, c. 11, by which the obligee is entitled to have damages assessed for such breaches of the condition as he may prove, and to have judgment for the whole penalty as security for future breaches (*m*). A bond conditioned for payment of a less sum by instalments is within the latter, and not within the former statutes (*n*). Payment into court in satisfaction in an action on a bond under the above statute is admissible to particular breaches only and not to the whole action (*o*).

CHAP. VII.

Bond with special condition.

Various transactions may become equivalent in law to payment in satisfaction by agreement of the parties. It is a general rule that payment of a less sum in satisfaction of a greater liquidated debt, operates only as a discharge *pro tanto*, and cannot in law discharge the whole debt without a release under seal, or some valid consideration for abandoning the residue (*p*). But payment of a less sum may operate in satisfaction of a debt under a valid agreement to that effect: as if agreed to be paid at an earlier day, or at a different place (*q*); or under an agreement to abandon a defence to an action for the debt and to pay the costs (*r*); or under a composition of debts between the debtor and creditors (*s*); or under a compromise of a doubtful claim (*t*); or to or by a third party (*u*). And a negotiable security, as a bill, note, or cheque, for a less amount than the debt may be given and accepted in satisfaction, though it is the security of the debtor only (*x*). A judgment

Transactions equivalent to payment.

Payment of less sum than the debt.

(*h*) See *ante*, pp. 57, 628.

(*i*) *Collins v. Collins* (1759), 2 Burr. 820; *Lee v. Lester* (1849), 18 L. J. C. P. 312; 7 C. B. 1108. See *Attwooll v. Attwooll* (1853), 22 L. J. Q. B. 287; 2 E. & B. 23.

(*k*) See Ord. XXII.

(*l*) *Lee v. Lester* (1849), 18 L. J. C. P. 312; 7 C. B. 1108.

(*m*) See *Gainsford v. Griffith* (1667), 1 Wms. Saund. 67, n. (1); *Tutcher v. Caralampi* (1888), 21 Q. B. D. 414.

(*n*) *Preston v. Dania* (1872), 42 L. J. Ex. 33; L. R. 8 Ex. 19.

(*o*) Ord. XXII. r. 1.

(*p*) *Cumber v. Waue* (1719), 1 Strange,

426; 1 Sm. L. C. 325; *Foakes v. Beer* (1884), 54 L. J. Q. B. 130; 9 Ap. Ca. 605; *Underwood v. Underwood* (1894), 63 L. J. P. 109; (1894) P. 204.

(*q*) *Pinnell's case* (1602), 5 Co. 117 a; *Smith v. Trousdale* (1854), 23 L. J. Q. B. 107; 3 E. & B. 83.

(*r*) *Cooper v. Parker* (1855), 24 L. J. C. P. 68; 15 C. B. 822.

(*s*) See *ante*, p. 644.

(*t*) *Re Warren* (1884), 53 L. J. C. 1016.

(*u*) *Welby v. Drake* (1825), 1 Car. & P. 557.

(*x*) *Sihree v. Tripp* (1816), 15 L. J. Ex. 318; 15 M. & W. 23; *Curlewis v. Clark* (1849), 18 L. J. Ex. 144; 3 Ex. 375;

PART IV.

creditor having agreed not to proceed upon the judgment upon the debtor paying a sum down and the balance of the judgment debt by instalments, and the debt having been so paid; it was held that the agreement showed no consideration for the creditor abandoning interest on the judgment and he might issue execution to recover it (*y*). Payment of a less sum may operate in effectual discharge of an unliquidated or uncertain claim for a greater sum (*z*). And payment of a less sum may discharge a greater debt, where it has that effect according to the law of the place of payment (*a*).

Payment by
set-off in
account.

Where an account is stated between two parties respecting debts on both sides, and it is agreed that the debts on one side shall be set off against the debts on the other, leaving the balance only due, the transaction is equivalent to payment of the debts set off, and may be so pleaded (*b*). "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment it has the same effect" (*c*). A written memorandum acknowledging such payment by set-off in account is a receipt which may require a receipt stamp (*d*). A set-off of cross claims may form part of the original contract, leaving the balance as the only debt incurred (*e*). And this contract may be implied, as in the case of an agent whose accountability is subject to the just charges and allowances of the agency (*f*). Money paid to third parties at the request of a person may be taken by agreement as payment to himself (*g*).—Upon the above principle, under an agreement to lend money the set-off of a debt then due from

Goddard v. O'Brien (1882), 9 Q. B. D. 37;
Bidder v. Bridges (1887), 57 L. J. C. 300;
37 Ch. D. 406.

(*y*) *Evokes v. Beer* (1884), 54 L. J. Q. B. 130; 9 Ap. Ca. 605; *Underwood v. Underwood* (1894), 63 L. J. P. 109; (1894) P. 204.

(*z*) *Wilkinson v. Byers* (1834), 3 L. J. K. B. 144; 1 A. & E. 106; *Bridgman v. Dean* (1851), 21 L. J. Ex. 90; 7 Ex. 199.

(*a*) *Rall v. Dennistoun* (1851), 20 L. J. Ex. 278; 6 Ex. 483.

(*b*) *Callander v. Howard* (1850), 19 L. J. C. P. 312; 10 C. B. 290.

(*c*) *Campbell. C. J., Livingstone v.*

Whiting (1850), 19 L. J. Q. B. 528; 15 Q. B. 723; *Mellish, L. J., Spargo's case* (1873), 42 L. J. C. 488; L. R. 8 Ch. 414.

(*d*) *Lucas v. Jones* (1844), 13 L. J. Q. B. 208; 5 Q. B. 949; *Lucynstone v. Whiting* (1850), 19 L. J. Q. B. 528; 15 Q. B. 722.

(*e*) *Churworth v. Pickford* (1840), 10 L. J. Ex. 41; 7 M. & W. 314; *Fung v. Kitchin* (1878), 3 Ex. D. 127; 47 L. J. Ex. 579.

(*f*) *Dale v. Sallet* (1767), 4 Burr. 2133.

(*g*) *Hamlyn v. Betteley* (1850), 49 L. J. C. P. 465; 5 C. P. D. 327.

the borrower is equivalent to an advance of two money for the purpose of supporting a mortgage to secure the amount (*h*); or to support a bill of sale describing the consideration as money then paid to the grantor, though no money in fact passed (*i*). But money retained by the lender as an intended set-off against accruing debts not yet due and payable cannot be truly so described (*k*).—A payment thus made has the full effect of payment in taking a debt out of the operation of the Statute of Limitations (*l*). And where the earlier items of an account are beyond the period of limitation, and the account is settled and a balance struck, the barred debts are effectually paid, and the balance only remains due (*m*). So if debts founded upon illegal considerations are paid by set-off in account, the objection of the illegality is excluded (*n*). A mere open account, without any agreement to set off the cross items, is inoperative in discharging the debts, or in preventing the operation of the Statute of Limitations (*o*). So the receipt of rents by a mortgagee in possession does not go in payment of interest without an appropriation and account stated to that effect (*p*). A mere account stated of a debt is not conclusive; consequently a payment in account, by set-off or otherwise, discharges only to the amount acknowledged, and is no answer to a claim of a larger sum for the same debt (*q*).

The delivery and acceptance of goods or other consideration at an agreed price in satisfaction of a debt is equivalent to payment in money (*r*). And it may be given in evidence of payment in an action upon a contract under seal; because the effect is not to contradict or vary the deed, but to satisfy the breach (*s*). A payment thus made is equivalent to payment in money in preventing the operation of the Statute of Limitations (*t*). It is a

Goods taken
in payment.

(*h*) *Keran v. Crawford* (1877), 46 L. J. C. 729; 6 Ch. D. 29.

(*i*) *Hamlyn v. Betteley* (1880), 49 L. J. C. P. 465; 5 C. P. D. 327; *Credit Co. v. Pitt* (1880), 50 L. J. Q. B. 106; 6 Q. B. D. 295.

(*k*) *Richardson v. Harris* (1889), 22 Q. B. D. 268.

(*l*) *Worthington v. Grimsditch* (1845), 15 L. J. Q. B. 52; 7 Q. B. 479; *Amos v. Smith* (1862), 31 L. J. Ex. 423; 1 H. & C. 238.

(*m*) *Ashby v. James* (1843), 12 L. J. Ex. 295; 11 M. & W. 542.

(*n*) *Queens v. Denton* (1834), 4 L. J. Ex. 68; 1 Cr. M. & R. 711.

(*o*) *Waugb v. Cope* (1840), 10 L. J. Ex.

145; 6 M. & W. 824; *Clark v. Alexander* (1844), 13 L. J. C. P. 133; 8 Scott, N. R. 147.

(*p*) *Cockburn v. Edwards* (1881), 51 L. J. C. 46; 18 Ch. D. 449. See *Worthington v. Grimsditch* (1845), 15 L. J. Q. B. 52; 7 Q. B. 479.

(*q*) *Smith v. Page* (1846), 15 M. & W. 683; *Perry v. Attwood* (1856), 25 L. J. Q. B. 408; 6 E. & B. 691.

(*r*) *Sartin v. Wilkin* (1833), 12 L. J. Ex. 381; 11 M. & W. 622. See *Graham v. Wildcockson* (1877), 46 L. J. Ex. 55.

(*s*) *Smith v. Battams* (1857), 26 L. J. Ex. 232.

(*t*) *Hooper v. Stephens* (1835), 5 L. J. K. R. 4; 4 A. & E. 72.

PART IV.

Bill or note
taken for
the debt:—
in conditional
payment.

payment within the enactment of the bankrupt law which protects payments by or to a bankrupt, if received or paid without notice of an act of bankruptcy (*u*).

A negotiable security, as a bill or note, indorsed or delivered to and taken by the creditor on account of a simple contract debt, presumptively operates as conditional payment, that is, the debt is discharged if the security be met at maturity, but revives if it is dishonoured (*x*). But if by the act or laches of the creditor the money secured becomes irrecoverable he will be deemed to have made the bill or note his own, and his debt will be treated as satisfied (*y*). And the conditional payment operates as consideration for the security by implying forbearance of the debt during its currency (*z*). So where payment is to be made by bill by the terms of the contract, the bill given operates in conditional payment, and if dishonoured it is the same in effect as if no bill had been given (*a*). If the security is paid when due, it is equivalent to payment of the original debt, and may be so pleaded (*b*). If the security is partially paid, the debt is discharged *pro tanto*, and is revived for the residue (*c*). If a security given for an undisputed part of a debt be retained by the creditor, he can only sue for the residue of the debt, although he offers to return the security if the balance is not forthcoming (*d*); but a judgment recovered upon the security without satisfaction is no payment or discharge of the debt (*e*).—While the security is current it affords an answer to the claim by suspending all remedies: as an action for the price of goods sold upon credit of a bill (*f*); or a bankrupt notice given by a judgment creditor, who afterwards takes a note payable at a future time for the

Suspension
of remedies.

(*u*) 46 & 47 Vict. c. 52, s. 49. See *Cannan v. Wood* (1837), 6 L. J. Ex. 112; 2 M. & W. 465.

(*x*) *Sayer v. Wagstaff* (1844), 5 B. & A. 415; affd. (1844), 14 L. J. C. 116; *Belshaw v. Bash* (1852), 22 L. J. C. P. 24; 11 C. B. 191; *Hadley & Co. v. Hadley* (1898), 68 L. J. C. 694; (1898) 2 Ch. 680; *Ex p. Debtor* (1908), 77 L. J. K. B. 409; (1908) 1 K. B. 344.

(*y*) *Camidge v. Allenby* (1827), 5 L. J. O. S. K. B. 95; 6 B. & C. 373; *Alderson v. Langdale* (1832), 1 L. J. K. B. 273; 3 B. & Ad. 660.

(*z*) *Baker v. Walker* (1845), 14 L. J. Ex. 371; 14 M. & W. 465; *Currie v. Misa* (1875), 44 L. J. Ex. 44; L. R. 10 Ex. 153; *Stott v. Fairlamb*, 53 L. J.

Q. B. 47; *ante*, p. 446. See Bills of Exchange Act, 1882, s. 27.

(*a*) *Gunn v. Boleker* (1875), 44 L. J. C. 732; L. R. 10 Ch. 491.

(*b*) *Thorne v. Smith* (1851), 20 L. J. C. P. 71; 10 C. B. 659.

(*c*) *Bottomley v. Nuttall* (1858), 28 L. J. C. P. 110; 5 C. B. N. S. 122.

(*d*) *Stuart v. Cave* (1859), 28 L. J. C. P. 193; 5 C. B. N. S. 737.

(*e*) *Turleton v. Allhusen* (1834), 4 L. J. K. B. 17; 2 A. & E. 32; *Wegg Prosser v. Evans* (1894), 64 L. J. Q. B. 1; (1895) 1 Q. B. 108.

(*f*) *Paul v. Dod* (1846), 15 L. J. C. P. 177; 2 C. B. 890; *Wayne's Coal Co. v. Morewood* (1877), 46 L. J. Q. B. 746.

debt (*g*); or a notice given to sell mortgaged premises under a power of sale, which is suspended if the creditor takes a bill on account of the debt, and revived if the bill is not paid (*h*).—So the conditional payment suspends the remedies on a lien for the debt, but without removing the lien (*i*); but if the seller has contracted to deliver the goods upon the credit of a bill, he has no lien until the credit has expired (*k*).

CHAP. VII.

Effect on
lien for the
debt.

The bill or note may be given and taken in satisfaction and discharge of the debt, the creditor taking upon himself the risk of dishonour; and the subsequent dishonour does not revive the debt (*l*). Whether a bill or note is given and taken in satisfaction or as conditional payment is a question of fact as to the intention shown by the parties; the presumption being that it is a conditional payment with a recourse to the original debt (*m*). But if the creditor take bank notes or a bill or note or other form of credit of a third party, instead of cash, it is an absolute payment in satisfaction of the debt; and he cannot upon dishonour of the security have recourse to his remedy for the debt (*n*).—By special agreement a bill or note may be indorsed to the creditor and taken by him as a collateral security for the debt, without suspending or affecting his other remedies (*o*). And a note of the debtor payable on demand received by the creditor for the debt would operate only as a collateral security, so long as it remained in his hands (*p*).

Bill or note
taken in
satisfaction.

Bill or note
taken as
collateral
security.

In the case of a specialty debt or contract under seal at common law, a bill or note given for the debt operated presumptively only as a collateral security, without affecting the remedy; and it operated in payment only if in fact paid when due. "The cases in which the giving of the bill has been held not to suspend the

Bill taken
for specialty
debt.

(*g*) *Ex p. Matthes* (1881), 12 Q. B. D. 506; *Ex p. Debtor* (1908), 77 L. J. K. B. 405; (1908) 1 K. B. 344.

(*h*) *Wood v. Murton* (1877), 47 L. J. Q. B. 191.

(*i*) *Dixon v. Yates* (1833), 2 L. J. K. B. 198; 5 B. & Ad. 313; *Ex p. Widdoughby* (1881), 16 Ch. D. 604.

(*k*) See *Miles v. Gorton* (1834), 3 L. J. Ex. 155; 2 Cr. & M. 504; *Gunn v. Bolekow* (1875), 44 L. J. C. 732; L. R. 10 Ch. 491; *Re Defries & Sons, Ltd.* (1909), 78 L. J. C. 720; (1909) 2 Ch. 423.

(*l*) *Sayer v. Wagstaff* (1814), 5 Beauv. 415; *affd.* (1844), 14 L. J. C. 116;

Sibree v. Tripp (1846), 15 L. J. Ex. 318; 15 M. & W. 23.

(*m*) *Goldshede v. Cottrell* (1836), 6 L. J. Ex. 26; 2 M. & W. 20; *Maillard v. Argyll (Duke)* (1843), 6 Man. & G. 40.

(*n*) *Anderson v. Hillier* (1852), 21 L. J. C. P. 150; 12 C. B. 499; *Lechfield Union v. Greene* (1857), 25 L. J. Ex. 140; 1 H. & N. 881.

(*o*) *Pring v. Clarkson* (1822), 1 L. J. O. S. K. B. 24; 1 B. & C. 11; *Pencek v. Pursell* (1863), 32 L. J. C. P. 266; 14 C. B. N. S. 728.

(*p*) *Per cur. Fearn v. Cochrane* (1817), 16 L. J. C. P. 161; 4 C. B. 274.

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remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an agreement that the bill shall operate as a conditional payment does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill" (q). But the legal implication may be rebutted by the circumstances, for the giving of the bill affords some evidence of an agreement by a creditor to suspend his remedy during the currency of the bill (r). Where a bill of sale under seal was given as security for a debt, providing that possession might be taken upon default in payment on demand, and a bill of exchange at four months was given for the same debt; it was held that the bill operated only by way of collateral security and not in suspension of the debt or of the right of possession under the deed (s). But a note payable at three months given by a judgment debtor was held to be evidence of an agreement to suspend the judgment; and suspension of the judgment was held sufficient consideration to support the note (t).

Debtor
primarily
liable on bill.

Debtor
secondarily
liable.

Where the debtor himself is primarily liable upon the bill given in conditional payment, it lies upon him to show circumstances excusing non-payment on his part, as that the bill is not yet due or is outstanding in the hands of an indorsee (u).—If the debtor is only secondarily liable, as if he be drawer or indorser, the delivery of the bill is a sufficient *prima facie* answer to the claim; for the creditor, as holder of the bill, is bound to take all steps necessary to obtain payment and to preserve the rights of his debtor upon it, as due presentment for payment and notice of dishonour; in default of which, where it is necessary, the latter is discharged not only from his liability upon the bill, but also from the original debt, unless the creditor can show circumstances excusing the omission (x). And a like responsibility rests with a creditor who holds a bill which has been indorsed to him by the debtor as collateral security for the debt (y).

(q) *Per cur.* *Belshaw v. Bush* (1851), 22 L. J. C. P. 29; 11 C. B. 206.

(r) *Palmer v. Bramley* (1845), 65 L. J. Q. B. 47; (1895) 2 Q. B. 405.

(s) *Bramwell v. Eglinton* (1864), 33 L. J. Q. B. 130; 5 B. & S. 39; *affd.* on other grounds (1865), 35 L. J. Q. B. 133; 1 L. R. 1 Q. B. 494.

(t) *Baker v. Walker* (1845), 1 L. J. Ex. 371; 14 M. & W. 465. See *Er v. Debtor* (1909), 77 L. J. K. B. 409; (1909)

1 K. B. 344.

(u) *Price v. Price* (1847), 16 L. J. Ex. 99; 16 M. & W. 242. See *National Strong Bank v. Traugh* (1875), 56 L. J. C. P. 260; 1 L. R. 2 C. P. 556.

(x) *Bridges v. Berry* (181), 3 Taunt. 130; *Seward v. Palmer* (1818), 8 Taunt. 277. See *Craze v. Clay* (1854), 23 L. J. Ex. 150; 9 Ex. 604.

(y) *Parock v. Parrell* (1863), 32 L. J. C. P. 266; 14 C. B. N. S. 728.

—There are conflicting decisions whether a debtor who delivers, on account of the debt, a bill to which he is not a party, and without indorsing it, is entitled to notice of dishonour as if he had indorsed it, in order to be made liable for the price of goods in respect of which the bill was given (z). If the debtor delivers notes of a bank payable to bearer on demand, the creditor is bound either to circulate them at once, or to present them for payment and give notice if dishonoured; and by neglecting to do so he, and not the debtor, becomes subject to loss caused by the bank stopping payment (a).—If a bill is given by a third party on account of the debt, there is presumptively no duty in the creditor towards the debtor in regard to the bill, and non-payment revives the debt without notice of dishonour (b). And if a bill is given by an agent of the debtor, or by one of partners or co-debtors, and is dishonoured, the debt is revived (c).

CHAP. VII.
Debtor not
party to bill.

Bill taken
from a third
party.

Payment by a bill or note may also be avoided by showing that the instrument was forged, or invalid, or unstamped; and in such cases the creditor may repudiate the payment and claim the debt without taking any steps to obtain payment of the note and without giving any notice of dishonour (d). A payment admitted in account may be avoided by proving that it was made by a bill which was void for want of a stamp or by a forged bill (e).—At common law if the creditor lost a negotiable bill which was given for the debt, he lost his remedy not only upon the bill but also for the debt; and though the bill when lost was not in a negotiable state, as if payable to his order but not indorsed, provided it was negotiable in form (f). But the Court of Chancery granted relief against the loss of the instrument upon giving a sufficient indemnity against other claims upon it; and by the Bills of Ex-

Void bill
taken for
the debt.

Loss of bill.

(z) *Swinyard v. Bowers* (1816), 5 M. & S. 62; *Smith v. Mercer* (1867), 37 L. J. Ex. 21; L. R. 3 Ex. 51. And see *Biley, J., Hylton v. Wilkins* (1822), 1 L. J. O. S. K. B. 11; 1 B. & C. 10; *per cur. Van Wart v. Woolley* (1821), 3 L. J. O. S. K. B. 51; 3 B. & C. 445.

(a) *Cumdy v. Akenby* (1827), 5 L. J. O. S. K. B. 95; 6 B. & C. 373; *Robson v. Over* (1817), 16 L. J. Q. B. 437; 10 Q. B. 704.

(b) *Bishop v. Rowe* (1815), 3 M. & S. 362; *Swinyard v. Bowers* (1816), 5 M. & S. 62; *Parson's claim* (1869), L. R. 8 Eq. 506.

(c) *Everett v. Collins* (1810), 2 Camp.

515; *Bottomley v. Nuttall* (1859), 28 L. J. C. P. 110; 5 C. B. N. S. 122; *Keay v. Fenwick* (1876), 1 C. P. D. 745.

(d) *Brown v. Watts* (1808), 1 Taunt. 353; *Conly v. Marriott* (1811), 9 L. J. O. S. K. B. 70; 1 B. & A. 696; *Bell v. Buckley* (1856), 25 L. J. Ex. 163; 11 Ex. 631.

(e) *Smart v. Nokes* (1844), 13 L. J. C. P. 79; 6 Man. & G. 911.

(f) *Hansard v. Robinson* (1827), 5 L. J. O. S. K. B. 242; 7 B. & C. 90; *Ramuz v. Crowe* (1847), 1 L. J. Ex. 280; 1 Ex. 167; *Crowe v. Clay* (1854), 23 L. J. Ex. 150; 9 Ex. 604.

PART IV. change Act, 1882, ss. 69, 70, a general provision is made to that effect (*g*). Where the lost bill has got back into the possession of the debtor, the effect as payment is avoided, and the creditor may resort to his original claim (*h*).—If the bill taken for the debt is vitiated by a material alteration for which the creditor is responsible, and which destroys the debtor's remedies against prior parties, the creditor is precluded from recovering the original debt (*i*). But if the debtor is the party primarily liable upon the bill and has no remedies over, the creditor may resort to his original claim, notwithstanding the alteration, after the extended credit has expired (*k*).

Alteration
of bill.

Payment by
banker's
cheque.

Upon the above principles the giving of a cheque on a banker, whether payable to bearer or to order, if accepted on account of a debt is equivalent to payment and suspends the remedy, until the cheque has been presented for payment and dishonoured (*l*). A payment by cheque or draft upon a banker who has funds of the drawer in his hands to meet it will discharge the drawer, notwithstanding it is lost in the post and never reaches the payee's hands, where a remittance in this manner is authorised expressly or by the general course of dealing (*m*); and a remittance by cheque is *prima facie* proof of payment without evidence that it was honoured (*n*). But a creditor taking a cheque in preference to cash does not preclude himself from resorting to his original claim upon dishonour of the cheque (*o*). If the debtor stops a cheque which he has given in payment, the debt and remedies are revived (*p*); but he is not bound to stop a cheque for the benefit of third parties, nor does he incur any liability to third parties by countermanding a direction to stop payment (*q*). An agent is not justified in accepting a cheque on behalf of his principal in lieu of a payment in cash,

(*g*) See *ante*, p. 599.

(*h*) *Widdens v. Gorton* (1857), 26 L. J. C. P. 165; 1 C. B. N. S. 576.

(*i*) *Alderson v. Langdale* (1832), 1 L. J. K. B. 271; 3 B. & Ad. 663.

(*k*) *A'kinson v. Hawdon* (1835), 4 L. J. K. B. 85; 2 A. & E. 628.

(*l*) *Hough v. May* (1836), 5 L. J. K. B. 186; 4 A. & E. 954; *Johnston v. Boyes* (1899), 68 L. J. C. 425; (1899) 2 Ch. 731. See *Charles v. Blackwell* (1877), 46 L. J. C. P. 368; 2 C. P. D. 151.

(*m*) *Warwicke v. Noakes* (1791), 1 Peake, 98; *Thairluall v. G. N. Ry.* (1910), 70

L. J. K. B. 924; (1910) 2 K. B. 509.

(*n*) *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.* (1873), 42 L. J. C. P. 262; L. R. 8 C. P. 685.

(*o*) *Everett v. Collins* (1810), 2 Camp. 515.

(*p*) *Cohen v. Hale* (1878), 47 L. J. Q. B. 496; 3 Q. B. 371; *Elliott v. Grutchley* (1905), 75 L. J. K. B. 147; (1906) A. C. 7.

(*q*) *Ex p. Richdale* (1882), 51 L. J. C. 462; 19 Ch. D. 409; *Bence v. Shearman* (1898), 67 L. J. C. 513; (1898) 2 Ch. 582.

unless he has authority to do so; but if an agent authorised to receive payment in cash accepts a cheque which is met upon presentation, and before his authority to receive payment is revoked, the debtor is discharged (r).

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A creditor who takes a cheque may present it for payment at any time, until it is barred by the Statute of Limitations; and formerly the debtor was not discharged if the cheque was presented within six years after it was drawn. This rule has been altered by statute according to which, after a reasonable time for presenting the cheque has elapsed, the creditor holds it at his own risk against the failure of the banker; and if the money is lost through that failure, the drawer to that extent is discharged, the holder becoming creditor of the banker to the same extent (s). The reasonable time for presenting a cheque is by general custom within the next day after receiving it, if payable at the same place where received, and whether presented in person or through a banker; if payable at a distance another day is allowed for transmission by post, and the banker or agent to whom it is transmitted is allowed the next day after receiving it (t). The same rule applies as between the customer and the banker as to cheques sent for collection (u). The time for presenting foreign cheques is settled by the custom of bankers (x). The acceptance of a bill "payable at a banker's," unless expressly stated to be not payable elsewhere, is not similarly restricted in time for presentment; being payable by the acceptor without presentment or demand (y).

Presentment of cheque.

A written receipt or admission of payment by the creditor is *prima facie* evidence against him, but not conclusive except in favour of a person who has acted upon it in ignorance of the true state of facts; and it is competent for the creditor to adduce

Receipt as evidence of payment.

(r) *Bridges v. Garrett* (1870), 39 L. J. C. P. 231; L. R. 5 C. P. 454; *Poppe v. Wexarott* (1893), 63 L. J. Q. B. 222; (1894) 1 Q. B. 272; *Johnst v. Brown* (1894), 63 L. J. C. 425; (1899) 2 Ch. 733. See *Charles v. Blackwell* (1877), 16 L. J. C. P. 3-6; 2 C. P. D. 151.

(s) Bills of Exchange Act, 1882, s. 74; *Laur v. Raul* (1857), 27 L. J. C. P. 76; 3 C. B. N. S. 412; See *Hokin v. Ware* (1869), 38 L. J. Ex. 147; L. R. 4 Ex. 268.

(t) *Doddington v. Schlucker* (1843), 2 L. J. K. B. 138; 4 B. & Ad. 752;

Bailey v. Bodenham (1864), 33 L. J. C. P. 252; 16 C. B. N. S. 288.

(u) *Moul v. Brown* (1838), 7 L. J. C. P. 111; 4 Bing. N. C. 266; *Hare v. Hunt* (1861), 30 L. J. C. P. 302; 10 C. B. N. S. 65; *Prideaux v. Cridlle* (1869), 38 L. J. Q. B. 232; L. R. 4 Q. B. 455.

(x) Bills of Exchange Act, 1882, s. 74 (2); *Hewwood v. Pickering* (1874), 43 L. J. Q. B. 145; L. R. 9 Q. B. 428.

(y) Bills of Exchange Act, 1882, ss. 19, 32, 51. See *ante*, p. 624.

PART IV. evidence to contradict or explain it; and the debtor may prove payment notwithstanding a written receipt (z). A general receipt indorsed upon a bill of exchange is *prima facie* evidence of discharge of a bill; but it may be shown that the payment was made in negotiation of it (a). A receipt given under a composition with creditors, expressed to be in absolute discharge of the debt, may be explained by the terms of the composition, as given for payment in promissory notes, which operate in conditional payment only until paid (b).—A receipt may be shown to have been given in gratuitous discharge of the debt without any money passing, in order to rebut the admission of payment (c).—A receipt purporting to be for the price of goods sold may be explained by showing that the sale was fictitiously made for the purpose of protecting the property from the creditors of the pretended seller; who therefore might recover back the goods from the pretended buyer (d). A receipt purporting to be for the price of goods sold, but which are in fact left in the possession of the seller, may evidence a transaction within the Bills of Sale Act, and require registration as a bill of sale (e).

Gratuitous receipts.

Fictitious receipts.

Effect of receipt as to third party.

A receipt or admission of payment is not evidence against a third party where it is sought to charge him with the money expressed to be paid; but it may be admissible in connection with other circumstances to prove the payment (f). Nor can a third party who is responsible for the debt, as surety or otherwise, take the benefit of a receipt given to the debtor as concluding the creditor; who may explain the receipt as applying to the personal liability of the debtor only (g).—But a receipt may be conclusive in favour of a third party who acts upon the faith of it; as if the creditor gives a receipt to an agent of the debtor, upon the faith of which the debtor pays or settles with his agent (h). In marine insurance

(z) *Jacob v. Lindsay* (1801), 1 East, 460; *Skuse v. Jackson* (1824), 3 L. J. O. S. K. B. 43; 3 B. & C. 421; *Farrar v. Hutchinson* (1839), 8 L. J. Q. B. 107; 9 A. & E. 611; *Lee v. Lancashire & Yorks. Ry.* (1871), L. R. 6 Ch. 531.

(a) *Graves v. Key* (1832), 3 B. & Ad. 313; *Phillips v. Warren* (1845), 14 L. J. Ex. 200; 14 M. & W. 379.

(b) *Edwards v. Haueher* (1875), 1 C. P. D. 111.

(c) *Foster v. Parker* (1851), 20 L. J. Ex. 385; 6 Ex. 839. See *Maher v. Maher* (1867), 36 L. J. Ex. 70; L. R. 2 Ex. 153.

(d) *Bowen v. Foster* (1858), 27 L. J. Ex. 262; 2 H. & N. 779. See *Taylor v. Bowens* (1876), 46 L. J. Q. B. 39; 1 Q. B. D. 291.

(e) *Berkett v. Tower Asuta Co.* (1891), 60 L. J. Q. B. 493; (1891) 1 Q. B. 638.

(f) *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.* (1873), 42 L. J. C. P. 262; L. R. 8 C. P. 685.

(g) *Exp. Good* (1877), 46 L. J. Bk. 65; 5 Ch. D. 49. See *Re E. W. A.* (1901), 70 L. J. Q. R. 810; (1901) 2 K. B. 642.

(h) *Wyatt v. Hertford (Lord)* (1802), 3 East, 147.

the underwriter accepts the broker as his debtor and acknowledges the receipt of the premium in the policy; the assured is then entitled to pay the broker upon the faith of that receipt; though as between the broker and the underwriter the receipt may be disputed (i). And the receipt in the policy is conclusive evidence in an action by the assured against the underwriter for a return of the premium upon a failure of the policy (k).

By the Stamp Act, 1891, "a receipt given for or upon the payment of money amounting to 2*l.* or upwards" is charged with a stamp duty of 1*d.*, with the exemptions therein specified (l). By sect. 101 (1), the term "receipt" is defined as any writing whereby any money or any bill or note for money is acknowledged to have been received, deposited or paid, or whereby any debt or demand is acknowledged to have been settled, satisfied or discharged, whether signed or not (m). By sect. 103, a person who gives a receipt liable to duty and not duly stamped, or refuses to give a receipt duly stamped, or separates or divides the amount with intent to evade the duty is liable to a penalty. And by force of the general enactment of sect. 17, a receipt liable to the duty "cannot be pleaded, or given in evidence, or admitted to be good, useful or available in law or in equity, unless it is duly stamped." But payment may be proved by other evidence, although a receipt was given in writing; and an unstamped receipt may be used to refresh the memory of a witness as to the payment (n). A document in form of a receipt, though not admissible as evidence of payment, for want of a stamp, may be admitted to prove a collateral matter (o). But a promissory note which is insufficiently stamped is not admissible as evidence of receipt of money by the maker (p).

Receipt stamp.

A receipt or acknowledgment of payment made under seal operates at common law in estoppel between the parties, and is conclusive according to the terms of the deed; but it may be

Receipt under seal.

(i) *Per cur.* *Jenkins v. Power* (1817), 6 M. & S. 287; *Power v. Butcher* (1849), 8 L. J. O. S. K. B. 217; 10 H. & C. 329. See *Fog v. Bell* (1811), 3 Taunt. 193.

(k) *Dalzell v. Mair* (1808), 1 Camp. 532. See *De Gamunde v. Pigou* (1812), 4 Taunt. 216.

(l) 51 & 55 Viet. c. 39, schedule, tit. "Receipt."

(m) See *Livingstone v. Whiting* (1850), 19 L. J. Q. B. 528; 15 Q. B. 722; *Reg.*

v. Overton (1851), 2 L. J. M. C. 29.

(n) *Jacob v. Lindsay* (1801), 1 East, 160; *Maugham v. Hubbard* (1828), 6 L. J. K. B. 229; 8 B. & C. 14; *Singleton v. Barrett* (1852), 1 L. J. Ex. 134, 2 Cr. & J. 368.

(o) *Matherson v. Ross* (1819), 2 H. L. C. 286; *Evans v. Pro hero* (1852), 21 L. J. C. 772; 1 De G. M. & G. 572.

(p) *Ashling v. Boon* (1891), 60 L. J. C. 306; (1891) 1 Ch. 568.

PART IV.

Receipt
indorsed on
deed.

explained and set aside upon equitable terms in cases of mistake or fraud (*q*). And evidence is admissible in equity to show that the consideration stated in a deed was not in fact paid, notwithstanding a formal acknowledgment of payment and a release contained in the deed (*r*). And at law it might be shown that payment was made by cheque which was subsequently dishonoured (*s*). Evidence is also admissible of a collateral agreement to take payment in goods to be delivered or services to be rendered; if such evidence be consistent with the deed (*t*).—The receipt usually indorsed upon a deed, not being executed as part of the deed, did not operate in estoppel; it was merely an admission in writing, and was *prima facie* evidence of payment (*u*). But as regards third parties accepting the title to property upon the faith of such receipt, it estopped the party signing it from denying, as against a subsequent purchaser for value and without notice of the truth, that the money had been paid (*x*). And on the other hand the absence of, or any apparent irregularity in the indorsed receipt was held to operate in equity as constructive notice to a purchaser that the money had not been paid, or, at least, to impose upon him the duty of inquiry (*y*). The Conveyancing Act, 1881, s. 54, now enacts, as to deeds executed after the commencement of the Act, that "a receipt for consideration money in the body of a deed shall be a sufficient discharge for the same, without any receipt being indorsed on the deed"; and by sect. 55, shall, in favour of a subsequent purchaser without notice to the contrary, be sufficient evidence of the payment (*z*). Where the deed does not contain an acknowledgment of the consideration money, nor a receipt indorsed therefor, and there is no evidence of any vendor's lien for unpaid purchase-money, a subsequent purchaser who requires evidence that the consideration money was in fact paid must bear the expense (*a*).

(*q*) *Rex v. Scammonden* (1789), 3 T. R. 474; *Bottrell v. Summers* (1828), 2 Y. & J. 407; *Harding v. Ambler* (1838), 7 L. J. Ex. 131; 3 M. & W. 279; *Rimmer v. Webster* (1902), 71 L. J. C. 561; (1902) 2 Ch. 163.

(*r*) *Wilson v. Keating* (1859), 28 L. J. C. 895; 4 De G. & J. 588.

(*s*) *Duerell v. Whitmarsh* (1841), 5 Jur. 964.

(*t*) *Baker v. Dewey* (1823), 1 L. J. O. S. K. B. 1'3; 1 B. & C. 704; *Smith v. Battams* (1857), 26 L. J. Ex. 232.

(*u*) *Lampon v. Corke* (1822), 5 B. & Ald. 606.

(*x*) *Hunter v. Walters* (1871), 11 L. J. C. 175; L. R. 7 Ch. 75; *Bickerton v. Walker* (1885), 55 L. J. C. 227; 31 Ch. D. 131.

(*y*) *Kennedy v. Green* (1831), 3 M. & K. 716.

(*z*) *Bateman v. Hunt* (1904), 73 L. J. K. B. 782; (1904) 2 K. B. 530.

(*a*) *Re Scott and Alvarez* (1894), 64 L. J. C. 378, n. The point is not noticed in the report, (1895) 1 Ch. 596.

Payment in satisfaction made to one of joint creditors discharges the debt at law against all; for in an action at law all the joint creditors must have joined in suing, and if one of co-plaintiffs is barred he cannot recover jointly with the others in rescission of his own act (*b*). And, after the death of the creditor who had accepted payment, the surviving joint creditors did not become entitled to sue (*c*). But in equity creditors of the same debt are presumptively interested severally, as tenants in common; and payment to one satisfies him only in respect of his share (*d*). But courts of equity did not entertain actions for a bare money claim, and unless there is some circumstance which would have given the court of chancery jurisdiction prior to the Judicature Act, the common law rule remains unchanged. In the case of partnership debts if the debtor knew that the partner to whom he paid had no authority to receive payment, or if he knew the payment to be otherwise irregular, as by setting off a separate debt of that partner, the payment would not be valid beyond the share of the latter, and the others might recover their shares of the debt (*e*). Joint creditors suing for a debt are not concluded by a receipt given by one of them, and may prove that it was given in fraud of the others, and that no money was paid (*f*). A joint receipt presumptively charges all; but it may be shown that one only received the money in order to charge him with it and to discharge the others (*g*).—Under a joint account clause, declaring that the parties are entitled to the money jointly, the receipt of the survivors or survivor is a discharge, notwithstanding notice to the payer of a severance of the joint account; but the several interests of the parties *inter se* are not affected by the clause (*h*).—In the case of money paid in to a bank upon a joint account, it is generally implied from the purpose of such an account and the relation between banker and customer, that

Joint
accounts.

(*b*) *Wallace v. Kelsall* (1840), 10 L. J. Ex. 12; 7 M. & W. 264. See *Powell v. Brodhurst* (1901), 71 L. J. C. 587; (1901) 2 Ch. 160.

(*c*) *Husband v. Davis* (1851), 20 L. J. C. P. 118; 10 C. B. 645.

(*d*) *Steeda v. Steeds* (1889), 58 L. J. Q. B. 302; 22 Q. B. D. 537. See *Powell v. Brodhurst* (1901), 70 L. J. C. 587; (1901) 2 Ch. 160.

(*e*) *Gordon v. Ellis* (1846), 15 L. J. C. P. 178; 2 C. H. 821; *Piercy v. Fynney* (1871), 40 L. J. C. 404; L. R. 12 Eq. 69.

(*f*) *Skaife v. Jackson* (1824), 3 L. J.

O. S. K. B. 43; 3 B. & C. 421; *Ferra v. Hutchinson* (1839), 8 L. J. Q. B. 107; 9 A. & E. 641.

(*g*) *Straton v. Rastall* (1788), 2 T. R. 366. See *Brice v. Stokes* (1805), 11 Ves. 319; 2 Wh. & T. L. C. Eq. 633.

(*h*) *Conveyancing Act*, 1881, s. 61; *Re Jackson* (1887), 56 L. J. C. 593; 34 Ch. D. 732; *Re Parker and Keech* (1887), 56 L. J. C. 358. See *Re Selous* (1901), 70 L. J. C. 402; (1901) 1 Ch. 921; *Powell v. Brodhurst* (1901), 70 L. J. C. 587; (1901) 2 Ch. 160.

PART IV.

it shall not be withdrawn without the joint order of all; and the banker who pays to one only remains liable as for a breach of duty (i).

Payment by joint debtors.

Payment by one of co-debtors or co-contractors, whether liable jointly only, or jointly and severally, for the same debt or liability, discharges all and may be pleaded as payment by any of them. Thus a payment by any one of the makers of a joint and several promissory note operates in discharge of the note as against all jointly and severally (k). Where the payment made by one of two joint and several makers of a note was afterwards avoided in bankruptcy as a fraudulent preference and the money returned, it was held that the other maker, though a surety only, was not discharged (l). Part payment by one, though accepted in satisfaction of an action against him for the debt, operates only as payment *pro tanto* in an action against a co-debtor (m). A receipt in full given to one of joint debtors or partners may be explained by the circumstances as a settlement of the claim against him only, leaving the claim against the others unsatisfied (n).

**Payment to trustees.
Power to give receipts.**

In equity a debtor, having notice of a trust affecting the money, could not discharge himself by a mere payment to the trustee, but was bound to see that the money reached the beneficiaries, unless the trustee was expressly or impliedly invested with power to give receipts discharging the debtor from this obligation, in which event the beneficiaries could claim only subject to the receipts given by the trustee, which, if in strict conformity with the power, discharged the debtor (o). Now by the Trustee Act, 1893, s. 20, "the receipt in writing of any trustee for any money payable to him under any trust or power shall be a sufficient discharge, and shall effectually exonerate the person paying the same from seeing to the application thereof"; and the section applies to trusts created before or after the commencement of the Act.—Payment to one of two or more joint trustees is not

(i) *Maule, J., Huskard v. Davis* (1851), 20 L. J. C. P. 118; 10 C. B. 650; Campbell, C. J., *Brandon v. Scott* (1857), 26 L. J. Q. B. 163; 7 E. & B. 236.

(k) *Beaumont v. Greathhead* (1846), 15 L. J. C. P. 10; 2 C. B. 494; *Thorne v. Smith* (1851), 20 L. J. C. P. 71; 10 C. B. 659.

(l) *Petty v. Cooke* (1871), 40 L. J. Q. B. 281; L. R. 6 Q. B. 790.

(m) *Waters v. Smith* (1831), 2 B. & Ad. 889; *Fild v. Robins* (1838), 7 L. J. Q. B. 153; 8 A. & E. 90.

(n) *Ex p. Goad* (1877), 46 L. J. Bk. 65; 5 Ch. D. 46. See *Re E. W. A.* (1901), 70 L. J. K. B. 810; 1901 2 K. B. 642.

(o) *Elliot v. Merryman* (1740), Barn. 78; 2 Atk. 41; 2 Wh. & T. L. C. 896; *Leake, Law of Land*, pp. 112, 200—202.

a discharge; nor is payment to one trustee with the authority of the others; the object of appointing several trustees being that the money shall not get into the hands of one alone (*p*). An agent receiving money from or on behalf of joint trustees is not discharged by payment to and a receipt given by one of them only (*q*). Payment of purchase-money on the joint receipt of trustees of a mortgage was held good without apportioning the money to the several shares in which they held the mortgage debt (*r*). Executors or administrators have a several as well as a joint authority to administer the estate of the deceased whom they represent, and one of several executors or administrators may collect the debts or sell the personal estate for the purposes of administration and give receipts to a debtor or purchaser, who is not, and never was, bound to see to the application of the purchase-money (*s*). Executors after paying all debts are in the position of trustees, and their power of giving receipts is restricted accordingly; but debtors are not thereby affected without notice that the debts are paid (*t*).

Payment to executor.

Payment to an agent authorised by the creditor to receive payment discharges the debt; and the debtor is not responsible for the agent paying over the money (*u*). And after the agent has paid over or accounted for the money to his principal, no claim can be made against him to recover it back by reason of failure of consideration or other invalidity in the payment as against the principal (*x*). Payment to a solicitor or agent of trustees is, in general, no discharge; but the Trustee Act, 1893, s. 17, enables a trustee to appoint agents to receive payment of money in the manner there provided. A solicitor or other agent employed by trustees about the trust property is answerable only to his principals, unless he participates in a breach of trust, when he becomes answerable to the beneficiaries (*y*).—An authority to

Payment to agent.

(*p*) *Re Bellamy and Met. Bd. of Wks.* (1883), 52 L. J. C. 870; 24 Ch. D. 387; *Re Flower* (1884), 53 L. J. C. 955.

(*q*) *Lee v. Sankey* (1873), L. R. 15 Eq. 204; *Magnus v. Queensland Nat. Bk.* (1888), 57 L. J. C. 413; 37 Ch. D. 466.

(*r*) *Re Parker and Beek* (1887), 56 L. J. C. 358.

(*s*) *Elliot v. Merryman* (1740), Barn. 78; 2 Atk. 41; 2 Wh. & T. L. C. 896; *Jacomb v. Horwood* (1751), 2 Ves. Sen. 265.

(*t*) *Charlton v. Durham* (1869), 38 L. J. C. 183; L. R. 4 Ch. 433; *Lee v. Sankey* (1873), L. R. 15 Eq. 201.

(*u*) See *ante*, p. 351.

(*x*) *Holland v. Russell* (1863), 32 L. J. Q. B. 297; 4 B. & S. 14. See *Bamford v. Shuttlesworth* (1840), 11 A. & E. 926.

(*y*) *Att.-Gen. v. Leicester* (1844), 7 Beav. 176; *Hardy v. Caley* (1844), 33 Beav. 365; *Brinsden v. Williams* (1891), 63 L. J. C. 713; (1894) 3 Ch. 185.

PART IV. receive payment presumptively authorises payment in money only (z); and the debtor is not discharged by giving a bill of exchange or promissory note (a), or by delivering goods to the agent as payment (b), without a special authority to take payment in that form. Authority to take payment by a bill is a particular and not a general authority, and must be strictly followed in its terms (c). An agent to collect bills has no authority to accept a sum less than the full claim on the bill and cancel the bill, without the special assent of his principal (d).—Payment by a cheque on a banker is not considered as payment in cash so as to discharge the debtor, although it is *prima facie* evidence of payment, unless cash is subsequently received for it by the agent (e). But a clerk or shopman employed to take cash over the counter is not authorised to receive payment by a cheque sent in a letter (f); or to receive payment in any transaction beyond the scope of the employment (g).—Authority in an agent to receive payment presumptively does not authorise payment by a set-off in account of debts due from the agent to the debtor (h); or by returning to the agent a cheque of his own (i). But payment by set-off may be authorised by usage: as in the case of a broker buying and selling goods upon a running account with his principal according to a known general course of business (k); or of an insurance broker setting off losses and premiums with the underwriter (l). Upon the same principle money paid in to the London agent of a country bank and placed to the credit of their account was held to be payment to the country bank, though it stopped payment before receiving notice of the credit (m).

Payment to agent by cheque.

Payment to clerk or shopman.

Set-off in account with agent.

Payment to partner.

Payment to one of a firm of partners discharges a debt to the firm, because each partner is general agent of all the others within

(z) *Papé v. Westacott* (1893), 63 L. J. Q. B. 222; (1894) 1 Q. B. 272; *Johnston v. Boyes* (1899), 68 L. J. C. 425; (1893) 2 Ch. 73.

(a) *Williams v. Evans* (1866), 35 L. J. Q. B. 111; L. R. 1 Q. B. 352.

(b) *Howard v. Chapman* (1831), 4 C. & P. 508.

(c) *Hogarth v. Wherly* (1875), 44 L. J. C. P. 330; L. R. 10 C. P. 630.

(d) *Bank of Scotland v. Dominion Bk.* (1891) A. C. 592.

(e) *Bridges v. Garrett* (1870), 35 L. J. C. P. 251; L. R. 5 C. P. 451; *Papé v. Westacott* (1893), 63 L. J. Q. B. 222; (1891) 1 Q. B. 272.

(f) *Kane v. Bell* (1850), 19 L. J. Ex.

346; 5 Ex. 269.

(g) *Sanderson v. Bell* (1834), 3 L. J. Ex. 66; 2 Cr. & M. 304.

(h) *Barker v. Greenwood* (1837), 6 L. J. Ex. (Eq.) 54; 2 Y. & C. Ex. 414; *Pearson v. Scott* (1878), 47 L. J. C. 705; 9 Ch. D. 188.

(i) *Underwood v. Nicholls* (1855), 25 L. J. C. P. 79; 17 C. B. 239.

(k) *Catterall v. Hindle* (1867), L. R. 2 C. P. 368.

(l) *Stewart v. Aberdin* (1838), 7 L. J. Ex. 292; 4 M. & W. 211; *Sweeting v. Pearce* (1860), 30 L. J. C. P. 109; 9 C. B. N. S. 534.

(m) *Williams v. Dureau* (1849), 4 Ex. 397.

the scope of the partnership business (*n*). And the receipt of money by one partner in the ordinary course of business charges the firm (*o*). But if the debtor has notice that the partner in receiving the payment is acting without authority or in fraud of the other partners, the payment is invalid against the other partners (*p*).—A solicitor retained to sue is authorised to receive payment of the debt or damages, until the authority is duly revoked (*q*); but payment to a solicitor suing without authority is no discharge (*r*). So the solicitor of a defendant to whom costs are awarded is authorised to receive the amount (*s*). Payment to the clerk or agent of the solicitor retained is no discharge in the absence of a special authority to receive it; nor can the agent having received payment retain the money as against debts due to him from his principal (*t*). Nor is a payment made to the clerk of a solicitor valid, without proving his authority to receive it (*u*). The old rule of law which required a special authority to entitle a solicitor to receive for his client money paid in discharge of purchases or mortgages of land has been abrogated by the Conveyancing and Law of Property Act, 1881, s. 56, which enacts that "where a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt, the deed shall be sufficient authority for paying the same to the solicitor" (*x*). It was decided that this section did not apply where the clients of the solicitor producing the deed were trustees (*y*); but this decision is now overridden by the Trustee Act, 1893, s. 17.

Payment to solicitor.

Receipt of mortgage debt and purchase-money.

Payment by an agent is equivalent to payment by the debtor; and a receipt given by the creditor to an agent of the debtor acknowledging payment, upon faith of which the debtor accounts

Payment by agent.

(*n*) Partnership Act, 1890, ss. 5, 7; *Porter v. Taylor* (1817), 6 M. & S. 156.

(*o*) *St. Aubyn v. Smart* (1868), L. R. 3 Ch. 646; *Biggs v. Bre* (1881), 51 L. J. C. 263.

(*p*) *Piercy v. Fynney* (1871), 48 L. J. C. 404; L. R. 12 Eq. 69; *ante*, pp. 377, 661.

(*q*) *Crozer v. Pelling* (1825), 3 L. J. K. B. 131; 4 B. & C. 28; *Levi v. Abbott* (1849), 19 L. J. Ex. 62; 4 Ex. 588.

(*r*) *Robson v. Euton* (1785), 1 T. R. 62.

(*s*) *Mason v. Whitehouse* (1838), 7 L. J. C. P. 295; 4 Bing. N. C. 692.

(*t*) *Yates v. Frickleton* (1781), 2 Doug. 622; *Perry v. Turner* (1831), 1 L. J. Ex. 13; 2 Cr. & J. 89. See *Ex. p. Edwards* (1881), 51 L. J. Q. B. 108; 8 Q. B. D. 262.

(*u*) See *Kirton v. Braithwaite* (1836), 5 L. J. Ex. 165; 1 M. & W. 310.

(*x*) See *Day v. Woolrich Bg. Soc.* (1889), 58 L. J. C. 280; 40 Ch. D. 491; *King v. Smith* (1900), 69 L. J. C. 598; (1900) 2 Ch. 425.

(*y*) *Re Bellamy and Met. Rd Wks.* (1883), 52 L. J. C. 870; 24 Ch. D. 387.

PART IV. with his agent upon the footing of payment, is conclusive against the creditor, though the agent has not in fact paid the debt (z). A mere authority given to an agent to pay a debt is revocable, and gives the creditor no claim against the agent; but an assignment of funds to an agent or trustee for the payment of creditors may create a valid trust in their favour. Such an assignment, unless the creditors are parties to it, or unless communicated to them and accepted on their part, operates merely as a voluntary agency or trust for the benefit of the debtor himself and is revocable (a). Payment by a person professing to act for the debtor, though without authority in fact, if ratified by the debtor, operates as a payment by the debtor himself (b). The ratification may be made after the commencement of an action by the creditor for the recovery of the debt (c). But at any time before ratification by the debtor, it is competent for the creditor and the person paying the debt to rescind the payment and return the money, and the debtor then remains liable (d).—A payment by a third party without any actual or professed authority has been held to be inoperative to discharge the debtor (e). Although this doctrine has been questioned, as being contrary to the maxim of the civil law, "*debitorem ignarum, seu etiam invitum, solvendo liberare possumus*" (f), it is consonant with the principles of English law regulating contracts by agents for undisclosed principals (g). Payment of a debt by a third party may be made with the intention of keeping the debt in force and reserving the benefit of it, and unless made in payment of a particular debt will not discharge the debtor (h). In the case of bills of exchange, the acceptor is the party primarily liable to pay it, except in the case of an accommodation acceptance, accordingly payment by the drawer or indorser does not discharge the acceptor unless made by the party accommodated, and the holder may recover in his own right,

Ratification
of payment.

Payment by
third party.

Payment by
parties to
bills.

(z) See *ante*, p. 658.

(a) *Harland v. Binks* (1850), 20 L. J. Q. B. 126; 15 Q. B. 713; *Johus v. James* (1878), 47 L. J. C. 853; 8 Ch. D. 714; *Henderson v. Rothschilbs* (1887), 56 L. J. C. 471; affg. (1886), 33 Ch. D. 459. See *Glegg v. Rees* (1871), 41 L. J. C. 243; L. R. 7 Ch. 71.
(b) *Bebshaw v. Bush* (1852), 22 L. J. C. P. 24; 11 C. B. 191.
(c) *Beldhew v. Bush* (1852), 22 L. J. C. P. 24; 11 C. B. 191; *Simpson v. Eggington* (1855), 24 L. J. Ex. 312; 10 Ex. 845.

(d) *Walter v. James* (1871), 40 L. J. Ex. 105; L. R. 6 Ex. 127.

(e) *James v. Isaacs* (1852), 22 L. J. C. P. 73; 12 C. B. 791.

(f) *Willes, J., Cook v. Lister* (1862), 32 L. J. C. P. 126; 13 C. B. N. S. 594.

(g) *Knightley v. Durant* (1901), 70 L. J. K. B. 662; (1901) A. C. 240.

(h) *McIntyre v. Miller* (1845), 14 L. J. Ex. 380; 13 M. & W. 725; *Lucas v. Wilkinson* (1856), 26 L. J. Ex. 13; 1 H. & N. 420; *Butler v. Rice* (1910), 79 L. J. C. 652; (1910) 2 Ch. 278.

or as trustee for the drawer or indorser to the amount paid by them (i). And the bill after such payment continues negotiable until paid by the acceptor at maturity (k). But in the case of an accommodation acceptance payment by the drawer, being the party primarily liable, discharges the bill (l). Payment at or after maturity by or on behalf of the acceptor discharges the bill (m); but payment before maturity, even by the acceptor, is a discount or purchase of the bill, and the bill continues negotiable (n).

CHAP. VII.

It is a general rule of law, "that the party who pays money has the right to apply that payment as he thinks fit. If there are several debts due from him he has a right to say to which of the so debts the payment shall be applied" (o). If the creditor do not consent to apply the money tendered according to the declared intention of the debtor, he may refuse it; but if he in fact accepts it, he must apply it to the account on which it is paid; and what he then says to the contrary is immaterial, according to the maxim, "*non quod dictum, sed quod factum est inspicitur*" (p).

Appropriation of payment—by debtor.

An appropriation by the debtor may be inferred from the circumstances, where not declared in express terms. If a man sends money to another and that other receives it, the first point to be ascertained is what was the intention with which it was sent; and if that cannot be ascertained by direct proof, it must be got at by circumstantial evidence; and whatever is the intention that must prevail unless the other elects to return the money (q). Accordingly payment of the exact amount of one of the debts is presumptively appropriated to the discharge of that debt; payment of a sum with discount deducted is presumptively appro-

Presumptive appropriation by debtor.

(i) Bills of Exchange Act, 1882, s. 59 (2), (3); *Jones v. Broadhurst* (1850), 9 C. B. 173. See *Randall v. Moon* (1852), 21 L. J. C. P. 226; 12 C. B. 261.

(k) Bills of Exchange Act, 1882, s. 59 (2) (b); *Callow v. Lawrence* (1814), 3 M. & S. 95.

(l) Bills of Exchange Act, 1882, s. 59 (3); *Parr v. Jewell*, 16 C. B. 684; *Cook v. Lister* (1863), 32 L. J. C. P. 121; 13 C. B. N. S. 543.

(m) Bills of Exchange Act, 1882, s. 59 (1). See *Bartram v. Caddy* (1838), 8 L. J. Q. B. 31; 9 A. & E. 275; *Nash v. De Fréville* (1900), 69 L. J. Q. B. 484; (1900) 2 Q. B. 72.

(n) *Morley v. Culverwell* (1840), 10

L. J. Ex. 35; 7 M. & W. 174; *Attomborough v. Mackenzie* (1856), 25 L. J. Ex. 244. See *Glasscock v. Ball* (1880), 59 L. J. Q. B. 51; 24 Q. B. D. 13.

(o) Bayley, J., *Simson v. Ingham* (1823), 1 L. J. O. S. K. B. 231; 2 B. & C. 72. See Grant, M. R., *Clayton's case* (1816), 1 Mer. 605.

(p) *Croft v. Lumley* (1858), 27 L. J. Q. B. 221; 6 H. L. C. 672; *Devoport v. Reg.* (1877), 47 L. J. P. C. 8; 3 Ap. Ca. 115. See *Day v. McLea* (1889), 58 L. J. Q. B. 293; 22 Q. B. D. 610.

(q) Knight-Bruce, L. J., *Nash v. Hodyson* (1835), 25 L. J. C. 188; 6 D. G. M. & G. 474.

PART IV. appropriated to a debt upon which discount may be claimed, rather than to a debt for which the credit has expired (*r*); and as between admitted and disputed debts, a payment is presumptively referred to a debt admitted (*s*). A payment made in answer to an application for a specific debt is presumptively made in discharge of the debt applied for; and if one payment is made to an application for several debts of a like kind it is presumptively appropriated proportionately to all (*t*). A payment made out of the proceeds of the sale of a mortgaged estate is presumed to be appropriated to the discharge of the mortgage debt (*u*). Where a payment was made upon an account containing debts for rent and other matters, it was held that the creditor could raise no presumption of rent remaining unpaid in order to claim a forfeiture for non-payment (*x*).—There is no general presumption in favour of a surety that a payment is appropriated to the debt which he has guaranteed, though he was not informed of any other debts when he gave his guarantee, unless the payment was demanded at his request (*y*). And in the absence of stipulation to the contrary, either the debtor or, if he does not, the creditor may appropriate a payment to an unguaranteed debt (*z*). But a creditor holding a security which covers several debts, one of which is guaranteed by a surety, must appropriate the proceeds of the security first in discharge of the guaranteed debt (*a*).—A composition for debts implies an appropriation of payments proportionately to every debt; and the creditor who accepts the composition upon several debts cannot appropriate the whole amount to some only in preference to others for which he may have other remedies (*b*). Consequently if one of the debts or any part of a debt be guaranteed by a surety, the creditor must allow the composition in reduction, and charge the surety only for the balance (*c*); and if the surety

Guaranteed
debt.

Composition
and bank-
ruptcy.

(*r*) *Marryatt v. White* (1817), 2 Stark. 102.

(*s*) *Burn v. Boulton* (1816), 15 L. J. C. P. 97; 2 C. B. 476.

(*t*) *Shaw v. Pictou* (1825), 4 L. J. O. S. K. B. 29; 4 B. & C. 715. See *Kirkpatrick v. S. Austr. Insur.* (1886), 11 Ap. Ca. 177.

(*u*) *Young v. English* (1843), 13 L. J. C. 76; 7 Beav. 10.

(*x*) *Lowther v. Heaver* (1889), 58 L. J. C. 485; 41 Ch. D. 248.

(*y*) *Williams v. Rowlinson* (1825), 3 L. J. C. P. 164; 3 Bing. 71; *Shaw v. Pictou* (1825), 4 L. J. O. S. K. B. 29; 4 B. & C. 715; *Wright v. Hocking*

(1866), 36 L. J. C. P. 30; L. R. 2 C. P. 199.

(*z*) *Re Sherry* (1884), 53 L. J. C. 401; 25 Ch. D. 692.

(*a*) *Pearl v. Deacon* (1867), 26 L. J. C. 761; 1 De G. & J. 461; *Kinnaird v. Webster* (1878), 48 L. J. C. 348; 10 Ch. D. 139. See *ante*, p. 312.

(*b*) *Thompson v. Hudson* (1871), L. R. 6 Ch. 320.

(*c*) *Burdwell v. Lydall* (1831), 9 L. J. C. P. 148; 7 Bing. 489; *Gee v. Pack* (1863), 33 L. J. Q. B. 49. See *Ellis v. Emmanuel* (1876), 46 L. J. Ex. 28; 1 Ex. D. 157.

have previously paid the debt in full, the creditor will be trustee for him as to the composition upon that debt (*d*). The same rule applies with dividends in bankruptcy; they are appropriated rateably in payment of all the debts (*e*).

CHAP. VII.

Appropriation
in accounts.

In banking accounts and accounts of a like kind which are passed between the parties and accepted as correct, as a general rule, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account; presumably it is the sum first paid in that is first drawn out; it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts" (*f*). Accordingly where one of a firm of partners dies or retires, and the surviving or continuing partners carry on the dealings with a creditor, joining the transactions of the old and new firms in one entire account, payments entered in the account by the continuing partners are presumptively appropriated to the earlier debts and in discharge of the old firm; and conversely, credits entered to a debtor of the firm are presumptively appropriated to his earlier debts (*g*). The same principle applies to the accounts of a cost book mining company, notwithstanding changes in the shareholders (*h*); and to the accounts between a joint stock company and their banker in favour of former shareholders, who are exonerated from contributing to the balance due on winding up the company, if sufficient payments have been made to the bank to discharge what was due when they ceased to be shareholders (*i*). Such appropriation of payment in account will discharge a lien which the banker holds upon title-deeds for advances to a customer (*k*); and will take the balance of the account out of the Statute of Limitations, though the earlier items were barred by the statute (*l*). The principle is applied although

(*d*) *Pol y v. Field* (1806), 12 Ves. 435.

(*e*) *Rakes v. Tudd* (1838), 8 L. J. Q. B. 35; 8 A. & E. 816. See *Martin v. Brecknell* (1813), 2 M. & S. 39.

(*f*) *Grant, M. R., Clayton's case* (1816), 1 Mer. 608; *Tud. L. C. Mere.* 1.

(*g*) *Clayton's case* (1816), 1 Mer. 572; *Tud. L. C. Mere.* 1; *Brooke v. Enderby* (1840), 2 Br. & B. 70; *Holland v. Tred*

(1818), 7 Ha. 50; *Hooper v. Keay* (1875), 1 Q. B. D. 178.

(*h*) *Genke v. Jackson* (1866), 36 L. J. C. P. 108.

(*i*) *Bateman's case* (1873), 42 L. J. C. 577.

(*k*) *London and Co. Bk. v. Rutchiffe* (1881), 51 L. J. C. 28; 6 Ap. Ct. 722.

(*l*) See *ante*, p. 651; *post*, p. 671.

PART IV. it may affect the rights of third parties (*m*). It is, however, essential that there should be an account current between the parties (*n*).—But the above presumption of payment in banking and other like accounts may be rebutted by evidence of a different intention: as that the entry was of a payment by a bill which was found to be forged (*o*); or that the entry was fraudulent (*p*); or generally from the way in which the accounts are rendered (*q*).

Appropriation by creditor.

Where there is no appropriation by the debtor, either in terms or by inference from circumstances, the creditor has the right of appropriation. "According to the Law of England the debtor may, in the first instance, appropriate the payment, *solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation, *recipitur in modum recipientis*" *r*. The creditor may appropriate such payment to the debt for which he has an inferior remedy or security: as a simple contract debt instead of a specialty debt (*s*); or to an equitable debt instead of a legal debt (*t*); or to a debt which is unguaranteed, instead of one for which he has a surety (*u*). But he cannot appropriate the payment to a disputed debt (*x*). Upon the same principle a creditor holding a security covering several debts may apply the proceeds of the security to any one of the debts in preference to the others (*y*); unless one of the debts is guaranteed by a surety, in which case the surety becomes entitled to the benefit of the securities for the debt (*z*).—The creditor may appropriate the payment to a debt which he could not recover by action, if supported by a sufficient consideration: as a debt under a contract within the Statute of Frauds (*a*); a debt of the solicitor of a corporate body for his bill of costs, which he could not recover by action for want of a retainer under the corporate seal (*b*); a debt for spirituous liquors supplied under circumstances which create a

Claims not recoverable by action.

(*m*) *Re Stepping*, (1895) 2 Ch. 433.
 (*n*) *The Mercers* (1897), 66 L. J. P. 86; (1897) A. C. 286.
 (*o*) *Bell v. Baskby* (1856), 25 L. J. Ex. 163; 11 Fx. 631.
 (*p*) *Lea v. Hill* (1878), 47 L. J. C. 161; 4 Ch. D. 537.
 (*q*) *Horsker v. Wigg* (1843), 4 Q. B. 792; *City Insurance Co. v. McLean* (1874), 43 L. J. C. P. 344; L. R. 9 C. P. 692; *The Mercers* (1907), 66 L. J. P. 86; (1907) A. C. 286.
 (*r*) *Tindal, C. J., Mills v. Fowler* (1839) 8 L. J. C. P. 750; 5 Bing. N. C. 461.
 (*s*) *Peters v. Anderson* (1814), 5 Taunt. 596.

(*t*) *Bosanquet v. Wray* (1816), 6 Taunt. 597. See *Gondard v. Hodges* (1832), 2 L. J. Ex. 20; 1 Cr. & M. 33.
 (*u*) *Re Sherry* (1881), 53 L. J. C. 404; 25 Ch. D. 692.
 (*x*) *Burn v. Boulton* (1816), 15 L. J. C. P. 97; 2 C. B. 476.
 (*y*) *Ex p. Dickin* (1875), 44 L. J. Bk. 113; L. R. 20 Eq. 767.
 (*z*) See *ante*, pp. 312, 668.
 (*a*) *Albott, C. J., Mansfield v. Wadsley* (1824), 3 L. J. O. S. K. B. 31; 3 B. & C. 362.
 (*b*) *Arnold v. Poole (Mayor)* (1842), 12 L. J. C. P. 97; 4 Man. & G. 860.

statutory disability to sue (e). But where a builder had executed a building contract, and extra works for which he had not the authority required by the contract, it was held that he had no legal or equitable claim for the extra works to which he could appropriate a payment (d). And a solicitor having received a payment on account of his bill of costs cannot appropriate it to the taxable charges and leave the non-taxable charges for recovery by action (e).—The creditor may appropriate a general payment on account to a debt then barred by the Statute of Limitations, instead of more recent debts then due. But the appropriation by the creditor only does not constitute such part payment of a debt as will take the balance out of the operation of the statute; it requires an appropriation by the debtor himself to operate as an admission of the balance remaining due (f). Where a person indebted upon three promissory notes, two of which were then barred by the statute, paid a sum on account of interest generally; it was held that it must be presumed that he intended the payment either upon all three notes, or upon the later only, to which the creditor might appropriate the payment (g).—The creditor may exercise his right of appropriation at any time before verdict or judgment, whilst the position of the debtor remains unaltered; and he is not bound by an intended appropriation until it has been communicated to the debtor; he is not concluded by entries in his own books or accounts, or in a pass-book of the debtor, until the account has been delivered to and accepted by the debtor, but after the creditor has made an appropriation he is precluded from altering the statement of account in this respect (h). And the creditor has no right of appropriation of a payment received from a third party without the knowledge of the debtor (i).

Debt barred by Statute of Limitations.

Time of appropriation.

If neither the debtor nor the creditor make any appropriation, the law appropriates the payment upon equitable principles; and

Appropriation by law.

(e) *Philpott v. Jones* (1834), 4 L. J. K. B. 65; 2 A. & E. 41.

(d) *Lumrell v. Butterday Union* (1849), 18 L. J. Ex. 281; 3 Ex. 183.

(e) *James v. Hold* (1842), 2 L. J. Ex. 78; 2 Cr. & J. 687.

(f) *Miles v. Fowler* (1839), 8 L. J. C. P. 750; 5 Bing. N. C. 45; *Fried v. Young* (1897), 66 L. J. C. 7-7; (1897) 2 Ch. 421; *Re Buxton* (1906), 75 L. J. C. 234, 638; (1906) 2 Ch. 392.

(g) *Nash v. Hodgson* (1855), 25 L. J. C. 186; 6 De G. M. & G. 474.

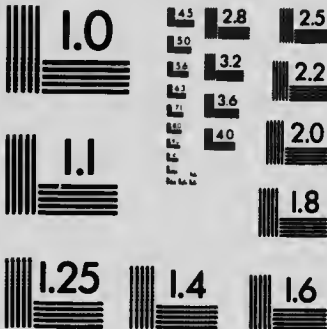
(h) *Grant, M. R., Clayton's case* (1816), 1 Mer. 606; *Tud. L. C. Merc.* 1; *Swann v. Ingham* (1823), 1 L. J. O. S. K. B. 234; 2 B. & C. 65; *Hooper v. Kray* (1875), 1 Q. B. D. 178; *Fried v. Young* (1897), 66 L. J. C. 737; (1897) 2 Ch. 421; *Smith v. Betty* (1903), 72 L. J. K. B. 853; (1903) 2 K. B. 317.

(i) *Waller v. Lucy* (1840), 9 L. J. C. P. 217; 1 Man. & G. 54.



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prima facie to the earlier debt (*k*). Where a broker, contracting as principal, sold and delivered several parcels of goods to his employer, who paid a sum to his general account with the broker: the broker having become insolvent, it was held that the payment should be apportioned between the several owners of the goods sold, leaving the balance only due upon each sale (*l*). Where there are two contracts one lawful and the other void for illegality, the law appropriates a general payment to the legal debt; though if a payment is expressly appropriated to the illegal contract, the money cannot be recovered back (*m*).

(*k*) *Grant, M. R., Clayton's case* (1816), 1 Mer. 606; *Tud. L. C. Merc.* 1; *Tindal, C. J., Mills v. Fowkes* (1839), 8 L. J. C. P. 750; 5 Bing. N. C. 461; *Copland v. Toulmin* (1840), 7 Cl. & F. 349; 5 E. R. 1102.

(*l*) *Farrne v. Bennett* (1809), 11 East, 36.
(*m*) *Wright v. Laing* (1814), 3 B. & C. 165; *Philpott v. Jones* (1834), 4 L. J. K. B. 65; 2 A. & E. 41. See *ante*, p. 506.

CHAPTER VIII.

RELEASE.

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THE term release applies to the discharge of a right of action by act of the party entitled. Release of a right of action, whether the cause arose upon simple contract, or contract under seal, or contract of record, is required by common law to be made by a deed under seal (*a*). A release not under seal can only operate if given upon a valid consideration, or by way of accord and satisfaction (*b*). A release under seal, being subject to the rules and incidents of a contract under seal, does not require a consideration to support it, either at law or in equity (*c*); the acceptance of the release by the releasee is presumed (*d*); and if made by a deed *inter partes*, it cannot operate directly as a release to a person not party to the deed (*e*).—A release under seal also operates in estoppel against the party executing it, according to its terms (*f*); and no exception or modification of a release under seal by a mere parol agreement or understanding between the parties at the time of its execution could be pleaded at common law (*g*). But in equity it may be corrected or set

Release
under seal.Effect in
estoppel.

(*a*) Co. Lit. 264 a, b; 291 a; *Harris v. Goodwyn* (1841), 10 L. J. C. P. 62; 2 Man. & G. 405; *Barker v. St. Quentin* (1844), 13 L. J. Ex. 144; 12 M. & W. 441.

(*b*) *Lyon v. Tomkies* (1836), 5 L. J. Ch. 260; 1 M. & W. 603; *Fanchaleur v. Blagrove* (1843), 6 Beav. 535; affd. (1847), 17 L. J. Ch. 47; *De Bussche v. Alt* (1878), 47 L. J. C. 381; 8 Ch. D. 286.

(*c*) *Pinnel's case* (1602), 5 Co. 117 b; Brett, M. R., *Re Garnett* (1884), 31 Ch. D. 8.

(*d*) See ante, p. 94.

(*e*) See ante, p. 299. And see *Ex p. Halifax Joint Stock Bk.* (1877), 46 L. J. Bk. 65; 5 Ch. D. 46.

(*f*) See ante, p. 659.

(*g*) *Brooks v. Stuart* (1839), 8 L. J. Q. B. 184; 9 A. & E. 854.

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aside upon sufficient grounds, as for fraud or mistake; and under the Judicature Act the like jurisdiction may be exercised in all divisions of the High Court. Thus it may be shown that the amount for which the release purports to have been given was stated under a mistake (*h*); or that it was executed in ignorance of the rights of the parties (*i*); or that the release was worded in general terms in ignorance of the claim to which it was afterwards sought to apply it contrary to the intention (*k*).

Release by
agreement
not under
seal.

A release, or agreement amounting to a release, upon a valid consideration and in the form of a binding contract, though not under seal, may be effectual in equity in discharge of the debt; but a voluntary release without deed and without consideration is equally inoperative in equity and in law (*l*). "A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not, without consideration, bar the right any more than at law accord without satisfaction would be a plea" (*m*). A representation made by the creditor to his debtor of his release or abandonment of the debt, which the debtor acts upon to the material alteration of his position, may operate in equity as effectually, to the extent to which it is acted upon, as if the creditor had in fact executed a release (*n*).—Bills of exchange and promissory notes are regulated by rules founded on the custom of merchants and not by the common law; and the liability upon these instruments, both before and after they have become due and payable, may be discharged by the holder by express renunciation or waiver without deed and without consideration (*o*).

Renunciation
of bills and
notes.

Construction
of release.

Release of
actions, debts,
and demands.

A release of all actions includes not only actions pending but also debts and causes of action then existing; but it does not extend to judgments and executions (*p*). A release of all actions does not discharge a covenant before breach, as a covenant to

(*h*) *Brooke v. Haymes* (1868), L. R. 6 Eq. 25.

(*i*) *Re Garnett* (1884), 31 Ch. D. 1.

(*k*) *Lyall v. Edwards* (1861), 30 L. J. Ex. 193; 6 H. & N. 337; *Eccles. Commrs. v. N. E. Ry.* (1877), 47 L. J. C. 20; 4 Ch. D. 845.

(*l*) *Price v. Hauns* (1853), 11 Hare, 151; *Taylor v. Manners* (1865), 35 L. J. C. 128; L. R. 1 Ch. 48.

(*m*) *Grant, M. R., Stackhouse v. Barnston* (1805), 10 Ves. 466.

(*n*) *Flower v. Weston* (1837), 2 M. & Cr. 459; *Yeomans v. Williams* (1865), 35 L. J. C. 283; L. R. 1 Eq. 184.

(*o*) Bills of Exchange Act, 1882, s. 62; *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627; *Edwards v. Walters* (1896), 65 L. J. C. 557; (1896) 2 Ch. 157.

(*p*) Co. Lit. 285 a; *Alham's case* (1610), 8 Co. 150 b.

build a house, or to repair, or to pay rent, or to make an estate; because at the time of the release there is no debt or cause of action existing; but a release of all covenants is a good discharge of the covenant before it is broken (*q*). A release of all debts or duties extends to all things that are then certain, and therefore discharges judgments and executions: but it does not extend to a liability to account, the result of which is uncertain (*r*). It extends to debts then due though payable at a future time; but it does not discharge contingent debts payable upon the happening of an uncertain event (*s*). Nor can it discharge debts or liabilities incurred subsequently to the release: as the acceptance of a bill after a release given to the drawee (*t*). A release of all claims and demands is the most extensive form of release, and discharges all covenants, conditions, obligations, contracts and remedies, and all actions and executions (*u*). If given after the commencement of an action it discharges not only the debt or cause of action but also the claim for damages and costs, and may be pleaded generally to the action (*x*). The release of a debt also discharges all securities held for the debt, as against the debtor (*y*).

A release is construed by reference to the state of facts actually existing or contemplated at the date when it was executed (*z*). Accordingly a release in general terms is construed as restricted by the recitals in the deed (*a*). A release of all actions whatsoever was construed as restricted in operation by a recital stating the object of the deed to be the putting an end to actions then pending between the parties; and evidence was admitted to direct and restrain the application of the release to the actions intended (*b*). Upon this principle a general release by a creditor having a separate debt, and also a joint debt as partner with

General
release
restricted by
recitals and
object of deed.

q *Hoe's case* (1593), 5 Co. 71 a; *Hancock v. Fidd* (1607), Cro. Jac. 170; *Wilton v. By* (1618), Cro. Jac. 186.

(*r*) Co. Lit. 291 a.

(*s*) *Hoe's case* (1593), 5 Co. 70 b; *Altham's case* (1610), 8 Co. 153 a; *Tyngan v. Bridges* (1612), Cro. Jac. 300.

(*t*) *Ashton v. Freeston* (1840), 10 L. J. C. P. 53; 2 Man. & G. 1; *Hartley v. Manton* (1842), 12 L. J. Q. B. 41; 5 Q. B. 247.

(*u*) *Altham's case* (1610), 8 Co. 153 b.

(*x*) *Tetley v. Wantless* (1867), 36 L. J. Ex. 153; L. R. 2 Ex. 275.

y *Corper v. Green* (1841), 10 L. J. Ex. 346; 7 M. & W. 633.

(*z*) *Fazakerly v. McKnight* (1856), 26 L. J. Q. B. 30; 6 E. & B. 795; *Lyall v. Edwards* (1861), 30 L. J. Ex. 193; 6 H. & N. 337; *L. & S. W. Ry. v. Blackmore* (1870), 39 L. J. C. 713; L. R. 4 H. L. 610.

(*a*) *Turner v. Turner* (1880), 14 Ch. D. 829; *Dauby v. Coutts* (1885), 54 L. J. C. 577; 29 Ch. D. 500; *Re Perkins* (1898), 67 L. J. C. 454; (1898) 2 Ch. 182.

(*b*) *Simons v. Johnson* (1832), 1 L. J. K. B. 98; 3 B. & Ad. 175.

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Conditional
release.
Condition
precedent.

Condition
subsequent.

Covenant
not to sue.

others, due from the releasee, is construed as presumptively restricted to the separate debt (*c*). And a release of debts given to a debtor owing a separate debt, and also a joint debt as partner in a firm indebted to the same creditor, is presumptively restricted to his separate debt (*d*). Where a release of debts was executed by creditors, with a blank left for filling in the amount of the debts; it was held that though it could not be filled in after execution, the deed operated as a release of the existing debts, which might be proved by extrinsic evidence (*e*).

A release may be conditional upon the happening of some event or contingency: as in a deed of composition with creditors, providing that if any creditor sue for his debt before the time allowed for payment of the composition, the deed may be pleaded in bar as a release (*f*); and in a deed of arrangement, that the debtor was to carry on his business during a certain time for the benefit of his creditors, and if any creditor should interfere with him during that time, the deed might be pleaded in bar to an action by that creditor (*g*). The effect of the conditional release under such deeds extends only to an action or proceedings for the debt brought contrary to the terms of the deed; but not to discharge the debt itself, so as to deprive the creditor of his claim to the composition (*h*). - A release may also be subject to a condition subsequent defeating it in a certain event; as in the case of a deed of composition with creditors containing a release, with a proviso that if default be made in payment of the composition the deed shall be void and the creditors remitted to their original claims (*i*).

A covenant made by a creditor with his debtor not to sue him at any time for the debt, though it does not in terms release the debtor, yet is held, upon the principle of avoiding circuity of action, to be equivalent in effect to a release, and may be so pleaded in an action against the debtor (*k*). But it is not available as a release in an action against the debtor sued jointly with another

(*c*) *Bain v. Cooper* (1842), 11 L. J. Ex. 325; 9 M. & W. 701.

(*d*) *Ex p. Kirk* (1877), 46 L. J. Bk. 101; 5 Ch. D. 800. And see *Ex p. Halifax Joint Stock Bk.* (1877), 46 L. J. Bk. 65; 5 Ch. D. 46.

(*e*) *Harrhy v. Wall* (1871), 1 B. & Ald. 103; *Fazakerly v. McK. Jt.* (1856), 26 L. J. Q. B. 30; 6 E. & B. 795.

(*f*) *Corner v. Sweet* (1866), 35 L. J. C. P. 151; L. R. 1 C. P. 456.

(*g*) *Gibbons v. Foulton* (1849), 19 L. J.

C. P. 74; 8 C. B. 483.

(*h*) *Ellis v. M. Henry* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 228.

(*i*) *Newington v. Levy* (1870), 10 L. J. C. P. 29; L. R. 6 C. P. 189; *Hall v. Levy* (1874), 14 L. J. C. P. 89; L. R. 10 C. P. 154.

(*k*) *Per cur. Ford v. Beech* (1848), 17 L. J. Q. B. 114; 11 Q. B. 871. See *Lidger v. Stanton* (1862), 2 J. & H. 687; *Keyes v. Elkens* (1864), 34 L. J. Q. B. 25; 5 B. & S. 240.

for a joint debt, and the remedy of the covenantee is then only for the breach of covenant in suing him; nor is it available in an action against the other joint debtor sued separately (*l*); nor in an action brought by the covenantor jointly with another in respect of a joint debt (*m*). And a covenant not to sue made with a debtor jointly with other covenantees, and not severally, is not available to the debtor as a release of his several liability (*n*). A covenant by the obligee of a bond not to sue the obligor and to indemnify him in case of his assigning it, was construed as excepting an assignment, and therefore not pleadable as a release in an action brought for the benefit of an assignee (*o*). A covenant not to sue for a limited time operates as a covenant only, and cannot be pleaded as equivalent to a release *p*. And a simple contract not to sue for a limited time operates by way of contract only and cannot be pleaded in bar of an action (*q*). But a covenant not to sue for a limited time, with a condition suspending the right of action during that time, operates as a conditional release, and may be pleaded in bar to an action brought within the time (*r*). A covenant or agreement not to sue a debtor for a limited time discharges a surety for the debt (*s*).

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Covenant not to sue for a limited time.

The release of one of co-debtors jointly, or jointly and severally liable for the same debt, releases all. "If two be jointly and severally bounden in an obligation, if the obligee release to one of them, both are discharged" (*t*). The release of one of debtors severally and not jointly liable for the same debt, not being in the relation of principal and surety, does not discharge the others (*u*).—At common law the effect of an absolute release under seal of one of co-debtors in discharging the others could not be met by a merely parol agreement to the contrary (*x*). But a release of one

Release of co-debtor.

Reserve of remedies against co-debtor.

(*l*) *Dean v. Newhall* (1799), 8 T. R. 168; *Hutton v. Epyre* (1815), 6 Taunt. 289. See *Henderson v. Stobart* (1850), 19 L. J. Ex. 135; 5 Ex. 99.

(*m*) *Walmesley v. Cooper* (1839), 10 L. J. Q. B. 49; 11 A. & E. 216.

(*n*) *Salmon v. Webb* (1852), 3 H. L. C. 510.

(*o*) *Morley v. Fear* (1830), 8 L. J. O. S. C. P. 176; 6 Bing. 517.

(*p*) *Thimbleby v. Barron* (1838), 7 L. J. Ex. 128; 3 M. & W. 210.

(*q*) *Ford v. Beech* (1848), 17 L. J. Q. B.

114; 11 Q. B. 852. See *S. C.* in equity *sub nom. Beech v. Ford* (1818), 7 Ha. 298.

(*r*) *Walker v. Norri* (1864), 34 L. J. Ex. 73; 3 H. & C. 403.

(*s*) *Moss v. Hall* (1850), 19 L. J. Ex. 205; 5 Ex. 46; *Boitau v. Buckenham* (1890), 60 J. L. J. Q. B. 261; (1891) 1 Q. B. 278.

(*t*) *Re E. W. A.* (1901), 70 L. J. K. B. 810; (1901) 2 K. B. 612.

(*u*) *Collins v. Prosser* (1823), 1 L. J. O. S. K. B. 212; 1 B. & C. 682.

(*x*) See *ante*, p. 673.

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of co-debtors may be qualified by an express proviso or reservation of the remedies of the creditor against the other co-debtors; and the release in such form operates only between the parties to it, and with the same effect as a covenant not to sue (*y*). "The reason why a release to one debtor releases all jointly is, because, unless it was held to do so, the co-debtor after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor" (*z*). So a creditor of a firm of partners may release one or more of the partners, reserving the right to sue them all jointly, or the others separately (*a*). And creditors may release the debtor under a composition without prejudice to their remedies against co-debtors or sureties (*b*). A release or composition under the bankruptcy law operates without affecting the remedies of creditors against other parties because it takes effect by force of law (*c*).

Reserve of
remedies
against
surety.

Where two persons have contracted liability for the same debt in the relation of principal and surety, to the knowledge of the creditor, a release of the principal, or a covenant not to sue the principal for a limited or unlimited time, discharges the surety by reason of the relation (*d*). The release of a surety does not discharge the principal debtor (*e*); and the release of a surety discharges a joint co-surety, but not a co-surety severally bound (*f*). The effect of a release or covenant not to sue made with an express reservation of remedies against the surety is—"first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason: for the debtor cannot complain if

(*y*) *Prior v. Barker* (1855), 24 L. J. Q. B. 130; 4 E. & B. 760; *Willis v. De Castro* (1858), 27 L. J. C. P. 246; 4 C. B. N. S. 216.

(*z*) *Per cur. North v. Wakefield* 1848, 18 L. J. Q. B. 214; 13 Q. B. 541.

(*a*) *Sally v. Forbes* (1820), 2 Br. & B. 38.

(*b*) *Hulden v. Barclay* 1865, 31 L. J. Ex. 217; 3 H. & C. 391; *Bateson v. Gosling* (1871), 41 L. J. C. P. 53; L. R. 7 C. P. 9.

(*c*) *Ellis v. Walnut* (1874), 44 L. J. Ex. 10; L. R. 10 Ex. 10; *Ex p. Jacobs*

(1871), 41 L. J. Bk. 34; L. R. 10 Ch. 211.

(*d*) *Moss v. Hall* (1850), 19 L. J. Ex. 205; 5 Ex. 46; *Cragoe v. Jones* (1873), 42 L. J. Ex. 68; L. R. 8 Ex. 81; *Bolton v. Buckenham* (1890), 60 L. J. Q. B. 261; (1891) 1 Q. B. 278; *Comm. Bk. of Tasmania v. Jones* (1893), 62 L. J. P. C. 101; (1893) A. C. 313.

(*e*) *Ex p. Good* (1876), 46 L. J. Bk. 65; 5 Ch. D. 46.

(*f*) *Wood v. Nat. Bank of New Zealand* 1883, 53 L. J. P. C. 65; 8 Ap. Ca. 755

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the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him" (g). Accordingly, the holder of a bill of exchange may release the acceptor, at the same time expressly reserving his remedies against other parties secondarily liable; who retain their right of recourse against the acceptor (h). Where the surety had guaranteed the interest of the debt, but not the debt itself, a release of the debtor with a reserve of rights against other persons was held not to release the surety, though the surety could only stop the interest by paying the debt, in which case he might charge the debtor with the amount (i). The original contract may expressly reserve to the creditor the power of releasing a debtor without discharging the co-debtors or sureties; and a general release is then qualified by the terms of the contract (k).

A release by one of co-creditors jointly entitled to the debt discharges the debtor against all (l); but where a person, being a creditor in his own right and also as partner in a firm, executed in his own name a release to the debtor, he was taken to have executed for his own debt only and not for the partnership debt (m). A covenant by one of joint creditors not to sue the debtor, though it may operate as equivalent to a release as against that creditor upon the principle of avoiding circuity of action, has no effect in releasing the debtor from the joint claim; and all the creditors may join in suing, though the one would thereby commit a breach of his covenant (n).—In the case of a co-creditor releasing the debt in collusion with the debtor and in fraud of the other creditors, the Court of Chancery upon equitable principles will set aside the release; as in the case of a partner collusively releasing a partnership debt (o). The courts of common law exercised a more limited jurisdiction to permit the plaintiff to set aside a plea of release (p); or to traverse the validity of a release set up by

Release by one of co-creditors.

Covenant not to sue.

Release obtained by collusion and fraud.

(g) *Per cur.*, *Kearsey v. Cole* (1816), 16 L. J. Ex. 115; 16 M. & W. 135; *Robinson v. Gosling* (1871), 41 L. J. C. P. 53; L. R. 7 C. P. 9.

(h) *Muir v. Crawford* (1874), L. R. 2 H. L. Sc. 456.

(i) *Green v. Wynn* (1878), 38 L. J. C. 76; L. R. 4 Ch. 201.

(k) *Perry v. Nat. Prov. Bk.* (1910), 79 L. J. C. 509; (1910) 1 Ch. 464.

(l) *Hawckshaw v. Parkins* (1819), 2

Swan-1, 539; *Wilkinson v. Lindo* (1840), 10 L. J. Ex. 94; 7 M. & W. 81.

(m) *Bain v. Cooper* (1812), 11 L. J. Ex. 325; 9 M. & W. 701. See *Porell v. Brookhouse* (1904), 70 L. J. C. 587; (1904) 2 Ch. 160.

(n) *Walsley v. Cooper* (1839), 10 L. J. Q. B. 40; 11 A. & E. 216.

(o) *Perry v. Farnup* (1871), 40 L. J. C. 401; L. R. 12 Eq. 69.

(p) *Phillips v. Clappett* (1813), 12 L. J. Ex. 275; 11 M. & W. 34.

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plea (q). This jurisdiction was enlarged by the Common Law Procedure Act (r), and subsequently by the Judicature Act all the divisions of the court have the power to give full equitable relief (s).

(q) *Wild v. Williams* (1840), 9 L. J. Ex. 277; 6 M. & W. 490; *Robinson v. Lorton (Lord)* (1860), 29 L. J. C. P. 135; 7 J. B. N. S. 231.

(r) *De Pothonier v. Matton* (1858), 27

L. J. Q. B. 260; E. B. & E. 401; *Exp. Gunra* (1834), 33 L. J. Ex. 317; 3 H. & C. 294.

(s) *Montfort v. Maraden* (1894), 64 L. J. C. 32; (1895) 1 Ch. 11.

CANADIAN NOTES.

Release.

In *Simpson vs. Kerr*, 33 U. C. Q. B., 345, there was a declaration for work and materials in the construction of a house and a plea setting up that plaintiff had covenanted to finish the work before a certain date, under a forfeiture of twenty dollars per week while the work was unfinished, under which four hundred dollars had become due. Plaintiffs replied on equitable grounds that, after the breach in the plea alleged, the defendant for good and sufficient consideration had by parole discharged the plaintiff from the performance of the agreement. It was held that this was a good replication.

CHAPTER IX.

MERGER AND ESTOPPEL.

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Judgment against joint debtor—joint debtor beyond seas—effect in equity of merger of joint debt	681
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"It is a general rule of law, that a party, by taking or acquiring a security of a higher nature in legal operation than the one he already possesses, merges and extinguishes his legal remedies upon the minor security or cause of action: that is to say, the taking a bond or covenant or the acquiring a judgment for a simple contract debt merges and extinguishes the simple contract (a). "The policy of the law is, that there shall not be two subsisting remedies, one upon the covenant and another upon the simple contract by the same person against the same person for the same demand" (b). A debt secured by bond or other specialty merges in a judgment recovered in respect of it (c). But no merger takes place where the securities are of equal degree: as a bond taken for a bond or for a covenant (d); or a bond or covenant taken for payment of rent, which is also a specialty debt (e);

(a) *Green v. Hoare*, 1 L. C. 311; *Green v. Hoare* (1831), 20 L. J. C. 311; 3 Mac. & 407; *Wain v. Bolton* 1850, 19 L. C. 251; 3 De G. & Sm. 751; *Kendall v. Hamilton* 1879, 18 L. J. C. P. 707; 1 App. Ca. 504; *Comes v. Stroops v. Hope* (1891), 60 L. J. P. C. 41; (1891) A. C. 476.

(b) *Manle, J., Price v. Moulton* 1851, 20 L. J. C. P. 102; 10 C. B. 571.

(c) *Higgin's case* (1837), 6 Co. 44; *Patterson v. Wellman* (1837), 11 L. & G. t. Plunket, 95.

(d) *Bentham v. Cornwell, Cro. Car.* 85. See *Chetwood v. Allen* (1898), 68 L. J. C. 100; 1899 1 Ch. 353.

(e) *Cresswell, J., Price v. Moulton* (1851), 20 L. J. C. P. 102; 10 C. B. 571; *Kidd v. Bone* 1871, 40 L. J. C. 531; L. R. 12 Eq. 89.

PART IV. or a judgment recovered upon a contract of record (*f*). The remedy by action in the nature of an action for waste is available notwithstanding an express covenant in that behalf; this forming the only apparent exception to the generality of the rule (*g*).

Conditions of merger:— It is a necessary condition of merger that the two securities should be co-extensive; that is to say, the superior security must be for the same identical debt and between the same parties as the inferior security. A bond for a limited sum cannot merge a simple contract debt of indefinite amount; as a bond given to secure the payment of money then due and thereafter to become due under a simple contract for work (*h*). But merger may be effected of part of a claim, if the superior security be specifically appropriated to that part (*i*).—The new security must also be between the same parties; a superior security given by a surety for the debt does not merge the debt as against the principal (*k*). And a joint bond of a principal and surety does not merge the debt of the principal (*l*). A mortgage with a covenant to pay the debt, given by one of the makers of a joint and several promissory note, was held not to merge the note as against the other maker (*m*). And a superior security given to a third party as trustee for the creditor does not merge the original debt (*n*).

Intention of merger. Merger is effected by mere operation of law, independently of any intention of the parties that the inferior remedy should be discharged (*o*); and it seems that it is not competent for the parties to prevent the operation of the rule of law, by an express agreement to the contrary, except in cases where merger is inferred from the circumstances, as upon the payment off of a mortgage by an absolute owner (*p*). But a new security, though not within the conditions required to effect a merger by operation of law, may be given and accepted in discharge of the prior

(*f*) *Preston v. Perton* 1600, Cro. Eliz. 817.

(*g*) *Marker v. Kenrick* (1853), 22 L. J. C. P. 129; 13 C. B. 188.

(*h*) *Norfolk Ry. v. McNamara* (1819), 3 Ex. 628.

(*i*) *Price v. Moulton* 1851, 20 L. J. C. P. 102; 10 C. B. 561.

(*k*) *White v. Cagley* (1795), 6 T. R. 176.

(*l*) *Holmes v. Bell* (1841), 1 Man. & G. 213.

(*m*) *Ansell v. Baker* (1850), 15 Q. B. 20; *Baker v. Mosper* (1865), 34 L. J. C. P. 230; 19 C. B. N. S. 76.

(*n*) *Bell v. Banks* (1841), 3 Man. & G. 258; *Muratt v. Lonsborough* (Lord) (1851), 23 L. J. Q. B. 38; 1 E. & B. 1.

(*o*) *Price v. Moulton* (1851), 20 L. J. C. P. 102; 10 C. B. 561; *Norfolk Ry. v. McNamara* (1819), 3 Ex. 628.

(*p*) *Canons of Stamps v. Hope* (1891), 60 L. J. P. C. 44; (1891) A. C. 476. See *Liquidation Estates Purchase Co. v. Willoughby* (1898), 67 L. J. C. 251; (1898) A. C. 321; *Ingle v. Vaughan Jenkins* (1900), 69 L. J. C. 618; (1900) 9 Ch. 368.

debt by agreement of the parties; and it then operates by way of accord and satisfaction (*q*).—A deed acknowledging a simple contract debt may be construed as implying a covenant to pay the debt, with the effect of merging the simple contract. "In the simple case of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, it must be assumed that, although no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed?" (*r*). But if the acknowledgment of debt is made for a particular purpose declared in the deed, it is construed presumptively as restricted to the declared purpose, and there is no merger (*s*). Where a deed acknowledges a simple contract debt for the declared purpose of assigning certain security for it, without any express terms of covenant, no intention to give a covenant can be implied, and the debtor remains chargeable with the original debt (*t*). But if the deed reciting a simple contract debt agrees to execute a mortgage to secure it with all usual powers and covenants incidental thereto, it converts the debt into a specialty debt, because a covenant for payment is a usual covenant (*u*). Where money is lent upon a deed of mortgage containing a covenant to pay it out of the mortgaged property, the borrower cannot be charged with a simple debt for money lent, or with any other liability than the covenant (*x*).

CHAP. IX.

Effect of
implied
covenant.

A judgment recovered by the plaintiff in an action for a debt or breach of contract merges the original cause of action, and is a bar to another action for the same claim (*y*). An order of the court directing payment of money, as in the case of a balance order under the Companies Act, 1862, is not necessarily a judgment so as to effect a merger (*z*). Judgment recovered

Merger by
judgment
recovered.

q) See ante, p. 613.

r) Cairns, L. J., *Isaacson v. Haywood* (1868), 37 L. J. C. 213; L. R. 3 Ch. 228.

s) *Yates v. Aston* (1813), 12 L. J. Q. B. 160; 4 Q. B. 182; *Courtney v. Taylor* (1843), 12 L. J. C. P. 330; 6 Man. & G. 851.

t) *Isaacson v. Haywood* (1868), 37 L. J. C. 209; L. R. 3 Ch. 225; *Jackson v. N. E. Ry.* (1878), 47 L. J. C. 303; 7 Ch. D. 573.

u) *Saunders v. Milsome* (1867), L. R. 2 Eq. 573. See *Kidd v. Raine* (1871), 40 L. J. C. 531; L. R. 12 Eq. 89.

x) *Mathew v. Blackmore* (1857), 26 L. J. Ex. 150; 1 H. & N. 762.

y) *King v. Hoare* (1811), 11 L. J. Ex. 29; 13 M. & W. 191; *Kendall v. Hamilton* (1879), 48 L. J. C. P. 705; 4 Ap. Ch. 504; *Hammond v. Schofield* (1891), 60 L. J. Q. B. 539; 1891 1 Q. B. 153; *McLeod v. Fowler* (1898), 67 L. J. C. 551; (1898) 2 Ch. 295. See *Ederman v. Cohen* (1889), 13 Ch. D. 187.

z) *Westmoreland State Co. v. Eddien* (1891), 60 L. J. C. 680; (1891) 3 Ch. 15. See *Carpenter v. Thornton* (1819), 3 B. & Ald. 522.

PART IV.

Judgment on collateral security.

Warrant of attorney.

Reversal of judgment.

Merger of joint debt.

for a less sum than that claimed merges the whole claim, because it is conclusive as to the amount recoverable; and no further action can be brought upon the same claim in respect of the residue (*a*). A judgment recovered in an action for interest only is no bar to a subsequent action claiming the principal debt (*b*). And a judgment recovered in an action for the principal debt only, is no bar to a subsequent action for interest accrued previous to the judgment (*c*). As the judgment merges the debt no interest can afterwards accrue except upon the judgment (*d*). But a judgment, though it merges the debt, does not affect a charge or mortgage of property for the debt and interest (*e*).—Where a bill of exchange was given in payment of a debt due under a covenant, and judgment recovered upon the bill, it was held that the judgment alone, without payment or satisfaction, though it merged the remedy upon the bill, afforded no answer to an action upon the covenant (*f*).—A warrant of attorney to enter up judgment, or a *cognovit actionem*, is only a collateral security for obtaining the judgment, and does not alone merge the original debt nor satisfy it, before payment is made or judgment entered (*g*). A warrant of attorney given to a third party as trustee for the creditor, with judgment entered under it, is no merger, because not between the same parties, nor is it any satisfaction until paid (*h*).—A judgment, though erroneous or voidable for any cause, retains its operation in merger of the cause of action until reversal; but if reversed or set aside, the creditor is restored to his original cause of action (*i*).

A judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action

a *Bagot v. Lord v. Williams* (1824), 3 B. & C. 235; *Stewart v. Todd* (1846), 16 L. J. Q. B. 327; 9 Q. B. 767.

b *Blackburn, J., Morgan v. Rowlands* (1872), 41 L. J. Q. B. 187; L. R. 7 Q. B. 493.

c *Florence v. Jennings* (1857), 26 L. J. C. P. 274; 2 C. B. N. S. 454.

d *Ex p. Oriental Finance Corp.* (1876), 46 L. J. C. 57; 4 Ch. D. 33; *Ex p. Fawcett* (1883), 53 L. J. C. 543; 25 Ch. D. 338.

e *Papple v. Sylvestre* (1882), 52 L. J. C. 54; 22 Ch. D. 98; *Economic Life Assn.*

v. Usborn (1901), 71 L. J. P. C. 31; (1902) A. C. 147.

f *Wigg Prosser v. Evans* (1894), 64 L. J. Q. B. 1; (1895) 1 Q. B. 168.

g *Dillon v. Rimner* (1822), 1 Bing. 100; *Siddall v. Ravellyff* (1833), 2 L. J. Ex. 237; 1 Cr. & M. 487.

h *Bell v. Banks* (1841) Man. & G. 258.

i *Higgins' case* (1605), 6 Co. 45 b; *Vibart v. Coles* (1889), 59 L. J. Q. B. 152; 24 Q. B. D. 364; *Hammond v. Schofield* (1891), 60 L. J. Q. B. 539; (1891) 1 Q. B. 453.

against the others; but if the obligors are bound jointly and severally the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part of the debt remains due (*k*). So a judgment against one of the makers of a joint and several promissory note does not merge the note against the others severally (*l*). A consent to judgment given by one of two joint contractors in an action brought against the two is a bar to the further maintenance of the action against the other (*m*); but a petition in bankruptcy founded on a debt is not defeated by judgment having been recovered subsequently (*n*).—An exception has been made by the Mercantile Law Amendment Act, 1856, s. 11, in the case of one of joint debtors being beyond the seas at the time the cause of action accrued; in which case it is provided that the judgment recovered against one then within the jurisdiction shall not merge the remedy against the joint debtor beyond the seas, who may be sued after his return.

Joint debtor
beyond seas.

Merger of a joint liability has presumptively the same effect in equity as at law in discharging co-debtors; and though they were unknown to the plaintiff at the time of recovering the judgment (*o*). And judgment recovered against a husband bars an action against the wife upon the same contract in respect of her separate property (*p*). Nor can a judgment against one of joint debtors be set aside with the consent of the judgment debtor for the purpose of joining a joint debtor who is discharged by the judgment (*q*). But in the case of partners the assets are several in equity, and a creditor has a several claim against the assets of a deceased partner; and in such circumstances a judgment against the surviving partner does not bar the claim against the share of the deceased; nor does judgment against the latter bar an action against the survivor (*r*). And a judgment against partners jointly does not merge the debt so far as to exclude the right of the credi-

Effect in
equity of
merger of
joint debt

k, *King v. Hove* (1834), 14 L. J. Ex. 29; 13 M. & W. 491.

l, *Lynch v. Darnport* (1807), 2 B. & P. N. R. 471.

m, *McLeod v. Power* (1898), 67 L. J. C. 551; (1898) 2 Ch. 295.

n, *Ex p. Horner* (1891), 64 L. J. Q. B. 126; (1895) 1 Q. B. 189.

o, *Kendall v. Hamilton* 1879, 48 L. J. C. P. 705; 4 Ap. Ca. 504.

p, *Howe v. Niblett* (1891), 60 L. J.

Q. B. 565; (1891) 1 Q. B. 781. See *Morrell Bros. & Co., Ld. v. Westmoreland (Earl)* (1903), 73 L. J. K. B. 93; 1904 A. C. 11.

q, *Hammond v. Schofield* (1891), 60 L. J. Q. B. 539; (1891) 1 Q. B. 453.

r, *Liverpool Borough Bk. v. Walker* (1859), 4 De G. & J. 24; *Re Hodgson* (1885), 55 L. J. C. 241; 31 Ch. D. 177. See *Blyth v. Fladgate* (1890), 60 L. J. C. 66; (1891) 1 Ch. 337.

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tor to prove in bankruptcy against their separate estates in respect of separate liabilities, if any, for the original debt (*s*).—A judgment recovered against one of joint debtors, though it merges the debt and prevents recovery against the others, does not bar his right of contribution from them (*t*).

Estoppel by judgment against plaintiff.

A judgment against the plaintiff in an action is a conclusive estoppel as to the matter adjudicated. "When one is barred in any action, real or personal, by judgment on demurrer, confession, verdict, &c., he is barred as to that, or the like action of the like nature for the same thing, for ever; for '*expedit reipublice ut sit finis litium*'" (*u*). And the estoppel extends to matters which the party might have raised but omitted to do (*x*). But the judgment, in order to operate in estoppel, must have proceeded upon grounds which are decisive of the cause of action subsequently sued upon (*y*): a plaintiff is not estopped by a judgment against him upon the ground of having brought the action prematurely, as an action to recover back the deposit under a contract of sale before the contract was rescinded (*z*). If the plaintiff discontinued the former action, or if it was dismissed for want of prosecution, there is no bar to a second action (*a*). The plaintiff may also bring a second action upon new matter arising which defeats the defence of the former action; as in the case of a composition deed being defeated by non-payment of the composition (*b*). But he cannot bring a new action upon the discovery of new evidence in support of his case, unless it amounts to a new cause of action which he could not have known before (*c*). And a plaintiff cannot bring an action to impeach a judgment upon grounds of fraud which he might have pleaded in the former

^(s) *Ex p. Chandler* (1884), 13 Q. B. D. 50.

^(t) See *Hammond v. Schofield* (1891).

60 L. J. Q. B. 539; (1891) 1 Q. B. 454.

^(u) *Kingston's (Duchess) case* 1776, 34

Lds. Jols. 655; 2 Sm. L. C. 713;

Peareth v. Marriott (1882), 52 L. J. C.

221; 22 Ch. D. 182. See *Exp. Withersell*

(1852), 2 D. & G. M. & G. 559; *Att.-*

Gen. (Trinidad and Tobago) v. Eriché

(1893), 62 L. J. P. C. 6; (1893) A. C.

518.

^(x) *Humphrys v. Humphries* (1910),

79 L. J. K. B. 919; (1910) 2 K. B.

531.

^(y) *Hadley v. Green* (1832), 1 L. J. Ex.

137; 2 Cr. & J. 374.

^(z) *Palmer v. Temple* 1839, 8 L. J.

Q. B. 179; 9 A. & E. 508.

^(a) *Re Orrell Coll. Co.* (1879), 48

L. J. C. 655; 12 Ch. D. 681; *Magnus*

v. Bk. of Scotland (1888), 57 L. J. C.

902; Ord. XXVI. r. 1.

^(b) *Hall v. Lory* (1874), 4— C. P.

89; L. R. 10 C. P. 154.

^(c) *Phosphate Sewage Co. v. Mossion*

(1879), 4 Ap. Ca. 801; *Heath v. Wear-*

haven (1894), 63 L. J. M. C. 187;

(1894) 2 Q. B. 103. See *Re May* (1885),

54 L. J. C. 338; 28 Ch. D. 516; *See t*

v. Alvarez (1895), 64 L. J. C. 376;

(1895) 1 Ch. 596.

action (*d*). Where the defendant relied for defence upon a judgment against the plaintiff in a former action against a joint debtor for the same debt, it was held that he must show that the former judgment was obtained upon grounds open to all the joint debtors, and not upon grounds peculiar to the one previously sued (*e*).

Upon the same principle a judgment for the plaintiff for a certain amount operates in estoppel as to the amount recoverable, and precludes his suing again for a greater amount or further damages under the same claim (*f*). But a judgment may be set aside by the court upon the ground of mistake in the amount claimed, and upon the ground of fraud upon the plaintiff (*g*). Where a plaintiff sued for two distinct debts, but proceeded for and proved one only, it was held that the judgment did not include the other debt and was no bar to a second action (*h*).—So if the plaintiff in a county court abandons so much of his claim as is in excess of the jurisdiction, he is precluded by the judgment of the court from bringing another action for the excess (*i*). But the defendant in a county court action may make a counterclaim in excess of the jurisdiction of the court, which is available in that court only to the amount of the plaintiff's claim; consequently he may bring an action in the superior court for the residue, in which action the judgment of the county court is conclusive as to the cause of action, and the only question is the amount of the debt or damages (*k*).

Judgment
for part of
claim.

The principle of estoppel extends to all matters adjudicated upon by a court of competent jurisdiction, as against the parties before the court, and all persons claiming in the same right (*l*); but not against parties suing or being sued in different rights (*m*).

Estoppel by
res judicata.

d) *Flower v. Lloyd* (1879), 10 Ch. D. 327. See *Turner v. Tipper* (1877), 46 L. J. C. 703.

e) *Phillips v. Ward* (1863), 33 L. J. Ex. 7; 2 H. & C. 717.

f) *Bayot (Lord) v. Williams* (1824), 3 B. & C. 235; *Stewart v. Tait* (1815), 16 L. J. Q. B. 327; 9 Q. B. 767; *Serrao v. Noel* (1885), 15 Q. B. D. 519.

g) *Gannan v. Knapp* (1856), 26 L. J. Q. B. 62; 5 E. & B. 391.

h) *Seddon v. Tudor* (1796), 6 T. R. 607; *Hadley v. Green* (1832), 1 L. J. Ex. 137; 2 Cr. & J. 374.

i) County Courts Act, 1888, s. 81. See *Fines v. Arnold* (1849), 19 L. J. C. P. 98; 8 C. B. 632; *Clarke v. Yorke*

(1882), 52 L. J. C. 32; *Lorejoy v. Cole* (1891), 61 L. J. Q. B. 120; (1891) 2 Q. B. 861.

k) *Davis v. Flagstaff Mining Co.* (1878), 47 L. J. C. P. 503; 3 G. P. D. 228; *Webster v. Armstrong* (1884), 54 L. J. Q. B. 237.

l) *Kingston's (Duchess) case* (1776), 34 Lds. Jols. 665; 2 Sm. L. C. 713; *Symons v. Rees* (1876), 1 Ex. D. 416; *Re May* (1885), 54 L. J. C. 333; 28 Ch. D. 516; *Edgar v. Plomley* (1899), 69 L. J. P. C. 95; (1900) A. C. 431; *Wakefield (Corp.) v. Cooke* (1903), 73 L. J. K. B. 88; (1904) A. C. 31.

m) *Needham v. Brenner* (1866), 36 L. J. C. P. 313; L. R. 1 C. P. 583;

PART IV.

Judgment by default.

Admissions in pleading.

Effect of verdict or judgment.

And where the judgment decides a general right affecting a class of persons, the estoppel includes all persons of that class who were properly represented in the suit, though not actual parties (*n*).—

"The judgment of the courts of common law is not only conclusive with reference to the actual matter decided, but it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered" (*o*). Therefore a judgment recovered against a party by default or by consent estops him in a second action as to all traversable allegations in the former action which are necessary to support the judgment; but not as to defences, consistent with such allegations, which he merely omitted to plead (*p*). And a plea of set-off found against the defendant estops him from suing for the same claim in a subsequent action, though he offered no evidence upon the set-off (*q*).—The allegations and admissions in the pleadings of an action, which are made and intended for the purpose of that action only, do not operate in estoppel in other proceedings (*r*).—The facts actually decided by an issue in any suit in a court having competent jurisdiction cannot be litigated again between the same parties, and are evidence between them (*s*). Hence a verdict operates in estoppel as to the facts in issue which are material to support it, so long as it stands; but the court may grant a new trial upon the grounds of there being no evidence to support it; or of it being against the weight of evidence, or of misdirection by the court (*t*). The court can disregard the verdict only in the case of there being no evidence, so that a new trial is useless; or where the matter of the verdict is immaterial (*u*). An estoppel must be specially

Leggatt v. G. N. Ry. (1876), 45 L. J. Q. B. 557; 1 Q. B. D. 539; *Ex p. Young* (1881), 50 L. J. C. 824; 17 Ch. D. 668; *Ballantyne v. Mackinnon* (1896), 65 L. J. Q. B. 616; (1896) 2 Q. B. 455.

(*n*) *Cummins, of Sears v. Gellatly* (1876), 45 L. J. C. 788; 3 Ch. D. 610.

(*o*) *Mellish, L. J., Alison's case* (1873), 43 L. J. C. 11; L. R. 9 Ch. 25.

(*p*) *Hawlett v. Tate* (1861), 31 L. J. C. P. 146; 10 C. B. N. S. 813; *Navigation v. Levy* (1870), 40 L. J. C. P. 40; L. R. 6 C. P. 180; *Re S. American & Mexican Co.* (1894), 64 L. J. C. 189; (1895) 1 Ch. 37.

(*q*) *Eastmore v. Laues* (1837), 5 L. J. C. P. 236; 5 Bing. N. C. 444.

or Bodden v. Rothin (1848), 2 Ex. 665. See *Hobdopp v. Utway* (1870), 2 Wms. Sannd. 346, n. 1.

(*r*) *Boscoe v. Stephens* (1824), 3 L. J. O. S. C. P. 257; 2 Bing. 213; *Carter v. James* (1814), 13 L. J. Ex. 373; 13 M. & W. 137; *Priestman v. Thomas* (1881), 53 L. J. P. 109; 9 P. D. 210; *Concha v. Concha* (1886), 56 L. J. C. 257; 11 App. Ca. 541; *Re Marvin* (1905), 74 L. J. C. 499; (1905) 2 Ch. 430.

(*t*) *See euc. Re May* (1885), 54 L. J. C. 338; 28 Ch. D. 519; *Humphries v. Humphries* (1910), 79 L. J. K. B. 919; (1910) 2 K. B. 531.

(*u*) *Ex p. Morgan* (1876), 45 L. J. Bk. 36; 2 Ch. D. 72.

pleaded, where there is an opportunity, because it concludes the fact without inquiry; but if issue is joined instead of pleading the estoppel, the inquiry is open and it is matter of evidence only and not conclusive; unless there was no opportunity of pleading the estoppel in which case it is conclusive in evidence *x*).

The judgment of an inferior court, not being a court of record, does not merge the debt in a higher security, but it operates by way of estoppel; as the judgment of the ancient county court at common law (*y*). The county court as constituted by statute is expressly made a court of record (*z*); and the judgment of the statutory county court is a bar to an action for the same cause in any other court (*a*). By the County Courts Act, 1888, it is enacted, s. 93, "every judgment and order of this court shall be final and conclusive between the parties"; but it is provided that the court shall have power to nonsuit the plaintiff; also power to order a new trial. An action will not lie upon a judgment of a county court; nor in a county court upon a judgment of the High Court (*b*).—The judgments and decisions of inferior courts of competent jurisdiction are conclusive between the parties, and operate in estoppel upon the principles above stated. The decision of a county court on a claim for rent, that the tenancy was yearly and not weekly, was held to be conclusive in an action for trespass and eviction in the superior court (*c*). And the verdict and judgment of a county court upon a counterclaim was held to be conclusive as to the claim; though not as to the amount due in excess of the plaintiff's claim (*d*). And a judgment or order made by consent is equally effective as an estoppel (*e*). The decision of justices exercising summary jurisdiction in petty sessions upon a matter within their jurisdiction is an estoppel between the parties (*f*).

Effect of judgment of inferior court in merger.

Effect in estoppel.

A judgment recovered in a foreign court does not merge the cause of action in the courts of this country; and therefore, unless

Foreign judgment.

(*x*) *Kingston's (Duchess) case* (1776), 34 Lds. Jols. 665; 2 Sm. L. C. 713; *Voogt v. Winch* (1819), 2 B. & Ald. 662.

(*y*) *Higgin's case* (1605), 6 Co. 45 a.

(*z*) County Courts Act, 1888, s. 5.

(*a*) *Austin v. Mills* (1853), 23 L. J. Ex. 40; 9 Ex. 288.

(*b*) See the County Courts Act, 1888, ss. 63, 115.

(*c*) *Flitters v. Alfrey* (1874), L. R. 10 C. P. 29; 44 L. J. C. P. 73.

(*d*) *Webster v. Armstrong* (1885), 54 L. J. Q. 3 236.

(*e*) *Ribble Committee v. Croston Dist. Council* (1896), 66 L. J. Q. B. 384; (1897) 1 Q. B. 251.

(*f*) *Millett v. Coleman* (1875), 44 L. J. Q. B. 194; *Wakefield (Corp.) v. Cooke* (1903), 73 L. J. K. B. 88; (1904) A. C. 31. See *Dover v. Child* (1876), 45 L. J. Ex. 462; 1 Ex. D. 172.

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followed by satisfaction, it affords no answer to an action upon the original claim (*g*). But a final judgment of a foreign court is conclusive between the parties, and operates in estoppel as to the matters adjudicated. It therefore raises an implied debt between the parties which forms a distinct cause of action; and the debtor cannot plead any matter of defence which was available to him in the foreign court (*h*). A foreign judgment is also conclusive as to the amount recoverable, which may be discharged by payment or satisfaction of the judgment (*i*). Upon the same principle a final and conclusive judgment upon the merits against the plaintiff in a suit brought in a foreign court, may be set up in estoppel against an action brought by him for the same cause in the courts of this country (*k*).

Action pending for same cause.

If concurrent actions are brought by the same plaintiff in an English court and also in a court in the King's dominions for the same cause, it is *prima facie* vexatious, and the plaintiff will be put to his election to determine in which court he will sue; but in the case of a foreign action, by reason of the different procedure and remedies, there is no such presumption, and it lies upon the defendant to show special grounds for the interference of the court (*l*).

(*a*) *Smith v. Nicolls* (1838), 8 L. J. C. P. 42; 5 Bing. N. C. 208; *Bank of Australasia v. Harding* (1850), 19 L. J. C. P. 345; 9 C. B. 661; *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 281; 16 Q. B. 717; *Taylor v. Ballard* (1902), 71 L. J. K. B. 278; (1902) 1 K. B. 676.

(*h*) *Vauquelin v. Bouard* (1863), 33 L. J. C. P. 78; 15 C. B. N. S. 311; *Grant v. Easton* (1883), 53 L. J. Q. B. 68; 13 Q. B. D. 302; *Pemberton v. Hughes* (1899), 68 L. J. C. 281; (1899) 1 Ch. 781.

(*i*) *Barber v. Lamb* (1860), 29 L. J. C. P. 234; 8 C. B. N. S. 95.

(*k*) *Ricardo v. Garcias* (1815), 12 Cl. & F. 368; *Nowion v. Freeman* (1890), 59 L. J. C. 337; 15 Ap. Ca. 1.

(*l*) *Curran Iron Co. v. MacLaren* (1855), 24 L. J. C. 620; 5 H. L. C. 416; *McHenry v. Lewis* (1883), 52 L. J. C. 325; 22 Ch. D. 397; *Peruvian Guano Co. v. Bockwoldt* (1883), 52 L. J. C. 711; 23 Ch. D. 225; *Mutrie v. Bonnie* (1885), 35 Ch. D. 614; *Deschamps v. Miller* (1908), 77 L. J. C. 416; (1908) 1 Ch. 856; *Jopson v. James* (1908), 77 L. J. C. 824.

CANADIAN NOTES.

Merger.

In *Smith vs. Tennant*, 20 O. R., 180, the defendant agreed with the plaintiff to exchange five houses then in course of erection for certain lands of the plaintiff. The houses were to be completed by May 30th, similar to certain houses on a street named. Mutual conveyances were to be exchanged between the parties within sixty days from the date of the contract, which would be the 24th of May, but, as a matter of fact, they were executed and exchanged about the 9th of May. Plaintiff in this action claimed damages for non-completion and defect in the finishing of the houses. The deed from the defendant contained no covenant covering the matter complained of. It was held, nevertheless, that the plaintiff was entitled to recover on the original contract. A contract to perform work or to do things for the other contracting party on a sale of land at a period after the time fixed by the same contract for the execution and final delivery of the former conveyance does not become merged in the conveyance.

29 L. J.

, 12 Cl. &
1890), 59

ren (1855),
C. 416;
L. J. C.
Guano Co.,
C. 711;
nie 1885),
v. Muller
98) 1 Ch.
7 L. J. C.

CHAPTER X.

ARBITRATION AND AWARD.

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By agreement of the parties, or, in some cases, by an order of the court or a judge, a right of action may be referred to arbitration instead of being determined by the adjudication of a competent court. An arbitration is a judicial proceeding (a). Arbitration is now regulated by the Arbitration Act, 1889, which repeals and consolidates the previous enactments relating to arbitration. As to reference by consent, out of which it is enacted, sect. 1, "A submission (which is defined by sect. 27 to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not), unless a contrary intention is expressed therein, shall be as valid and effectual except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made by an order of court. The written agreement to submit to arbitration is required by the Act to be signed by the parties (b).—Sect. 2. "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to this Act so far as they are applicable to the reference under the submission." The provisions in the schedule regulate the appointment of arbitrators and umpire, the time of making the award, the conduct and costs of the reference,

Arbitration.

Reference by consent.

(a) *Re N. Western Rubber Co. and Huttenbach & Co.* (1908), 77 L. J. K. B. 61; (1908) 2 K. B. 907; *Re Enoch and Zaretsky, Buck & Co.* (1910), 79 L. J. K. B. 363; (1910) 1 K. B. 327.
 (b) *Baker v. Yorkshire Fire Assn.* (1892), 61 L. J. Q. B. 838; (1892) 1 Q. B. 144.

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Reference by
order of court
for report.

Reference
for award.

Award con-
clusive upon
the parties.

and the finality of the award. They apply to submissions made before the Act as well as after (c).

As to references under order of court, it is enacted, sect. 13 (1), "The court or a judge may refer any question arising in any cause or matter (d) for inquiry or report to any official or special referee." (2) "The report of an official or special referee may be adopted wholly or partially by the court or a judge (e); and if so adopted may be enforced as a judgment or order to the same effect."--Sect. 14, "In any cause or matter, (1) If all the parties interested who are not under disability consent (f); or, (2) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its ordinary officers (g); or, (3) If the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court" (h).

An award, good on the face of it, whether made upon a reference by consent, or by order of the court, is binding and conclusive upon both parties, but not as between strangers, until it is set aside; upon the same principle that a judgment binds the parties as *res judicata* (i). The award binds not only the parties to the reference, but also all persons claiming through or under them; as a judgment creditor of one of the parties claiming satisfaction out of property which is subject of the award (k). And the award is conclusive as to all causes and matters within the scope of the reference, or which a party might have brought forward, though he has omitted to do so (l). But an award beyond the

(c) *Re Williams and Stepney* (1891), 60 L. J. Q. B. 636; (1891) 2 Q. B. 257.

(d) See *Weed v. Ward* (1889), 58 L. J. C. 454; 40 Ch. D. 555.

(e) *Dunkirk Coll. Co. v. Lever* (1878), 9 Ch. D. 20.

(f) *Darlington Wagon Co. v. Harding* (1890), 60 L. J. Q. B. 110; (1891) 1 Q. B. 245; *Zelma Gold Mining Co. v. Hoskins* (1894), 64 L. J. P. C. 45; (1895) A. C. 100.

(g) *Hamilton v. Merchants' Marine*

Insee, (1889), 58 L. J. Q. B. 544.

(h) *Harbutt v. Basset* (1892), 62 L. J. Q. B. 1; (1893) 1 Q. B. 77. See *Hoe v. Boor* (1880), 49 L. J. Q. B. 665.

(i) Arbitration Act, 1889, s. 2, scheduled 1, s. 15; *Hall v. Ball* (1828), 2 Bl. N. S. 1; *Wenman v. Mackenzie* (1855), 25 L. J. Q. B. 41; 5 E. & B. 447.

(k) *Martin v. Boulenger* (1883), 5 L. J. P. C. 31; 8 Ap. Ca. 296.

(l) *Dunn v. Murray* (1829), 7 L. J. O. S. K. B. 320; 9 B. & C. 780; *Pete*

scope of the reference is not binding (*m*). And it is in general for the court and not for the arbitrator to construe the reference as to what matters are referred to arbitration (*n*).

Hence an award upon a cause of action, followed by performance of the award, is a complete discharge of the claim; and an award that nothing is due may be pleaded in bar to an action upon the claim referred (*o*). An award that a certain sum is due is conclusive as to the amount, and a defence limited to a claim for an amount in excess of the sum awarded is regular (*p*). And in an action for the breach of a covenant in a lease to repair the demised premises, an award upon the amount of dilapidations is conclusive evidence of the amount of damages (*q*). But if the award substitutes a new debt or duty in satisfaction of the claim referred, the award alone, without payment or performance, may be pleaded in answer to the claim; and the party must pursue his remedy upon the award (*r*). Thus an award under a submission of a claim for breach of a covenant in a lease to repair, that the lessee should pay a certain sum, and put the premises in repair, and quit on a certain day, was held to be a sufficient answer to an action on the covenant, without alleging performance (*s*). But an award upon a claim referred, that mutual releases should be executed by the parties was held to be no plea to an action without execution of the release (*t*).

CHAP. X.

Effect of award in answer to claim.

An agreement between British subjects to refer to arbitration differences that may arise under a contract does not oust the jurisdiction of the court, and is no bar to an action; but, as hereafter mentioned, may be a ground for staying proceedings under sect. 4 of the Arbitration Act, 1889. "It would be against the policy of the law to give effect to an agreement that" a right of action "should not be enforced through the medium of the ordinary tribunals" (*u*). And the pendency of an arbitration upon such

Effect of agreement to refer.

v. *Fountain* (1839), 8 L. J. C. P. 305; 5 Bing. N. C. 442; *Gueret v. Audouin* (1893), 62 L. J. Q. B. 633.

(*m*) *Ravee v. Farmer* (1791), 4 T. R. 146; *Hutcheon v. Eaton* (1884), 13 Q. B. D. 861. See *Turnell v. Sanderson* (1891), 60 L. J. C. 703.

(*n*) *Hutcheson v. Eaton* (1884), 13 Q. B. D. 861. See *De Ricci v. De Ricci* (1891), 61 L. J. P. 17; (1891) P. 391.

(*o*) *Parker v. Smith* (1850), 19 L. J. Q. B. 405; 15 Q. B. 297.

(*p*) *Cayme v. Watts* (1823), 3 D. & R.

224; *Cummings v. Heard* (1869), 39 L. J. Q. B. 9; 1 L. R. 4 Q. B. 669.

(*q*) *Whitehead v. Tattersall* (1834), 1 A. & E. 491.

(*r*) *Parke, B., Bates v. Townley* (1818), 19 L. J. Ex. 339; 2 Ex. 157.

(*s*) *Gascoyne v. Edwards* (1826), 1 Y. & J. 19.

(*t*) *Freeman v. Bernard* (1696), 1 Ld. Raym. 248.

(*u*) *Chelmsford, L. C., Scott v. Liverpool Corp.* (1858), 28 L. J. C. 235; 3 De G. & J. 360.

544.
(2), 62 L. J.
See *Hoch*
3, 665.
n. 2, *ibid.*
(825), 2 Bli.
enzie (1855),
3, 447.
(1883), 52
96.
(9), 7 L. J.
780; *Pitch*

PART IV.

Arbitration
made a con-
dition pre-
cedent to
claim.

difference, until a final award made, has no greater effect, and affords no answer to an action for the matter referred (x). Accordingly the usual condition in a policy of insurance, that any difference as to the loss or damage should be referred to arbitration, does not alone exclude the assured from suing on the policy (y). A covenant in a lease of mines not to bring any action without first submitting all matters in difference to arbitration was held to be a collateral independent covenant, which did not exclude an action, though in breach of the covenant (z). Full effect, however, will be given to a provision contained in a contract between foreigners to submit all disputes between them to their own domestic forum (a).

But an arbitration of differences may be made a condition precedent to any claim or liability arising upon the contract; so that no action can be brought until an arbitration has been held and an award made. Accordingly provisions in policies of insurance not only that the loss or damage recoverable shall be referred to arbitration, but further, that no action shall be brought except for the sum awarded to be paid will be given effect to (b). A policy of insurance may further expressly provide that the liability as well as the amount of the loss shall be referred to and settled by arbitration, as a condition precedent to the claim of payment. Such conditions are legal and must be satisfied before a cause of action arises; and consequently the court will stay an action brought before the arbitration (c). Upon the same principle of construction, in the case of building and engineering contracts with the condition for payment of such sums only as the architect or engineer shall certify to be due, there is no claim or right of action until the certificate is given, unless it appear that the certificate was not to be final and conclusive (d). And

(x) *Wood v. Copper Miners' Co.* (1856), 25 L. J. C. P. 166; 17 C. B. 561; *Cooke v. Cooke* 1867, 36 L. J. C. 480; L. R. 4 Eq. 77.

(y) *Roper v. London* 1859, 28 L. J. Q. B. 260; 1 E. & E. 825. See *Edwards v. Aberayron Mutual Ship Inscr.* (1876), 1 Q. B. D. 563.

(z) *Horton v. Sayer* (1859), 29 L. J. Ex. 28; 4 H. & N. 643. And see *Dawson v. Fitzgerald* (Lord) (1876), 45 L. J. Ex. 893; 1 Ex. D. 257; *Collins v. Locke* (1879), 48 L. J. P. C. 68; 4 Ap. Ca. 674.

(a) *Gienar v. Meyer* 1798, 2 H. Bl.

603; *Kirchner & Co. v. Girdan* 1909, 78 L. J. C. 678; (1909) 1 Ch. 413. See *British Wagon Co. v. Gray* (1895), 65 L. J. Q. B. 75; (1896) 1 Q. B. 35.

(b) *Scott v. Avery* (1855), 25 L. J. Ex. 303; 5 H. L. C. 811; *Caledonian Ins. v. Gilmour*, (1893) A. C. 85; *Spurrier v. La Cloche* (1902), 71 L. J. P. C. 101; (1902) A. C. 446. See *Northampton Gas Light Co. v. Parnell* (1855), 24 L. J. C. P. 60; 15 C. B. 630.

(c) *Trainor v. Phoenix Inscr.* (1892), 65 L. T. 825.

(d) *Scott v. Liverpool Corp.* (1858), 28 L. J. C. 230; 3 De G. & J. 334. *Sharpe*

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in the case of a horse race for a sum of money to be paid to the winner upon the decision of the stewards, no claim can be made by the winner, without showing a decision in his favour (e). Where a tenant of house and furniture covenanted to deliver them up in good order, and in the event of loss or damage to pay for the same, the amount to be settled by two valuers, it was held that no action for dilapidations was maintainable until the sum was ascertained by the valuers (f). In the event of the arbitration failing a party may be entitled to claim upon the original consideration; as in the case of goods sold and delivered at a price to be fixed by valuers, who are duly appointed by the parties, but fail to act (g).—Upon the same principle, arbitration clauses in Acts of Parliament presumptively do not oust the jurisdiction of the court; but they may be obligatory by the express enactment, or impliedly by the objects which they are intended to serve. Examples occur in the Tramway Act, 1870 (h); in the Friendly Societies Acts (i); and in the Building Societies Acts (j); and in private Acts of Parliament (k). The arbitration provided by the Railway Companies Arbitration Act, 1859, is compulsory; but it does not oust the jurisdiction of the court unless one of the parties insists upon the arbitration (l). Where the statutory tribunal becomes non-existent, the parties may appeal to the ordinary tribunals (m).

Statutory
arbitration
clauses.

An action lies upon a submission, or agreement to refer differences, for a breach in refusing to refer; though such agreement cannot be set up in answer to an action upon the cause referred (n). But the damages in such action must in general

Remedy on
agreement to
refer:—
Action.

v. *San Paulo Ry.* (1873), 1 L. R. 8 Ch. 597; *Robins v. Goddard* (1904), 74 L. J. K. B. 167; (1905) 1 K. B. 294.

(e) *Broen v. Overbury*, 25 L. J. Ex. 169; 11 Ex. 715. See *Sidler v. Smith*, 39 L. J. Q. B. 17; L. R. 5 Q. B. 40.

(f) *Bibbidge v. Colburn* (1882), 52 L. J. Q. B. 50; 9 Q. B. D. 235.

(g) *Cooper v. Shatthworth* (1856), 25 L. J. Ex. 114; *Dunham v. Bradford* (1870), L. R. 5 Ch. 519.

(h) *Norwich Corp. v. Norwich El. Tram. Co.* (1906), 75 L. J. K. B. 636; (1906) 2 K. B. 119.

(i) *Huckle v. Wilson* (1867), L. R. 2 C. P. 410; *Stone v. Liverpool Marine Soc.* (1894), 63 L. J. Q. B. 471; *Cor v. Hutchinson* (1910), 79 L. J. C. 259; (1910) 1 Ch. 513.

(j) *Municipal Ry. Soc. v. Kent* (1884), 53 L. J. Q. B. 290; 9 Ap. Ca. 260; *Western Suburban Ry. Soc. v. Martin* (1886), 55 L. J. Q. B. 382; 17 Q. B. D. 609; *Municipal Ry. Soc. v. Richards* (1889), 58 L. J. C. 8; 39 Ch. D. 372.

(k) *Gl. W. Ry. v. Phillips* (1908), 77 L. J. K. B. 306; (1908) A. C. 101.

(l) *L. C. & D. Ry. v. S. E. Ry.* (1888), 58 L. J. C. 75; 40 Ch. D. 190. And see *Crosfield v. Manchester Ship Canal* (1905), 74 L. J. C. 637; (1905) A. C. 421.

(m) *Bentley v. Manchester, Sheff. & Lines. Ry.* (1891), 60 L. J. C. 641; (1891) 3 Ch. 222.

(n) *Livingston v. Ralli* (1855), 24 L. J. Q. B. 269; 5 E. & B. 132.

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be nominal, because it cannot be ascertained what the award would be, if the reference were carried out; unless the agreement stipulates for liquidated damages (*o*). So an action will lie for refusing to appoint an arbitrator; and where upon such refusal the other party is authorised by the terms of submission to proceed to an award, he may recover the sum awarded (*p*). And an arbitration bond with a penalty, conditioned to "perform" the award, is forfeited by a party preventing the award by revoking the authority of the arbitrator (*q*).

Specific performance

The court will not grant specific performance of an agreement to refer by compelling a party to appoint an arbitrator, or to execute an arbitration bond (*r*); nor does the Arbitration Act, 1889, give the court power to make an order to that effect (*s*). And the court will not grant specific performance of an agreement to sell property at a price to be settled by arbitrators or valuers to be appointed by the parties, unless an award of the price has been made; the mode agreed upon for settling the price being an essential condition of the contract (*t*). But the court will compel a vendor under such an agreement to admit the appointed valuer to enter to make the valuation (*u*). Specific performance will be granted of a contract of sale at a fair valuation, where the court can provide the means of ascertaining the price (*x*). And the court granted specific performance of an agreement for a lease to contain "all usual and proper conditions" as shall be judged reasonable by a land surveyor named; the person not being held essential to the performance (*y*). And where the benefit of an agreement has been had and enjoyed upon the terms of paying a valuation price which cannot be ascertained as agreed, the court will enforce completion and supply the valuation (*z*).

Staying legal proceedings.

Sect. 4 of the Arbitration Act, 1889, enables the court (*a*)

(*o*) Eldon, L. C., *Stret v. Rigby* (1802), 6 Ves. 817; *Bramden v. Staines Loc. Bd.* (1884), 1 Cab. & E. 272.

(*p*) *Thomas v. Fredricks* (1847), 16 L. J. Q. B. 383; 10 Q. B. 775.

(*q*) *Fynior's case* (1609), 8 Co. 81 b; *Warburton v. Storr* (1825), 3 L. J. O. S. K. B. 156; 4 B. & C. 103.

(*r*) *Agar v. Mackle* (1825), 4 L. J. O. S. Ch. 16; 2 Sim. & S. 418. See *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170.

(*s*) *Re Smith and Nelson* (1880), 59 L. J. Q. B. 533; 25 Q. B. D. 545.

(*t*) *Milnes v. Gery* (1807), 14 Ves. 400;

Vickers v. Vickers (1867), 36 L. J. C. 946; L. R. 4 Fq. 529; *Firth v. Midland Ry.* (1875), 41 L. J. C. 313; L. R. 20 Eq. 100.

(*u*) *Morse v. Merest* (1821), 6 Madd. 26; *Smith v. Peters* (1875), 44 L. J. C. 613; L. R. 20 Eq. 511.

(*x*) *Gregory v. Mighell* (1811), 18 Ves. 328; *Jackson v. Jackson* (1853), 22 L. J. C. 873; 1 Sm. & G. 184.

(*y*) *Gourlay v. Somerset (Duke)* (1815), 19 Ves. 429. See *Hart v. Hart* (1881), 50 L. J. C. 697; 18 Ch. D. 670.

(*z*) *Dinham v. Bradford* (1870), L. R. 5 Ch. 519.

(*a*) *Morriston Tinplate Co. v. Brooker*,

to stay proceedings in an action where the subject-matter of the action is agreed to be referred (*b*); but the application must be made after appearance and before the party applying has taken any step in the action. Under this enactment, it is the "*prima facie* duty" of the court to stay proceedings upon matters which the parties have agreed to refer, but it is within the discretion of the court to refuse to do so (*c*). An agreement to refer disputes to a foreign tribunal is a submission to arbitration giving the English courts jurisdiction to stay proceedings (*d*). A counterclaim is a cross-action, and the plaintiff in the original action may apply to have proceedings on a counterclaim stayed if the subject-matter has been agreed to be referred (*e*). An application for a stay of proceedings until security for costs be given (*f*), or for particulars or for interrogatories (*g*), or to obtain further time for delivery of a defence (*h*), is a step in the proceedings; but a notice requiring the delivery of a statement of claim (*i*), or filing affidavits in answer to affidavits filed in support of an application for the appointment of a receiver (*k*), do not amount to a step in the proceedings. A stay will be refused after an order has been made, or an undertaking in lieu thereof given, on a summons for directions (*l*). But the court will refuse to stay legal proceedings, pending a submission to arbitration, where they involve a charge of fraud made by the defendant (*m*); where part only of the differences between the parties can be disposed of in the arbitration (*n*); or where the proceedings are not within

77 L. J. K. B. 197; (1908) 1 K. B. 403.

(*b*) *Turnell v. Sanderson* (1891), 60 L. J. C. 703; *Bicker v. Yorkshire Fire Assce.* (1892), 61 L. J. Q. B. 838; (1892) 1 Q. B. 141; *Aitken v. Batchelor* (1893), 62 L. J. Q. B. 193; *Hodson v. Ry. Pass. Ass.* (1904), 73 L. J. K. B. 1001; (1904) 2 K. B. 833.

(*c*) *Lyon v. Johnson* (1889), 58 L. J. C. 626; 40 Ch. D. 579; *Manchester Ship Canal v. Parson* (1900), 69 L. J. Q. B. 852; (1900) 2 Q. B. 606; *Bonnin v. Neame* (1910), 79 L. J. C. 388; (1910) 1 Ch. 732.

(*d*) *Austrian Lloyd SS. Co. v. Gresham Life Assce.* (1903), 72 L. J. K. B. 211; (1903) 1 K. B. 249; *Kirchner & Co. v. Granbar* (1908), 78 L. J. C. 117; (1909) 1 Ch. 413.

(*e*) *Spartali v. Van Hoorn*, W. N. (1881) 32.

(*f*) *Adams v. Catley* (1892), 66 L. T.

687; 40 W. R. 570.

(*g*) *Chappell v. North* (1891), 60 L. J. Q. B. 554; (1891) 2 Q. B. 252.

(*h*) *Ford's Hotel Co. v. Bottlett* (1895), 65 L. J. Q. B. 106; (1896) A. C. 1.

(*i*) *Ires and Barker v. Wilans* (1894), 63 L. J. C. 521; (1894) 2 Ch. 478.

(*k*) *Zalaceff v. Hammond* (1898), 67 L. J. C. 370; (1898) 2 Ch. 92.

(*l*) *County Theatres and Hotels v. Knowles* (1907), 71 L. J. K. B. 351; (1907) 1 K. B. 480; *Richardson v. Le Maitre* (1903), 72 L. J. C. 779; (1903) 2 Ch. 222; *Ochs v. Ochs Bros.* (1909), 78 L. J. C. 555; (1909) 2 Ch. 121.

(*m*) *Wallis v. Hirsch* (1856), 26 L. J. C. P. 72; 1 C. B. N. S. 316; *Russell v. Russell* (1880), 49 L. J. C. 268; 14 Ch. D. 471. See *Trainor v. Phoenix Fire Assce.* (1892), 65 L. T. 825.

(*n*) *Turnock v. Sartoris* (1889), 43 Ch. D. 150; *Davis v. Starr* (1889), 58 L. J. C. 808; 41 Ch. D. 242.

PART IV. the scope of the reference, unless that question is intentionally included in the reference (*o*). If the matters in dispute involve questions of law, this is a fact of importance, but not conclusive, as affecting the exercise of the judicial discretion to stay proceedings (*p*). And the court will allow a reference, including the question whether the contract containing the agreement to refer has been dissolved (*q*).

Appointment of arbitrator

An agreement to refer does not import any undertaking by a party, in appointing an arbitrator, that the arbitrator will act, nor any liability for his not acting or for the failure of the arbitration in consequence (*r*). By the Arbitration Act, 1889, s. 6, it is provided that if an arbitrator refuses to act, or becomes incapable of acting, the party may appoint a new arbitrator; and if he refuses to appoint an arbitrator, either originally or by way of substitution, the other party, after notice given, may appoint a sole arbitrator. Also in certain cases of the appointment failing by disagreement of the parties, or by refusal, incapacity, or death of the arbitrator, the court is empowered by s. 5 of the Act to appoint; but the court has no general power of appointing in other cases (*s*). The statutory powers given to a party and to the court to supply an arbitrator do not apply to mere valuations, which do not involve any differences: as in the cases of sales of property at a valuation (*t*).

Remedies on award:—by action.

A submission by consent, and an order by consent for submission to arbitration, implies an agreement to perform the award; upon which an action will lie for non-performance. The action may be in the form of a claim for debt or damages, or for specific performance according to the kind of liability imposed by the award (*u*).—A submission has also the same effect in all respects as if it had been made an order of court; and by the Arbitration

Under order of court.

(*o*) *Purey v. Young* (1880), 14 Ch. D. 200. See *Petch v. Fountain* (1839), 8 L. J. C. P. 305; 5 Bing. N. C. 44; *Turnell v. Sanderson* (1851), 60 L. J. C. 703.

(*p*) *Randegger v. Holmes* (1866), L. R. 1 C. P. 679; *Forwood v. Watney* (1880), 49 L. J. Q. B. 447; *Bonham v. Neame* (1910), 79 L. J. C. 388; (1910) 1 Ch. 732.

(*q*) *Pleus v. Baker* (1873), 43 L. J. C. 212; L. R. 16 Eq. 564.

(*r*) *Cropper v. Shuttleworth* (1856), 25 L. J. Ex. 114.

(*s*) *Re Smith and Nelson* (1890), 59 L. J.

Q. B. 533; 25 Q. B. D. 515; *Re Wilson and Eastern Counties Nav.* 1891, 61 L. J. Q. B. 237; (1892) 1 Q. B. 81; *Re Eyre and Leicester* 1891, 61 L. J. Q. B. 438; (1892) 1 Q. B. 136.

(*t*) *Re Davdy* (1885), 54 L. J. Q. B. 574; 15 Q. B. D. 426; *Re Cyrus-Wilson* (1887), 56 L. J. Q. B. 530; 18 Q. B. D. 7.

(*u*) *Wood v. Griffith* (1818) 1 Swanst. 43; *Nickels v. Hancock* (1885), 7 De G. M. & G. 300; *Blackett v. Bates* (1866), 35 L. J. C. 324; L. R. 1 Ch. 117; *Livesley v. Gilmore* (1866), 35 L. J. C. P. 351; L. R. 1 C. P. 570.

Act, sect. 12, "an award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect" (*x*). And by sect. 15, in all cases of reference under an order of the court or a judge in any cause or matter, "the report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury." An order by consent of the parties to refer the action, and all matters in difference, is not an order within the section, but an order by virtue of the consent only; consequently the award cannot be reviewed by the court as is the case with a verdict, and is final (*y*).

A submission, or agreement to refer differences to arbitration, is a binding contract, which cannot be revoked by one of the parties, without the consent of the other (*z*). But the reference to a particular arbitrator under it was revocable at common law at any time before an award made (*a*); and if one arbitrator was appointed to act for both parties, either party might revoke his authority (*b*). The Arbitration Act, 1889, now enacts generally, sect. 1, that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge." This enactment applies to the authority of the arbitrator when appointed; the agreement to refer being irrevocable by one party only, independently of the statute (*c*). The court will grant leave to revoke a reference upon grounds which would vitiate an award made under it; as a wrongful admission of evidence or an erroneous decision of law (*d*). And the court has jurisdiction to restrain an arbitration, but will not exercise it where the proceedings are futile and cannot result in any binding effect (*e*). By sect. 11 of the Act, an arbitrator or umpire may be removed for misconduct (*f*).

Revocation
of reference.

(*x*) See Ord. XLII. r. 24; *Re Bankruptcy Notice* (1906), 76 L. J. K. B. 171; (1908) 1 K. B. 478.

(*y*) *Durlington Wagon Co. v. Harding* (1890), 60 L. J. Q. B. 110; (1891) 1 Q. B. 245.

(*z*) *Piercy v. Young* (1880), 14 Ch. D. 200; *Farwood v. Watney* (1880), 49 L. J. Q. B. 447.

(*a*) *Green v. Pole* (1830), 8 L. J. O. S. C. P. 149; 6 Bing. 443.

(*b*) *Fraser v. Fehrensperger* (1883), 53 L. J. Q. B. 73; 12 Q. B. D. 310.

(*c*) See *per* Fisher, M. R., *Re Smith*

and *Nelson* (1890), 59 L. J. Q. B. 533; 25 Q. B. D. 550.

(*d*) See *East and West India Docks v. Kirk* (1887), 57 L. J. Q. B. 295; 12 Ap. Ca. 738; *James v. James* (1889), 58 L. J. Q. B. 424; 23 Q. B. D. 12.

(*e*) *Farmer v. Cooper* (1890), 59 L. J. C. 500; 44 Ch. D. 323; *Wood v. Lillies* (1891), 61 L. J. C. 154; *Kitts v. Moore* (1894), 64 L. J. Q. B. 152; (1895) 1 Q. B. 253.

(*f*) *Re Enoch and Zaretsky, Bock & Co.* (1909), 79 L. J. K. B. 363; (1910) 1 K. B. 327.

CANADIAN NOTES.

Arbitrations.

In *Snowball vs. Ritchie*, 14 S. C. R., 741, a replevin action for logs alleged to have been wrongfully cut by the plaintiff was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots in dispute, the agreement providing that the lines of the land held under license should be surveyed and established by surveyors named. It was held, reversing the decision of the Supreme Court of New Brunswick, that under this agreement the surveyors were bound to make a formal survey and could not take a line run by one of them at a former time as the said boundary line.

In *Dominion Construction Company vs. Goode & Co.*, 30 S. C. R., 114, where the contract for the construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company not a party to such a contract, who was to be the sole and final arbiter of all disputes between the parties, it was held that the contractor was not bound by such condition when the party named as arbiter proved to be in fact the engineer of the other party to the contract.

In *McNance vs. City of Toronto*, 24 O. R., 313, it was also held in a contract between the plaintiff and the city for additions and improvements to the waterworks that all differences and so on should be referred to the determination of the superintendent in charge of the work, that the fact of the referee being such superintendent did not disqualify him from acting as arbitrator.

In *Good vs. Toronto, Hamilton and Buffalo Company*, 26 O. A. R., 133, affirmed, 30 S. C. R., 114, it was held that the rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as and is supposed by the contractor to be an engineer of a third person.

In *Farguhar vs. The City of Hamilton*, 20 O. A. R., 86, the decision of the city engineer was made final and conclusive in respect of work done under a contract with the city. It was held that he was not disqualified in the absence of fraud or bad faith from deciding such questions, and that his possible bias in favour of the plans and specifications drawn by him was not sufficient to disqualify him.

CHAPTER XI.

STATUTES OF LIMITATION.

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THE right of action for a debt, or for breach of contract, may be barred by the Statutes of Limitation, which prescribe a limit of time within which the action must be commenced, and afford an absolute bar to an action brought beyond the prescribed limit. But these statutes do not affect the rules respecting presumption of satisfaction of debts within a period short of that fixed by statute (a).—By the Limitation Act, 1623, s. 3, "all actions of

Statutes of
Limitation.

Simple con-
tracts.

(a) *Cropper v. Turner* (1819), 2 Stark. 497; *Hollis v. Turner* (1836), 5 L. J. C. P. 264; 2 Bing. N. C. 713; *per* Jessel, M. R., *Sutton v. Sutton* (1882), 52 L. J. C. 333; 22 Ch. D. 515.

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account and upon the case, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent,—shall be commenced and sued within six years next after the cause of such actions or suit, and not after.”—The actions upon the case include actions of *assumpsit*, which was the form of action for breach of a simple contract, express or implied, other than a mere debt (*b*). The statute also contained an exception of merchants’ accounts, but this exception was abolished by effect of the Mercantile Law Amendment Act, 1856, s. 9. The actions of debt for rent apply only to rent reserved on a demise without deed (*c*). The section applies to all actions of debt by simple contract, notwithstanding the debt is also secured by a charge upon land (*d*).

Contracts
under seal
and by
specialty.

By the Civil Procedure Act, 1833, s. 3, so far as it is material to state it, “all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and also all actions of debt upon any award where the submission is not by specialty, shall be commenced and sued within the time and limitation hereinafter expressed and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, within twenty years after the cause of such actions or suits, but not after; and the said other actions within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.”—At common law bonds and specialty debts were presumed to have been satisfied after the lapse of twenty years without any payment of interest or other acknowledgment of the debt. The above enactment substituted a peremptory bar of twenty years, subject to the provision as to acknowledgment contained in sect. 5 of the statute (*e*).

Presumptive
satisfaction.

Money
charged
upon land.

By the Real Property Limitation Act, 1874, ss. 8, 9, “no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise

(*b*) *Chandler v. Flett* (1680), 2 Wms. Saund. 391; *Battle v. Faulkner* (1820), 3 B. & Ald. 288; *Baker v. Conyng & Co.* (1909), 79 L. J. K. B. 313; (1910) 1 K. B. 56.

(*c*) *Freeman v. Stacey* (1629), Hutt. 109; *Leigh v. Thornton* (1818), 1 B. &

Ald. 625.

(*d*) *Barnes v. Glinton* (1899), 68 L. J. Q. B. 502; (1899) 1 Q. B. 855.

(*e*) *Cranworth, L. C. Morley v. Morley* (1855), 25 L. J. C. 1; 5 De G. M. & G. 625; *Jessel, M. R., Sutton v. Sutton* (1882), 52 L. J. C. 333; 22 Ch. D. 515.

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charged upon or payable out of any land (f) or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (g); unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable (h), or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."—A debt on bond or covenant binding the heirs, though recoverable against heir and devisee to the extent of the real assets of the obligor, is not "charged upon or payable out of land," within this section (i). But the section applies to a personal action against a mortgagor upon his covenant to pay the mortgage debt, as well as to the action to enforce the mortgage against the land (k); also to an action upon a collateral bond given by the mortgagor at the same time with the mortgage to secure the mortgage debt (l); also, it seems, to an action upon the covenant of a surety contained in the mortgage deed to pay the mortgage debt (m); but not to an action on a bond given by a surety conditioned for payment by the mortgagor (n). It applies to an action on a judgment (o). A personal covenant to pay a rent-charge cannot be enforced where the remedy against the land is barred (p).

Construction of Act.

By the Real Property Limitation Act, 1853, s. 42, "no arrears of rent or of interest in respect of any sum of money charged upon or payment out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next

Rent or interest of money charged upon land.

(f) *Re Stock y* (1905), 75 L. J. C. 58; (1906) 1 Ch. 67.

(g) *Horsley v. The Bd. v. Monarch Ry. Soc.* (1889), 21 Q. B. D. 1; 59 L. J. Q. B. 105; *Re England* (1895), 65 L. J. C. 21; 1885 2 Ch. 820.

(h) *Batshaw v. Widdrington* (1902), 71 L. J. C. 627; (1902) 2 Ch. 334; *Re Lucas* (1906), 76 L. J. C. 316; (1907) 1 Ch. 334.

(i) *Edkiss v. Morley* (1857), 26 L. J. C. 434; 1 De G. & J. 1; *Re Chant* (1905), 74 L. J. C. 542; (1905) 2 Ch. 225.

(k) *Sutton v. Sutton* (1882), 52 L. J. C. 334; 22 Ch. D. 591. See *Re Turner* (1895), 43 W. P.

(l) *Francis v. At* (1833), 52 L. J. 79; 22 Ch. D. 579.

(m) *Cotton v. Re Frisby* (1889), 59 L. J. C. 91; Ch. D. 115.

(n) *Re Power* (1885), 30 Ch. D. 291.

(o) *Hebblethwaite v. Power*, 1841 1 Q. B. 121; *Jay v. Johnston* (1892), 62 L. J. Q. B. 128; (1893) 1 Q. B. 189.

(p) *Shaw v. Compton*, (1910) 80 L. J. K. B. 32; 1910 2 K. B. 370.

PART IV

after the same respectively shall have become due, or next after an acknowledgment of the same in writing"; subject to a proviso that, "where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action" the person entitled may recover the arrears of interest during the whole time of such possession. This section applies to the recovery of arrears of rent or interest by distress, action or suit against the land only; and if the payment of the rent or interest is also secured by bond or covenant or other specialty, the limitation of an action upon such security is twenty years under sect. 3 of the Civil Procedure Act, 1833 (*q*). And the statutory limitation of the remedies against the land is not removed or extended by reason of the longer limitation of the covenant or special security (*r*). Where the mortgagee takes proceedings to enforce his security, he is only entitled to six years' arrears of interest, but in a redemption action he may recover all arrears of interest although they exceed six years (*s*). A mortgagee exercising a power of sale is not within the statute, and may retain more than six years' interest out of the proceeds of the sale (*t*). The lien of a vendor for unpaid purchase-money is not within the section, and all arrears of interest payable under the contract of sale are recoverable (*u*). The section did not apply where the money charged upon land and interest were secured by an express trust (*x*); but this right is now taken away by sect. 10 of the Real Property Limitation Act, 1874. Sect. 42 of the Real Property Limitation Act, 1833, does not apply to the interest of money charged upon personal estate, though invested upon mortgage of land (*y*).

Debts created by statute.

Actions for debts created by statute, as before stated, are in general ranked as actions of debt upon specialty within sect. 3 of the Civil Procedure Act, 1833, and are subject to the limitation of twenty years (*z*). Debts founded on foreign statutes, as a debt

(*q*) *Paget v. Foley* (1836), 5 L. J. C. P. 258; 2 Bing. N. C. 679; *Manning v. Phelps* (1854), 24 L. J. Ex. 62; 10 Ex. 59. See ante, p. 702.

(*r*) *Hunter v. Nockolds* (1850), 19 L. J. C. 117; 1 Mac. & G. 610.

(*s*) *Dingle v. Coppen* (1899), 68 L. J. C. 337; (1899) 1 Ch. 726; *Re Lloyd* (1902), 72 L. J. C. 78; (1903) 1 Ch. 385.

(*t*) *Edmunds v. Waugh* (1856), 35 L. J. C. 234; L. R. 1 Eq. 418; *Re Marshfield* (1886), 56 L. J. C. 599; 34 Ch. D. 721.

(*u*) *Taft v. Stevenson* (1854), 5 De G. M. & G. 735.

(*x*) *Cox v. Dolman* (1853), 22 L. J. C. 427; 2 De G. M. & G. 592; *Knight v. Bowyer* (1858), 27 L. J. C. 520; 1 De G. & J. 421.

(*y*) *Smith v. Hall* (1878), 47 L. J. C. 788; 9 Ch. D. 143; *Mellersh v. Brown* (1890), 60 L. J. C. 43; 45 Ch. D. 225. See *Charter v. Watson* (1894), 68 L. J. C. 1; (1899) 1 Ch. 175.

(*z*) *Cork and Brandon Ry. v. Goode*

PART IV.

Limitations
extinguishing
the right.

France (*h*); or for a debt incurred in India (*i*); in both which cases the period of limitation is three years. A bond executed under seal in India, which is there treated as a simple contract debt with a limitation of three years, is not barred in this country by less than twenty years (*k*). A foreign judgment raises a simple contract debt in this country for which the limit of action is six years (*l*). A statute of limitation may be so framed as to extinguish the right and not merely to bar the remedy by action; as is expressly enacted respecting the title to land and real estate by the Real Property Limitation Act, 1833, s. 34 (*m*). And "where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, in such case the statute may be set up in any other country to which the parties remove;" provided "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case" (*n*). The statutes of limitation which operate upon the title to land have no application beyond the country in which the land is situated (*o*).

Limitations
of equitable
rights and
remedies.

The Courts of Chancery in dealing with legal rights followed the law, including the statutes of limitation, which in terms applied only to common law actions; in dealing with equitable claims corresponding to legal rights, as claims for money obtained by fraud or mistake, they adopted the corresponding statutory limitations; in dealing with rights and remedies of purely equitable jurisdiction, as trusts, specific performance, and injunctions, where no statute of limitation was applicable, they exercised an original jurisdiction over delay or neglect in suing, upon equitable principles (*p*). Under the Judicature Acts the statutes of limitation apply directly to actions in all Divisions of the High

h) *Huber v. Steiner* (1835), 2 Bing. N. C. 202.

i) *Finch v. Finch* (1876), 45 L. J. C. 816.

k) *Alliance Bk. v. Carey* (1880), 49 L. J. C. P. 781; 5 C. P. D. 429.

l) *Dupleix v. De Roven* (1705), 2 Vern. 540.

m) *De Beaufort v. Owen* (1850), 19 L. J. Ex. 177; 5 Ex. 166; *Dawkins v. Penrhyn* (1878), 48 L. J. C. 304; 4 Ap. Ca. 51; *Trustees', Executors' and Agency*

Co. v. Short (1888), 58 L. J. P. C. 4; 13 Ap. Ca. 793.

n) See *Huber v. Steiner* (1835), 2 Bing. N. C. 211; *Phillips v. Eyre* (1870), 40 L. J. Q. B. 48; L. R. 6 Q. B. 1.

o) *Pitt v. Dacre* (1876), 45 L. J. C. 796; 3 Ch. D. 295.

p) *Westbury, L. C., Knox v. Gye* (1872), 42 L. J. C. 234; L. R. 5 H. L. 674; *Charter v. Watson* (1898), 68 L. J. C. 1; (1899) 1 Ch. 175; *London and Midland Bank v. Mitchell* (1899), 68 L. J. C. 568; (1899) 2 Ch. 161.

Court according to their terms and subject to the same equitable considerations (*q*). There is no equitable jurisdiction to give relief where rights have been barred by the lapse of the statutory limitation of time; except in cases of mistake and fraud (*r*); or to refuse relief in the case of a right not barred, merely on the ground of lapse of time short of the statutory limitation (*s*). But in the exercise of an equitable jurisdiction to which no statutory limitation applies, the court requires that there shall be no unreasonable delay on the part of a claimant; having regard to the nature and circumstances of the claim, and the particular consequences of the delay (*t*).

By the Judicature Act, 1873, s. 25 (2), "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations," an enactment declaratory of the law (*u*). This enactment applies to trusts of real and of personal estate, and to trusts arising from the deposit or receipt of money or goods; it is restricted to express trusts, but these are only required to be expressed in writing in the case of land where the Statute of Frauds so provides (*x*).—But by the joint effect of sects. 8 and 10 of the Real Property Limitation Act, 1874, proceedings to recover "any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable or so secured, or any damages in respect of such arrears," must be commenced within twelve years from the accrual of the right (*y*).—By the Trustee Act, 1888, s. 8,

Trusts of
property.

(*q*) *Jessel, M. R., Re Greaves* (1881), 50 L. J. C. 818; 18 Ch. D. 551.

(*r*) *Brookbank v. Smith* (1836), 6 L. J. Ex. Eq. 31; 2 Y. & C. Ex. 58; *Moore v. Knight* (1891), 60 L. J. C. 271; (1891) 1 Ch. 547; *Willis v. Hoare (Earl)* (1893), 62 L. J. C. 690; (1895) 2 Ch. 545; *Bejtjmann v. Bejtjmann* (1895), 61 L. J. C. 641; (1895) 2 Ch. 471. And see *Thorne v. Hoard* (1895), 61 L. J. C. 652; (1895) A. C. 495.

(*s*) *Fullwood v. Fullwood* (1878), 47 L. J. C. 459; 9 Ch. D. 176; *Re Baker* (1882), 51 L. J. C. 315; 20 Ch. D. 230; *Re Muddlever* (1883), 52 L. J. C. 733; 27 Ch. D. 523.

(*t*) *Bright v. Legerton* (1861), 30 L. J. C. 338; 2 De G. F. & J. 606; *Pegge v. Veath Dist. Trans.* (1897), 67 L. J. C. 17;

1898, 1 Ch. 183; *Charter v. Watson* 1898, 68 L. J. C. 1; (1899) 1 Ch. 175.

(*u*) See *Brattham v. Goodman* (1868), 37 L. J. C. 337; L. R. 5 Eq. 545.

(*v*) *Metrop. Bk. v. Haron* (1880), 5 Ex. D. 319; *Banner v. Berryidge* (1881), 50 L. J. C. 630; 18 Ch. D. 254; *Saer v. Ashwell*, (1893) 2 Q. B. 390; *Friend v. Young* (1897), 66 L. J. C. 737; (1897) 2 Ch. 421; *N. American Land & Timber Co. v. Watkins* (1904), 73 L. J. C. 626; 1904, 2 Ch. 233.

(*y*) See *Hughes v. Cotes* (1884), 53 L. J. C. 1047; 27 Ch. D. 231; *Re Blackford* (1884), 54 L. J. C. 215; 27 Ch. D. 676; *Re Rowe* (1889), 58 L. J. C. 703; *Williams v. Williams* (1899), 69 L. J. C. 77; (1900) 1 Ch. 152.

PART IV.

it is enacted to the effect that in any action against a trustee, except where the claim is founded on fraud, or is to recover trust property or the proceeds thereof in his hands, the trustee shall have the benefit of any statute of limitation as "if the trustee had not been a trustee"; and if the action is brought to recover money or other property, the trustee shall be entitled to plead the lapse of time as a bar to such action, "as if the claim had been against him in an action of debt for money had and received" (z).

Trusts for
payment of
debts.

A conveyance of land, and, it is to be presumed, a devise of land upon express trust for the payment of debts is within sect. 10 of the Real Property Limitation Act, 1874 (a). And the trust does not affect the remedies for the debts, by personal action, or against the personal estate, or by petition or proof in bankruptcy (b). A charge of debts upon land also keeps the debts alive for the purpose of the charge, so long as the charge subsists; but the recovery of any money charged on land is limited to twelve years by the enactment above cited (c). A trust for payment of debts, or a charge of debts, presumptively does not include debts already barred by the statutes; but it may include them if clearly referred to with that intention (d). And the court in general will not allow barred debts to be paid out of a fund in court (e). A trust, charge, or direction by will for the payment of debts has no effect as regards personal estate (including leasehold), because it merely expresses the same liability which the law imposes primarily upon personal estate; and the executor may plead the statutes of limitation in bar of debts of the testator (f).—An assignment of property to trustees upon trust for payment of debts presumptively invests them with an authority only, which is revocable by the owner of the property; unless the creditors are made parties to the trust, or unless it is

(z) See *Re Somerset* (1893), 63 L. J. C. 41; (1894) 1 Ch. 231; *Re Lanis Allotment Co.* (1894), 63 L. J. C. 291; (1894) 1 Ch. 616; *Thorne v. Heard* (1895), 64 L. J. C. 652; (1895) A. C. 495; *Re Davies* (1898), 67 L. J. C. 507; (1895) 2 Ch. 142.

(a) *Williams v. Williams* (1899), 69 L. J. C. 77; (1900) 1 Ch. 152. See *Re Stephens* (1889), 59 L. J. C. 109; 43 Ch. D. 39.

(b) *Boatwright v. Boatwright* (1873), 43 L. J. C. 12; L. R. 17 Eq. 71; *Ex p. Smith* (1885), 54 L. J. Q. B. 422; 14

Q. B. D. 394. See *Re Stephens* (1889), 59 L. J. C. 109; 43 Ch. D. 39.

(c) *Personal Prop. Lim. Act*, 1874, s. 10; *Dickenson v. Transdale* (1862), 32 L. J. C. 37; 1 De G. J. & S. 52; *Re Stephens* (1889), 59 L. J. C. 109; 43 Ch. D. 39.

(d) *Barke v. Jones* (1813), 2 V. & B. 275; *Waltamson v. Naylor* (1838), 3 Y. & C. 208; *Philips v. Philips* (1844), 13 L. J. C. 445; 3 Hare, 281.

(e) *Re Harris* (1880), 49 L. J. C. 327.

(f) *Scott v. Jones* (1838), 4 Cl. & F. 382. See *Re Barker* (1892), 62 L. J. C. 76; (1892) 2 Ch. 491.

communicated to them and they accept it; it then becomes a binding trust which the creditors may enforce, and which is not affected by any statute of limitation; but such trust does not include debts previously barred (*g*).—Upon the same principle estates in bankruptcy are held upon a trust for distribution amongst the creditors, which is not affected by any statutes of limitation; and a creditor who is not barred before the adjudication may prove his debt at any time after (*h*). But debts barred at the time of adjudication are not admissible to proof, even by consent of the trustee (*i*). So judgment in an administration action prevents the running of statutes of limitation against creditors who are not then barred, and they may come in and prove at any time (*k*). And an order for winding up a company charges the assets with the payment of all liabilities subsisting at the date of the order; and they are not afterwards affected by any statutes of limitation. "The Legislaturo intended to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time is entitled to participate in the assets, and that the statute of limitations does not run against this claim; but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend" (*l*).

Debts
provable in
bankruptcy.

The claim to an account against an agent who stands in a fiduciary relation to his principal rests upon the same principle as the claim of a *cestui que trust* against his trustee: as in the case of an agent intrusted to sell property and to invest or hold the proceeds (*m*); a director of a company who misapplies the money of the company (*n*); an agent and receiver of rents of an estate (*o*); a receiver under an order of court in relation to

Agents.

g) *Philips v. Philips* (1844), 13 L. J. C. 415; 3 Hare, 281. See *ante*, p. 656, n. (*a*).

h) *Ex p. Lancaster Bk.* 1878), 48 L. J. C. 89; 10 Ch. D. 776; *Ex p. Bd. of Trade* 1895), 65 L. J. Q. B. 106; 1896 1 Q. B. 99.

i) *Re Baker* (1890), 59 L. J. C. 661; 44 Ch. D. 262.

k) *Angell v. Haddon* (1816), 1 Madd. 529; *Re Graves* 1881), 50 L. J. C. 817; 18 Ch. D. 551.

l) *Mellish L. J., Re General Rolling Stock Co.* 1872, 41 L. J. C. 732; L. R. 7 Ch. 619.

m) *Burdick v. Garrick* 1870), 39 L. J. C. 369; L. R. 5 Ch. 233; *N. American Land Co. v. Watkins* (1904), 73 L. J. C. 626; 1904 2 Ch. 233.

n) *Flitecroft's case* (1882), 52 L. J. C. 217; 21 Ch. D. 519; *Re Sharpe* (1891), 61 L. J. C. 193; (1892) 1 Ch. 154.

o) *Lyell v. Kennedy* (1889), 59 L. J. C. 268; 14 Ap. Ca. 437.

- PART IV.** the beneficiaries entitled to the money received (*p*). Where the accounting party is entitled to plead sect. 8 of the Trustee Act, 1888, the order should not carry the period over which the account should extend beyond six years from the commencement of the action (*q*). The claim against an agent to recover profits wrongfully or fraudulently made by him in the execution of his agency, as by taking bribes or commission, being money received for his own use and not for his principal, is barred by the statute, the time beginning to run from the discovery of the wrong or fraud (*r*).—A banker employed by a customer in the ordinary business of banking, that is, to receive money by way of loan to be disposed of as he pleases, under the obligation of cashing cheques of the customer in repayment, is not considered as standing in a fiduciary relation to the customer, and his liability of repayment ceases at the end of six years (*s*), calculated from the last demand by cheque (*t*). But a banker intrusted with property for safe custody is in a fiduciary position which is not affected by statutes of limitation (*u*). And a banker may be affected with notice that a deposit of a customer is trust money, so as to be chargeable with a breach of trust in misapplying it; as where the deposit is made upon a specified separate account (*x*).—A solicitor retained by a client for professional services, who receives money in the ordinary course of business, is not a fiduciary agent (*y*).—Partners are in the position of fiduciary agents in the conduct of the partnership business, so long as the relation of partners continues (*z*). But the claim to an account of partnership business after the termination of the partnership, against a partner who continues the business, is within the statute, and is barred by the lapse of six years from the time the partnership
- Banker.**
- Solicitor.**
- Partner.**

(*p*) *Seagram v. Tuck* (1881), 50 L. J. C. 572; 18 Ch. D. 296.

(*q*) *How v. Winterton* (Lord, (1896), 65 L. J. C. 832; (1896) 2 Ch. 626; *Re Davies* (1898), 67 L. J. C. 507; (1898) 2 Ch. 142.

(*r*) *Metrop. Bk. v. Heiron* (1880), 5 Ex. D. 319.

(*s*) *Foley v. Hill* (1848), 2 H. L. C. 28. See *Re Tidd* (1893), 62 L. J. C. 915; (1893) 3 Ch. 154.

(*t*) *Pott v. Clegg* (1847), 16 L. J. Ex. 210; 16 M. & W. 321.

(*u*) *Hatherley, L. C., Burdick v. Gar-*

rick (1870), 39 L. J. C. 369; L. R. 5 Ch. 240.

(*x*) *Ex p. Kingston* (1871), 40 L. J. Bk. 91; L. R. 6 Ch. 632; *Bailey v. Finch* (1871), 41 L. J. Q. B. 83; L. R. 7 Q. B. 34; *Coleman v. Bucks & Oxon Bk.* (1897), 66 L. J. C. 564; (1897) 2 Ch. 243.

(*y*) *Crawford v. Crawford* (1868), 16 W. R. 411; *Watson v. Woodman* (1875), L. R. 20 Eq. 721; *Doddy v. Watson* (1888), 57 L. J. C. 865; 39 Ch. D. 178. See *Soar v. Ashwell*, (1893) 2 Q. B. 390.

(*z*) See *ante*, p. 379.

ceased (*a*); and a debt admitted to be due upon an account stated at the termination of a partnership is a debt within the statute (*b*).

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By the joint effect of the Limitation Act, 1623, the Civil Procedure Act, 1833, and the Mercantile Law Amendment Act, 1856, s. 10, the statutory limitation does not run while the plaintiff is or shall be "within the age of twenty-one years, *feme covert*, or *non compos mentis*," and the persons so under disability are "at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, as other persons having no such impediments should have done" (*c*).—If a person who might plead the Limitation Act, 1623, is "beyond the seas," the person entitled to sue him may, by force of the statute 4 Anne, c. 16, s. 19, postpone taking proceedings until after his return from beyond the seas, provided he commences the same within the statutory period after the defendant's return from beyond the seas (*d*).—The 4th section of the Civil Procedure Act, 1833, contains a similar provision with respect to actions on specialties accruing against persons beyond the seas. And as to the meaning of the expression "beyond the seas" used in the above statutes, it is enacted "that no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas" (*e*). The statute applies to the renewal of a debt by an acknowledgment or promise made by the debtor when beyond the seas; against which the statute does not begin to run until his return (*f*).

Disabilities of plaintiff excepted by the statutes.

Defendant beyond the seas.

Under the above statutes, in the case of joint debtors, if one of joint debtors was beyond the seas at the time of the accrual of the cause of action, the limitation did not begin to run until his return, though the others remained within the jurisdiction (*g*).

Joint debtor beyond the seas.

(*a*) *Knox v. Gye* (1872), 42 L. J. C. 234; L. R. 5 H. L. 656. See *Rae v. Jewell* (1881), 18 Ch. D. 660.

(*b*) *Noyes v. Crawley* (1878), 48 L. J. C. 112; 10 Ch. D. 31.

(*c*) See *Chandler v. Edlett* (1670), 2 Wms. Saund. 391; *Pardo v. Bingham* (1869), 39 L. J. C. 170; L. R. 4 Ch. 735.

(*d*) *Forbes v. Smith* (1855), 21 L. J. C.

299; 11 Ex. 161.

(*e*) Civil Procedure Act, 1833, s. 7; Merc. Law Amend. Act, 1856, s. 12; *H. H. Ruckmabuge v. Lallubhaiy Mottichand* 1851, 8 Moo. P. C. 1; *Musurus Bey v. Gadban* (1894), 63 L. J. Q. B. 621; (1894) 2 Q. B. 352.

(*f*) *Re Bethell* (1887), 56 L. J. C. 334; 34 Ch. D. 561.

(*g*) *Fannin v. Anderson* (1845), 14

PART IV.

But since the Mercantile Law Amendment Act, 1856, s. 11, a creditor must sue any one or more of joint debtors who are not beyond the seas, but may postpone taking action against any joint debtor who was beyond the seas at the time the cause of action accrued until after his return.

Disability supervening.

The disabilities above mentioned must exist at the time when the cause of action first accrues; where the statute has once begun to run no subsequently supervening disability will suspend its operation (*h*). The disability of the debtor to pay for want of assets is no exception to the operation of the statutes; for the creditor may recover a judgment which will be available against future assets (*i*). But a debt may be contracted as payable out of a particular fund only, so that there is no cause of action, nor does the statute begin to run, until there is a fund to pay the debt (*k*).

When the time of limitation begins to run.

The statutes of limitation in general begin to run from the time when the cause of action first accrues, subject to the above exceptive conditions of disability; and the cause of action upon a contract first accrues upon a breach. There is no limitation of time to a contract before breach, except such as may be expressly or impliedly prescribed in its terms; though a presumption may arise from lapse of time that the contract has been performed and satisfied or has been mutually abandoned and rescinded (*l*). Where there are several conditions upon which a cause of action arises for the same debt, the statute runs against the debt from the earliest satisfied (*m*). The limitation of an action for money charged upon land, under the Real Property Limitation Act, 1874, s. 8, begins to run "next after a present right to receive the same shall have accrued to some person capable of giving a discharge," which is not the same as a present right to sue (*n*).

Judgment debts.

A judgment takes effect from the day when it is pronounced in court, unless otherwise ordered; and the entry of the judgment is

L. J. Q. B. 482; 7 Q. B. 811; *Turner v. Maud* 1855, 24 L. J. C. P. 89; 16 C. B. 123.

(*h*). *Rhodes v. Southurst* 1840, 9 L. J. Ex. 330; 6 M. & W. 351. See *Sturges v. Dorell* (1860), 29 L. J. Ex. 172; 6 H. & N. 120.

(*i*). *Emery v. Day* (1874), 3 L. J. Ex. 307; 1 Cr. M. & R. 215.

(*k*). *Re Kensington Station Act* (1875), L. R. 20 Eq. 197. See *Williams v. Hathaway* (1877), 6 Ch. D. 514.

(*l*). *Schoon v. Kirkman* 1836, 5 L. J. Ex. 212; 1 M. & W. 118; *Bock v. Pierce* (1887), 56 L. J. C. 631; 35 Ch. D. 94; *MacKenzie v. Childers* (1889), 59 L. J. C. 188; 45 Ch. D. 255. See *ante*, pp. 181, 577.

(*m*). *Rees v. Butcher* 1891, 60 L. J. Q. B. 619; (1891) 2 Q. B. 509.

(*n*). *Hornsey Loc. Bd. v. Monarch Ry. Soc.* 1886, 59 L. J. Q. B. 165; 24 Q. B. D. 1.

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dated as of that day (*o*). An action to recover a judgment debt is therefore barred by the lapse of twelve years from that date (*p*). "As between the original parties to a judgment execution may issue at any time within six years from the recovery of the judgment" (*q*). And where six years have elapsed, or any change has taken place in the parties, execution may issue by leave of the court (*r*). And an order of the court or a judge may be enforced in the same manner as a judgment to the same effect (*s*). The action to recover a debt under a foreign judgment, which is treated as a simple contract in the courts of this country, is six years from the recovery of the judgment (*t*).

In the case of a single bond the cause of action is complete from the execution of the bond, and the action must be brought within twenty years from that date. In the case of a bond with a condition the cause of action accrues when the condition is first broken; as in the case of a *post obit* bond, the statute runs from the death upon which the money is payable (*u*). Where there are several conditions in a bond, or several covenants in the same deed, every distinct breach gives a new cause of action; and the statute can only be pleaded as to those breaches which have occurred within the period of limitation (*x*). Upon a bond conditioned to pay an annuity, default in each periodical payment is a distinct breach of the condition and gives a new cause of action (*y*). So with a bond or covenant to pay a sum of money by instalments; but if it is stipulated that upon default in payment of one instalment the whole amount is to become due, then upon the first default a cause of action accrues for all that then remains due, and the statute begins to run forthwith (*z*). So under a lease each periodical accrual of rent gives a new cause of action against which the statute begins to run; but as long as the relation of landlord and tenant subsists the right to rent is not barred, except

Bonds and
covenants.

o, Ord. XLII. r. 3. See *Hanning v. Butcher* 1875, 11 L. J. Ex. 51; L. R. 10 Ex. 54; *de Mornay* 1876, 55 L. J. C. 613; 30 Ch. D. 48; *Hobbs v. Holroyd* 1889, 59 L. J. Q. B. 46; 21 Q. B. D. 103; *Re Walks* 1891, 60 L. J. C. 694, (1891) 3 Ch. 79.

p, 37 & 38 Vict. c. 57, s. 8. See *Hetherington v. Price*, 1891 1 Q. B. 121; *Jay v. Johnston* 1892, 62 L. J. Q. B. 128; 1893 1 Q. B. 189.

q, Ord. XLII. r. 22.

r, Ord. XLII. r. 23.

s, Ord. XLII. r. 21.

t, *Ante*, p. 83.

u, *Tuckey v. Hawkins* (1817, 16 L. J. C. P. 201; 4 C. B. 655).

v, *Blau v. Ormond* 1851, 20 L. J. Q. B. 111; 17 Q. B. 423; *Ashlin v. Lee* 1875, 11 L. J. C. 171, 376.

w, *Scott v. Holden* 1852, 22 L. J. Q. B. 11; 18 Q. B. 593; *White v. Gaskell* 1859, 28 L. J. Q. B. 228; 1 E. & E. 692.

x, *Hemp v. Gierhard* 1842, 12 L. J. Q. B. 131; 4 Q. B. 519; *Rees v. Butcher* (1891), 60 L. J. Q. B. 619; 1891 2 Q. B. 509.

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PART IV. that the arrears payable out of the land are limited to six years (a).

**Bills of
exchange
and notes.**

Upon a bill of exchange or other negotiable instrument the statute runs from the date when the instrument is due and unpaid, and notice of dishonour given where necessary. A promissory note payable upon demand is payable immediately, and the statute runs from the date of the note (b). But where such a note is given as a continuing security for future advances, as to secure a banking account, the statute does not begin to run until the credit is determined and the account closed (c). A bill or note payable at a certain time after demand is not due until a demand made and the time elapsed, nor does the statute run until that time; but a presumption of a demand having been made may arise from lapse of time, or from payment of interest, unless the interest is expressly payable by the contract (d). And upon a bill or note drawn payable at or after sight no cause of action arises, nor does the statute begin to run, until it has been presented for payment and become due (e). A right of action against the drawer or indorser of a bill arises upon dishonour by non-acceptance: in such case no new right of action arises upon non-payment and the statute runs accordingly; but as against an indorsee taking such bill without notice of the prior dishonour, the statute does not run until the bill is due and unpaid (f). Where the holder of a bill or note delays suing until it is barred by the statute, the prior indorsers are discharged: and subsequent indorsees take the overdue bill subject to the statutory defence (g).

**Contracts
giving credit.**

On a mere loan of money the limitation commences from the date of the loan: but if the contract fixes a time for repayment the statute runs from that time; as in the case of a loan secured by a bill of the borrower payable at a future date, the statute runs, not from the advance of the money, but from the maturity of the bill (h). A loan of money for which the lender gives his cheque to the borrower dates, not from the delivery, but from the cashing

(a) *Archbold v. Scully* (1861), 9 H. L. C. 360.

(b) *Norton v. Ellam* (1837), 6 L. J. Ex. 121; 2 M. & W. 461; *Re George* (1890), 59 L. J. C. 709; 44 Ch. D. 627.

(c) *Hartland v. Jukes* (1863), 32 L. J. Ex. 162; 1 H. & C. 667.

(d) *Re Rutherford* (1880), 49 L. J. C. 654; 14 Ch. D. 687.

(e) *Holmes v. Kerrison* (1810), 2 Taunt. 323; *Dixon v. Nuttall* (1834), 3 L. J. Ex.

290; 1 Cr. M. & R. 307; *Re Boyse* (1886), 56 L. J. C. 135; 33 Ch. D. 613.

(f) *Whitehead v. Walker* (1842), 11 L. J. Ex. 168; 9 M. & W. 506.

(g) *Webster v. Kirke* (1852), 21 L. J. Q. B. 159; 17 Q. B. 917.

(h) *Wittersham v. Carlisle* (Countess) (1791), 1 H. Bl. 631; *Irving v. Fitch* (1837), 7 L. J. Ex. 25; 3 M. & W. 90. See ante, p. 454.

of the cheque (*i*). A sale of goods at six months' credit, payment to be then made by bill at three months, is in effect a credit for nine months; and in an action for the price the statute runs from the maturity of the bill; but if a bill is not given according to the contract, an action will lie from that time (*k*). Where indefinite credit is given which the creditor may put an end to at any time by a demand of payment or by commencing an action, as is the case generally with contracts implied in law, the statute runs from the time when the debt is first due and actionable: though the debtor is not in default so long as the credit is continued, and may tender payment at any time before a demand is made (*l*); but this rule does not apply where there is no debt, as in the case of money deposited for safe custody, where no right of action exists until a demand for its return (*m*).

Under a contract for work there is in general no claim for payment, and the statute does not begin to run, until the work is completely performed; as in the case of a solicitor retained to conduct an action, the statute does not begin to run against his bill of costs until the termination of the action, or the termination of his retainer by a proper notice (*n*); and an appeal is a continuation of the action for this purpose, and postpones the accrual of his claim (*o*).

Contract
for work.

The right of action against a surety accrues, and the statute begins to run, immediately upon the default of the principal debtor; and the time is not postponed by disputes arising between the debtor and the creditor concerning the default (*p*). Where there is a joint and several covenant by a debtor and surety to pay upon demand, the statute does not run against the surety until a demand to pay is made upon the principal debtor (*q*). Upon an indemnity against the costs of legal proceedings, the cause of action, for the purpose of the statute, dates from the payment of the costs and not from the time of incurring the liability

Guarantee
and in-
demnity.

(*i*) *Garden v. Bruce* (1868), 37 L. J. C. P. 112; L. R. 3 C. P. 300.

(*k*) *Helps v. Winterbottom* (1831), 9 L. J. O. S. K. B. 258; 2 B. & Ad. 431.

(*l*) *Birks v. Trippet* (1666), 1 Wms. Saund. 33; *Pott v. Tlegg* (1847), 16 L. J. Ex. 210; 16 M. & W. 321. See *Re Brown* (1893), 62 L. J. C. 695; (1893) 2 Ch. 300.

(*m*) *Re Todd* (1893), 62 L. J. C. 915; (1893) 3 Ch. 154.

(*n*) *Martindale v. Falkner* (1846), 15

L. J. C. P. 91; 2 C. B. 706; *Whitehead v. Lord* (1852), 21 L. J. Ex. 239; 7 Ex. 691; *Coburn v. Colledge* (1897), 66 L. J. Q. B. 162; (1897) 1 Q. B. 702.

(*o*) *Harris v. Quine* (1869), 38 L. J. Q. B. 331; L. R. 4 Q. B. 653.

(*p*) *Holl v. Radley* (1835), 1 L. J. K. B. 126; 2 A. & E. 758; *Colvin v. Buckle* (1841), 11 L. J. Ex. 33; 8 M. & W. 680.

(*q*) *De Brown* (1893), 62 L. J. C. 695; (1893) 2 Ch. 300.

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to pay (*r*). Upon the implied indemnity in accepting an accommodation bill, the cause of action arises not when the bill becomes due, but when the acceptor is damnified by payment (*s*). In the case of co-sureties the action for contribution accrues as soon as one has in fact paid more than his proportion, and the statute then begins to run against his claim for the excess; the action by a surety against the principal debtor for money paid for his use accrues at the time he in fact pays the debt (*t*).

Continuing breaches.

A breach of contract may be in its nature continuing, with a continual renewal of the time of limitation. Thus a covenant for title is broken by the existence of an adverse title, and is continuously broken so long as the adverse title exists; as by an outstanding prior lease so long as the term lasts; the covenantee in such case may sue from time to time whenever any damage results, but only such damage will be recoverable as has occurred within the time of limitation (*u*). In the case of a covenant to repair the breach is continuing, because the covenant is broken afresh every day the premises are out of repair; but a covenant to build within a certain period of time is broken once for all at the expiration of the stipulated period (*x*).

Cause of action unknown.

The statutory limitation runs against an action at common law, though the cause of action was unknown to the plaintiff. In the case of a solicitor neglecting to examine the title of property sold, which was consequently lost to his client the purchaser, it was held that the right of action dated from the act of the negligence, though it was unknown to the client and not discovered by him until barred by the statute (*y*). So in the case of a debtor beyond the seas, the statute begins to run from the date of his return within the jurisdiction for however short a time, though unknown to his creditor (*z*). And upon a promise by a debtor to pay when he was able, it was held that the statute began to run from the time when the debtor first became able to pay, though the

(*r*) *Collings v. Heywood* (1839), 8 L. J. Q. B. 98; 9 A. & E. 633.

(*s*) *Reynolds v. Doyle* (1840), 1 Man. & G. 753.

(*t*) *Davies v. Humphreys* (1840), 9 L. J. Ex. 263; 6 M. & W. 153; *Wolmeres-hawson v. Gallick* (1893), 62 L. J. C. 773; (1893) 2 Ch. 511.

(*u*) *Kingdon v. Nottle* (1813), 1 M. & S. 355; (1815), 1 M. & S. 53; *King v.*

Jones (1811), 5 Taunt. 118; (1815), 1 M. & S. 188; *Turner v. Moon* (1901), 70 L. J. C. 822; (1901) 2 Ch. 825.

(*v*) *Jacob v. Doun* (1900), 69 L. J. C. 493; (1900) 2 Ch. 156.

(*y*) *Hovell v. Young* (1826), 1 L. J. O. S. K. B. 160; 5 B. & C. 259; *Heslop v. Tinsden* (1886), 55 L. J. C. 481.

(*z*) *Gregory v. Harvill* (1826), 1 L. J. O. S. K. B. 262; 5 B. & C. 341.

creditor was ignorant of the fact (*a*). But a right of action against a bailee of goods for not delivering them back to the owner on demand is not barred by a previous wrongful conversion of the goods unknown to the owner, for which the right of action has become barred by time; the contract being distinct from the wrong (*b*). The Court of Chancery had no original jurisdiction to grant relief against the statute upon the ground that the cause of action was unknown to the plaintiff; unless it was also fraudulently concealed by the defendant (*c*). In the courts of common law the effect of the statute of limitations could not be avoided by showing that the cause of action was fraudulently concealed from the plaintiff by the defendant; but according to the equitable rule established by the Court of Chancery, and which is now effective in all courts, a defendant who has fraudulently concealed the cause of action is excluded from the benefit of the statute; and the statute does not run against the claimant until discovery of the fraud, or until such discovery can be reasonably imputed to him (*d*).

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Cause of action fraudulently concealed.

When the statute has once begun to run it is not stopped or suspended by any supervening disability, or other circumstance preventing the creditor from bringing an action *e*. Where the cause of action has accrued in the lifetime of the debtor it is not stopped or suspended by his death; and the debt becomes barred, though no personal representative capable of being sued was appointed before the time of limitation had expired, and the action was commenced as soon as a representative was appointed (*f*). But if the cause of action does not accrue until after the death of the debtor, the statute does not begin to run until a representative is appointed who is capable of being sued (*g*). Nor is the operation of the statute suspended by the

Statute runs continuously.

Death of debtor

Death of creditor.

(a) *Waters v. Thaurt* (Earl, 1842), 11 L. J. Q. B. 87; 2 Q. B. 757.

(b) *Wilkinson v. Perity* (1871), 40 L. J. C. P. 141; L. R. 6 C. P. 206. See *Miler v. Bell* (1891), 60 L. J. Q. B. 404; (1891) 1 Q. B. 468.

(c) *Rams v. Barton* (1880), 10 L. J. C. 473; 14 Ch. D. 537. See *Bull Coal Mining Co. v. Osborne* (1899), 68 L. J. P. C. 49; (1899) A. C. 351; *Re Astley and Tyddley Coal Co.* (1899), 68 L. J. Q. B. 252.

(d) *Gibbs v. Guild* (1882), 51 L. J. Q. B. 313; 9 Q. B. D. 59. See *Moore*

v. Knight (1891), 60 L. J. C. 271; (1891) 1 Ch. 517.

(e) *Rhodes v. Sneathurst* (1810), 9 L. J. Ex. 330; 6 M. & W. 351; *Goodall v. Sherratt* (1855), 21 L. J. C. 323; 3 Drew. 216.

(f) *Freake v. Cranefield* (1838), 8 L. J. C. 61; 3 M. & Cr. 199; *Rhodes v. Sneathurst* (1810), 9 L. J. Ex. 330; 6 M. & W. 351; *Boatwright v. Boatwright* (1873), 43 L. J. C. 12; L. R. 17 Eq. 71.

(g) *Johiffe v. Pitt* (1715), 2 Vern. 691. See *Webster v. Webster* (1804), 10 Ves. 93.

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death of the creditor after the accrual of a cause of action, though no personal representative was appointed within the period of limitation (*h*). But if the cause of action accrued after the death of the creditor, the statute does not begin to run until the constitution of a representative capable of suing (*i*). So in the case of a debt payable on certain conditions, if the creditor dies intestate before the conditions are satisfied, the cause of action is not then complete, and the statute does not begin to run before the appointment of an administrator (*k*). And "if a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run against his administrator until letters of administration have been taken out" (*l*).—An action commenced in the lifetime of the creditor or debtor does not abate by the death of either, and if the cause of action survives, it may be carried on by or against the representative (*m*); or in such case a new action may be commenced by or against the representative of the deceased party, within a reasonable time after the appointment of such representative, and though in the meantime the limitation has expired (*n*).—If a debtor takes out administration to his creditor, the remedy is suspended without discharging the debt; but if a debtor is appointed executor, the statute ceases to run, because he is considered as having paid the debt and as holding the sum as part of the estate (*o*).

Death *pendente lite*.

Computation of time of limitation.

The time of limitation prescribed by the statutes is directed to be "next after" the cause of action has accrued: accordingly it should be computed exclusively of the day on which the cause of action accrued (*p*). The commencement of the action, which must be brought within the time of limitation, is the date of issuing the original writ of summons: and the writ bears date on the day on which it is issued (*q*).—The original writ of summons

Renewal of writ.

h) *Frany v. Brice* (1865, 18 C. B. N. S. 363. See *Hodsdon v. Harridge*, 2 Wms. Saund. 170, n. (7).

i) *Webster v. Webster* (1804), 10 Ves. 93; *Murray v. East India Co.* (1821), 5 B. & Ald. 204; *Clark v. S. Metrop. Gas Co.* (1885), 54 L. J. C. 259; affirmed (1886), 53 L. T. 646.

k) *Atkinson v. Bradford Ry. Soc.* 1890, 59 L. J. Q. B. 360; 25 Q. B. D. 377.

l) *Per cur. Atkinson v. Bradford Ry.*

Soc. 1890, 59 L. J. Q. B. 360; 25 Q. B. D. 377.

m) Ord. XVII. rr. 1, 2, 4.

n) *Swindell v. Bulkeley* (1887, 56 L. J. Q. B. 613; 18 Q. B. D. 250.

o) *Seagram v. Knight* (1867), 36 L. J. C. 918; L. R. 2 Ch. 628. See *Ingle v. Richards* (1866), 38 Beav. 366.

p) See *Clarke v. Davey* (1820), 4 Moo. 485; *Hardy v. Ryle* (1829), 7 L. J. O. S. M. C. 116; 9 B. & C. 603.

q) Ord. II. rr. 1, 8.

continues in force for twelve months from the day of the date thereof, including the day of the date. But before the expiration of the twelve months it may be renewed, by leave of the court or judge, for six months from the date of such renewal including, and so from time to time during the currency of the renewed writ. "And a writ of summons so renewed shall remain in force, and be available to prevent the operation of any statute whereby time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons" (*r*). The renewed writ prevents the operation of the statute in that action, but not in any other action or proceeding: as in the case of the plaintiff bringing an administration suit to recover the same debt (*s*). And the court will not amend the writ by adding causes of action which have become barred since issuing the writ (*t*). Nor will the court, except perhaps under exceptional circumstances, renew the writ after it has expired and the right of action has become barred (*u*).

The Statutes of Limitation offer an absolute bar to a claim dating beyond the prescribed limitation of time; whether charged as a cause of action or a cause of set-off or counterclaim. But a party may waive any benefits conferred upon him, and therefore if he wishes to take advantage of the statute must plead it, with an allegation of any facts necessary to show the application of it to the claim (*x*).

An executor or administrator of a debtor has the same option to plead the statute, unless and until his discretion is displaced by an adjudication of the court; and he may, in the exercise of his discretion, pay a barred debt and charge it against the personal estate, and if that is deficient, against the real estate (*y*). And an executor may retain for a debt due to himself which is barred by the statute (*z*). There is no right to retain out of

Operation of the statute.

Executor may pay barred debt.

(*r*) Ord. VIII. r. 1. See *Swalpage v. Tongue* (1886), 55 L. J. Q. B. 518; 17 Q. B. D. 644; *Hume v. Somerton* (1890), 59 L. J. Q. B. 420; 25 Q. B. D. 232.

(*s*) *Manby v. Manby* (1876), 3 Ch. D. 101.

(*t*) *Weldon v. Neal* (1887), 55 L. J. Q. B. 621; 19 Q. B. D. 394.

(*u*) *Hewett v. Barr* (1890), 60 L. J. Q. B. 268; (1891) 1 Q. B. 98.

(*v*) Ord. XIX. r. 15; Ord. XXV. See *Wilde, J., Coombs v. Coombs* (1876), 36

L. J. P. 21; L. R. 1 P. & D. 289; *Cairns, L. C., Duckins v. Penrhyn (Lord)* (1879), 18 L. J. C. 304; 4 Ap. Ca. 51.

(*y*) *Lowis v. Ramney* (1867), L. R. 4 Eq. 451; *Midgley v. Midgley* (1893), 62 L. J. C. 905; (1893) 3 Ch. 282.

(*z*) *Crowder v. Stewart* (1880), 50 L. J. C. 136; 16 Ch. D. 368. See *Trevor v. Hutchins* (1896), 65 L. J. C. 738; (1896) 1 Ch. 844; *Re Giles* (1896), 65 L. J. C. 419; (1896) 1 Ch. 956.

PART IV.

Legatee must
account for
barred debt.

Insolvent
estates.

Lien for
barred debt.

equitable assets (*a*). A creditor of an intestate is entitled to a grant of administration, though his right of action is barred by the statute (*b*). But in an action to administer assets under the direction of the court, creditors, and any other parties interested in the estate, may set up the statute against barred debts in protection of their own interests (*c*).—A beneficiary, who is also a debtor to the estate of his testator, must account for the debt in payment of his gift, though the remedy by action is barred by the statute (*d*); and so where a next of kin is indebted to the estate of an intestate (*e*); and where a creditor of a testator is indebted to the estate in respect of a barred debt (*f*).—In administering an insolvent estate in bankruptcy the trustee, as acting for the creditors, has no option to admit proof of debts barred by the statute (*g*).

The Statutes of Limitation only bar the remedy by personal action, leaving all other securities for the debt unaffected (*h*). And a general lien, by usage or otherwise, includes debts barred by the statute; though barred before obtaining possession of the goods upon which the lien is held (*i*). A solicitor's lien upon documents includes costs barred by the statute; and such costs must be allowed on taxation under an order for delivering up the documents (*k*). Upon the same principle a mortgagee may retain the mortgaged property, or may enforce his remedy by foreclosure, though the personal action for the debt is barred by the statute (*l*); and he may charge the proceeds of the property under a power of sale with more than six years' arrears of interest, though he cannot recover more by action (*m*). Upon the

(*a*) *Walters v. Walters* (1881), 50 L. J. C. 819; 18 Ch. D. 182.

(*b*) *Coombs v. Coombs* (1866), 36 L. J. P. 21; L. R. 1 P. & D. 288.

(*c*) *Silver v. Vanderhorst* (1831), 1 L. J. C. 107; 1 Russ. & M. 347; *Re Wenham* (1892), 61 L. J. C. 535; (1892) 3 Ch. 59; *Midgley v. Midgley* (1893), 62 L. J. C. 905; (1893) 3 Ch. 282.

(*d*) *Coates v. Coates* (1864), 33 L. J. C. 448; 33 Beav. 249; *Re Akerman* (1891), 61 L. J. C. 34; (1891) 3 Ch. 212. See *Re Orpen* (1880), 50 L. J. C. 27; 16 Ch. D. 202; *Re Abrahams* (1908), 77 L. J. C. 578; (1908) 2 Ch. 69.

(*e*) *White v. Cordwell* (1875), 44 L. J. C. 746; L. R. 20 Eq. 644.

(*f*) *Gree v. Liddell* (1866), 35 Beav. 629.

(*g*) *Ex p. Dewdney* (1809), 15 Ves.

479; *Ex p. Roffey* (1815), 19 Ves. 468.

(*h*) *Higgins v. Scott* (1831), 9 L. J. O. S. K. B. 262; 2 B. & Ad. 413; *Seager v. Aston* (1857), 26 L. J. C. 809. See *Re Haxell's Trusts* (1907), 77 L. J. C. 97; (1908) 1 Ch. 34.

(*i*) *Spears v. Hartly* (1800), 3 Esp. 81; *Re Broomhead* (1817), 16 L. J. Q. B. 355; 5 D. & L. 52; *Re Carter* (1885), 55 L. J. C. 230.

(*k*) *Curwen v. Milburn* (1889), 42 Ch. D. 424.

(*l*) *Re Hancock* (1888), 57 L. J. C. 793; *London and Midland Bk. v. Mitchell* (1899), 68 L. J. C. 568; (1899) 2 Ch. 161. See *Chatter v. Watson* (1898), 68 L. J. C. 1; (1899) 1 Ch. 175.

(*m*) *Re Marshfield* (1887), 56 L. J. C. 599; 34 Ch. D. 721.

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same principle if a debtor pay money to a creditor without directing the appropriation, the creditor, having acquired the right to apply it to one or other of several debts, may apply it in payment of a debt of which the remedy by action is barred by the statute (*n*).

Renewal of simple contract debts.

The liability for a simple contract debt may be renewed, with the effect of taking the case out of the operation of the statute and renewing the time of limitation: by an acknowledgment or promise; by part payment of the debt; or by payment of interest. By the Statute of Frauds Amendment Act, 1828, s. 1, after reciting the Limitation Act, 1623, s. 3, it is enacted, "that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." And by sect. 4, "this Act shall be taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise." By the Mercantile Law Amendment Act, 1856, s. 13, it is enacted that "an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself." And the signing by the party or agent may be in any manner sufficient to authenticate the writing (*o*).—The effect of an acknowledgment in taking a case out of the statute applies only to debts; a promise in renewal of the liability for the breach of contract must be treated as a new and original contract requiring a valid consideration (*p*). But a renewal of a debt by acknowledgment, is so far a new cause of action that an acknowledgment given after an action brought is insufficient to warrant the maintenance of the action upon a statute-barred debt (*q*).

Acknowledgment or promise.

(*n*) *Mills v. Fowler* (1839), 8 L. J. C. P. 276; 5 Bng. N. C. 455.

(*o*) *Cleave v. Jones* (1851), 20 L. J. Ex. 238; 6 Ex. 53; *H. Jones v. Mackrell* (1858), 3 C. B. N. S. 789.

(*p*) *Short v. McCarthy* (1850), 3 B. & Ald. 626; *Whitchent v. Howard* (1820),

2 Br. & B. 372. See *Blair v. Ormond* (1851), 20 L. J. Q. B. 444; 17 Q. B. 423.

(*q*) *Bateman v. Pinder* (1812), 11 L. J. Q. B. 231; 3 Q. B. 574. See post, p. 723.

PART IV.
Construction
of written
acknowledg-
ment.

Implied pro-
mise to pay.

The construction of the written document, as containing an acknowledgment or promise sufficient to take the case out of the statute, is a question of law for the court, according to the general rule (r). And if the written document is lost, secondary evidence, though not in writing, may be given of the contents (s). But the Statute of Frauds Amendment Act, 1828, has made no alteration in the legal construction to be put upon acknowledgments or promises; and since that Act, as before, there must be an express promise to pay the debt; or such an acknowledgment of the debt from which a promise to pay must be inferred (t). And "upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, the rule '*expressum facit cessare tacitum*' applies" (u).—Accordingly expressions importing hope, or expectation, or deliberation, or endeavour to pay; or regret or excuse for not paying; or inability to pay, taken alone are held to be not sufficient to take the case out of the statute (x); but such expressions, if appended to an absolute acknowledgment of debt, are not sufficient to rebut the promise implied in such acknowledgment (y). If an acknowledgment of debt is accompanied with repudiation of liability; as a distinct refusal to pay, or a statement that the debt has been paid, or that it is barred by the statute or other like grounds of repudiation, no promise can be implied (z). A request by a debtor "to send in his account"; or any acknowledgment of an account pending *primâ facie* implies a promise to pay what shall be found due upon that account and takes it out of the statute (a). And an

(r) *Routledge v. Ramsay* (1838), 7 L. J. Q. B. 156; 8 A. & E. 221; *Morrell v. Frith* (1838), 7 L. J. Ex. 172; 3 M. & W. 402.

(s) *Haydon v. Williams* (1830), 9 L. J. O. S. C. P. 16; 7 Bing. 163; *Rand v. Price* (1909), 77 L. J. K. B. 1137; (1909) 2 K. B. 724.

(t) *Haydon v. Williams* (1830), 9 L. J. O. S. C. P. 16; 7 Bing. 163; *Waters v. Thonet* (Earl) (1842), 11 L. J. Q. B. 87; 2 Q. B. 757; *Green v. Humphreys* (1884), 53 L. J. C. 625; 26 Ch. D. 474.

(u) *Per cur. Tanner v. Smart* (1827), 5 L. J. O. S. K. B. 218; 5 B. & C. 604.

(x) *John v. Lewis* (1830), 9 L. J. O. S. C. P. 95; 6 Bing. 319; *Morrell v. Frith* (1838), 7 L. J. Ex. 172; 3 M. & W.

402; *Hart v. Frendergast* (1845), 15 L. J. Ex. 223; 14 M. & W. 741; *Smith v. Thorne* (1852), 21 L. J. Q. B. 199; 18 Q. B. 134; *Rackham v. Marriott* (1857), 24 L. J. Ex. 315; 2 H. & N. 196; *Green v. Humphreys* (1884), 53 L. J. C. 625; 26 Ch. D. 474.

(y) *Cooper v. Kniboll* (1909), 78 L. J. K. B. 580; (1909) 1 K. B. 405.

(z) *A'Court v. Cross* (1825), 4 L. J. O. S. C. P. 79; 3 Bing. 329; *Brigstocke v. Smith* (1833), 2 L. J. Ex. 187; 2 Cr. & M. 483.

(a) *Quincey v. Sharpe* (1876), 45 L. J. Ex. 317; 1 Ex. D. 72; *Bonner v. Berridge* (1881), 50 L. J. C. 630; 18 Ch. D. 254; *Curwen v. Milburn* (1889), 42 Ch. D. 424.

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acknowledgment of some balance being due implies a promise to pay; which is not rebutted by an accompanying demand for an account with vouchers (*b*). But a request by a debtor for his bill, which he promised to pay "if just," was held not to be sufficient admission of liability (*c*).—The amount of the debt acknowledged or promised in the writing may be supplied by extrinsic evidence (*d*): as in the case of an acknowledgment of "the bill," or the "account" or "the balance" due (*e*); or the promise of a joint debtor to pay his "proportion" of the debt (*f*); or the promise of a surety to pay the deficiency of the principal (*g*).—An acknowledgment made for a special purpose is limited in effect to the purpose intended, and cannot be taken beyond that purpose as a renewal of the debt: as a proposal for discharging the debt by a set-off or some special arrangement (*h*); a proposal to submit the debt to arbitration (*i*); a consent by a surety that his liability shall not be prejudiced by the creditor taking a composition from the principal debtor (*k*); and an acknowledgment expressly made "without prejudice" (*l*). An agreement settling a particular item of an account has no effect in acknowledging the general account (*m*). An acknowledgment of a debt in proceedings in bankruptcy or composition with creditors, though sworn to by the debtor, does not take the case out of the statute in other proceedings (*n*).

Amount of debt.

Acknowledgment limited to special purpose.

"The new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor

Conditional renewal.

(*b*) *Sheet v. Lindsay* (1877), 46 L. J. Ex. 219; 2 Ex. D. 314; *Lantrish v. Watts* (1903), 72 L. J. K. B. 435; (1903) 1 K. R. 636.

(*c*) *Sping v. Wright* (1842), 12 L. J. Ex. 141; 9 M. & W. 629.

(*d*) *Walter v. Loeg* (1840), 9 L. J. C. P. 217; 1 Man. & G. 54.

(*e*) *Gardner v. McMahon* (1842), 11 L. J. Q. B. 297; 3 Q. B. 501; *Quinsey v. Sharpe* (1876), 45 L. J. Ex. 347; 1 Ex. D. 72.

(*f*) *Lechmere v. Fletcher* (1843), 2 L. J. Ex. 219; 1 Cr. & M. 623.

(*g*) *Humphreys v. Jones* (1845), 14 L. J. Ex. 254; 14 M. & W. 1.

(*h*) *Cripps v. Davies* (1843), 12 L. J.

Ex. 217; 12 M. & W. 159; *Goutte v. Goutte* (1836), 1 H. & N. 29; *Francis v. Hinkley* (1859), 28 L. J. Q. B. 370; 1 E. & E. 1052.

(*i*) *Mitchell's claim* (1871), L. R. 6 Ch. 822.

(*k*) *Cockrill v. Sparke* (1863), 32 L. J. Ex. 118; 1 H. & C. 699.

(*l*) *Mitchell's claim* (1871), L. R. 6 Ch. 822.

(*m*) *Hughes v. Paramore* (1865), 24 L. J. C. 681; 7 De G. M. & G. 229.

(*n*) *Everett v. Robertson* (1838), 28 L. J. Q. B. 23; 1 E. & E. 16; *Ex p. Topping* (1863), 34 L. J. Bk. 44; 4 De G. J. & S. 551.

PART IV.

Time of
renewal.Action on
renewed
liability.

can claim nothing more than the promise gives him" (o). The conditions must be accepted and satisfied in order to renew the liability, and the renewal dates from the time when the promise becomes absolute. A promise by the debtor to his creditor that "if he could prove the debt he would pay him" was held to be a conditional promise, and that the condition was to be satisfied by proof in an action for the debt, and therefore the case was taken out of the statute (p). So a promise by the debtor to pay "as soon as he is able" becomes absolute when he first becomes able; and though his ability may not then be known to the creditor (q). A promise that "as soon as we can get our affairs arranged we will see you paid" was construed either not to be conditional, or if conditional, that the condition was presumptively satisfied after a reasonable delay (r).—The renewal of liability may be made before or after the debt is barred by the statute (s). And it is material to the construction of the acknowledgment or promise whether the debt is barred or not at the time of making it; in the former case the debtor is in a position to couple any promise he makes with a condition; in the latter he has no right to impose terms, and must be presumed to have no such intention, for the action is then brought upon his original liability (t). The time when the acknowledgment or promise was written or signed, upon which the renewal of liability depends, may be supplied by extrinsic evidence (u).

The renewal of liability for a barred debt must be absolute, and discharged of all conditions, before an action can be commenced: it then operates as a new cause of action with the full time of limitation (x).—By the Statute of Frauds Amendment Act, 1828,

(o) *Wigram, V.-C., Philips v. Philips* (1844), 13 L. J. C. 445; 3 Hare, 300; *Tanner v. Smart* (1827), 5 L. J. O. S. K. B. 218; 6 B. & C. 603; *Brigstocke v. Smith* (1833), 2 L. J. Ex. 187; 1 Cr. & M. 483; *Smith v. Thorne* (1852), 21 L. J. Q. B. 199; 18 Q. B. 134; *Buckmaster v. Russell* (1861), 10 C. B. N. S. 745. See ante, p. 721.

(p) *Heyling v. Hastings* (1698), 1 Ld. Raym. 389, 421.

(q) *Tanner v. Smart* (1827), 5 L. J. O. S. K. B. 218; 6 B. & C. 603; *Waters v. Thanet (Earl)* (1842), 11 L. J. Q. B. 87; 2 Q. B. 757; *Meyrhoeff v. Frohlich* (1878), 48 L. J. C. P. 43; 4 C. P. D. 63; *Re Bethell* (1887), 66 L. J. C. 334; 34 Ch. D. 561.

(r) *Chasemore v. Turner* (1875), 45 L. J. Q. B. 66; L. R. 10 Q. B. 500.

(s) *Chanuall v. Ditchburn* (1839), 9 L. J. Ex. 1; 5 M. & W. 491; *Goddard v. Ingram* (1842), 12 L. J. Q. B. 9; 3 Q. B. 839; *Latoche v. Latoche* (1864), 34 L. J. Ex. 85; 3 H. & C. 576.

(t) *Per cur. Haydon v. Williams* (1830), 9 L. J. O. S. C. P. 16; 7 Bing. 168; *per cur. Cornforth v. Smithard* (1860), 29 L. J. Ex. 228; 5 H. & N. 13.

(u) *Edmunds v. Hownes* (1834), 3 L. J. Ex. 98; 2 Cr. & M. 59.

(x) *Bayley, B., Brigstocke v. Smith* (1833), 2 L. J. Ex. 187; 1 Cr. & M. 486; *Waters v. Thanet (Earl)* (1842), 11 L. J. Q. B. 87; 2 Q. B. 757; *Bateman v. Pinder* (1842), 11 L. J. Q. B. 281; 3

s 8, "no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps." Hence an instrument containing an acknowledgment or promise may be used in evidence to take a debt out of the statute without a stamp, though if used to prove the debt or for any other purpose it may be an agreement requiring a stamp (*y*). But an instrument which is a bill of exchange or promissory note is not available in evidence, under the above proviso, unless properly stamped (*z*). An indorsement of name and date upon a promissory note by the maker was construed as a sufficient renewal without making it a new note requiring a new stamp (*a*).

The Statute of Frauds Amendment Act, 1828, also contains a proviso that "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal, or interest, made by any person whatsoever." A payment proved by an acknowledgment or admission made by words only, without any writing or signature, is within this proviso, and may take the case out of the statute (*b*).—The same statute, sect. 3, further enacts, "that no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statute." The words "other writing" in this enactment mean the writing containing the contract; leaving to other memoranda of payment the ordinary effect in evidence (*c*).—"The meaning of part payment is not the naked fact of payment of a sum of money, but payment of a smaller sum on account of a greater sum, which part payment implies an admission of such greater sum being then due and a promise to pay it" (*d*). The appropriation of the payment by the debtor to the debt or account charged may be proved by

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Exemption
from stamp
duty.

Renewal of
simple contract by part
payment.

Indorsement
of payment.

Meaning of
part payment.

Q. B. 574; *Bush v. Martin* (1863), 33 L. J. Ex. 17; 3 H. & C. 311.

(*y*) *Morris v. Dixon* (1836), 5 L. J. K. B. 155; 4 A. & E. 845.

(*z*) *Jones v. Ryder* (1838), 7 L. J. Ex. 216; 4 M. & W. 32; *Parmiter v. Parmiter* (1861), 30 L. J. C. 508; 3 De G. F. & J. 461.

(*a*) *Bourdin v. Greenwood* (1871), 41 L. J. C. 73; L. R. 13 Eq. 281. See

Holmes v. Mackrell (1858), 3 C. B. N. S. 789.

(*b*) *Clave v. Jones* (1851), 20 L. J. Ex. 234; 6 Ex. 573.

(*c*) *Bradley v. James* (1853), 22 L. J. C. P. 193; 13 C. B. 822.

(*d*) *Per cur. Waters v. Tompkins* (1835), 5 L. J. Ex. 61; 2 Cr. M. & R. 726; *Friend v. Young* (1897), 66 L. J. C. 737; (1897) 2 Ch. 421; *Re Boswell* (1906), 75 L. J. C. 658; (1906) 2 Ch. 359.

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evidence distinct from the payment (e). A payment on a certain account may be sufficient, although the amount due on that account is not ascertained at the time of the payment (f). A payment made with the expressed intention of discharging the whole debt, or with a refusal to pay more, excludes any inference of a promise (g). Payment into court in an action admits the debt to the amount paid in and no more (h). The payment of a dividend in bankruptcy, or under a composition with creditors, is intended in full discharge, and has no effect in renewing the debt, or any security for it (i). A payment enforced by a judgment recovered against the debtor *in invitum* excludes any inference of a promise in renewal (k). A part payment will take a barred debt out of the statute, though the payment may be voidable on the subsequent bankruptcy of the debtor (l).

Payment of interest.

Payment of interest may amount to an admission that the principal debt was due during the time the interest paid was accruing and at the time it accrued due, so as to avoid the effect of the statute from that time; but apart from circumstances it is no admission that the debt remained due at the time of the payment made (m). In the case of a promissory note to pay a sum with interest, the interest is made part of the debt; and an arrear of interest having been paid after it had accrued due, and the payment indorsed upon the note, which was retained by the payee, it was held sufficient to take the note out of the statute from the time of the payment (n). A promissory note to pay a certain sum on demand carries no interest until demand made; but a payment of interest is evidence of a demand having been made and of interest running upon the note; and therefore the

(e) *Waters v. Tompkins* (1835), 5 L. J. Ex. 61; 2 Cr. M. & R. 723; *Balden v. Watton* (1848), 17 L. J. Ex. 357; 1 Ex. 617.

(f) *Walker v. Butler* (1856), 25 L. J. Q. B. 377; 6 E. & R. 509. See *Re Rainforth* (1879), 49 L. J. C. 5; *Friend v. Yoona* (1897), 66 L. J. C. 737; (1897) 2 Ch. 421.

(g) *Wanman v. Knuman* (1847), 16 L. J. Ex. 232; 1 Ex. 118; *per cur.* *Foster v. Dauber* (1851), 20 L. J. Ex. 385; 6 Ex. 853.

(h) *Roid v. Dickens* (1833), 5 R. & Ad. 499. See *Hennell v. Davies* (1893), 62 L. J. Q. B. 220; (1893) 1 Q. B. 367.

(i) *Davies v. Edwards* (1851), 21 L. J. Ex. 4; 7 Ex. 22; *Ex p. Topping* (1865),

34 L. J. Bk. 41; 4 De G. J. & S. 551; *Taylor v. Hallod* (1902), 71 L. J. K. B. 278; (1902) 1 K. B. 676.

(k) *Morgan v. Rowlands* (1872), 41 L. J. Q. B. 187; L. R. 7 Q. B. 493.

(l) *Ex p. Gaze* (1889), 58 L. J. Q. B. 373; 24 Q. B. D. 74.

(m) *Sanders v. Meredith* (1828), 3 Man. & Ry. 116; *Hollis v. Palmer* (1836), 5 L. J. C. P. 261; 2 Bing. N. C. 713; *Re Fontaine* (1909), 68 L. J. C. 648; (1909) 2 Ch. 382. See *Dubb v. Walker* (1893), 62 L. J. C. 536; (1893) 2 Ch. 429.

(n) *Bealy v. Greenslade* (1831), 1 L. J. Ex. 1; 2 Cr. & J. 61. See *Pardon v. Pardon* (1842), 12 L. J. Ex. 3; 10 M. & W. 563.

payment admits the note due and takes it out of the statute (*o*). Where there are several securities for the same debt, as a mortgage and a promissory note, payment of interest prevents the statute as to all (*p*). A payment made expressly on account of principal only, or accompanied with a refusal to pay interest, excludes admission of liability for the latter (*q*). And if the principal debt is barred, the claim for interest, being accessory to the principal, is barred with it (*r*).

The payment need not be made in cash, the reduction of the debt or the satisfaction of the interest by any agreed mode which would support a plea of payment is a payment within the statutes (*s*); as the delivery and acceptance of goods in part payment (*t*); the payment of money to a third party at the request and direction of the creditor instead of to himself (*u*); a payment made by set-off in account (*x*); or by set-off of an agreed weekly charge for board and lodging (*y*); or for the maintenance of a child in payment of the interest on a promissory note (*z*). Where a bill, a note or a cheque is given on account of a larger debt or of interest, the renewal of the cause of action dates from the delivery of the bill, note or cheque, whether it be immediately payable and whether it be honoured at maturity or not (*a*). So where a debtor fails to pay a composition, whereby the liability of the debtor to pay the original debt is revived, the statute runs from the date of the default (*b*). Where the trustees of a fund for a married woman lent the fund to her husband with an arrangement that the wife should give the trustees receipts for the interest as if paid to her through her husband, it was held that the loan was kept alive against the husband though no money in fact passed (*c*). It sometimes happens that the debtor has

Transactions
equivalent to
payment.

(*o*) *Bamfield v. Tupper* (1851), 21 L. J. Ex. 6; 7 Ex. 27. See *Re Rutherford* (1889), 49 L. J. C. 654; 14 Ch. D. 687.

(*p*) *Douglas v. Ford* (1843), 12 L. J. Ex. 342; 11 M. & W. 329.

(*q*) *Collins v. Wilcock* (1827), 5 L. J. O. S. C. P. 181; 4 Bing. 313.

(*r*) *Holla v. Pabner* (1836), 5 L. J. C. P. 264; 2 Bing. N. C. 717.

(*s*) *Bodger v. Arch* (1844), 21 L. J. Ex. 19; 10 Ex. 333; *Maber v. Maber* (1867), 36 L. J. Ex. 70; L. R. 2 Ex. 153.

(*t*) *Hart v. Nash* (1833), 2 Cr. M. & R. 337; *Hooper v. Stephens* (1835), 5 L. J. K. B. 4; 4 A. & E. 71.

(*u*) *Worthington v. Grawditch* (1845), 15 L. J. Q. B. 52; 7 Q. B. 479. See

Maber v. Maber (1867), 36 L. J. Ex. 70; L. R. 2 Ex. 153.

(*x*) *Ashby v. James* (1813), 12 L. J. Ex. 295; 11 M. & W. 542.

(*y*) *Blair v. Ormoud* (1851), 20 L. J. Q. B. 444; 17 Q. B. 423.

(*z*) *Bodger v. Arch* (1851), 24 L. J. Ex. 19; 10 Ex. 333.

(*a*) *Irving v. Vetch* (1837), 7 L. J. Ex. 25; 3 M. & W. 90; *Turney v. Dowell* (1854), 23 L. J. Q. B. 137; 3 E. & B. 136; *Martinez v. Dixon* (1908), 77 L. J. K. B. 839; (1908) 2 K. B. 584.

(*b*) *Ex p. Anos* (1897), 66 L. J. Q. B. 146.

(*c*) *Anos v. Smith* (1862), 31 L. J. Ex. 423; 1 H. & C. 248. See *Re Dixon*

PART IV.

Receipts and entries.

Appropriation of payment.

Renewal of specialty debts.

himself an interest in the debt, the familiar instance being where a tenant for life of settled land is entitled to a charge upon the settled land either absolutely, or for a limited interest; in this case the court proceeds upon the footing of a hypothetical payment and treats the debt as being kept alive; and it is immaterial that the rents of the land and interest on the debt are payable to different trustees for the same person (*d*).—Where a debtor made a valid tender of the interest due to the creditor who signed and delivered a receipt to the debtor with the intention of giving him the amount, it was held to be equivalent to payment in taking the debt out of the statute, though no money in fact passed (*e*). An entry or memorandum made by the creditor himself may be evidence of the payment after his death, as being an admission made against his own interest; and such evidence is *prima facie* sufficient to take the debt out of the statute (*f*); provided the entry was made before the debt was barred, for if made after it would operate for, rather than against, his interest (*g*).—A payment which is not appropriated by the debtor at the time of making it to any particular debt may be appropriated by the creditor to a debt barred by the statute; but such appropriation by the creditor has no effect in taking the debt out of the statute (*h*). Where a debtor owing three debts, two of which were then barred by the statute, paid a sum on account of interest generally, it was held that he must have intended it either as a payment upon all the debts, or upon the later only; and that the later, at least, was renewed by the payment (*i*). As between two debts, one of which was admitted and the other disputed, a payment was presumed to have been made upon the admitted debt, though it was then barred by the statute, and that it renewed that debt (*k*).

The renewal of specialty debts is regulated by the Civil Procedure Act, 1833, s. 5, enacting in effect, as a proviso to sect. 3

(1900), 69 L. J. C. 609; (1900) 2 Ch. 561.

(*d*) *Burrell v. Egremond (Earl)* (1844), 13 L. J. C. 309; 7 Beav. 205; *Topham v. Booth* (1887), 56 L. J. C. 812; 35 Ch. D. 607. See *Re England* (1895), 65 L. J. C. 21; (1895) 2 Ch. 820; *Re Chant* (1905), 74 L. J. C. 642; (1905) 2 Ch. 225; *Re Lucy* (1907), 76 L. J. C. 316; (1907) 1 Ch. 330.

(*e*) *Maher v. Maher* (1867), 36 L. J. Ex. 70; L. R. 2 Ex. 153.

(*f*) *Bradley v. James* (1853), 22 L. J. C. P. 193; 13 C. B. 822.

(*g*) *Briggs v. Wilson* (1851), 5 De G. M. & G. 12.

(*h*) *Mills v. Fawkes* (1839), 8 L. J. C. P. 276; 5 Bing. N. C. 455; *Re Boswell* (1906), 75 L. J. C. 234, 658; (1906) 2 Ch. 359.

(*i*) *Nash v. Hodgson* (1855), 25 L. J. C. 186; 6 De G. M. & G. 474.

(*k*) *Burn v. Boulton* (1846), 15 L. J. C. P. 97; 2 C. B. 476.

already cited (*l*), "if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of an indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid."—

This section applies only to debts, and has no application to breaches of bonds or covenants sounding in damages and not resulting in money debts, as a breach of covenant to repair; in respect of which acknowledgments have no effect in renewing the liability (*m*).

Acknowledgment under this section does not mean a new promise and cause of action, as required for the renewal of simple contract debts; any acknowledgment sufficient to rebut the presumption of payment arising from lapse of time, if made in writing signed, though made to a third party and not to the plaintiff, is sufficient to support the action (*n*). The Real Property Limitation Act, 1874, s. 8, as to money charges upon land, requires the acknowledgment to be made in writing "to the person entitled thereto or his agent" (*o*). The acknowledgment must be of the debt as then existing, and not a mere recital of its existence at the original date (*p*). The amount of the debt may be supplied by parol evidence (*q*). Where an acknowledgment has been lost, parol evidence of its contents may be given in evidence (*r*). Payment of interest is within the section, whether chargeable by express terms of the contract or as damages for non-payment (*s*).—The acknowledgment by writing or by payment must be made by the party liable by virtue of the specialty (*t*); and the effect is confined to the party making it, his real and personal representatives, and parties becoming liable in the same

Acknowledgment.

Effect on parties in different interests.

(*l*) *Ante*, p. 702.

(*m*) *Blair v. Osmond* (1851), 20 L. J. Q. B. 444; 17 Q. B. 423.

(*n*) *Forsyth v. Bristowe* (1853), 22 L. J. Ex. 255; 8 Ex. 716; *Moudie v. Bannister* (1859), 28 L. J. C. 881; 4 Drew. 432.

(*o*) See *ante*, p. 703.

(*p*) *Howcutt v. .*, 18 L. J. Ex. 262; 3 Ex. 41.

(*q*) *Parke, B., Ho . Bonsor* (1849),

18 L. J. Ex. 262; 3 Ex. 496. See *Newbould v. Smith* (1889), 14 Ap. Ca. 423.

(*r*) *Read v. Price* (1909), 78 L. J. K. B. 1137; (1909) 2 K. B. 724.

(*s*) *Forsyth v. Bristowe* (1853), 22 L. J. Ex. 255; 8 Ex. 716.

(*t*) *Re Chant* (1905), 74 L. J. C. 542; (1905) 2 Ch. 225; *Re Lacey* (1907), 76 L. J. C. 316; (1907) 1 Ch. 330.

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interest (*u*); and payment of interest upon debts chargeable against the real assets of the testator by a devisee for life of land settled by the will prevents the statute running against all persons becoming entitled in remainder to the settled land, and against the persons entitled to the other real assets of the testator (*x*). And it seems generally that a payment made by any of the persons interested in property which is discharged by the payment will keep the charge alive against all other persons interested in and liable to be charged in respect of the same property (*y*). Payment of interest upon a mortgage debt by an assignee of the equity of redemption takes the case out of the statute against the covenant of the mortgagor (*z*); but payment of interest by the mortgagor after assignment of the equity of redemption does not keep the charge alive against the assignee (*a*). Where a bond was given under one penalty to secure two distinct sums upon separate trusts, the statute was held to run against each separately and payment of one sum did not take the other out of the statute (*b*). Payment by either a principal or a surety keeps the debt alive against both (*c*).

Acknowledgment by joint debtor.

By a Statute of Frauds Amendment Act, 1828, s. 1, after reciting the Limitation Act, 1623, s. 3, and enacting that no acknowledgment or promise shall be sufficient unless made in writing and signed (*d*), proceeds to enact that "where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal

(*u*) *Re England* (1895), 65 L. J. C. 21; (1895) 2 Ch. 820; *Re Allen* (1898), 67 L. J. C. 614; (1898) 2 Ch. 499.

(*x*) *Rotham v. Mayley* (1857), 26 L. J. C. 438; 1 D. G. & J. 1; *Re Chant* (1905), 74 L. J. C. 542; (1905) 2 Ch. 225.

(*y*) *Chumery v. Evans* (1864), 11 H. L. C. 115; *Huelock v. Ashberry* (1882), 51 L. J. C. 394; 19 Ch. D. 539; *Bradshaw v. Widdington* (1902), 71 L. J. C. 627; (1902) 2 Ch. 430.

(*z*) *Forsyth v. Bristowe* (1853), 22 L. J. Ex. 255; 8 Ex. 716; *Inbb v. Walker*

(1893), 62 L. J. C. 536; (1893) 2 Ch. 429.

(*a*) *Newbould v. Smith* (1886), 55 L. J. C. 788; 33 Ch. D. 127.

(*b*) *Ashlin v. Lee* (1875), 44 L. J. C. 376.

(*c*) *Lewin v. Wilson* (1886), 55 L. J. P. C. 75; 11 Ap. Ch. 639; *Re Fishy* (1889), 59 L. J. C. 91; 43 Ch. D. 106. See *Cockrill v. Sparke* (1863), 32 L. J. Ex. 118; 1 H. & C. 699.

(*d*) See *ante*, p. 721.

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or interest made by any person whatsoever": with a further proviso that in actions against such joint contractors, executors or administrators, if the plaintiff, though barred against one of them by the statute, shall be entitled to recover against any other or others by virtue of a new acknowledgment or promise or otherwise, judgment may be given for and against the plaintiff accordingly.—Before this enactment an acknowledgment or promise or a part payment or a payment of interest made by one of several persons jointly, or jointly and severally liable for the same debt renewed the liability against all, both jointly and severally (e); but only during the continuance of the joint liability; and where a joint debt was severed by the death of one of the joint debtors, a renewal by the survivor, or by the representative of the deceased, had no effect against the other party or his representative (f). In the case of a specialty an acknowledgment signed by one of several co-obligors, where the liability is joint and several, is to displace the bar imposed by the Civil Procedure Act, 1833 (g). The effect of payment in renewing the liability of a joint debtor remained unaltered by the terms of the above enactment (h). Where the liability is several, payment by one co-contractor does not keep the debt alive as against the other co-contractor (i).

By the Mercantile Law Amendment Act, 1856, s. 14, it was enacted, in reference to the provisions of the Limitation Act, 1623, s. 3, and the Civil Procedure Act, 1833, s. 3, "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators." This provision only applies to the "payment" of any principal or interest (k). In the case of debts charged upon land the liability of persons liable to pay the debt

Payment by
joint debtor.

(e) *Whitcomb v. Whiting* (1781), Doug. 652; 1 Sm. L. C. 561; *Peckham v. Raynal* (1824), 3 L. J. O. S. C. P. 271; 2 Bing. 306; *Burleigh v. Stott* (1828), 6 L. J. O. S. K. B. 232; 8 B. & C. 36.
(f) *Atkins v. Tredgold* (1823), 1 L. J. O. S. K. B. 228; 2 B. & C. 23; *Stater v. Lawson* (1831), 9 L. J. O. S. K. B. 4; 1 B. & Ad. 396.

(g) *Read v. Price* (1909), 78 L. J. C. 1137; (1909) 2 K. B. 724.

(h) *Wyatt v. Hodson* (1832), 1 L. J. C. P. 63; 8 Bing. 309.

(i) *Re Wolmerhausen* (1890), 62 L. T. 541; *Re Tucker* (1894), 63 L. J. C. 737; (1894) 3 Ch. 429.

(k) *Read v. Price* (1909), 78 L. J. C. 1137; (1909) 2 K. B. 724.

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Payment by partner.

is regulated by the Real Property Limitation Act, 1874, s. 8 (l). The renewal of a partnership debt by a payment of one of the partners is not within the enactment, because it is chargeable by reason of the agency of the partner to act for the firm during the continuance of the partnership; the effect of a payment made after dissolution of the partnership as a renewal of the debt is dependent upon the validity of the revocation of the agency as against the creditor (m). An acknowledgment of a debt made by an executor will keep the debt alive as chargeable against the assets, whether in the hands of another executor or outstanding (n). A written consent given by a debtor to his creditor that a payment by a co-debtor should not prejudice the claim against him was held not to add any effect to the payment in renewal of the debt which would take it out of the statute (o).

Renewal to third party or agent.

An acknowledgment of a debt, though made to a third party who is neither the creditor nor his agent, is sufficient at common law to rebut a presumption of payment arising from lapse of time (p); and if made in writing and signed by the debtor it is sufficient to renew a specialty debt for a limit of twenty years after such acknowledgment, under the Civil Procedure Act, 1833, s. 5 (q). But an acknowledgment in writing made by the debtor, unless made to the creditor himself or to an agent on his behalf, is not sufficient ground for inferring a promise to the creditor; which is required for the renewal of a simple contract debt under the Limitation Act, 1623 (r). Similarly, an acknowledgment by payment must be made to the creditor or his agent in order to renew the liability of the debtor (s). An acknowledgment or promise in renewal of a debt may be made and signed by an agent

Renewal by agent.

(l) *Re Frisby* (1880), 59 L. J. C. 1; 43 Ch. D. 106; *Re Chant* (1905), 74 L. J. C. 542; (1905) 2 Ch. 225; *Re Lacey* (1907), 76 L. J. C. 316; (1907) 1 Ch. 330.

(m) *Watson v. Watson* (1875), 45 L. J. C. 57; L. R. 10 Eq. 721; *Re Tucker* (1894), 63 L. J. C. 17; (1894) 3 Ch. 429.

(n) *Re Macdonald* (1897), 66 L. J. C. 630; (1897) 2 Ch. 81; *St. S. Astbury v. Astbury* (1898), 67 L. J. C. 471; (1898) 2 Ch. 111.

(o) *Cockrill v. Spence* (1863), 32 L. J. Ex. 118; 1 H. & C. 699.

(p) *Mumtash v. B. B.* (1819), 3

B. & Ald. 141; *Clark v. Hougham* (1823), 2 P. & C. 14.

(q) *Furyth v. Bristow* (1853), 22 L. J. Ex. 251; 8 Ex. 716; *Maudie v. Bannister* (1859), 28 L. J. C. 881; 4 Drew. 439.

(r) *Fuller v. Redman* (1859), 26 Beav. 614; per Alderson, B., *Greutell v. Girlington* (1837), 7 L. J. Ex. Eq. 42; 2 Y. & C. Ex. 602.

(s) *Meggison v. Harper* (1834), 3 L. J. Ex. 81; 2 Cr. & M. 322; *Stamford, Spalding and Boston Bk. v. Smith* (1842), 61 L. J. Q. B. 405; (1892) 1 Q. B. 765.

duly authorised with the same effect as by the party himself (*l*). And part payment or payment of interest by an agent has the same effect in renewal of the debt as if made by his principal (*n*); as a payment made by a partner on account of a partnership debt (*x*). But an agent authorised to pay a sum in discharge of the whole debt cannot renew the liability by applying the sum in part payment (*y*). Similarly, a payment in bankruptcy cannot operate except as a discharge of the residue, which negatives any renewal of liability (*z*).

The statute of limitation runs against the liability of a husband for the debts of his wife before marriage, from the date of the cause of action against the wife, whether the original cause of action or a renewal by her before marriage; but after the marriage a renewal by the wife is no renewal against the husband, unless made as his agent with his authority (*a*). But the husband's liability would be measured by the property which he had acquired or become entitled to from or through his wife, after deducting any sums paid under judgments recovered against him in respect of her debts or liabilities (*b*). Payment to the husband of the interest on a promissory note of the wife is considered *prima facie* as made to him as her agent, with the effect of taking the note out of the statute (*c*). The statute of limitation applies to debts of a married woman chargeable upon her separate estate (*d*); and since the Married Women's Property Act, 1882, a renewal by a married woman is effectual to charge her separate estate, though not to charge her husband (*e*).—An infant, so far as he is capable of contracting a debt for necessities, may also renew such debt by a sufficient acknowledgment or promise (*f*).—And an executor, so far as he may pay a debt

Husband
and wife.

Infant.

Executor.

(*l*) *Taft v. Stephenson* (1851), 21 L. J. C. 129; 1 De G. M. & G. 28. See *ante*, pp. 721, 729.

(*n*) *Keir v. Pittet* (1831), 1 A. & E. 196; *Jones v. Hughes* (1850), 19 L. J. Ex. 200; 3 Ex. 101; *Re Hale* (1890), 68 L. J. C. 517; (1892) 2 Ch. 107. See *Re Fontaine* (1909), 78 L. J. C. 618; (1909) 2 Ch. 382.

(*x*) *Re Tucker* (1894), 63 L. J. C. 727; (1894) 4 Ch. 429.

(*y*) *Lincoln v. Bonner* (1835), 5 L. J. C. P. 40; 2 Wing N. C. 211.

(*z*) *Re Hild* (1902), 71 L. J. K.

Hollands (1852), 21 L. J. Q. B. 289; 19 Q. B. 262.

(*b*) Married Women's Property Act, s. 14.

(*c*) *Hart v. Stephens* (1811), 14 L. J. Q. B. 148; 6 Q. B. 937; *Re Duran* (1900), 69 L. J. C. 609; (1900) 2 Ch. 561.

(*d*) *Latouche v. Latouche* (1865), 34 L. J. Ex. 85; 3 H. & C. 576; *Re Hastings* (1887), 56 L. J. C. 631; 35 Ch. D. 91.

(*e*) *Beck v. Pierce* (1889), 58 L. J. Q. B. 16; 23 Q. B. D. 323.

(*f*) *Wallins v. Smith* (1854), 24 L. J. Q. B. 62; 4 E. & H. 180. See *ante*,

PART IV. of his testator which is barred by the statute, may also renew his liability as executor for such debt (*g*). An executor's advertisement to creditors to send in their claims imports no acknowledgment of liability (*h*). An acknowledgment made to a person acting as administrator or to an agent on his behalf becomes available after he has taken out administration (*i*). An acknowledgment may renew a debt due to the estate of a deceased person; but it must imply a promise to pay his representative, and cannot be charged as a promise to the deceased (*k*).

(*g*) *Fordham v. Wallis* (1853), 22 L. J. C. 548; 10 Hare, 217; *Briggs v. Wilson* (1851), 5 De G. M. & G. 12; *Midgley v. Midgley* (1893), 62 L. J. C. 905; (1893) 3 Ch. 282; *Re Macdonald* (1897), 66 L. J. C. 630; (1897) 2 Ch. 181. See *Astbury v. Astbury* (1898), 67 L. J. C. 471;

(1898) 2 Ch. 111.

(*h*) *Scott v. Jones* (1838), 4 Cl. & F. 382.

(*i*) *Bodger v. Arrh* (1854), 24 L. J. Ex. 21; 10 Ex. 343.

(*k*) *Sarell v. Wine* (1803), 3 East, 409; *Ward v. Hunter* (1815), 6 Taunt. 210.

CHAPTER XII.

SET-OFF AND COUNTERCLAIM.

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By common law there is no right of set-off between parties mutually indebted, in the absence of agreement to that effect. And the rule of equity follows the law, unless there are special circumstances connecting the debts, besides the mere fact of mutuality, on which the relief can be founded (*a*).—Accordingly a debtor is not entitled to apply a set-off in reduction of his debt and tender the balance only (*b*); or to apply a set-off to prevent a forfeiture, as in the case of a forfeiture of shares for non-payment of calls by a shareholder who is at the same time a creditor of the company (*c*); or to apply a set-off in answer to an attachment of the debt under a judgment against the creditor (*d*); or to apply a set-off in discharge of a lien for a debt, and claim possession of the property discharged of the lien (*e*); but in the

Set-off at
common law.

(*a*) *Clark v. Cort* (1840), 10 L. J. C. P. 113; Cr. & Ph. 154; *Rawson v. Samuel* (1841), 10 L. J. C. 214; 1 Cr. & Ph. 161; *Best v. Hill* (1872), 42 L. J. C. P. 10; L. R. 8 C. P. 10.
(*b*) *Searles v. Sadgrove* (1855), 25 L. J. Q. B. 15; 5 E. & B. 639; *Phillipotts v. Clifton* (1861), 10 W. R. 135.

(*c*) *Johnson v. Lytle's Agency* (1877), 46 L. J. C. 786; 5 Ch. D. 687.
(*d*) *Stunroe v. Campbell* (1892), 61 L. J. Q. B. 463; (1893) 1 Q. B. 314.
(*e*) *Clarke v. Fell* (1832), 2 L. J. K. B. 84; 4 B. & Ad. 44; *Finnock v. Harrison* (1837), 7 L. J. Ex. 137; 3 M. & W. 532.

PART IV.

Set-off by
agreement.

case of money received to the use of another there can be no lien or claim to retain money beyond the balance of the account between the parties in their own rights (*f*).

A contract may be made with an express stipulation to set off mutual claims arising under it: as a contract for goods to be supplied or work done from time to time on either side upon terms of mutual credit, leaving the balance only due (*g*); an agreement between incoming and outgoing tenants for the valuation and set-off of items chargeable on both sides (*h*); a contract for services upon the terms that the value of all goods lost or damaged by the negligence of the servant shall be deducted from the wages (*i*); a building contract with the stipulation that penalties for delay shall be deducted from the contract price (*k*); or with the condition, express or implied, that the contract price shall be reduced by the damages recoverable for defective work or delay in completion (*l*). The contract of an agent to account for money received is impliedly subject to the just charges and allowances of the agency, rendering him accountable for the balance only (*m*). And by the usage of a particular trade or business a set-off or deduction of cross claims may become binding as part of the contract (*n*).—By subsequent agreement, after the accruing of a debt or breach of contract, the set-off in account of mutual claims may be taken as payment, or by way of accord and satisfaction (*o*).

Set-off by
statute.

The right of set-off between solvent parties, independently of agreement, was given to prevent cross actions, and does not rest on the same principle as the mutual credit clause in bankruptcy, by which the rights of the parties are adjusted according to their beneficial interests (*p*). Until judgment the debts remain separate and distinct debts (*q*). The statute of set-off was superseded

(*f*) *Miller v. Atke* (1849), 3 Fx. 799.
See *Stuware v. Campbell* (1892), 61 L. J. Q. B. 463; (1892) 1 Q. B. 314.

(*g*) *Kinnerley v. Hossack* (1809), 2 Taunt. 170.

(*h*) *Leeds v. Burrows* (1810), 12 East. 1.

(*i*) *Chevroth v. Parkford* (1840), 10 L. J. Ex. 41; 7 M. & W. 314.

(*k*) *Jones v. St. John's Coll.* (1871), 40 L. J. Q. B. 80; L. R. 6 Q. B. 115.

(*l*) *Young v. Kitchen* (1878), 47 L. J. Ex. 579; 3 Fx. D. 127; *Newfoundland Gov. v. Newfoundland Ry.* (1887), 57

L. J. P. C. 35; 13 Ap. Ca. 199.

(*m*) *Dale v. Sollet* (1767), 4 Burr. 2133.

(*n*) *Per cur. Meyer v. Dresser* (1874), 33 L. J. C. P. 294; 16 C. B. N. S. 8, 646.

(*o*) *Callander v. Howard* (1850), 19 L. J. C. P. 312; 10 C. B. 290; *Lovinstone v. Whiting* (1850), 19 L. J. Q. B. 528; 15 Q. B. 73.

(*p*) *Forster v. Wilson* (1843), 13 L. J. Ex. 209; 12 M. & W. 191.

(*q*) *Re Hiram Maxim Lamp Co.* (1902), 72 L. J. C. 18; (1903) 1 Ch. 70.

by the Judicature Acts and Orders, and finally repealed by the Statute Law Revision Act, 1883, s. 4; with the saving by sect. 5, of "any jurisdiction or principle or rule of law or equity established or confirmed by any enactment repealed by this Act."

CHAP. XII.

By the Judicature Act, 1873, s. 24 (3), it is provided generally that the courts shall have power to grant to any defendant "all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively or any judge thereof might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner."—And by Order XIX. r. 3, "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim." By Order XXI. r. 17, "Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." Where a company in liquidation recovered in an action of tort damages which were less in amount than the defendant was entitled to recover upon a counterclaim in the action, the court refused to put this rule in force, as it would enable the defendant to be paid in full to the injury of the other creditors of the company (*r*).—The distinction between a set-off, strictly so called under the former statutes of set-off, and a counterclaim, is that the former applied to mutual debts only and was pleaded by way of answer to a claim of debt; while the latter is treated as a cross action to be decided independently of the cause of action to which it is pleaded (*s*).

Set-off and counterclaim under the Judicature Acts.

Distinction of set-off and counterclaim.

A defendant must plead a set-off or counterclaim in order to avail himself of it in an action; and the court on the application

Pleading set-off or counterclaim.

(*r*) *Prov. Bill-Posting Co. v. Lee Moor Iron Co.* (1901), 78 L. J. K. B. 702; (1909) 2 K. B. 344.

(*s*) *Gathercole v. Smith* (1841), 50 L. J. Q. B. 681; 7 Q. B. D. 626; *McGovern v. Middleton* (1883), 52 L. J. Q. B. 355;

11 Q. B. D. 464; *Westcott v. Bevan* (1891), 60 L. J. Q. B. 536; (1891) 1 Q. B. 774; *Reg. v. City of London Ct.* (1851), 60 L. J. Q. B. 575; (1891) 2 Q. B. 71.

PART IV.

Pleading to
set-off.Set-off
arising after
action.Set-off
matter of
procedure.

of the plaintiff has a discretion to refuse permission to plead it (*t*). The defendant is not bound to avail himself of it in the action; he may reserve it for a separate cross action, or for a defence to a subsequent action (*u*). And in an action upon a judgment the defendant may plead a set-off, which he might have pleaded in the original action (*x*). And a defendant may plead a set-off in an action for a debt, though he contracted to pay in ready money (*y*).—The subject of a set-off or counterclaim must be a debt or claim for which an action will lie; and not a claim which is enforceable only by attachment, or by summary proceedings, or by leave of the court (*z*). And the debt or claim must continue due at the time of trial (*a*).—The plaintiff must reply to a plea of set-off or counterclaim as if pleading to an original action (*b*): as that he has paid the debt (*c*); that the debt was incurred during infancy (*d*); that the debt was barred by the statute of limitation (*e*); or that after action brought defendant became bankrupt and the set-off vested in his trustee (*f*); or plead to the matter of the defendant's counterclaim, a counterclaim in respect of a cause of action arising after the issue of the writ, but arising at the same time and out of the same transaction as the counterclaim of the defendant (*g*).—Under the Judicature Acts a defendant may plead a set-off or counterclaim which arises after the commencement of the action; and the plaintiff may reply defences to it which arise after the plea, as payment, the statute of limitation, or bankruptcy (*h*).—The set-off of mutual debts and counterclaims are matters of procedure only, and a set-off according to the procedure of a foreign court cannot be pleaded as a matter of right in an action brought in the courts of this country (*i*).

(*t*) Ord. XIX. rr. 2, 3; *Beddall v. Maitland* (1881), 50 L. J. C. 401; 17 Ch. D. 14; *Glegg v. Webb* (1882), 51 L. J. C. 815; 21 Ch. D. 502; *A'ey and Gaden Ro. v. Greenhall* (1895), 65 L. J. C. 99; (1896) 1 Ch. 19.

(*u*) *Stanton v. Styles* (1850) 19 L. J. Ex. 336; 5 Ex. 578; *Baker v. Alexander* (1865), 35 L. J. C. P. 217.

(*x*) *Jenner v. Morris* (1861), 30 L. J. C. 361; 3 De G. F. & J. 45.

(*y*) *Eland v. Kere* (1801), 1 East, 375; *Croft v. Rickett* (1810), 2 M. & S. 510. See *Curke v. Fell* (1833), 2 L. J. K. B. 81; 4 B. & Ad. 407.

(*z*) *Field v. Bezanet* (1873), 2 L. J. K. B. 193; 5 B. & Ad. 357; *Birmingham Lakes Co. v. Smith* (1880), 49 L. J. C. 251; 13 Ch. D. 506; *Ex p. Pelly* (1882), 21 Ch. D. 492.

(*a*) *Dowdy v. Powell* (1838), 7 L. J. Ex. 154; 3 M. & W. 442; *Eyton v. Littledale* (1819), 18 L. J. Ex. 364; 4 Ex. 159.

(*b*) Ord. XIX. rr. 15; Ord. XXIV. r. 1.

(*c*) *Eyton v. Littledale* (1849), 18 L. J. Ex. 364; 4 Ex. 159.

(*d*) *Raulen v. Rawley* (1876), 45 L. J. Q. B. 675; 1 Q. B. D. 460.

(*e*) *Chapple v. Du ston* (1830), 1 Cr. & J. 1; *Walker v. Clements* (1850), 15 Q. B. 1046.

(*f*) *New Quebrada Co. v. Carr* (1869), 38 L. J. C. P. 283; L. R. 4 C. P. 651.

(*g*) *Tke v. Andrews* (1882), 51 L. J. Q. B. 281; 8 Q. B. D. 428.

(*h*) Ord. XXIV. rr. 1-3; *Beddall v. Maitland* (1881), 50 L. J. C. 401; 17 Ch. D. 174.

(*i*) *Meyer v. Dresser* (1864), 33 L. J.

A set-off can be pleaded only where the debts or claims are between parties in the same right (*k*): but the assignee of a debt originally due from his creditor to a third person, may set it off in an action brought by his creditor to recover his own personal debt (*l*). In an action for a debt due to the plaintiff solely, the defendant could not plead at law a set-off of a joint debt of the plaintiff and another, but might do so in equity, and this rule now prevails, where by reason of a course of dealing it appeared that joint credit had been given (*m*); but he may plead a set-off of a debt for which the plaintiff is severally liable as well as jointly with others; as a joint and several promissory note, or a joint and several bond of the plaintiff (*n*). And in an action for a several debt, the defendant cannot plead a set-off of a debt due to him and another jointly (*o*); but if sued solely for a joint debt of himself and another, he may plead a set-off of a debt due to them jointly from the plaintiff (*p*); and if he contracted as surety only for the other, he may set off a debt due from the plaintiff to the co-debtor which the latter could set off in reduction of the principal debt (*q*). Upon the death of one of joint debtors or creditors the debt accrues to the survivor, and may then form the subject of set-off in respect of an originally several debt of the survivor (*r*). -

Where several plaintiffs join in suing for a joint claim, or under Order XVI. r. 1, the defendant may set up separate counterclaims against each plaintiff (*s*). And where in an action any person is improperly or unnecessarily joined as a co-plaintiff, the defendant may obtain the benefit of a set-off or counterclaim by establishing it against the other parties (*t*). And a defendant may set up a "counterclaim which raises questions between himself and the plaintiff along with any other persons" who would be defendants

CHAP. XII.
Parties to
set-off.

Parties to
counterclaim.

C. P. 289; 16 C. B. N. S. 646; *South African Rep. v. Compagnie Franco-Belge* (1897), 66 L. J. C. 717; (1897) 2 Cn. 487. See *Mactharlane v. Norris* (1862), 31 L. J. Q. B. 215; 2 B. & S. 783.
(*l*) *Freeman v. Lomas* (1851), 20 L. J. C. 561; 9 Hare, 113; *Middleton v. Pollock* (1875), 41 L. J. C. 584; L. R. 20 Eq. 29; *Mackintosh v. Carington* (1878), 48 L. J. C. P. 179; 4 C. P. D. 28.
(*l*) *Bennett v. White* (1910), 79 L. J. K. B. 1143; (1910) 2 K. B. 613.
(*m*) *Fulham v. Noble* (1817), 3 Mer. 594; *Arnold v. Bainbridge* (1853), 23 L. J. Ex. 59; 9 Ex. 153. See *Fletcher v. Dycke* (1787), 2 T. R. 414.

(*n*) *Owen v. Wilkinson* (1858), 28 L. J. C. P. 3; 5 C. B. N. S. 526.
(*o*) *Muddleton v. Pollock* (1875), 44 L. J. C. 618; L. R. 20 Eq. 515; *Exp. Murre* (1879), 49 L. J. Bk. 9; 12 Ch. D. 491.
(*p*) *Stackwood v. Dunn* (1812), 12 L. J. Q. B. 3; 3 Q. B. 822.
(*q*) *Becherouse v. Lewis* (1872), 41 L. J. C. P. 171; L. R. 7 C. P. 372.
(*r*) *Slipper v. Stidmore* (1791), 5 T. R. 493; *French v. Audrade* (1796), 6 T. R. 582.
(*s*) *Manchester, S. & L. Ry. v. Brooks* (1877), 46 L. J. Ex. 214; 2 Ex. D. 213.
(*t*) Ord. XVI. r. 3.

PART IV.

Set-off with
agents.

to the counterclaim if enforced by cross action, by summoning such persons to appear and serving them with the counterclaim (*u*).

Where a contract is made through an agent for an undisclosed principal, the agent, having authority to act in his own name as principal, may be identified with the principal for the purpose of set-off; as where an agent has been intrusted with the possession and apparent ownership of goods for the purpose of selling them in his own name, and the buyer contracts with him in faith of his being the real owner, in an action by the principal for the price, the buyer may set off a debt of the agent that has accrued due to him before receiving notice of the agency (*x*). But if the buyer had knowledge, or may be inferred to have had knowledge from having the means of knowledge, of the agency he would be precluded from asserting the set-off (*y*). The set-off in such cases was allowed by an equitable application of the statute, though the debts are not strictly "mutual debts" within the words of the statute (*z*). But in the case of the bankruptcy of the agent, the settlement with his trustee by taking an account of mutual credits is not admissible as against the principal (*a*). In an action by the agent, the debtor *primâ facie* cannot set off debts due from the principal, because they are not mutual debts between plaintiff and defendant (*b*). But if the agent is suing, wholly or partly, merely as trustee for the principal, to the extent that the latter is beneficially interested in the action, debts due from him may be set off (*c*).—Partners as agents for the firm are within the same principle; and if one of the partners is allowed by the others to deal in his own name as principal in a partnership matter, the person so dealing with him without notice that it is a partnership contract may set off a separate debt due from that partner against the claim of the firm (*d*); though, except in such circumstances, a separate debt of one of the partners cannot be set off in an action by the firm (*e*). And an agreement with one of the partners to set off

Partners.

(*u*) Ord. XXI. rr. 11—15; *Finness v. Booth* (1876), 46 L. J. C. 112; 4 Ch. D. 586; *Harris v. Gamble* (1877), 46 L. J. C. 768; 6 Ch. D. 748; *Central African Trading Co. v. Grove* (1879), 48 L. J. Ex. 570.

(*x*) *George v. Clagett* (1797), 7 T. R. 359; 2 Sm. L. C. 135; *Rabone v. Williams* (1785), *ibid.* n. (a).

(*y*) *Baring v. Corrie* (1818), 2 B. & Ald. 137.

(*z*) *Carr v. Houchcliffe* (1825), 4 L. J. O. S. K. B. 5; 4 B. & C. 517.

(*a*) *Turner v. Thomas* (1871), 40 L. J. C. P. 271; L. R. 6 C. P. 610.

(*b*) *Isberg v. Bowden* (1853), 22 L. J. Ex. 322; 8 Ex. 852; *Attwood v. Attwood* (1853), 22 L. J. Q. B. 287; 2 E. & B. 23.

(*c*) See *post*, p. 741.

(*d*) *Gordon v. Ellis* (1816), 15 L. J. C. P. 178; 2 C. B. 821; *Spure v. Cass* (1850), 39 L. J. Q. B. 249; L. R. 5 Q. B. 656.

(*e*) *France v. White* 1836, 6 L. J. C. P. 27; 6 Bing. N. C. 33.

his separate debt without the consent of the other partners, would be void as being a fraud on the partnership (*f*). CHAP. XII.

These principles were applied at the common law in actions upon debts due to or by a married woman in which the husband might sue or be sued in his own name, or might be joined with the wife as plaintiff or defendant; in the former case a plea of set-off for debts due from himself only, in the latter a plea for debts chargeable against himself and wife was available; but both classes of set-off could not be pleaded in the same action (*g*). By the Married Women's Property Act, 1882, s. 1, a married woman is rendered capable of suing and being sued in all respects as if she were a *feme sole*; and when made a sole party under this section, a debt of the husband cannot be pleaded by way of set-off (*h*). In an action in which husband and wife were joined as co-defendants a counterclaim was permitted by them, claiming both for money due to the wife and for goods belonging to the husband (*i*). Set-off by and against husband and wife.

The courts of common law, in applying the statutory defence of set-off in an action, regarded legal debts only (*k*), but the Court of Chancery permitted a set-off against debts, of equitable interests which might be held in legal debts; and this rule by force of s. 25 of the Judicature Act is now of general application. Thus in an action by a trustee on behalf of a *cestui que trust* of the debt sued for, the defendant may set off debts due to him from the *cestui que trust* (*l*); as in the case of the holder of a bill suing, wholly or partly, on behalf of the drawer or indorser, debts of the latter to the defendant are available for set-off (*m*). But in an action by or against a trustee, as such, a debt in his own right cannot be made the subject of set-off (*n*); and a defendant sued in his own right cannot set off debts due to him as trustee for another; as bills which he holds merely as trustee or agent for collection (*o*); or costs upon which his solicitor Set-off in equity. Trustees.

f *Pacey v. Fynney* (1871), 40 L. J. C. 103; L. R. 12 Eq. 69. See *Kinnerley v. Hasack* (1809), 2 Taunt. 170.

g *Barrington v. Moss* (1830), 8 L. J. O. S. K. B. 287; 10 B. & C. 558; *Jones v. Colbeckton* (1873), 12 L. J. Q. B. 221; L. R. 8 Q. B. 501.

(*h*) See *ante*, p. 396.

(*i*) *Hobson v. Machi* (1878), 17 L. J. C. 604; 8 Ch. D. 569.

(*k*) *Tucker v. Tucker* (1833), 2 L. J. K. B. 143; 1 B. & Ad. 715.

(*l*) *Baikes v. Jarvis* (1903), 72 L. J. K. B. 267; (1903) 1 K. B. 549.

(*m*) *Thornton v. Mannard* (1875), 44 L. J. C. P. 382; L. R. 10 C. P. 695.

(*n*) *Middleton v. Pollock* (1875), 44 L. J. C. 584; L. R. 20 Eq. 29; *Richardson v. Stormont, Todd & Co.* (1900), 69 L. J. Q. B. 369; (1900) 1 Q. B. 701.

(*o*) *London and Bombay Bk. v. Navya-wary* (1872), 12 L. J. C. 329; L. R. 15 Eq. 93.

Part IV.
Set-off in the
administration
of trusts.

has a lien (*p*). And this rule prevails in the case of an executor, although he is beneficially entitled to the amount due to him in the character of executor (*q*). In the administration of trusts, as between trustee and *cestui que trust*, the latter can claim nothing out of the estate until he has paid what he owes, and his debts to the estate may be set off against him; but this liability is only in respect of debts due from him personally to the estate (*r*). In the event of his bankruptcy the trustee in bankruptcy can claim only subject to the same set-off (*s*). Where a person is entitled to the immediate transfer of a fund for his own benefit from a bare trustee, he will be treated generally as entitled in his own right for the purpose of set-off; but upon grounds of convenience the court will not inquire into a trust and take the accounts, to ascertain the rights of a *cestui que trust* and the amount due to him, merely for the purpose of establishing a set-off (*t*). Where the debt has been satisfied by a composition in bankruptcy there is no right of set-off against a further portion of the estate coming to the debtor in respect of the unsatisfied part of the debt (*u*). The same principle was applied in the winding-up of an insolvent company where a debenture holder's dividend was retained to satisfy his liability for damages for misfeasance (*x*).

Set-off by or
against
assignee of
debt.

Upon assignment of a debt, the remedy having been within the exclusive jurisdiction of the Court of Chancery, the assignee took subject to all the equities existing between the debtor and the assignor at the date of the assignment, including a right of set-off; and the assignee was bound by equities subsequently arising between the debtor and the assignor unless he had given notice to the debtor of his rights under the assignment, from which date the assignee was considered as the creditor in equity for the purpose of set-off; but the notice of the assignment would be in-

(*p*) *Ex p. O'leland* (1867), 36 L. J. Bk. 45; L. R. 2 Ch. 808.

(*q*) *Middleton v. Pollock* (1875), 44 L. J. C. 584; L. R. 20 Eq. 29.

(*r*) *Conway v. Williams* (1816), 15 L. J. Ch. 204; affg. (1844), 13 L. J. C. 461; 3 Ha. 539; *Re Taylor* (1891), 63 L. J. C. 424; (1894) 1 Ch. 671; *Re Bruce* (1908), 78 L. J. C. 56; (1908) 2 Ch. 682. See *Hallett v. Hallett* (1879), 49 L. J. C. 61; 13 Ch. D. 232.

(*s*) *Jones v. Mossop* (1844), 13 L. J. C. 470; 3 Ha. 568; *Re Watson* (1896), 65 L. J. C. 553; (1896) 1 Ch. 925.

(*t*) *Jones v. Mossop* 1844, 13 L. J. C. 470; 3 Ha. 568; *Freeman v. Lewis* (1851), 20 L. J. C. 564; 9 Ha. 109; *Middleton v. Pollock* (1875), 44 L. J. C. 584; L. R. 20 Eq. 29; *Ex p. Morier* (1879), 49 L. J. Bk. 9; 12 Ch. D. 191.

(*u*) *Re Binns* (1896), 65 L. J. C. 830; (1896) 2 Ch. 584; *Re Sewell* (1909), 78 L. J. C. 432; (1909) 1 Ch. 806.

(*x*) *Re Leeds and Hanley Theatre* (1901), 73 L. J. C. 553; (1901) 2 Ch. 45; S. P. *Rowe's Trustee's claim* (1905), 75 L. J. C. 23; (1906) 1 Ch. 1.

operative where there was an express agreement between the debtor and assignor giving the former a right to set-off notwithstanding the assignment (*g*). — A surety upon payment of the debt is entitled to an assignment of the securities of the creditor against the principal debtor, and may reduce the principal sum payable by a set-off of money due to himself from the creditor (*z*), or assert the same right of set-off against the creditor as is possessed by the principal debtor (*a*).

CURR. XII.

Set-off by surety.

The Statute of Set-off (2 Geo. 2, c. 22, s. 3, in terms provided, "if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other" (*b*). But if either party sues or is sued as executor or administrator, debts due from or to him in his own right cannot be set off; and if either party sues or is sued in his own right, debts due from or to him as executor or administrator cannot be set off; unless the estate has been cleared of all prior debts and charges so that the executor or administrator has become entitled to the clear residue (*c*). The debt sued on, and the debt sought to be set off must have accrued in the lifetime of the deceased, otherwise there is no mutuality within the meaning of the enactment, and consequently no right of set-off (*d*). In the case of an insolvent estate, the mutual credit clause, which is more far-reaching than the Statute of Set-off, is introduced by sect. 10 of the Judicature Act, 1875 (*e*), and the rule has no application where the insolvent estate is being administered in bankruptcy under sect. 125 of the Bankruptcy Act, 1883 (*f*). — By Order XVIII.

Set-off by and against executors and administrators.

(*g*) *Watson v. Mid-Wales Ry.* (1867), 36 L. J. C. P. 285; L. R. 2 C. P. 593; *Maddison v. Pollack* (1875), 41 L. J. C. 584; L. R. 20 Eq. 29; *Ex p. Thors* (1881), 53 L. J. C. 1008; 25 Ch. D. 587; *Christie v. Taunton, Deland, Lam & Co.* (1893), 62 L. J. C. 385; (1893) 2 Ch. 175; *Reynold v. White* (1910), 79 L. J. K. B. 1133; (1910) 2 K. B. 613.

(*z*) *Ex p. Stephens* (1805), 11 Ves. 24; *Fulham v. Noble* (1817), 3 Mer. 621; *Ex p. Barrett* (1865), 34 L. J. Bk. 41. (*a*) *Hamp v. Jones* (1840), 10 L. J. C. 258; *Buckerraise v. Lewis* (1842), 41 L. J. C. P. 171; L. R. 7 C. P. 372; *Re Watson* (1896), 65 L. J. C. 553; (1896) 1 Ch. 925. See *Murphy v. Glass* (1869), L. R. 2 P. C. 408.

(*b*) See *ante*, p. 736.

(*c*) *Bishop v. Church* (1748), 3 Atk. 691; *Taylor v. Taylor* (1875), 41 L. J. C. 718; L. R. 20 Eq. 155; *Maddison v. Pollack* (1875), 41 L. J. 584; L. R. 20 Eq. 29; *Ex p. Morier* (1879), 48 L. J. Bk. 9; 12 Ch. D. 491.

(*d*) *Rees v. Watts* (1855), 25 L. J. Ex. 30; 11 Ex. 410; *Mordall v. Thellusson* (1856), 6 E. & B. 976; *Newell v. Nat. Prov. Bk.* (1876), 45 L. J. C. P. 285; 1 C. P. D. 196.

(*e*) *Re Smith* (1883), 22 Ch. D. 586; 52 L. J. C. 411; *Re Girdney* (1908), 77 L. J. C. 428; (1908) 1 Ch. 804; *Re McMahon* (1899), 68 L. J. C. 112; (1908) 1 Ch. 173.

(*f*) *Watkins v. Lindsay* (1898), 67 L. J. Q. B. 262.

PART IV.
Joinder of
claims by or
against
executor.

Set-off in
administra-
tion of
assets.

Set-off in
bankruptcy.

r. 5, "Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator" (*q*). This rule does not apply to counterclaims, and therefore the defendant cannot set up claims against the plaintiff personally and also as executor (*h*).

In the administration of assets an executor may retain a pecuniary legacy in payment of a debt due by the legatee to the testator, if the debt is immediately payable (*i*); but not of a debt of the legatee to the executor in his own right (*k*); and an assignee of the legacy can claim only subject to the debts of the legatee to the testator, and even including debts barred by the statute of limitations (*l*). But if the executor has set apart the legacy and retains the amount merely as trustee for the legatee, he cannot afterwards set off a debt of the latter to the estate (*m*). In the case of bankruptcy of the debtor before the legacy is due, the executor must pay the legacy in full to the trustee in bankruptcy and prove for the debt; nor can he retain it for dividends until a dividend is declared (*n*). And if the debtor has made a valid composition with his creditors the executor can only retain for the amount of composition (*o*).

By the Bankruptcy Act, 1883, s. 38 (repeating previous enactments to the same effect), "where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall have been made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is

(*q*) See *Hall v. C.*, *Padwick v. Scott* (1876), 45 L. J. C. 350; 2 Ch. D. 714.

(*h*) *Macdonald v. Carington* (1878), 48 L. J. C. P. 179; 4 C. P. D. 28.

(*i*) *Campbell v. Sanford* (1831), 2 Cl. & F. 429; *Re Watson* (1896), 65 L. J. C. 553; (1896) 1 Ch. 925; *Re Abrahams* (1908), 77 L. J. C. 578; (1908) 2 Ch. 69.

(*k*) *Freeman v. Lomas* (1851), 20 L. J. C. 564; 9 Hare, 113; *Maddleton v. Pollock* (1875), 44 L. J. C. 584; L. R. 20 Eq. 29.

(*l*) See *Re Knapman* (1880), 50 L. J. C. 629; 18 Ch. D. 300; *Re Akerman* (1891), 61 L. J. C. 34; (1891) 3 Ch. 212; *Re*

Bruce (1808), 78 L. J. C. 56; (1908) 2 Ch. 682; *Re Sewell* (1909), 78 L. J. C. 432; (1909) 1 Ch. 806. See *Re Goy & Co.* (1900), 69 L. J. C. 481; (1900) 2 Ch. 119.

(*m*) *Ballard v. Marsden* (1880), 49 L. J. C. 611; 14 Ch. D. 374.

(*n*) *Cherry v. Boulter* (1839), 9 L. J. C. 118; 4 My. & Cr. 442; *Re Hodgson* (1878), 48 L. J. C. 52; 9 Ch. D. 673; *Re Bunn* (1896), 65 L. J. C. 830; (1896) 2 Ch. 584.

(*o*) *Re Orpen* (1880), 50 L. J. C. 25; 16 Ch. D. 202.

CHAP. XII.

due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him." By the Judicature Act, 1875, s. 10, the section is to be applied in the administration of insolvent estates of deceased persons (*p*); and in the winding-up of insolvent companies (*q*). Before the section can be applied it is essential that there should have been mutuality of dealing between the parties (*r*). But the section overrides any agreement to the contrary which may be existing between the parties (*s*). The section discharges the debts and credits in the course of administration, leaving the balance only payable; but it is also available as a plea of set-off in an action by the trustee of the bankrupt (*t*). And a transferee of the bankrupt estate takes it subject to such set-off in account (*u*). The section applies between parties in their mutual rights: it is not applicable where either party claims as trustee for another (*x*); nor is it applicable in the case of dealing with an agent as apparent owner, as against the claim of the principal (*y*); nor to mutual debts with joint parties one of whom becomes bankrupt (*z*); and a creditor is not entitled to set off a sum payable by him to the trustee, *quâ* trustee and not as representing the debtor's estate, against a debt due by him to the debtor (*a*). The credit must be given before notice of an act of bankruptcy, by the express terms of the proviso of the section, as to credits given to the bankrupt, and by necessary impli-

Parties to credits.

Notice of bankruptcy.

- (*p*) *Re Smith* (1883), 22 L. J. C. 411; 22 Ch. D. 586; *Watkins v. Lindsay* (1898), 67 L. J. Q. B. 362; *Re McMahon* (1899), 69 L. J. C. 142; 1899 1 Ch. 173; *Re Goding* (1909), 77 L. J. C. 128; (1908) 1 Ch. 801.
 (*q*) *New Mersey Steel Co. v. Naylor* (1881), 53 L. J. C. 497; 9 Ap. Ca. 434; *Eberle's Hotel Co. v. Jones* (1887), 56 L. J. Q. B. 278; 18 Q. B. D. 459.
 (*r*) *Re Mid-Kent Factory* (1896), 65 L. J. C. 250; (1896) 1 Ch. 567. See *Ex p. Lewis* (1896), 65 L. J. Q. B. 144; (1896) 1 Q. B. 219.
 (*s*) *Ex p. Jackson* (1877), 6 Ch. D. 350.

- (*t*) *Peat v. Jones* (1881), 51 L. J. Q. B. 128; 8 Q. B. D. 117.
 (*u*) *West v. Baker* (1875), 45 L. J. Ex. 113; 1 Ex. D. 41.
 (*x*) *Forster v. Wilson* (1843), 13 L. J. Ex. 209; 12 M. & W. 101; *De Mattos v. Saunders* (1872), L. R. 7 C. P. 750.
 (*y*) *Tarner v. Thomas* (1871), 40 L. J. C. P. 271; L. R. 6 C. P. 610; *Ex p. Ray* (1877), 47 L. J. Bk. 36; 7 Ch. D. 10.
 (*z*) *New Quebrada Co. v. Carr* (1869), 38 L. J. C. P. 283; L. R. 4 C. P. 651.
 (*a*) *Ex p. Pankhall Goldfield, Ltd.* (1909), 78 L. J. K. B. 351; (1909) 1 K. B. 430.

PART IV.

Credits and
dealings
admissible
to set-off.

Deposit or
possession of
property.

ation as to credits received from the bankrupt (*b*). Credits given or mutual dealings after the date of the receiving order are not available for set-off within the section (*c*).

The section applies to any claims arising out of mutual credits or dealings which become capable of set-off: as a claim for the price of goods sold upon a credit which has not expired before the bankruptcy (*d*); or a claim for not accepting a bill in payment for goods sold (*e*); or claims upon the acceptance or indorsement of bills which are running at the time of the bankruptcy, and which are then in the hands of the parties, or which they have been compelled to take up since (*f*); but bills accepted or indorsed since the bankruptcy cannot be set off (*g*). The acceptance or indorsement of an accommodation bill is a credit which may be set off, when the party has been compelled to pay the holder after the bankruptcy (*h*). The notes of a banker may be brought into account against him in his bankruptcy; provided they were taken without notice of an act of bankruptcy, and though with notice that he had stopped payment (*i*). The purchase-money payable in respect of land may be set off against a claim for work done in the course of the bankrupt's trade prior to the date of the receiving order (*k*).

—A mere deposit or possession of property is not a credit or dealing within the statute; nor does a mere balance of mutual credit give the creditor a lien upon property of the debtor which is in the possession of the creditor at the time of the bankruptcy (*l*). But the set-off of mutual credits, leaving the balance only payable, discharges the debts to that extent, and therefore discharges to the same extent any lien or charge upon property (*m*). A deposit of goods or securities with authentic

(*b*) *Elliott v. Tappin* (1881), 51 L. J. P. C. 1; 7 Ap. Ca. 79.

(*c*) *Ex p. Mant* (1900), 69 L. J. Q. B. 297; 1900 1 Q. B. 546; *Ex p. Norrell* (1910), 79 L. J. K. B. 610; (1910) 1 K. B. 562.

(*d*) *Atkinson v. Elliott* (1797), 7 T. R. 378.

(*e*) *Gibson v. Bell* (1833), 2 L. J. C. P. 242; 1 Bing. N. C. 743.

(*f*) *Collins v. Jones* (1830), 10 B. & C. 777; *Abney v. Currie* (1844), 13 L. J. Ex. 203; 12 M. & W. 751.

(*g*) *Ex p. Ryder* (1871), 40 L. J. Bk. 63; 1 L. R. 6 Ch. 413.

(*h*) *Russell v. Bell* (1842), 8 M. & W. 277; *Buttleson v. Tommis* (1845), 1 C. B. 389.

(*i*) *Hawkins v. Whitten* (1830), 8 L. J. O. S. K. B. 135; *Forster v. Wilson* (1813), 13 L. J. Ex. 209; 12 M. & W. 191.

(*k*) *Ex p. Norrell* (1910), 79 L. J. K. B. 610; 1910 1 K. B. 562.

(*l*) *Rose v. Hart* (1818), 8 Taunt. 499; 2 Sm. L. C. 301; *Eberle's Hotel Co. v. Jones* 1887, 56 L. J. Q. B. 278; 18 Q. B. D. 459; *Lord's Trustees v. G. E. Ry.* (1908), 77 L. J. K. B. 611; (1908) 2 K. B. 54; *revid.* on other grounds *non. G. E. Ry. v. Lord's Trustees* (1909), 78 L. J. K. B. 160; (1909) A. C. 109.

(*m*) *Ex p. Backett* (1874), 43 L. J. Bk. 87; 1 L. R. 9 Ch. 293. See *Macfarlane v. Nore* (1862), 31 L. J. Q. B. 215; 2 B. & S. 783.

convert them into money for the use of the owner gives a credit to the agent as to money received under it before notice of an act of bankruptcy; and notice of the bankruptcy revokes the authority, if it is roveable (*n*); but if there was no power to convert into money at the time of the bankruptcy, there is no credit given as to the property within the Act (*o*). Upon this principle a policy of insurance is not a credit or dealing with the insurance company which can be set off before the sum insured falls due; and upon liquidation of the company the then value of the policy cannot be set off against a claim against the policy holder for advances made upon the policy (*p*). The tenancy of a house is a credit or dealing within the section in respect of rent accruing due, which may be set off in account in the bankruptcy of the landlord or of the tenant (*q*). The trustee of a bankrupt tenant having accepted the tenancy for the benefit of the creditors becomes personally liable and entitled, as assignee of the tenancy; and upon the termination of the tenancy by notice to quit the landlord cannot set off rent accrued before the bankruptcy against the claims of the trustee as outgoing tenant, because they are not mutual credits or dealings (*r*).—A tenant having a claim for unliquidated damages upon an agreement of his landlord to put the demised premises in repair was held entitled in the bankruptcy of the landlord to set it off against rent accruing due (*s*). And in an action by the trustee of a bankrupt for the price of goods sold, the buyer may set off a claim for damages for defects and delay in delivery of the goods (*t*); or a claim for damages for fraudulent misrepresentation of the seller which induced the sale (*u*).—In addition to the statutory provision respecting the set-off of mutual debts, the trustee may deduct from the amount of the dividend payable to the proving creditor, or his assignee, any

Unliquidated
damages

(*n*) *Per cur.* *Ross v. Hart* (1818), 8 Trant. 199; 2 Sm. L. C. 301; *Narraj v. Bk. of India* (1868), 37 L. J. C. P. 221; L. R. 3 C. P. 414; *Elbott v. Turpin* (1882), 51 L. J. P. C. 1; 7 Ap. Ch. 79.

(*o*) *Tenny v. Bk. of Bengal* (1836), 1 Moore, P. C. 150; *Astley v. Ginnery* (1869), 38 L. J. C. P. 357; L. R. 1 C. P. 714.

(*p*) *Ex p. Price* (1875), L. R. 10 Ch. 648.

(*q*) *Booth v. Hutchinson* (1873), 42 L. J. C. 192; L. R. 15 Eq. 30.

(*r*) *Albany v. Steers* (1882), 52 L. J. Q. B. 38; 10 Q. B. D. 22. See *Ex p. Hastings* (1893), 62 L. J. Q. B. 628.

(*s*) *Booth v. Hutchinson* (1873), 42 L. J. C. 192; L. R. 15 Eq. 30.

(*t*) *Pent v. Jones* (1881), 51 L. J. Q. B. 138; 8 Q. B. D. 147; *Mersey Steel Co. v. Naylor* (1881), 53 L. J. C. 597; 9 Ap. Ch. 431; *Lee and Chapman's case* (1885), 51 L. J. C. 460; 30 Ch. D. 216.

(*u*) *Jack v. Kipping* (1882), 51 L. J. Q. B. 463; 9 Q. B. D. 113; *Tilley v. Borman* (1910), 79 L. J. K. B. 517; 1910 1 K. B. 715.

PART IV. sum awarded to the trustee to be paid by the creditor in respect of abortive applications in the bankruptcy (x).

Set-off with companies.

Set-off in winding-up.

Set-off with contributories.

In actions by or against public companies, so long as they are carrying on business, set-off or counterclaim may be pleaded according to the same rules as in actions by or against private persons; whether the party sued or suing is a shareholder or not, and whether he is charged with calls upon shares or other debts (y).—Upon the winding-up of a company, whether by order of the court or by voluntary resolution, a liquidator is appointed to carry on the business for the purpose of winding it up and distributing the assets in payment of creditors; consequently debts afterwards incurred by or against the liquidator cannot be set off against debts due to or from the company before the winding-up, because they are not in mutual rights (z). But in an action by the liquidator for debts due to the company before winding up, debts due from the company before winding up may be set off, as in bankruptcy (a). And by the Judicature Act, 1875, s. 10, the mutual credit clause of the Bankruptcy Act is imported in the winding-up of insolvent companies (b). Where a company in liquidation recovered damages for a tort committed by the defendant, who counterclaimed successfully for a debt due to him from the company under a contract, the court refused to allow a set-off under the power given by Order XXI. r. 17 (c).—The case of a contributory in the winding up is regulated by the Companies Consolidation Act, 1908, s. 165, which provides that the court may make an order on any contributory for the payment of any moneys due from him, exclusive of calls; and it may, “in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit: provided that when all the

(x) *Ex p. Off. Rec., Re Mayer* 1 Q. B. 76 L. J. K. B. 1086; 1907 2 K. B. 899.

(y) *Jessel, M. R., Barnett's case* (1875), 44 L. J. C. 233; L. R. 19 Eq. 450.

(z) *Re Whitehouse* (1878), 47 L. J. C. 801; 9 Ch. D. 594; *Gill's case* (1879), 48 L. J. C. 744; 12 Ch. D. 755; *Iner Hall Rolling Mills Co. v. Douglas Forge Co.* (1881), 51 L. J. Q. B. 238; 8 Q. B.

D. 179.

a) See *ante*, p. 745.

b) *Mersey Steel Co. v. Naylor* (1884), 53 L. J. C. 497; 9 Ap. Ca. 434; *Re Auriferous Properties, Ltd.* (No. 1) (1898), 67 L. J. C. 367; 1898 1 Ch. 691.

(c) *Pyor, Bill-posting Co. v. Low Moor Iron Co.* (1909), 78 L. J. K. B. 702; (1909) 2 K. B. 314.

creditors of any company are paid in full, any moneys due to any contributory from the company may be set off against any subsequent call or calls" (*d*). Until all the creditors are paid in full a contributory can claim no set-off against calls upon shares, which must be paid in full before he can claim a dividend with the other creditors (*e*). And any agreement to the contrary is inoperative in the winding up as against the creditors (*f*). This rule applies to calls made before the order for winding up (*g*). It applies whether the winding-up is voluntary or not (*h*); and whether the company is limited or unlimited (*i*); and under the same rule there can be no counterclaim by a contributory in an action for calls (*k*). An assignee from the contributory of debentures or debts of the company taking them after the order for winding up is in the same position, and cannot prove against the assets until all calls on the assignor are paid (*l*).

(*d*) *Re Hiram Maxim Lamp Co.* (1902), 72 L. J. C. 18; (1903) 1 Ch. 70.

(*e*) *Grimell's case* (1866), 35 L. J. C. 754; L. R. 1 Ch. 536; *Miller's case* (1884), 54 L. J. C. 227; *Re Auriferous Properties, Ltd.* (No. 2) (1898), 67 L. J. C. 571; (1898) 2 Ch. 428. See *Gibbs and West's case* (1870), 39 L. J. C. 667; L. R. 10 Eq. 312.

(*f*) *Black's case* (1873), 42 L. J. C. 404; L. R. 8 Ch. 254.

(*g*) *Barnett's case* (1873), 41 L. J. C. 233; L. R. 19 Eq. 419.

(*h*) *Re Whitehouse* (1878), 47 L. J. C.

801; 9 Ch. D. 595; *Hoby v. Birch* (1889), 59 L. J. Q. B. 247.

(*i*) *Ex p. Beauchite* (1879), 48 L. J. C. 163.

(*k*) *Government Security Inv. Co. v. Dempsey* (1880), 50 L. J. C. P. 159.

(*l*) *Ex p. Mackenzie* (1868), 38 L. J. C. 199; L. R. 7 Eq. 210; *Ex p. James* (1869), 38 L. J. C. 616; L. R. 8 Eq. 225. See *Ex p. Strang* (1870), 39 L. J. C. 611; L. R. 5 Ch. 492; *Lee and Chapman's case* (1885), 51 L. J. C. 460; 30 Ch. D. 216; *Re Gay & Co.* (1900), 69 L. J. C. 481; (1900) 2 Ch. 149.

CHAPTER XIII.

BANKRUPTCY.

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THE discharge of debts and liabilities in bankruptcy is now regulated by the Bankruptcy Act, 1883 (amended by the Bankruptcy Act, 1890), which enacts as follows:—Sect. 5, “The court may on a bankruptcy petition being presented either by a creditor or by the debtor make an order, in this Act called a receiving order, for the protection of the estate.” Sect. 9 (1), “On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor; and thereafter no creditor in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor, or shall commence any action or other legal proceeding, unless with the leave of the court”: (2) “But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security.” And, sect. 10 (2), “The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor.”

Sect. 18. The creditors may, by a majority in number representing three-fourths in value of all the creditors who have proved, accept a composition or scheme of arrangement, subject

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Adjudication
of bank-
ruptcy.

to the approval of the court; which shall be binding on all the creditors as to any debts due to them from the debtor and provable in bankruptcy.—Sect. 20. In default of any such composition or scheme, “the court shall adjudge the debtor bankrupt; and thereupon the property of the debtor shall become divisible among his creditors and shall vest in a trustee.” By sect. 21, provision is made for the appointment of some fit person to fill the office of trustee of the property of the bankrupt; in whom by sect. 54 the property of the bankrupt shall vest on appointment.

Order of
discharge.

Sect. 28 (1), “A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge”; which the court, upon consideration of the bankrupt’s conduct and affairs, may grant or refuse absolutely, or suspend for a specified time, or grant subject to conditions with respect to future earnings or income or property of the bankrupt. Sect. 28 (2), “An order of discharge shall release the bankrupt from all other debts provable in bankruptcy”; except those specified in the section, namely, debts on recognizance, debts chargeable at the suit of the crown or the public revenue, or on bail bonds; and “an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party.” By the Act, 1890, s. 10, “an order of discharge shall not release the bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or as a co-respondent in a matrimonial cause.”—Sect. 30 (3), “An order of discharge shall be conclusive evidence of the bankruptcy and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence.”—An order of discharge under the Act, if pleaded, is conclusive in an action by a creditor for a provable debt, though the creditor had no notice of the bankruptcy proceedings (a); and though his name was fraudulently

Pleading
order of
discharge.

(a) *Heather v. Webb* (1876), 16 L. J. C. P. 89; 2 C. P. D. 1. See *Lewis v. Leonora* (1880), 49 L. J. Ex. 308; 5 Ex. D. 165.

omitted by the debtor from the list of creditors (*b*); the only remedy in such cases being to apply to the court to rescind the order (*c*). If the order of discharge is not pleaded in an action, and judgment consequently obtained against the debtor, it cannot afterwards be pleaded in bar to an action or execution upon the judgment (*d*).

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The debts provable in bankruptcy, which are released by an order of discharge under sect. 30, and which are bound by a composition under sect. 18 (*e*), are further defined in sect. 37, as follows: (1) "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." (2) "A person having notice of any act of bankruptcy available for adjudication against the debtor (*f*) shall not prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice." (3) "Save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy" (*g*).

Debts and liabilities provable.

(4) "An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value." (5) "Any person aggrieved by any estimate made by the trustee may appeal to the court." (6) "If in the opinion of the court the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy." (7) "If in the opinion of the court the value of the debt or liability is capable of being fairly estimated," the court may direct the value to be assessed and the mode in which the assessment shall be made, "and the amount

Estimate of liability.

(*b*) *Elmalie v. Corrie* (1879), 48 L. J. Q. B. 462; 4 Q. B. D. 295; *Wadsworth v. Pickles* (1880), 49 L. J. Q. B. 451; 5 Q. B. D. 470.

(*c*) See Bankruptcy Act, 1883, s. 104 (1).

(*d*) *Todd v. Maxfield* (1826), 6 B. & C. 105; *Ellis v. Melleny* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 236.

(*e*) *Fhnt v. Bernard* (1888), 58 L. J.

Q. B. 53; 22 Q. B. D. 90.

(*f*) See *Ex p. Crossin* (1877), 47 L. J. C. 19; 7 Ch. D. 123; *Hood v. Newby* (1882), 52 L. J. C. 204; 21 Ch. D. 605; *Buckwell v. Norman* (1898), 67 L. J. Q. B. 435; (1898) 1 Q. B. 622.

(*g*) *Scaton v. Deerpur* (Lord) (1895), 64 L. J. Q. B. 430; (1895) 1 Q. B. 853; *Kerr v. Kerr* (1897), 66 L. J. Q. B. 838; (1897) 2 Q. B. 439.

PART IV.

"Liability"
defined.

Contingent
liabilities.

Contingencies
provable.

of the value when assessed shall be deemed to be a debt provable in bankruptcy."—By Sched. 2, r. 21, future debts may be proved as if payable presently "deducting thereout a rebate of interest at the rate of five per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable" (*h*). (8) "Liability shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor; and generally it shall include any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules or assessable only by a jury, or as matter of opinion."

Under the above provisions a contingent debt or liability is deemed to be provable and is released by an order of discharge; unless an order of the court is obtained that it is incapable of being fairly estimated (*i*). And the estimated value of a contingent liability assessed or accepted by the trustee for proof is conclusive of the amount provable; as the estimate of a life annuity, though it exceeded the actual value as afterwards ascertained by the death of the annuitant (*k*). But if the contingency happens before such estimate is made, the provable value is fixed by the event; as in the case of an annuity, upon the death of the annuitant the sum provable is limited to the payments accrued due at the death (*l*). So the liability upon a fire policy was ascertained by a loss happening after the order for winding up the company (*m*). And the liability on a covenant to pay the premiums of a life policy, upon the death happening, was limited to the premiums then paid (*n*).—The contingent liabilities in the following cases have

(*h*) *Ex p. Ador* (1891), 61 L. J. Q. B. 15; (1891) 2 Q. B. 574. See *Ex p. Farquhar* (1896), 65 L. J. C. 587; (1896) 2 Ch. 30.

(*i*) *Hardy v. Fothergill* (1888), 58 L. J. Q. B. 44; 13 App. Cas. 351.

(*k*) *Ex p. Bates* (1878), 48 L. J. C.

113; 11 Ch. D. 914.

(*l*) *Ex p. Pritchard* (1890), 59 L. J. Q. B. 403; 25 Q. B. D. 529.

(*m*) *Macfarlane's claim* (1881), 50 L. J. C. 733; 17 Ch. D. 337.

(*n*) *Ex p. Wardley* (1877), 6 Ch. D. 790.

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been held to be provable: an annuity to a widow during widowhood, which was referred to an actuary for valuation (*o*); a covenant in a separation deed to pay an annuity to the wife, subject to the contingencies of her not living a chaste life, and of a return to cohabitation, and of the marriage being dissolved, which was referred to a jury to find the value (*p*); damages obtained by the petitioner in the Divorce Court (*q*); a covenant for the payment of money out of the estate of the covenantor after his death (*r*); a joint and several covenant of principal and surety to pay a sum of money in certain future instalments, in the bankruptcy of the surety (*s*); the contingent liability of the debtor to a surety for his debt, as the liability of the acceptor to the drawer on an outstanding bill (*t*); the contingent liability of co-sureties for contribution, in the bankruptcy of one of the sureties (*u*); the indemnity impliedly given by the assignee to the assignor of a lease against breaches of the covenants of the lease (*x*); an assignment of after to be acquired property as security for a debt, which operates in law merely as a contract to assign when the property comes into existence (*y*); the liability for the costs of an action after verdict, though before taxation and before signing judgment (*z*).—It must be borne in mind that the category of "debts provable" has been gradually enlarged, and the following cases in which contingent liabilities have been held incapable of being estimated must be read with caution (*a*):—a covenant not to revoke a will (*b*); an undertaking to transfer a certain amount of consols at a future date or contingency, by reason of the uncertainty of value (*c*); a covenant by a husband to assign a reversionary interest of his wife in a sum of consols, such liability being subject to the contingencies of the wife sur-

Contingencies incapable of estimation.

(*o*) *Ex p. Blakemore* (1877), 46 L. J. Bk. 118; 5 Ch. D. 372.

(*p*) *Ex p. Neal* (1880), 14 Ch. D. 579.

(*q*) *Ex p. Bale* (1899), 68 L. J. Q. B. 650; (1899) 2 Q. B. 62.

(*r*) *Barnett v. King* (1890), 60 L. J. C. 148; (1891) 1 Ch. 4.

(*s*) *Ex p. Barwis* (1855), 25 L. J. Bk. 10; 6 De G. M. & G. 762. See *White v. Corbett* (1859), 28 L. J. Q. B. 228; 1 E. & F. 692.

(*t*) *Hooper v. Marshall* (1869), 39 L. J. C. P. 11; L. R. 5 C. P. 4. See *Saunders v. Best* (1864), 34 L. J. C. P. 25; 17 C. B. N. S. 731.

(*u*) *Adkins v. Farrington* (1860), 20

L. J. Ex. 345; 5 H. & N. 586.

(*v*) *Hardy v. Fothergill* (1888), 58 L. J. Q. B. 41; 13 Ap. Ca. 351.

(*y*) *Collier v. Isaacs* (1881), 51 L. J. C. 14; 19 Ch. D. 342.

(*z*) *Ex p. Patecock* (1873), 42 L. J. Bk. 78; L. R. 8 Ch. 68. See *Ex p. Ruffe* (1873), 42 L. J. Bk. 82; L. R. 8 Ch. 997. *Ex p. Lang* (1877), 5 Ch. D. 971.

(*a*) See *Ex p. Ador* (1890), 61 L. J. Q. B. 15; (1891) 2 Q. B. 574.

(*b*) *Robinson v. Cammney* (1883), 52 L. J. C. 440; 23 Ch. D. 285.

(*c*) *Cary v. Dawson* (1869), 38 L. J. Q. B. 360; L. R. 4 Q. B. 568.

PART IV. living and then disagreeing (*d*); a covenant for annual payments to a person so long as he conducted a business with success (*e*); the liability of a husband to pay monthly or weekly alimony under an order of the Divorce Court (*f*); the contingent liability of having to pay costs in a pending action (*g*); the liability of a surety upon a continuing guarantee for goods supplied to a third party, in respect of future supplies (*h*).

Liabilities on bills and notes

The liabilities on bills and notes, whether of maker or acceptor, or of drawer or indorser, are provable and released in bankruptcy (*i*); and on a bill or note payable a certain time after notice (*k*). A creditor holding an accommodation acceptance as security for a debt of the drawer of a less amount may prove in the bankruptcy of the acceptor for the full amount of the bill though he cannot recover dividends to a greater amount than the debt secured (*l*).

Liability of shareholder for calls.

The liability of a shareholder in a company in respect of future calls is provable whether the company is being wound up or not, the rule introduced by sect. 75 of the Companies Act, 1862, being superseded by sect. 10 of the Judicature Act, 1873 (*m*). By the Bankruptcy Act, 1883, s. 55, a bankrupt may be discharged of shares in companies by disclaimer of the trustee; subject to the right given to any person injured by the disclaimer to prove as a creditor of the bankrupt to the extent of the injury (*n*).

Liabilities for unliquidated damages.

"Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise" are not provable in bankruptcy (*o*). The court has no jurisdiction to restrain an action against a bankrupt for such claims; and if joined in an action with claims for provable debts and liabilities the action will be restrained as to the latter only (*p*). A judgment in an action

(*d*) *Kent v. Thomas* (1881), 40 L. J. Ex. 186; L. R. 6 Ex. 312.

(*e*) *Brett v. Jackson* (1869), 38 L. J. C. P. 139; L. R. 4 C. P. 259.

(*f*) *Linton v. Linton* (1885), 54 L. J. Q. B. 529; 15 Q. B. D. 239. See *Kerr v. Kerr* (1897), 66 L. J. Q. B. 838; (1897) 2 Q. B. 439.

(*g*) *Vint v. Hudspeth* (1885), 54 L. J. C. 844; 30 Ch. D. 24.

(*h*) *Boyd v. Robins* (1858), 28 L. J. C. P. 73; 5 C. B. N. S. 597. See *White v. Corbett* (1859), 28 L. J. Q. B. 228; 1 E. & E. 692.

(*i*) *Dignam v. Bailly* (1879), 38 L. J.

Q. B. 218; L. R. 4 Q. B. 376.

(*k*) *Clayton v. Gosling* (1826), 4 L. J. O. S. K. B. 176; 5 B. & C. 360.

(*l*) *Ex p. Newton* (1881), 50 L. J. C. 484; 16 Ch. D. 330.

(*m*) *Re McMahon* (1899), 69 L. J. C. 142; (1900) 1 Ch. 173. See *Rowe's Trustee's claim* (1905), 74 L. J. C. 347; (1905) 1 Ch. 597.

(*n*) *Ex p. United Ordnance Co.* (1899), 68 L. J. Q. B. 993; (1899) 2 Q. B. 579.

(*o*) Sect. 37; ante, p. 753.

(*p*) *Ex p. Baum* (1874), 44 L. J. Bk. 25; L. R. 9 Ch. 673; *Ex p. Harold* (1876), 45 L. J. Bk. 121; 3 Ch. D. 119.

of tort converts the liability into a debt which is provable in a subsequent bankruptcy of the debtor; but a judgment in such action signed after the bankruptcy, though upon a verdict for damages obtained before, is not provable (*q*). A liability in the nature of unliquidated damages, arising by reason of a contract or promise, was first made assessable in bankruptcy, and the amount provable after assessment, by the express enactment of the Bankruptcy Act, 1861, s. 153; and such liability is now provable under the general terms of the Act of 1883 (*r*). The implied indemnity of a tenant against a distress by the superior landlord was held not to be a liability "by reason of any contract or promise" within the Act, 1861, s. 153, and therefore not provable or discharged in bankruptcy (*s*). Where a plaintiff has the election to waive the damages for a wrong independent of contract and claim the proceeds of the wrong as a debt for money received for his use, the claim in the form of a debt becomes provable (*t*); as the claim of a patentee, who waives the damages for an infringement of his patent, to prove for an account of profits as a debt in bankruptcy (*u*).

Debts for money received by wrong.

Debts incurred by fraud or by fraudulent breach of trust are expressly exempted from the effect of an order of discharge or statutory composition in bankruptcy; but the debts are provable for a dividend (*x*). If the creditor has accepted dividends the debtor remains liable only for the unpaid balance of the debt; but if no dividends have been paid the creditor may sue for the whole debt, and the debtor having paid it in full is entitled to dividends upon the debt in place of the creditor (*y*). The court will not restrain an action against a bankrupt for such debt (*z*); but will not allow judgment to be enforced until he has obtained his discharge (*a*). The debt of a firm incurred by fraud is not released by the bankruptcy of the firm; and it may be proved against

Debts incurred by fraud.

(*q*) *Robinson v. Vale* (1824), 2 L. J. K. B. 171; 2 B. & C. 762; *Ex p. Brooke* (1876), 3 Ch. D. 494.

(*r*) *Ante*, p. 753. See *Sharland v. Spence* (1867), 36 L. J. C. P. 230; L. R. 2 C. P. 456; *Robertson v. Goan* (1867), 36 L. J. Ex. 251; L. R. 2 Ex. 396.

(*s*) *Johnson v. Skaffe* (1869), 38 L. J. Q. B. 318; L. R. 4 Q. B. 700.

(*t*) *Parker v. Norton* (1796), 6 T. R. 695. See *note*, p. 55.

(*u*) *Watson v. Holliday* (1883), 52

L. J. C. 543; affirming 1882, 20 Ch. D. 780.

(*x*) See *ante*, p. 752; *Emma Mining Co. v. Grant* (1881), 50 L. J. C. 419; 17 Ch. D. 122; *Hale v. Rowstead* (1882), 51 L. J. Q. B. 255; 8 Q. B. D. 453; *Re Crossley* (1887), 35 Ch. D. 266.

(*y*) *Ex p. Hemming* (1879), 49 L. J. Bk. 17; 13 Ch. D. 163.

(*z*) *Ex p. Coker* (1875), 44 L. J. Bk. 126; L. R. 10 Ch. 652; *Ex p. Hemming* (1879), 49 L. J. Bk. 17; 13 Ch. D. 163.

(*a*) *Ross v. Gutteridge*, 52 L. J. C. 280.

PART IV. the partners jointly and severally, though it was incurred by the fraud of one only (b).

Preferential debts.

Preferential payments in bankruptcy are governed by the Preferential Payments in Bankruptcy Act, 1888. By sect. 1 (1), "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:—(n) All parochial or other local rates and all assessed taxes, land tax, property or income tax, within the limits therein prescribed (c); (b) All wages or salary of any clerk or servant in respect of services rendered during four months before the date of the receiving order (d), not exceeding fifty pounds; (o) All wages of any labourer or workman not exceeding twenty-five pounds in respect of services rendered during two months before the date of the receiving order; (d) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is insufficient; in which case they shall abate in equal proportions between themselves." The Companies (Consolidation) Act, 1908, s. 209, in addition to the foregoing, gives priority to certain debtors of a company over debenture holders with a floating security. And by the Act, 1883, s. 40, subject to the above provisions "All debts proved in the bankruptcy shall be paid *pari passu*."—By the Bankruptcy Act, 1883, s. 42, as amended by the Bankruptcy Act, 1890, s. 28, the power to distrain for rent upon the goods of a bankrupt is available only for six months' rent accrued due prior to the date of the order of adjudication; with the right of proving under the bankruptcy for the surplus due. And by the Preferential Payments in Bankruptcy Act, 1887, s. 1 (4), the preferential debts above mentioned are made a first charge on the goods distrained or the proceeds of sale thereof.

Distress for rent.

Liability of co-debtor or surety of bankrupt.

By the Bankruptcy Act, 1883, s. 30 (4), "An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him" (e). This provision

(b) *Ex p. Adamson* (1878), 47 L. J. Bk. 103; 8 Ch. D. 807; *Cooper v. Prichard* (1883), 52 L. J. Q. B. 526; 11 Q. B. D. 351; *Ex p. Sheppard* (1887), 56 L. J. Q. B. 338; 19 Q. B. D. 84.

(c) *Richards v. Kilderminter Overseers* (1896), 65 L. J. C. 502; (1896) 2 Ch.

212; *Re Heywood* (1897), 67 L. J. C. 25; (1897) 2 Ch. 593.

(d) See *Ex p. Fox* (1886), 55 L. J. Q. B. 288; 17 Q. B. D. 4.

(e) See *Lloyd v. Dimmack* (1877), 47 L. J. C. 398; 7 Ch. D. 398.

applies to a discharge by a composition or scheme of arrangement under sect. 18 (15); the discharge in such cases being effected by operation of law (*f*). But if a creditor agrees to a composition independently of the Act, whereby he releases the debtor, any co-debtor or surety for the same debt is also released; unless the composition contains an express reservation of the rights of the creditor against them (*g*). And a composition deed made by agreement independently of the Act purporting to release the debtor "in like manner as if he had obtained a discharge in bankruptcy," was construed to be an unqualified release without any reserve of remedies, and therefore it released co-debtors and sureties (*h*).

Upon the bankruptcy of the principal debtor, if the surety is made to pay the debt, he stands in the place of the creditor to claim the dividend from the bankrupt's estate (*i*). If the creditor proves for the debt and receives the dividend, the surety remains liable for the unpaid balance of the debt; either in full, or to the limit to which he has guaranteed the debt (*k*). If the surety has guaranteed part only of a larger debt, or has guaranteed credit to a certain amount only and the creditor has given credit to a larger amount, the surety is presumptively entitled to the dividend on the amount guaranteed in reduction of his liability, and the creditor cannot claim the whole dividend on account of the unguaranteed balance (*l*); unless he has expressly stipulated in the guarantee that he should have the whole dividend besides his recourse to the surety (*m*). In such cases "it is a question of construction for the court to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only" (*n*). The creditor may prove the whole debt in the bankruptcy of the debtor, though

Right of
surety to
dividend.

(*f*) *Ex p. Jacobs* (1874), 44 L. J. Bk. 31; L. R. 10 Ch. 211; *Simpson v. Henning* (1875), 44 L. J. Q. B. 143; L. R. 10 Q. B. 406.

(*g*) See *ibid.*, p. 678.

(*h*) *Cragoe v. Jones* (1873), 42 L. J. Ex. 68; L. R. 8 Ex. 81.

(*i*) See *ante*, p. 312.

(*k*) *Ellis v. Emmanuel* (1876), 46 L. J. Ex. 25; 1 Ex. D. 157; *Ex p. National Prov. Bank* (1881), 17 Ch. D. 98. See *Ex p. Gilbey* (1878), 47 L. J. Bk. 49; 8 Ch. D. 248.

J. Thornton v. McKewan (1862), 32 L. J. C. 69; 1 H. & M. 525; *Gray v. Seckham* (1872), 42 L. J. C. 127; L. R. 7 Ch. 680.

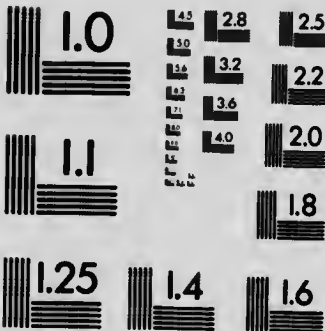
(*m*) *Mollard Banking Co. v. Chambers* (1869), 38 L. J. C. 478; L. R. 4 Ch. 398; *Ex p. National Prov. Bank* (1881), 17 Ch. D. 98. See *Commercial Bank of Australia v. Official Assignee* (1893), 62 L. J. P. C. 61; (1893) A. C. 181.

(*n*) *Per cur. Ellis v. Emmanuel* (1876), 16 L. J. Ex. 25; 1 Ex. D. 157.



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PART IV. the surety holds security from the latter, and could prove only for the balance of the debt after valuing the security (*o*).

Foreign
debts.

After the order of discharge no remedy can be had in the courts of this country for any foreign debts and liabilities upon contracts which were provable in the bankruptcy (*p*). The Bankruptcy Acts of the United Kingdom are of universal operation throughout the dominions of the crown, accordingly a debt contracted in Scotland or Ireland, or in any other part of the British Empire is released by the order of discharge (*q*). And the bankruptcy has a co-extensive effect in transferring the property of the bankrupt to the trustee, including land in a colony so far as it is transferable by the colonial law (*r*).—Upon the same principle, a Scotch sequestration under an Imperial statute (*s*); a discharge by the Irish Bankrupt Act, since the Union (*t*); and a discharge in a British Colony under an Act of the Imperial Parliament (*u*) will release a debt of the bankrupt in this country. But a discharge in Scotland under process of *cessio honorum*, which is peculiar to Scotch law and confined in effect to discharging the person of the debtor in respect of Scotch debts, was held to be no bar to an action in England for an English debt (*x*).

Foreign
bankruptcy.

The release of a debt by the bankruptcy law of the country in which it was contracted extinguishes the debt as a cause of action in any other country; but the release of a debt by the bankruptcy law of any other country than that in which it was contracted operates only within the jurisdiction of that bankruptcy law, and is no release in any other country (*y*); accordingly it is no answer to an action upon a contract made in this country, that the contract was discharged by a judicial liquidation in France (*z*); or

(*o*) *Mutland Bank Co. v. Chambers* (1869), L. R. 4 Ch. 298; 38 L. J. C. 478; *Ex p. Braithwaite* (1877), 46 L. J. Bk. 109. See *Ex p. Cama* (1874), 43 L. J. C. 683; L. R. 9 Ch. 686.

(*p*) *Per cur. Ellis v. McLennan* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 236.

(*q*) *Ellis v. McLennan* (1871), 40 L. J. C. P. 109; L. R. 6 C. P. 228; *New Zealand Loan Co. v. Morrisou* (1897), 67 L. J. P. C. 10; (1897) A. C. 349. See *Gill v. Barron* (1868), 37 L. J. P. C. 33; L. R. 2 P. C. 157.

(*r*) *Callender v. Lagos* (1891), 60 L. J. P. C. 33; (1891) A. C. 460.

(*s*) *Sidaway v. Hay* (1824), 2 L. J. O. S. K. B. 215; 3 B. & C. 12.

(*t*) *Ferguson v. Spencer* 1840, 1 Man. & G. 987; *Simpson v. Marabita* (1868), 38 L. J. Q. B. 76; L. R. 4 Q. B. 257. See *Ex p. McCulloch* (1880), 14 Ch. D. 717.

(*u*) *Philpotts v. Reed* (1819), 1 Br. & B. 294.

(*x*) *Phillips v. Allan* (1828), 7 L. J. O. S. K. B. 2; 8 B. & C. 477.

(*y*) *Smith v. Buchanan* (1800), 1 East, 6; *New Zealand Loan Co. v. Morrisou* (1897), 67 L. J. P. C. 10; (1898) A. C. 349.

(*z*) *Tharsis Co. v. Soc. des Métaux* (1889), 58 L. J. Q. B. 435. See *Gibbs v. Soc. des Métaux* (1890), 59 L. J. Q. B. 510; 25 Q. B. D. 399.

that it was discharged under a Bankruptcy Act of a colonial legislature, having no jurisdiction beyond the colony (a).—If the creditor claims the benefit of the foreign bankruptcy and accepts a share of the estate, he submits to the jurisdiction of the foreign court, and is bound by the proceedings; but not if he appears only for the purpose of opposing the proceedings (b). After receiving a dividend in the foreign bankruptcy the creditor may prove in an English bankruptcy of the debtor; but he must bring the dividend received into the common fund (c).

- (a) *Bartley v. Hodges* (1861), 30 L. J. L. R. 20 Eq. 733; *Re Gaudet Frères Co.* Q. B. 352; 1 B. & S. 375. (1879), 48 L. J. C. 118.
 (b) *Philips v. Allan* (1828), 7 L. J. (c) *Banco de Portugal v. Waddell* (1880), O. S. K. B. 2; 8 B. & C. 477. See 49 L. J. Bk. 33; 5 Ap. Ca. 161.
Ex p. Robertson (1875), 44 L. J. Bk. 99;

PART V.

REMEDIES FOR BREACH OF CONTRACT.

CHAPTER I.

DAMAGES AND INTEREST.

SECT. I.—PRINCIPLES OF THE LAW OF DAMAGES.

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Damages incurred by plaintiff in making good the breach—duty of plaintiff to mitigate damages—evidence of defendant in mitigation—accidental mitigation	770
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A BREACH of contract is attended with two kinds of remedy: an action for damages or pecuniary compensation; and an action for specific performance of the contract according to its terms, so far as the breach will admit. The former is the only remedy of the common law; the latter is supplied upon principles of equity. The right of action for damages is regulated by the Law of Procedure, which is beyond the scope of this treatise; but the damages, forming the substance of the right, are ascertained and measured according to general rules and principles, which in their application to contracts are here noticed.

The damages recoverable in an action are distinguished for some purposes as *general* and *special* damages: the former being the consequence of a breach of contract or other injurious act irrespective of any special circumstances, as the loss of money caused by non-payment of a debt, or the deprivation of goods caused by a

General and special damages.

PART V.

failure to deliver under a contract of sale, the latter being the further consequence caused by the breach of contract happening under special circumstances, as where goods are contracted to be delivered for a special purpose which fails by reason of the default in delivery. And it is a rule of pleading, that special damage must be charged with particularity in the statement of claim, otherwise it is not admitted to proof. General damages are sufficiently indicated by the statement of the breach of contract, which imports all the consequences that might generally be expected to happen; and if the plaintiff fails to prove the special damage charged, he may still recover the general damages.

Measure of general damages.

The measure of general damages is the pecuniary difference between the state of the plaintiff upon the breach of the contract, and what it would have been if the contract had been performed (a). The measure is in general the value of the performance to the plaintiff, not the cost of performance to the defendant; as in the case of the breach of a contract to enclose land of the plaintiff with a wall, the measure of damage was held to be the increase of value of the land by reason of the wall, which might be more or less than the cost of building the wall, and might be merely nominal (b). And in an action by a landlord against his tenant on the implied covenant not to commit waste during the term, the measure of damage is not the cost of restoring the waste, but the deterioration in value of the reversion (c). So in an action upon a covenant to repair for a breach during the term the measure of damages is not the then cost of repairs, but the diminution in value of the reversion; but at the end of the term the measure of damages is the full value of the repairs (d).

Consideration given.

Nor is the consideration which the plaintiff gave for the contract material to the damages or compensation for the breach; as in the case of an action for not delivering goods sold the damages depend upon the market value at the time of the breach, and not upon the fact of an enhanced price having been paid for

(a) *Strutt v. Farlar* (1847), 16 L. J. Ex. 84; 16 M. & W. 249; *Hall v. Conder* (1857), 26 L. J. C. P. 138; 2 C. B. N. S. 22; *Inchbald v. Western* *Neigherry Coffee Plantation* (1864), 34 L. J. C. P. 15; 17 C. B. N. S. 733; *Michael v. Hart & Co.* (1902), 71 L. J. K. B. 265; (1902) 1 K. B. 482.

(b) *Wigzell v. Blind School* (1882), 51 L. J. Q. B. 330; 8 Q. B. D. 357. See

Re Chiffersel (1889), 58 L. J. C. 263; 40 Ch. D. 45.

(c) *Whitham v. Kershaw* (1886), 16 Q. B. D. 613.

(d) *Joyner v. Weeks* (1891), 60 L. J. Q. B. 510; (1891) 2 Q. B. 31; *Conquest v. Ebbetts* (1896), 65 L. J. C. 808; (1896) A. C. 490. See *Henderson v. Thorne* (1893), 62 L. J. Q. B. 586; (1893) 2 Q. B. 164.

CHAP. I.
SECT. I.

Presumption
against
wrongdoer.

delivery at a certain date (e). But where the consideration has been paid for a performance which has failed, the money paid, and in some cases an apportioned part, may be recoverable, not as damages, but as an implied debt for money received (f).—In assessing damages the plaintiff is "entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrongdoers in the sense of refusing to perform, and not performing, their agreements. Every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bonâ fide* performance of the agreement" (g). But if there are several ways in which the contract might be performed, or if it is in the alternative to do one of two things at the election of the defendant, and neither way or alternative is elected or performed, the measure of damages is the loss attributable to the non-performance of that which is least beneficial to the plaintiff and least burdensome to the defendant (h). And where one of two alternatives becomes impossible by the act of the promiser, the promise to perform the other alternative becomes absolute, and the damages are fixed upon this footing (i).

General damages are restricted to the proximate consequences of the breach of contract, and the remote consequences are not to be regarded; according to the maxim, "*In jure non remota causa sed proxima spectatur*" (k). "The damages must be something immediately flowing out of the breach of contract complained of, something immediately connected with the breach of contract, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of" (l). "It is a vague rule . . . it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day" (m). And it is for the court

Proximate
and remote
damages.

(e) *Brady v. Oastler* (1864), 33 L. J. Ex. 300; 3 H. & C. 112.

(f) *Devaux v. Conolly* (1849), 19 L. J. C. P. 71; 8 C. B. 640.

(g) *Ld. Selborne, L. C., Wilson v. Northampton & Banbury Ry.* (1874), 43 L. J. C. 505; L. R. 9 Ch. 285. See *Sapwell v. Bass* (1910), 79 L. J. K. B. 932; (1910) 2 K. B. 486.

(h) *Maule, J., Cockburn v. Alexander* (1848), 8 L. J. C. P. 74; 6 C. B. 811.

(i) *Hall v. Conder* (1857), 26 L. J. C. P. 138; 2 C. B. N. S. 22; *McIlquham*

v. Taylor (1894), 64 L. J. C. 296; (1895) 1 Ch. 53.

(k) *Bacon's Maxims*, reg. 1.

(l) *Cockburn, C. J., Hobbs v. L. & S. W. Ry.* (1875), 44 L. J. Q. B. 52; L. R. 10 Q. B. 19. See *Harrison v. Manchester* (1891), 60 L. J. Q. B. 102; (1891) 2 Q. B. 680. *de la Brie v. Pearson, Ltd.* (1908), 77 L. J. K. B. 380; (1908) 1 K. B. 280.

(m) *Blackburn, J., Hobbs v. L. & S. W. Ry.* (1875), 44 L. J. Q. B. 19; L. R. 10 Q. B. 121.

PART V.

to decide as a matter of law, upon the circumstances of each case whether the consequences are sufficiently proximate to be claimed as damages (n). An exception to this rule is the liability of a shipowner where there has been a deviation, who thereupon becomes liable as an insurer of the safety of goods, whether the damage occurs before or after the deviation, and loses the benefit of any qualification upon his common law liability contained in any contract (o).—In an action against a railway company for breach of contract in not carrying a passenger to a certain place at a certain time, it was held that a claim of the passenger for loss of business consequent upon his failing to keep appointments was too remote (p); and where in such case the passenger was compelled to walk to his destination, it was held that he was entitled to damages for the personal inconvenience, but that a consequential illness was too remote to be chargeable (q). In an action for breach of a contract to provide stabling for horses, it was held that damage to the horses from exposure for want of the stabling was a sufficiently proximate consequence (r). In an action upon a breach of warranty of the fitness of salmon for the purpose of food, the plaintiff recovered as part of his damages a sum for the loss of his wife's services, and the necessity of employing extra servants by reason of her death following upon eating the salmon which was in fact unfit for human consumption (s). In an action against a bailee of goods for not warehousing the goods in the place stipulated; it was held that having broken his contract by warehousing them in another place, where they were destroyed by fire, he had placed the goods at his own risk, and was responsible for the loss (t).

Special
damages
contemplated
by the
parties.

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be, either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself;

(n) *Per cur.* *Hadley v. Baxendale* (1854), 23 L. J. Ex. 479; 9 Ex. 351.

(o) *Thorley v. Newby S.S. Co., Ltd.* (1907), 76 L. J. K. B. 595; (1907) 1 K. B. 595; *Internationale Guano ex Sarsphosphatwerke v. Macandrew* (1909), 78 L. J. K. B. 691; (1909) 2 K. B. 569.

(p) *Hamlin v. G. N. Ry.* (1856), 26

L. J. Ex. 20; 1 H. & N. 403.

(q) *Hobbs v. L. & S. W. Ry.* (1875), 44 L. J. Q. B. 49; L. R. 10 Q. B. 111.

(r) *McMahon v. Field* (1881), 50 L. J. Q. B. 552; 7 Q. B. D. 591.

(s) *Jackson v. Watson & Co.* (1909), 78 L. J. K. B. 587; (1909) 2 K. B. 193.

(t) *Lilly v. Doshleay* (1881), 51 L. J. Q. B. 310; 7 Q. B. D. 510.

or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (u). Upon this principle it was held that damages were chargeable for the detention of a ship by reason of defects in the repair which the defendant had contracted to do (x). And damages were held chargeable for loss of profits from the sale of a machine, for which the defendant had contracted to supply an indispensable part, and without which he knew the machine would be useless (y). Upon the same principle where goods were sold as of a certain kind and quality, which the seller knew were bought for the purpose of resale in the ordinary course of business; the seller was held chargeable as damages with the costs of the buyer in reasonably defending an action brought against him upon a resale by reason of the goods not answering to the kind and quality for which they were sold (z). So colliery proprietors were held bound to indemnify a coal merchant who to their knowledge required the coals which they had agreed to sell him for the purpose of coaling a ship, against the damages and costs of an action by the shipowners for breach of his contract to coal the ship (a).—But mere notice or knowledge of the special circumstances or purpose of one of the parties in making the contract does not render the other party liable for the special consequences of a breach, or for the failure of the special purpose, unless he has expressly or impliedly contracted upon the basis of such special circumstances, and undertaken to be bound for the consequences; "in order that the notice have any effect, it must be given under such circumstances as that the actual contract arises on the part of the defendant to bear the special loss" (b). Thus in an action against a carrier for delivering a parcel of goods, the mere knowledge on his part that the parcel contained a part of the machinery of a mill, without which the mill could not be erected, was held not sufficient to charge him with the consequences of the stoppage of the mill until

Notice of
special cir-
cumstances

(u) *Per cur. Hadley v. Baxendale* (1854), 23 L. J. Ex. 179; 9 Ex. 354; *Conquest v. Ffiths* (1896), 65 L. J. C. 898; (1896) A. C. 490; *Steele v. Bass* (1910), 79 L. J. K. B. 932; (1910) 2 K. B. 486.
(x) *Wilson v. General Screw Coll.* (1878), 47 L. J. Q. B. 239.
(y) *Hydraulic Engineering Co. v. Mettache* (1879), 4 Q. B. D. 670. See *Cory v. Thames Iron Works Co.* (1867),

37 L. J. Q. B. 68; L. R. 3 Q. B. 181.
(z) *Hammond v. Bussey* (1887), 57 L. J. Q. B. 58; 20 Q. B. D. 79.
(a) *Agius v. Great Western Coll.* (1890), 68 L. J. Q. B. 312; (1899) 1 Q. B. 413.
(b) *Per cur. Horne v. Midland Ry.* (1872), 42 L. J. C. P. 54; L. R. 8 C. P. 131. See *Giebert-Borgnis v. Nagent* (1885), 54 L. J. Q. B. 511; 15 Q. B. D. 85.

PART V

the machinery could be replaced; and the damages were restricted to the cost of replacing the part lost, with interest upon that amount whilst remaining unpaid (c). So a carrier of raw material for a manufacturer is not responsible for the stoppage of a mill for want of the material, without a special notice of the circumstances given on delivery of the material to the carrier and his undertaking the risk (d). And upon the same principle, a collector of telegraphic messages for despatch was held not to be responsible for the special consequences of the loss of a message written in cipher, he having no knowledge of the contents (e). But a carrier who had undertaken to carry certain goods to a public exhibition was held to have sufficient notice of the purpose to render him responsible for the loss of probable profits of exhibiting the goods, which he failed to deliver in time (f).

**Damages for
injury to
feelings.**

The damages for a breach of contract are restricted to matters which are capable of pecuniary valuation; no damages can in general be awarded for mere disappointment or vexation of mind. "In the case of a wrong (independent of contract) the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings, and the pain he has experienced, as, for instance, the extent of violence in an action of assault; and many topics and many elements of damage find place in an action for tort or wrong of any kind which have no place whatever in an ordinary action of contract" (g). The contract to marry has always been considered an exception; and in assessing the damages for a breach of promise to marry not merely the loss of an establishment in life, but the injury to a person's feelings in regard to such contract may be compensated (h); in the case of a long engagement "the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties, and the then existing value of the marriage" (i); but the exception is more apparent than real, for where damages are

(c) *British Columbia Mill Co. v. Nettleship* (1868), 37 L. J. C. P. 235; L. R. 3 C. P. 499.

(d) *Geer v. Lanes. & Yorks. Ry.* (1860), 30 L. J. Ex. 11; 6 H. & N. 211. See *G. W. Ry. v. Redmayne* (1866), 35 L. J. C. P. 123; L. R. 1 C. P. 320.

(e) *Sanders v. Stuart* (1876), 45 L. J. C. P. 682; 1 C. P. D. 326.

(f) *Simpson v. L. & N. W. Ry.* (1876), 45 L. J. Q. B. 182; 1 Q. B. D. 274.

(g) *Per cur. Hamlin v. G. N. Ry.* (1856), 26 L. J. Ex. 20; 1 H. & N. 408.

(h) *Smith v. Woodfine* (1857), 1 C. B. N. S. 660.

(i) *Per cur. Frost v. Knight* (1872), 41 L. J. Ex. 81; L. R. 7 Ex. 116.

not obvious, and no objection can be taken to the direction of the judge, it is not the practice of the court to interfere with the assessment of damages by the jury *k*. In the case of seduction under the promise of marriage, the deteriorated position and prospects of the plaintiff are proper matter for compensation *l*. Personal trouble and inconvenience caused by a breach of contract may be compensated in the damages: as in an action for not carrying a passenger to his destination, the trouble and inconvenience of having to walk there *m*; and in an action for not carrying a passenger safely, he is to be compensated for bodily pain and suffering as well as for pecuniary loss, and for loss of probable professional earnings and emoluments *n*. Upon the same principle in an action upon a covenant not to build upon a particular spot, and in proceedings involving the value of land, the advantages of privacy and prospect may be considered in the valuation of damages, though they cannot be claimed by way of legal right or easement *o*.

Personal
incon-
venience.

Damages may be claimed and assessed for the reasonable and probable prospective consequences of a breach of contract, as well as for the loss in fact accrued at the time of action; but not for prospective future breaches or continuance of breaches *p*. In an action for the breach of a contract to procure for the plaintiff a certain office, it was held that the full value of the office was chargeable, though it was subject to periodical renewal, for there was a probability of continuance *q*. In an action for wrongful dismissal from service, the damages are restricted to the actual loss suffered in the wrongful determination of the service; no damages are recoverable for injured feelings or the probable difficulty of getting another service *r*. Where a commercial traveller was engaged to serve for three years at a commission upon the orders for goods obtained by him, he was held entitled to claim compensation for the loss of commission by the abandonment of

Prospective
damages.

(k) *Walker v. Broadhurst* (1853), 8 Ex. 889.

(l) *Berry v. Da Costa* (1866), 35 L. J. C. P. 191; L. R. 1 C. P. 331; *Millington v. Loring* (1880), 50 L. J. Q. B. 214; 6 Q. B. D. 190.

(m) *Hobbs v. L. & S. W. Ry.* (1875), 41 L. J. Q. B. 49; L. R. 10 Q. B. 111.

(n) *Phillips v. L. & S. W. Ry.* (1880), 49 L. J. Q. B. 233; 5 Q. B. D. 78; 5 C. P. D. 280.

(o) *Manners v. Johnson* (1876), 45 L. J. C. 404; 1 Ch. D. 673.

(p) *Lloyd v. Dimmock* (1878), 47 L. J. C. 398; 7 Ch. D. 398.

(q) *Richardson v. Mellish* (1824), 3 L. J. O. S. C. P. 265; 2 Bing. 229.

(r) *Deconald v. Rosser* (1906), 75 L. J. K. B. 688; (1906) 2 K. B. 728; *Addis v. Granophone Co.* (1909), 78 L. J. K. B. 1122; (1909) A. C. 188.

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the business (*n*). But where an agent for an insurance company was engaged for five years at a fixed salary, with a commission upon the profits of the company, upon the winding-up of the company he was held entitled to prove for the salary during the remainder of the term; but not for commission, because the engagement left the company free as to the extent of the business (*l*).

Assessment of damages conclusive.

Hence the damages finally assessed in an action are conclusive as to the amount, and no loss subsequently arising from the same cause can be claimed in another action; the amount assessed is presumed in law to be a complete compensation for all the consequences of the wrong (*n*). And if an action is barred by lapse of time, or by an accord and satisfaction, or by other form of discharge, all claim for damages subsequently arising from the same cause, though not then discovered or discoverable, is also barred (*x*).—But damages cannot be assessed in respect of the probable continuance of the breach which would give a new cause of action, as in the case of a continuing breach of a covenant to keep premises in repair, or for quiet enjoyment; and the damages for a continued breach must be sought in a new action, to which the judgment recovered in a former action, including damages for the breach up to the time of that action only, would be no bar (*y*). Where the interest is not a mere necessary to a debt, a personal judgment for the debt and interest to date, does not preclude other proceedings for interest accruing subsequently to the date of the judgment under the terms of a contract (*z*).

Damages for new cause of action.

The party claiming for a breach of contract may charge damages the cost of making good the breach in a reasonable manner at his own expense; the principle is, that if the party does not perform his contract the other may do so for him as near

Damages of plaintiff in making good the breach.

(*n*) *Re Patent Floor Cloth Co.* (1872), 11 L. J. C. 176; *Turner v. Goldsmith* (1891), 60 L. J. Q. B. 247; 1891 1 Q. B. 41; *Deconild v. Rosser* (1906), 75 L. J. B. 688; (1906) 2 K. B. 728.
(*l*) *Maclure's case* (1870), 39 L. J. C. 685; L. R. 5 Ch. 737; *Rhodes v. Forwood* (1876), 47 L. J. Ex. 396; 1 Ap. Ca. 256. See *Hamlyn v. Wood* (1891), 60 L. J. Q. B. 734; 1891 2 Q. B. 488.
(*u*) *Brett, J., Gibbs v. Cruikshank* (1873), 42 L. J. C. P. 273; L. R. 8 C. P. 463; *Florence v. Jennings* (1857),

26 L. J. C. P. 274; 2 C. B. N. 8, 451; *Ex p. Frutings* (1881), 53 L. J. C. 513; 25 Ch. D. 338.

(*x*) *Ante*, p. 716.

(*y*) *Onward v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153; *Child v. Stanning* (1879), 48 L. J. C. 392; 11 Ch. D. 82; *Henderson v. Thorne* (1892), 61 L. J. Q. B. 586; (1892) 2 Q. B. 162.

(*z*) *Economic Life Assce. v. Uxbridge* (1901), 71 L. J. P. C. 31; (1902) A. C. 117.

as may be, and charge him for the expense incurred in so doing (a). Where a railway company fails to carry a passenger to his destination, he may incur reasonable expense in travelling there by another mode of conveyance, and charge the amount to the company as damages; and if he does not avail himself of such means, he can only recover the pecuniary loss in fact sustained (b). In the case of a person travelling for amusement missing a train by default of the company, and taking a special train when there was an ordinary train starting in an hour, the expense was held to be unreasonable and not chargeable as damages (c). Where a bank, having issued letters of credit to a merchant abroad, failed to accept his drafts, it was held that he might arrange with another house to meet the bills and charge the former with the commission and expenses as damages (d). So where the seller has failed to deliver goods under a contract of sale, the buyer may supply himself with the goods at the market price and charge the seller with the difference; or if such goods cannot be obtained, he may purchase the best substitute, within reasonable limits (e).

A party to a contract is bound to take all reasonable means of mitigating the damages consequent upon a breach by the other party; so far that he cannot recover any part of the damage which is due to his neglect of such means (f). In an action for wrongful dismissal from service, the damages, though measured presumptively by the amount of wages for the period of engagement, may be reduced by the value of other service which the plaintiff could obtain (g). Upon this principle in an action for not accepting goods sold, the seller cannot recover the full price as damages, but only the difference between that and the price for which he could sell them to another person (h); and in an action for not delivering goods sold, the buyer can only recover the difference between the contract price and the price at which he could buy them (i). So where the charterer fails to provide a cargo within

that of
plaintiff to
mitigate
damages.

(a) *Mellish, L. J., Le Blanche v. L. & N. W. Ry.* (1876), 45 L. J. C. P. 521; 1 C. P. D. 313.

(b) *Hamlin v. G. N. Ry.* (1856), 26 L. J. Ex. 20; 1 H. & N. 408.

(c) *Le Blanche v. L. & N. W. Ry.* (1876), 45 L. J. C. P. 521; 1 C. P. D. 286.

(d) *Frehn v. Royal Bank of Liverpool* (1870), 39 L. J. Ex. 41; L. R. 5 Ex. 92.

(e) *Hinde v. Liddell* (1875), 44 L. J. Q. B. 165; L. R. 10 Q. B. 265.

(f) *James, L. J., Dunkirk Coll. v. Lever* (1878), 9 Ch. D. 25.

(g) *Hartland v. General Exchange Bk.* (1866), 17 L. T. 863; *Bruce v. Cable* (1895), 64 L. J. Q. B. 582; (1895) 2 Q. B. 253.

(h) *Brown v. Müller* (1872), 41 L. J. Ex. 214; L. R. 7 Ex. 319.

(i) *Valpy v. Oakley* (1851), 20 L. J. Q. B. 380; 16 Q. B. 911; *Waddell v. Blockey* (1879), 48 L. J. Q. B. 517; 9 Q. B. D. 678.

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Evidence of
defendant in
mitigation.Accidental
mitigation.

the stipulated time, the damages are measured by the amount due for freight after deducting expenses and any loss due to neglect by the master to procure another cargo (*k*).

The defendant is entitled to the benefit of any matter which goes in mitigation of damages (*l*). In an action for wrongful dismissal from service, the master may prove in mitigation of damages that the plaintiff after the dismissal continued to be employed or was offered employment, at the same remuneration as before (*m*). In an action for the price of goods sold with a warranty of quality, evidence of a breach of the warranty may be given in reduction of the price so far as such evidence is material to show a diminution in the value of the goods unless the contract provides otherwise (*n*). So in an action for the price of goods sold by sample or description or value, or for work and labour of a specified kind, it may be shown in reduction of the agreed price, that the subject of the contract was diminished in value by reason of a breach or insufficient performance of the contract by the defendant; but the remedy for damage caused by a breach of contract or warranty which does not qualify the value of the subject can only be recovered by way of counterclaim (*o*).

—The defendant cannot claim to reduce the damages on account of an accidental benefit accruing to the plaintiff, independently of the contract; as in an action for breach of covenant to deliver up demised premises in repair at the end of the term, the measure of damages is the cost of putting the premises into the state of repair in which they ought to have been left; and the damages cannot be reduced on the ground that in consequence of changes in the property the repairs would be useless; or that the plaintiff after the expiration of the lease pulled down the premises (*p*); or that the plaintiff had granted a new lease to a third party from the end of the term, and that the new lessee covenanted to

(*k*) *Wilson v. Hicks* (1857), 26 L. J. Ex. 212.

(*l*) *Oldershaw v. Holt* (1840), 11 L. J. Q. B. 221; 12 A. & E. 590.

(*m*) *Reid v. Explosives Co.* (1887), 55 L. J. Q. B. 388; 19 Q. B. D. 264; *Brace v. Calder* (1895), 64 L. J. Q. B. 582; (1895) 2 Q. B. 253.

(*n*) Sale of Goods Act, 1893, s. 53; *Street v. Blay* (1831), 2 B. & Ad. 456; *Bostock v. Nicholson* (1904), 73 L. J. K. B. 524; (1904) 1 K. B. 725; *Wallis, Son &*

Wells v. Pratt & Haynes (1910), 79 L. J. K. B. 1013; (1910) 2 K. B. 1003.

(*o*) *Allen v. Cameron* (1832), 2 L. J. Ex. 263; 1 Cr. & M. 832; *Mondel v. Steel* (1841), 10 L. J. Ex. 126; 8 M. & W. 858. See *Davis v. Hodges* (1871), 40 L. J. Q. B. 276; L. R. 6 Q. B. 687.

(*p*) *Rawlings v. Morgan* (1865), 34 L. J. C. P. 185; 18 C. B. N. S. 776; *Morgan v. Hardy* (1886), 17 Q. B. D. 780; affirmed on this point (1887), 35 W. R. 588.

pull down and alter the premises (*q*). In an action upon an undertaking to pay a person's debts, it was held that the damages were the full amount of the debts, though the debtor afterwards became bankrupt; and that the trustee in bankruptcy was entitled to the same damages (*r*). In a joint action for damages a mitigation of the several loss of one of the plaintiffs is not available to the defendant in reduction of the joint damages (*s*).

In an action for breach of contract, if the plaintiff proves the breach but fails to prove any appreciable damage in fact, he is entitled to judgment for damages in law, which as they exist only in name, and not in amount, are called nominal (*t*). Prior to the Judicature Act, 1873, the question was of greater importance, as the plaintiff, if entitled to nominal damages, was technically right and might recover his costs of action; but since that statute the court may order a successful plaintiff, who merely recovers nominal damages, or where the proceedings result in the discussion of a mere academic question, to pay the general costs of the defendant, even where the action is tried before a jury (*u*). The following instances illustrate the right to nominal damages:—An action against a banker who, having sufficient funds in his hands for the purpose, refuses to cash a customer's cheque, substantial damages being given only if the refusal is in fact injurious to the customer's credit (*x*): an action for not signing bills of lading according to a charterparty, the master having been willing to deliver the cargo on payment of freight, and no damage proved (*y*): an action for breach of a covenant to pay the premiums of a life insurance as security for a debt, the debt and interest having been paid since the breach (*z*): and an action upon a similar covenant which further provided that if the debtor failed to pay the premiums the creditor might pay them and add

Nominal
damages.

(*q*) *Joiner v. Weeks* (1891), 60 L. J. Q. B. 510; (1891) 2 Q. B. 31.

(*r*) *Ashdown v. Lupton* (1880), 50 L. J. Ex. 109; 5 Ex. D. 286.

(*s*) *Jensen v. East India Dock* 1875, 44 L. J. C. P. 181; L. R. 10 C. P. 309.

(*t*) *Macle, J., Brumant v. Greathead* 1816, 15 L. J. C. P. 159; 2 C. B. 459. See *Rayner v. Rederiaktieselskabet Candor* (1895), 64 L. J. Q. B. 510; (1895) 2 Q. B. 289.

(*u*) *Harris v. Petherick* (1879), 48 L. J. Q. B. 521; 4 Q. B. D. 611; *Dicks v.*

Brinks 1880, 49 L. J. C. 812; 15 Ch. D. 22; *Sprange v. Lee* (1908), 77 L. J. C. 271; (1908) 1 Ch. 424.

(*x*) *Moratti v. Williams* (1830), 9 L. J. O. S. K. B. 42; 1 B. & Ad. 415; *Rodin v. Steward* (1853), 23 L. J. C. P. 118; 14 C. B. 595. See *Larios v. Gurety* (1873), L. R. 5 P. C. 316.

(*y*) *Jones v. Hough* (1880), 49 L. J. Ex. 211; 5 Ex. D. 145.

(*z*) *National Assoc. v. Best* 1857, 27 L. J. Ex. 19; 2 H. & N. 605.

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the amount to the debt secured, it was held that express provision having been made for non-payment, the damages were nominal (*a*). But a plaintiff though entitled only to nominal damages on his own account may recover substantial damages as trustee for another who is beneficially interested in the cause of action (*b*). And an injunction may be granted to restrain a breach of contract, though the pecuniary damages would be nominal; the reason for granting an injunction being that damages are an inadequate or inappropriate remedy (*c*).

Detention of money.

In an action for the non-payment of a debt or liquidated demand in money, the measure of damages is the sum due, together with interest if any is payable; and nominal damages only can be claimed for the detention of the money beyond the day of payment, because the special consequences to the creditor from want of money are not in law considered to be within the contemplation of the parties (*d*). The same rule is applied to the dishonour of a bill of exchange by the acceptor, which creates a mere money debt for the amount of the bill and interest (*e*); but the drawer of a bill under a letter of credit from a bank, upon dishonour of the bill, is entitled to replace the credit by drawing on another bank and charge the former with the commission and expenses as damages (*f*). In local courts in which the jurisdiction is limited to a fixed amount, the damages for detention of a debt of exactly that amount, being nominal, do not enlarge the claim beyond the limit of the jurisdiction (*g*).—A debt or liquidated money demand differs in this respect from a claim for the detention of goods: the wrongful detention of goods may entitle the owner to substantial damages, and a subsequent delivery of the goods operates in mitigation of the damages only to the value of the goods; but the claim for damages for the original taking and the detention still remains (*h*).

Detention of goods.

a *Broune v. Price* (1858), 27 L. J. C. P. 290; 4 C. B. N. S. 598.

b *Lucan v. Crayford* (1808), 1 Taunt. 325; *Robertson v. Wait* (1853), 22 L. J. Ex. 209; 8 Ex. 299.

c *Tipping v. Eckersley* (1855), 2 K. & J. 264; *Manners v. Johnson* (1876), 45 L. J. C. 404; 1 Ch. D. 673.

d *Per cur. Graham v. Campbell* (1878), 47 L. J. C. 593; 7 Ch. D. 494; Jessel, M. R., *Wallis v. Smith* (1882), 52 L. J. C. 148; 21 Ch. D. 257. See *Larios v. Giverty* (1873), L. R. 5 P. C. 346.

e Bills of Exchange Act, 1882, s. 57.

See *Ex p. Roberts* 1886, 56 L. J. Q. B. 74; 18 Q. B. D. 286; *Re Commercial Bank* (1887), 57 L. J. C. 131; 36 Ch. D. 522; *Ex p. Bank of Brazil* (1893), 62 L. J. C. 578; (1893) 2 Ch. 438.

f *Prehn v. Royal Bank of Liverpool* (1870), 39 L. J. Ex. 41; L. R. 5 Ex. 92.

g *Joule v. Taylor* (1851), 21 L. J. Ex. 31; 7 Ex. 58.

h *Crossfield v. Such* (1852), 22 L. J. Ex. 65; 8 Ex. 159. See *Bryant v. Herbert* (1878), 47 L. J. C. P. 670; 3 C. P. D. 389.

CANADIAN NOTES.

Measure of Damages.

In *Bruce vs. Totton*, 4 O. A. R., 144, in which the defendant broke his contract to deliver wheat contracted for by the plaintiff, it was held that the plaintiff was entitled to recover as damages the amount which he had to pay for additional carriage on wheat which he was forced to buy in a more distant market in consequence of the defendant's breach of contract.

In *Sanders vs. Sutcliffe*, 38 N. S. R., 352, in an action by plaintiff on a promissory note given by defendant in part payment of the contract price for the erection of a vault in an office building owned by defendant, defendant counter-claimed damages on account of the imperfect condition of the vault and also on account of the loss of a tenant who had agreed to take a five years' lease of one floor of the building on condition that the vault was completed by a specified date. It was held that in order to recover on the latter part of the counter-claim defendants must shew that there was a contract by plaintiff to complete the vault by a specified date, and that plaintiff was so far aware of the agreement between the defendant and his proposed tenant that he must be taken to have contracted to bear the loss covered by the repudiation of the tenancy in consequence of his failure to carry out the terms of his contract, and that, in the absence of evidence of a contract on the part of plaintiff to complete his work in any definitely stated period or of such notification of the agreement between the defendant and his proposed tenant as to give rise to a contract on the part of the plaintiff to bear the loss occasioned by the refusal of the tenant to take the premises on account of the non-completion of the vault, defendant could not recover.

In *Weatherin vs. Whitney*, 30 N. S. R., 447, it was held that the breach of an agreement for the sale of a mining right did not entitle the vendor to recover the purchase money, but only the damages occasioned by the breach. It had been contended on the part of the plaintiff that the equitable title to the areas had passed by the agreement between plaintiff and defendant, and that this was sufficient to entitle the defendant to sue for the price of the areas.

It was held in *Smith vs. Tennant*, 20 O. R., 189, that the loss of rent which might have been obtained for houses to be completed at a stipulated time was a proper measure of damages for failure to complete, the contracting parties having known that the houses were intended to be rented.

In *Bruhm vs. Ford et al.*, 33 N. S., 323, in an action brought by plaintiff to recover an amount claimed by him for work done and materials supplied in constructing a mill for defendant defendant's counter-claimed for damages arising from the defective performance of the work which plaintiff was employed to do. It was held that plaintiff was not liable for damages not in contemplation of the parties, and not being the immediate result of the breach of the contract, such as, in this particular case, additional cost of sawing or logs sold at a loss.

In *Hutchinson vs. Conway*, 34 N. S., 554, the plaintiff was engaged by defendant to prepare plans and specifications for a hotel building to cost not more than \$4,000 or \$5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, etc., were given by defendant. Before the plans were completed changes were made by additions to the original plan involving an additional expenditure of \$1,500. The plans were approved by defendant when completed and tenders called for and the work partly proceeded with. It was then found by defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped. It was held that the plaintiff was entitled to recover the stipulated commission of two per cent. on the estimated cost of the building, with the additions agreed upon.

In *Leggatt vs. Marsh*, 29 S. C. R., 739, the Supreme Court of Canada affirmed the judgment of the Court of Queen's Bench of Quebec, holding that in an action for damages for failure to deliver goods at the time specified in the contract, a claim for the difference between the purchase prices and those at which the goods were selling at the time fixed for delivery was not too remote.

In *Ontario Lantern Company vs. Hamilton Brass Manufacturing Company*, 27 O. A. R., 346, a contract was made with the plaintiff for the manufacture by them of a large number of shells for electric light lamps to be delivered monthly for a period of twenty months. Five days after making the contract the defendants notified the plaintiff that they would not carry it out. The plaintiffs had done nothing towards performing the contract, and had incurred no expense. It was held that, though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profits, but that allowance should be made for the many contingencies that might have happened before the time for fulfilment. The damages awarded were, therefore, reduced.

In *The King vs. Stewart*, 7 Ex. C. R., 55, it was held that where there is a breach of contract the damages are to be measured as nearly as may be by the profits the contractor would have made by completing the contract in a reasonable time. It was held by the Supreme Court of Canada, 32 S. C. R., 483, that where in such a case the Crown dispossessed the contractor of his plant and used it for the purpose of the completion of the work the contractor was entitled to recover the value of such plant as a going concern, i. e., its value to anyone situated as the contractor himself was at the time of the taking of the plant: and, further, that where the contractor was not allowed interest upon the value of such plant he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid.

In *Chappell vs. Nolan*, 38 N. S. R., 74, defendant requested plaintiff to prepare for him a plan for a building to cost from \$1,500 to \$1,800. After inspecting the plan defendant objected that the building shewn would not give him sufficient room, and suggested changes which he was told would increase the cost. Defendant assented, and the plans as finally prepared were for a building which would cost \$25,000. It was held that the plaintiff was entitled to be paid a percentage on the latter amount, and that, in the absence of evidence to fix the value independently of the special contract proved by plaintiff, the amount allowed by the trial Judge could not be reduced.

In *Low vs. Robb Engineering Co.*, 37 N. S. R., 326, it was held that in an action claiming damages for breach of contract, the measure of damages is the profit which the plaintiff might reasonably look for in performing his contract had he not been prevented from doing so. Plaintiff gave evidence that he estimated his profit at from 15 to 20 per cent. on the total amount of the contract, but, on cross-examination, he failed to give any data by which the accuracy of his statement could be tested, while the person who actually did the work gave evidence that his profit was about thirty-five dollars, being less than half the amount claimed, and only half the amount fixed by the Judge. It was held that the burden was on plaintiff to shew grounds that would justify the Court in adopting his estimate and that in the absence of such evidence the amount of damages must be reduced to \$35. The trial Judge had added to plaintiff's estimated profits an allowance for plaintiff's time while the contract existed. It was held that he was wrong in doing so as time was one of the elements forming the basis upon which the profit was to be calculated; also that as to material provided by plaintiff for the purpose of carrying out his contract, he could only be allowed damages in so far as the material was shewn to be useless for any other purpose.

CHAPTER I.

DAMAGES AND INTEREST.

SECT. II.—APPLICATION TO CONTRACTS.

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The general rules and principles above stated may be further explained and illustrated in the application of them to some contracts of frequent occurrence.

In an action against the buyer for goods sold and delivered the sum recoverable is the price fixed in the contract; and if there is no price fixed, the value of the goods at the time of delivery; discount upon the fixed price may be allowed by the contract or by usage of trade (*a*). The damages for detaining the money due, unless interest is recoverable, are nominal (*b*). If payment is to be made by a bill, and no bill is given, the damages are the value of a bill in the terms stipulated for (*c*); and if the action is brought after the bill would have become due, interest is chargeable upon the amount as if the bill had been given (*d*). The buyer may

Damages in
action for
goods sold
and delivered.

(*a*) Sale of Goods Act, 1893, s. 49.
See *Ex p. Worthington* (1876), 45 L. J.
Bk. 135; 3 Ch. D. 803.

(*b*) *Page v. Newman* (1829), 7 L. J.
O. S. K. B. 237; 9 B. & C. 378; *per*
cur. *Graham v. Campbell* (1878), 47
L. J. C. 535; 7 Ch. D. 494; *Jessel*

M.R., Wallis v. Smith (1882), 52 L. J.
C. 148; 21 Ch. D. 257. See *Larios v.*
Givety (1873), L. R. 5 P. C. 346.

(*c*) *Mussen v. Price* (1803), 4 East,
117; *Paul v. Dal* (1815), 15 L. J. C. P.
177; 2 C. B. 899.

(*d*) *Marshall v. Poole* (1810), 13 East,

PART V.

Damages for
not accepting
goods sold.

reduce the claim for the price by proving a diminution in value caused by a breach of warranty or other breach of the contract by the seller which directly affects the goods (e); and where the seller, upon the buyer rejecting one instalment of goods as not complying with the terms of the contract, wrongfully repudiated the contract, the buyer was held entitled to recover damages for loss of the contract, in addition to damages for the faulty coal delivered antecedently to the repudiation as a compliance with the contract (f). - In an action against the buyer for not accepting the goods sold the measure of damages is the difference between the contract price and the market price of similar goods at the time appointed for acceptance (g); or if the goods are to be accepted in instalments at several times, the damages are the sum of the differences at those times (h). The price obtained upon a resale within a reasonable time is presumptive evidence of the market price (i); but not the price obtained after a delay during which the price may have materially altered (k). If no evidence is given of any loss upon the market price, the damages as regards the value of the goods are nominal (l).

Damages for
not
delivering
goods sold.

Upon the same principle in an action against the seller for not delivering the goods: the measure of damages, the price remaining unpaid, is the difference between the contract price and the market value at the time appointed for delivery (m). If the delivery is to be made in instalments, the measure of damages is the sum of the differences of the market value at the several times of delivery; and the damages in such cases are to be thus calculated, though the action is brought upon a complete breach before the times for delivery have all elapsed (n). The full market

98; *Farr v. Ward* (1837), 3 M. & W. 25; *Davis v. Smyth* (1840), 10 L. J. Ex. 473; 8 M. & W. 399.

(e) Sale of Goods Act, 1893, s. 53; *Street v. Blay* (1831), 2 B. & Ad. 455; *Allen v. Cameron* (1833), 2 L. J. Ex. 263; 1 Cr. & M. 832; *Mondel v. Steel* (1841), 10 L. J. Ex. 426; 8 M. & W. 858. See *Bustock v. Nicholson* (1901), 73 L. J. K. B. 524; (1901) 1 K. B. 725.

(f) *Dominion Coal Co. v. Dominion Iron & Steel Co.* (1909), 78 L. J. P. C. 115; (1909) A. C. 293.

(g) Sale of Goods Act, 1893, s. 50; *Phillipps v. Evans* (1839), 9 L. J. Ex. 33; 5 M. & W. 475; *Lever v. Dunkirk City*, 1881, 13 L. T. 706.

(h) *Brown v. Muller* (1872), 11 L. J.

Ex. 211; L. R. 7 Ex. 319.

(i) Sale of Goods Act, 1893, s. 50, 3; *Stewart v. Cartwright* 1811, 10 L. J. Ex. 318; 8 M. & W. 160; *Pott v. Flather* (1847), 16 L. J. Q. B. 366.

(k) *Waddell v. Blockley* (1879), 48 L. J. Q. B. 517; 4 Q. B. D. 678. See *Loder v. Kekule* (1857), 27 L. J. C. P. 27; 3 C. B. N. S. 128.

(l) *Fulpy v. Oakley* (1851), 20 L. J. Q. B. 380; 16 Q. B. 941; *Nichol v. Bestwick* (1858), 28 L. J. Ex. 1.

(m) Sale of Goods Act, 1893, s. 51; *Gainsford v. Carroll* (1821), 2 L. J. O. S. K. B. 112; 2 B. & C. 621; *Startup v. Cartazzi* (1835), 4 L. J. Ex. 218; 2 Cr. M. & R. 165.

(n) Sale of Goods Act, 1893, s. 51; *Jostling v. Irvine* (1861), 39 L. J. Ex.

value is to be taken, though the goods have become enhanced in value since the sale by the discovery of a special quality in them which was before unknown (*o*). The buyer cannot claim damages for the loss of profit on a resale of the goods at a price higher than the market price; unless the seller had such notice of the intended resale as to make him liable for the risk (*p*). If there is no difference between the contract price and the market price, the damages as to the value of the goods are presumptively only nominal (*q*). If the price has been paid, the buyer is entitled to recover the full market value of the goods at the time appointed for delivery; and so also, if the price has been paid by a bill, which during the currency of the bill is payment; but if the bill is subsequently dishonoured, the buyer is in the same position as if no payment had been made, and can recover only the difference between the contract price and the market value; and if the payment of the price was a condition precedent to the delivery, the seller is excused altogether by non-payment (*r*). The buyer is not entitled to claim greater damages by reason of his having paid an increased price for the goods in special consideration for their delivery by a certain day (*s*).—If the buyer in fact forbears the delivery at the request of the seller, though without binding himself to do so, the damages will be regulated by the state of the market when he withdraws the forbearance and claims the delivery, and he will have the benefit of a rise in the market at that time (*t*). And if the seller forbear delivery at the request of the buyer, he will be entitled to the benefit of the state of the market at the time of the buyer's ultimate refusal to accept (*u*). If the buyer forbear claiming delivery for his own convenience and not at the request of the seller, the mere forbearance in fact does not entitle him to claim the benefit of a rise in the market after the appointed time (*v*). But neither buyer nor seller can

Forbearance
of delivery.

78; 6 H. & N. 512; *Koper v. Johnson* (1873, 12 L. J. C. P. 65; L. R. 8 C. P. 167.

(*o*) *Justine v. Irvine* (1861), 30 L. J. Ex. 78; 6 H. & N. 512.

(*p*) *Williams v. Reynolds* (1865), 31 L. J. Q. B. 221; 6 R. & S. 495; *Thol v. Henderson* 1882, 8 Q. B. D. 457.

(*q*) *Volpy v. Oakley* (1851), 20 L. J. Q. B. 380; 16 Q. B. 941; *Nichol v. Bestwick* 1858, 28 L. J. Ex. 4.

(*r*) *Volpy v. Oakley* (1851), 20 L. J. Q. B. 380; 16 Q. B. 941; *Gripiths v.*

Perry 1859, 28 L. J. Q. B. 201, 1 E. & E. 680. See Sale of Goods Act, 1893, ss. 18, 28, 55.

(*s*) *Roady v. Oastler* (1864), 33 L. J. Ex. 300; 3 H. & C. 112.

(*t*) *Ogl v. Fane (Earl)* (1868), 37 L. J. Q. B. 77; L. R. 3 Q. B. 272.

(*u*) *Hickman v. Haynes* 1875, 44 L. J. C. P. 358; L. R. 10 C. P. 598.

(*v*) *Re Pass* 1873, L. R. 16 Eq. 155; *Pharis v. Downing* (1876), 15 L. J. C. P. 695; 1 C. P. D. 220.

PART V.

Sale of stock.

prevent the damages accruing from a fall or rise in the market price by merely giving notice to the other that he does not intend to accept or deliver the goods when the appointed time comes; unless the other party accepts such notice as an immediate breach of the contract (*y*). The above rules apply in an action for not delivering stock and shares under contracts, where a market is available for replacing them. The measure of damages is the price of the stock at the time contracted for delivery, with interest for subsequent delay; and special damage cannot be claimed for a subsequent rise in price, though the stock was bought for resale in such event (*z*). Where stock is lent upon a bond or covenant to replace the stock on a certain day, the time for replacing the stock is considered as enlarged by the consent of both parties so long as the loan continues, in analogy with the covenant for repayment in a mortgage (*a*).

Damages where no market price.

The measure of damages by the market price is available only where there is a market for the goods bought or sold to which buyer or seller can resort. "Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be unjust, if in such cases, the damage must be nominal; and there are several decisions showing that such is not the law" (*b*). Where the buyer was unable to procure goods of precisely the same kind, and was obliged in order to meet his own contracts to buy the nearest substitute he could get, which was of a superior quality and price, it was held that he was entitled to charge that price as damages (*c*). And where goods of a similar quality were not procurable in the market, the price at which the buyer had contracted to resell the goods in the ordinary course of business was held to be presumptively the value (*d*); but the profits or losses on a resale, as such, cannot be charged as damages, unless the seller had notice that the goods were bought for that purpose, and only so far as the terms of the resale were brought to his notice (*e*). Where a contract was made with the manufacturer

y See ante, p. 637.

z *Tinpest v. Kidner* 1816, 3 C. B. 249; *Van Diemen's Land Co. v. Cockerell* (1857), 26 L. J. C. P. 203; 1 C. B. N. S. 732; *Michael v. Hart & Co.* (1902), 71 L. J. K. B. 265; (1902) 1 K. B. 482. See *Summons v. London Jt. Stock Bank* (1890), 60 L. J. C. 313; (1891) 1 Ch. 270.

a *Green v. Bault* (1834), 23 L. J. C. P. 105; 14 C. B. 327; *Blyth v.*

Carpenter 136, 35 L. J. C. 823; L. R. 2 Eq. 501.

b *Per cur. Ellinger Aktien Gesellschaft v. Armstrong* (1874), 43 L. J. Q. B. 211; L. R. 9 Q. B. 476.

c *Rivale v. Liddell* (1875), 44 L. J. Q. B. 105; L. R. 10 Q. B. 265.

d *France v. Goulet* (1871), 40 L. J. Q. B. 121; L. R. 6 Q. B. 199.

e *Ellinger Aktien Gesellschaft v. Armstrong* (1874), 43 L. J. Q. B. 211; L. R.

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for the supply of goods which were not to be procured in the market, and which he knew to be intended for shipment and sale abroad, and he failed to deliver any at the time contracted for, and delivered a portion only after delay, it was held that damages were recoverable for the profit of a resale to a foreign buyer, and for the extra freight and insurance upon the part delivered consequent upon the delay (*f*).

In an action for a breach of contract in not delivering a specific chattel, the damages are measured by the cost of procuring another, if reasonably possible; and if it cannot be procured, or until it can be procured, the damages are measured by the average profit made by the ordinary use of such article (*g*). The contracts made by the buyer in the course of business for the use of the article when delivered, though not specifically chargeable as damages, are evidence of the ordinary profits for which the seller is chargeable (*h*). In the case of a contract to build or to repair a ship by a certain day, the damages for delay in delivering the ship are the ordinary profits of employing the ship during the time, and where the builder knew that the ship was intended for a certain voyage, the damages were measured by the difference between the contract freight for that voyage and the reduced freight for the same voyage at the time of delivering the ship (*i*). The same rule applies where the ship after delivery is delayed by defects in the repairs contracted for (*k*). In the case of a contract to supply a threshing machine to be ready for harvest, the contractor was held liable for the loss caused by want of the machine, in the crops being exposed to the weather and in the cost of storing the crops instead of threshing out (*l*). Where the subject of contract is intended for a certain use known to the seller, and with reference to which it is supplied, the damages include the loss caused by its failing to satisfy the required use: as the loss of an anchor caused by a

Damages
for not
delivering
specific
chattel.Defective
chattel.

9 Q. B. 176; *Thol v. Henderson* 1882, 8 Q. B. D. 457; *Giechelt-Borgues v. Nagout* (1885), 51 L. J. Q. B. 511; 15 Q. B. D. 85.

f *Borries v. Hutchinson* 1865, 34 L. J. C. P. 169; 18 C. B. N. S. 445.

g *Fletcher v. Taylor* (1855), 25 L. J. C. P. 65; 17 C. B. 21; *Cry v. Thames Ironworks* (1867), 37 L. J. Q. B. 68; L. R. 3 Q. B. 181.

h *Waters v. Towers* (1853), 22 L. J.

Ex. 186; 8 Ex. 101; *France v. Gaudet* (1871), 40 L. J. Q. B. 121; L. R. 6 Q. B. 199.

i *Fletcher v. Taylor* (1855), 25 L. J. C. P. 65; 17 C. B. 21; *Re Trent and Humber Co.* (1868), 38 L. J. C. 38; L. R. 1 Ch. 112.

k *Watson v. General Screw Coll.* (1878), 47 L. J. Q. B. 239.

l *Suved v. Ford* (1859), 28 L. J. Q. B. 178; 1 E. & E. 602.

PART V.

Damages for special use of chattel.

Damages where property has passed by the contract.

defective ship's cable (*m*). Upon this principle a gas company which supplied a defective pipe under a contract to supply the plaintiff with gas was held liable for the damages caused by an explosion of escaped gas; and though the gas was set on fire by the negligence of a third party *n*. And a carriage builder who supplied a pole for a carriage which was not fit for the purpose, was held liable for the damage done to the horses by the breaking of the pole (*o*). So where goods supplied under an implied warranty of fitness for food, caused the death of the plaintiff's wife, the plaintiff has been allowed by way of damages the expenses he was put to by reason of the illness and death of his wife, the loss which he sustained of her services in the household, including the cost of extra servants who had to be employed by reason of her death (*p*).— But the contractor is not liable for the loss due to a special use for which the article was intended, of which he was ignorant or with reference to which he did not contract; as where the article was required for the repair of a machine, of which he was not aware, it was held that he was liable for the cost of replacing the article, but not for the damages which the owner had to pay under a contract with a third party for the use of the machine (*q*). Where the defendant contracted to make part of a new invention as soon as possible, and he knew the plaintiff was under contract to supply the complete machine by a certain date, he was held liable for the loss of profits of the plaintiff's contract, and for the expense incurred by him upon the invention which was rendered useless by the delay (*r*). The contractor remains liable for damages measured by the ordinary use of an article which he fails to supply, though the buyer does not intend it for ordinary use, but only for a special use for which the contractor is not responsible (*s*).

"The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the

(*m*) *Barrydale v. Reardon* (1818), 8 Taunt. 535.

(*n*) *Barrydale v. March Gas Co.* (1872), 41 L. J. Ex. 46; L. R. 7 Ex. 96.

(*o*) *Randall v. Noeson* (1877), 46 L. J. Q. B. 259; 2 Q. B. D. 102.

(*p*) *Foot v. Aylesbury Dairy Co.* (1905), 74 L. J. K. B. 386; 1905, 1 K. B. 608; *Jackson v. Watson & Co.* (1903), 78 L. J.

K. B. 587; (1903) 2 K. B. 193.

(*q*) *Portman v. Middleton* 1858, 27 L. J. C. P. 231; 4 C. B. N. S. 322.

(*r*) *Hydraulic Engineering Co. v. McHaffie* (1879), 4 C. B. D. 670.

(*s*) *Cory v. Thomas Ironworks* (1868), 37 L. J. Q. B. 68; L. R. 3 Q. B. 181.

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price, and a lien upon the goods, if they remain in his possession till that price be paid; but default of payment does not rescind the contract" (1). If the seller resumes the property to himself, as by reselling to another, before or after the expiration of the credit, the buyer may recover as damages not the full value of the goods, but the value less the unpaid price (*n*). It is no defence to an action for the price that after the delivery of the goods under the contract the seller wrongfully retook possession (*x*). But in such case the buyer may recover from the seller the full value without any deduction for the unpaid price (*y*). And he may also recover full value for the goods in an action for wrongful conversion against a third party, though he has not paid the price to the seller (*z*).—By the Sale of Goods Act, 1893, s. 52, the court is empowered, in actions for breach of contract to deliver specific or ascertained goods on the application of the plaintiff, to direct the contract to be specifically performed without giving the defendant the option of retaining the same upon paying the damages assessed, either unconditionally or upon terms and conditions as to damages, payment of price or otherwise (*a*).

Specific
delivery of
goods sold.

In an action for breach of warranty of a specific chattel the measure of damages varies according to whether the chattel has been returned or kept. The chattel can be returned or refused only where the contract so provides in the event of a breach of warranty; or where the contract is made conditional upon the warranty; or where the seller agrees to take it back; or where the sale was effected by a fraudulent warranty and the buyer has repudiated it on that ground (*b*). If the chattel has been returned, the measure of damages is the price which was paid for it, unless returned under an agreement to a different effect. If the chattel is kept, the measure of damages is the diminution in value owing to the defect warranted against: unless the buyer is, by the terms of the contract, precluded from recovering any dam-

Damages for
breach of
warranty of
specific
chattels.

(1) *Per cur.* *Martindale v. Smith* (1841),
10 L. J. Q. B. 155; 1 Q. B. 395.

(n) *Chinery v. Fidd* (1860), 29 L. J.
Ex. 180; 5 H. & N. 288.

(x) *Stephens v. Wilkinson* (1831), 9 L. J.
O. S. K. B. 231; 2 B. & Ad. 320.

(y) *Gillara v. Brittan* (1841), 11 L. J.
Ex. 133; 8 M. & W. 575.

(z) *Turner v. Hardeastle* (1862), 31

L. J. C. P. 193; 11 C. B. N. S. 683;
Johnson v. Lewis & Yorks. Ry. (1878),
3 C. P. D. 499.

(a) See Ord. XLVIII. r. 1; *Winfield*
v. Boothroyd (1886), 51 L. T. 374;
Hymas v. Ogden (1901), 74 L. J. K. B.
101; (1905) 1 K. B. 246.

(b) Sale of Goods Act, 1893, ss. 11, 12,
13, 14, 15, 53, *ante*, p. 268.

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ages (c). The loss of profit upon a resale cannot in general be recovered; but such sale would be evidence of the value of the chattel if it had been sound; and similarly a sale at a diminished price, after discovery of the breach of warranty, would be evidence of the real value of the chattel (d). The buyer may, in some cases, after discovery of a breach of warranty and offering to return the chattel, charge as damages the expense of keeping the chattel for a reasonable time until it can be disposed of (e). The buyer of a horse with a warranty resold it with a similar warranty, and being sued for a breach, offered the defence of the action to the seller and, receiving no answer, defended the action himself; it was held that he might charge the seller with the costs of defending the action (f). But if he defends the action at his own risk, when he might have discovered the unsoundness, he cannot afterwards charge the costs to the seller (g); nor if he pays the claim when he has a good defence (h). If the warranty is fraudulent, the seller is responsible for the consequences of the buyer acting upon the faith of the warranty: as where a person sold a cow, and fraudulently warranted it to be sound, when he knew it to have an infectious disease, and the buyer placed it with other cows which caught the disease and died, the seller was held responsible in damages for the value of all the cows (i); and where the warranty was not fraudulent, but the seller of the cow knew that the buyer was a farmer keeping other cows, he was held equally responsible (k).

Warranty of goods sold by description.

Upon a contract for the sale and delivery of goods of a described quantity and quality, the seller is bound to deliver goods answering to the description contracted for, which he substantially warrants: the buyer may refuse to accept inferior goods and sue the seller for not delivering goods according to the contract, in which action the measure of damages is the value of goods of the description contracted for at the time appointed for delivery, or the difference between that value and the contract

(c) *Caswell v. Coore* (1809), 1 Taunt. 565; *Clare v. Maynard* (1837), 6 L. J. K. B. 138; 6 A. & E. 519; *Cox v. Walker*, 6 A. & E. 523, n. (a); *Wallis, Son & Wells v. Pratt & Haynes* (1910), 79 L. J. K. B. 1013; (1910) 2 K. B. 1003.
(d) *Clare v. Maynard* (1837), 6 L. J. K. B. 138; 6 A. & E. 519.
(e) *Caswell v. Coore* (1809), 1 Taunt. 565; *Chesterman v. Lamb* (1834), 2 A. & E. 129.

(f) *Lewis v. Peake* (1816), 7 Taunt. 158; *Hammond v. Bussey* (1887), 57 L. J. Q. B. 58; 20 Q. B. D. 79.
(g) *Wrightup v. Chamberlain* (1839), 7 Scott, 598.
(h) *Kiddle v. Lovett* (1886), 16 Q. B. D. 605.
(i) *Mullett v. Mason* (1866), 35 L. J. C. P. 299; 1 R. 1 C. P. 559.
(k) *St. v. Green* (1875), 45 L. J. C. P. 29; 1 C. P. D. 92.

price, accordingly as he has or has not paid the price. If the buyer has accepted the goods, the measure of damages is the difference between the value of goods of the description contracted for and the value of those actually delivered and accepted (*l*). If the seller knew that the buyer was buying for the purpose of resale, he may also be liable for the special damage occasioned to the buyer by reason of his not being able to complete such resale through the inferiority of the goods delivered (*m*). Under the same circumstances of knowledge the buyer may recover the value of material employed in combination with the goods sold to manufacture a new article, if the article is thereby rendered useless (*n*); and if the goods have been resold with a similar warranty, damages which he has been compelled to pay to the sub-purchasers for breach of warranty, or for losses incurred by them in using the goods so warranted, unless he is precluded, by the terms of the contract, from recovering any damages (*o*); but he is not entitled to be compensated for damage to the goodwill of his business by a resale of the goods (*p*). Where a contract was made for the supply of army shoes, which were known to be for the use of a foreign government, and which were rejected by them because of a latent defect in quality, the buyer was held entitled to claim as damages the costs of exporting, delivering, and warehousing, and the loss of profit (*q*). If the buyer has accepted the goods, the seller can only recover the value of the goods delivered, and in the result the price may thus be reduced to the vanishing point (*r*). If the buyer is entitled to refuse goods as not answering the description contracted for, he may recover the price previously paid as an implied debt arising upon the failure of the consideration (*s*).

In an action against a carrier for default or delay in delivering goods, the general measure of the damages is the value of the goods

Damages in action against carrier.

(*l*) Sale of Goods Act, 1893, ss. 13, 30, 53; *ante*, p. 666; *Loder v. Kekul* (1857), 27 L. J. C. P. 27; 3 C. B. N. S. 128; *Dingle v. Hare* (1860), 29 L. J. C. P. 143; 7 C. B. N. S. 145.

(*m*) See *Dingle v. Hare* (1860), 29 L. J. C. P. 113; 7 C. B. N. S. 145. And see *ante*, p. 767.

(*n*) *Bostock v. Nicholson* (1901), 73 L. J. K. B. 521; (1901) 1 K. B. 725.

(*o*) *Randall v. Raper* (1858), 27 L. J. Q. B. 266; E. B. & E. 81; *Bostock v. Nicholson* (1901), 73 L. J. K. B. 521;

(1901) 1 K. B. 725; *Wallis, Son & Wells v. Pratt & Haynes* (1910), 79 L. J. K. B. 1013; (1910) 1 K. B. 1003.

(*p*) *Bostock v. Nicholson* (1904), 73 L. J. K. B. 521; (1901) 1 K. B. 725.

(*q*) *Heilbutt v. Hickson* (1872), 11 L. J. C. P. 228; L. R. 7 C. P. 438.

(*r*) Sale of Goods Act, 1893, s. 53; *Street v. Blay* (1831), 2 B. & Ad. 456; *Bostock v. Nicholson* (1901), 73 L. J. K. B. 524; (1901) 1 K. B. 725.

(*s*) See *ante*, p. 67.

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at the place of destination at the time when they ought to have been delivered, and not the value at the place of despatch (*t*). This value is regulated by the market value at that place and time, if there is there a market for such goods; and in the case of delay in delivering the goods, the damages would be the fall in the market price during the delay (*u*); or if the price at that place varies with the season, the loss of the season for selling such goods (*x*); but damages for the loss of a market at another place to which the owner intended to forward them are not recoverable (*y*); nor the expected profits of selling the goods by an agent at the place of delivery (*z*). If there is no market price the value is to be estimated according to the circumstances: as in the case of goods intended for commerce, at the cost price with the cost of carriage and with a reasonable profit to the importer (*a*). In the case of samples of goods for procuring orders, known to be such by the carrier, which could not be replaced in the market, and which became useless by delay in carriage, the damages were assessed at the value to the owner at the time when they should have been delivered (*b*). The measure of the market value on expected arrival applies to a delay in the carriage of goods on long sea voyages, unless it can be inferred from the circumstances of the case that the state of the market at the time of arrival could not have been a factor in the contract between the parties (*c*). Where the shipowner is responsible for the loss of the goods carried the damages are the market value at the port of discharge at the time when the cargo should have arrived, deducting unpaid freight for which there is a lien; and it is immaterial in such case that the owner has sold the cargo "to arrive" at a price less than that market price (*d*). A declaration of value upon which the carrier receives the goods for carriage may limit the claim to damages; as a declaration signed upon the delivery of horses to a railway company for carriage that the value of each horse did not

Declaration
of value.

(*t*) *Rice v. Basendale* (1861), 30 L. J. Ex. 371; 7 H. & N. 96.

(*u*) *Collard v. S. E. Ry.* (1861), 30 L. J. Ex. 393; 7 H. & N. 79.

(*x*) *Wilson v. Lancs. & Yorks. Ry.* (1861), 30 L. J. C. P. 232; 9 C. B. N. S. 632. See *Horne v. Midland Ry.* (1873), 42 L. J. C. P. 59; L. R. 8 C. P. 131.

(*y*) *Hawes v. S. E. Ry.* (1884), 51 L. J. Q. B. 174.

(*z*) *G. W. Ry. v. Redmayne* (1866), 35 L. J. C. P. 123; L. R. 1 C. P. 329;

Wilson v. Lancs. & Yorks. Ry. (1861), 30 L. J. C. P. 232; 9 C. B. N. S. 632.

(*a*) *O'Hanlon v. G. W. Ry.* (1865), 34 L. J. Q. B. 154; 6 B. & S. 484.

(*b*) *Schulze v. G. E. Ry.* (1887), 56 L. J. Q. B. 442; 19 Q. B. D. 30.

(*c*) *Dunn v. Bucknall* (1902), 71 L. J. K. B. 963; (1902) 2 K. B. 614.

(*d*) *Rodocanachi v. Mithurn* (1886), 56 L. J. Q. B. 202; 18 Q. B. D. 67; *Smith v. Tregearthen* (1887), 56 L. J. Q. B. 437.

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exceed 10*l.* (e). The carrier may also be bound by receiving goods as of a declared value; and to avoid such liability he may receive them subject to the express condition, expressed in the bill of lading or otherwise, as of "value and contents unknown," or "quantity and quality unknown," the effect of which is to protect him from any previous representation made respecting the value, in which case also the owner of the goods is not bound by any representation made respecting them (f).

"Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object" (g). Where a railway company employed agents to collect the goods of exhibitors at an agricultural show for the special purpose of carrying them to another similar show; it was held that they had contracted to carry out the special purpose of the exhibitors, and therefore upon failure to deliver the goods in time for the show they became liable to pay for the expected profits of the exhibitor, and also for his loss of time (h). And in an action by a colliery owner against a railway company for refusing to carry coals, damages were assessed for loss of customers in his business (i).—But damages which could not reasonably be contemplated as the consequence of a breach in the delivery are not recoverable: as the stoppage of a mill by delay in delivering a portion of the machinery of which the carrier did not know the object (k); the stoppage of a manufacture by delay in delivering material to work upon (l); the loss caused by the non-delivery of a message, of the import of which the carrier was ignorant (m); the deterioration of goods during delay of carriage caused by an intrinsic defect in the goods of which the carrier was ignorant (n); the hotel ex-

Special damages contemplated by the parties.

Damages not contemplated by the parties.

(e) *McCance v. L. & N. W. Ry.* (1864, 34 L. J. Ex. 39; 3 H. & C. 313. See *Millen v. Brasch* (1882, 52 L. J. Q. B. 127; 10 Q. B. D. 142.

(f) *Lebeau v. Gen. Steam Nav.* (1872, 42 L. J. C. P. 1; L. R. 8 C. P. 88. See *Tully v. Terry* (1873), 42 L. J. C. P. 240; L. R. 8 C. P. 679.

(g) *Cockburn, C. J., Simpson v. L. & N. W. Ry.* (1876), 45 L. J. Q. B. 182; 1 Q. B. D. 277.

(h) *Simpson v. L. & N. W. Ry.* (1876),

45 L. J. Q. B. 182; 1 Q. B. D. 274.

(i) *Lanes. & Yorks. Ry. v. Gidlow* (1875), 45 L. J. Ex. 625; L. R. 7 H. L. 517.

(k) *Hodley v. Barendale* (1854), 23 L. J. Ex. 179; 9 Ex. 341.

(l) *Gee v. Lanes. & Yorks. Ry.* (1860, 30 L. J. Ex. 11; 6 H. & N. 211.

(m) *Sanders v. Stuart* (1876), 45 L. J. C. 682; 1 C. P. D. 326.

(n) *Baldwin v. L. C. & D. Ry.* (1882, 9 Q. B. D. 582.

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penses of a commercial traveller whilst waiting for the arrival of the goods (*o*); all such damages being too remote and not contemplated in making the contract. A mere notice given to the carrier of the special purpose for which the goods are sent is not in general sufficient to render him responsible; the notice must be given and received under such circumstances that he may be taken to contract to carry and deliver the goods with special reference to that purpose. Thus a notice given to a railway company at the time of despatching the goods that the senders were under contract to deliver them by a certain day, was held insufficient to charge the company with the loss of the contract price, instead of the market price at that day (*p*).

Damages for
delay of
passenger.

In an action by a passenger for breach of contract to carry him to his destination, he may claim as damages the expense of getting there by other reasonable means, if there be such, or compensation for the trouble and inconvenience of walking there, if there be not, because it is the direct object contemplated in the contract that he should reach his destination; but an accidental injury or illness happening to him in the course of reaching his destination by such means is neither a proximate consequence of the breach of contract nor within the contemplation of the parties at the time of contracting (*q*). Upon the same principle a loss of business appointments caused by the delay of a passenger is not generally chargeable as damages (*r*).

Damages in
actions by
vendor
against
purchaser
of land.

In an action against the purchaser of land for the purchase-money, the vendor may claim damages in respect of interest from the time appointed for taking possession, or from the date when a good title is shown in an action for specific performance (*s*). In an action against the purchaser for refusing to accept a conveyance, the land remaining the property of the vendor, he can recover the costs of the sale and preparatory to the execution of the conveyance; and if the purchaser has been in possession he may be charged with the profits of the land, or fixed with an occupation rent (*t*). By the conditions of sale the vendor may also

(*o*) *Woodger v. G. W. Ry.* (1867), 36 L. J. C. P. 177; L. R. 2 C. P. 318.

(*p*) *Horne v. Midland Ry.* (1873), 42 L. J. C. P. 59; L. R. 8 C. P. 131.

(*q*) *Hobbs v. L. & S. W. Ry.* (1874), 44 L. J. Q. B. 49; L. R. 10 Q. B. 111. See *McMahon v. Field* (1881), 50 L. J.

Q. B. 552; 7 Q. B. D. 591.

(*r*) *Hamlin v. G. N. Ry.* (1856), 26 L. J. Ex. 20; 1 H. & N. 408.

(*s*) *Marsh v. Jones* (1889), 40 Ch. D. 563; *Halkett v. Dudley (Earl)* (1907), 76 L. J. C. 330; (1907) 1 Ch. 590.

(*t*) *Laird v. Pim* (1841), 10 L. J. Ex.

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be entitled to retain the deposit (*n*). Upon the refusal of the purchaser to complete the vendor is entitled to resell the land and charge the purchaser with the deficiency of the purchase-money upon resale; and it is usual to insert an express condition to that effect in the conditions of sale (*x*). In the case of a resale under this right, the forfeited deposit must be accounted for in part payment of the deficiency of the purchase-money (*y*).

In an action against the vendor for not completing the sale, the purchaser may recover as damages the costs of preparing and entering into the agreement of sale, and the costs of investigating the title, including the expense of comparing deeds, searching for judgments, and journeys for these purposes (*z*). These costs may be given in proceedings under the Vendor and Purchaser Act, 1874, s. 9, and may be charged upon the vendor's interest in the property (*a*). The liability to pay such costs is sufficient for the assessment of the damages, though they have not been paid before action (*b*). But the purchaser cannot in general recover as damages the expenses incurred in the preliminary negotiation of the contract; nor the cost of a survey of the estate, or of a deed of conveyance prepared before ascertaining the title; nor the cost of re-investment (*c*); nor loss in buying farming stock for the land in expectation of completion (*d*). It is doubtful whether the purchaser was entitled at the common law to the cost of raising the purchase-money; he is not entitled to this item of damage where he has acted hastily or improvidently; and his right to interest on the money so raised, or capital unemployed seems to stand on the same footing (*e*). But having regard to the cases

Damages in
action against
vendor.

259; 7 M. & W. 474; *Howard v. Shaw* (1811, 10 L. J. Ex. 354; 8 M. & W. 118; *Gibson v. D'Este* (1813), 2 Y. & C. C. C. 512; *revid.* on other grounds (1818), 1 H. L. C. 605.

(*n*) *Exser v. Daniell* (1875), L. R. 10 C. P. 538; *Sprague v. Booth* (1909), 78 L. J. P. C. 161; (1909) A. C. 576.

(*x*) *Ex p. Hunter* (1801), 6 Ves. 91; *Noble v. Edwards* (1877), 5 Ch. D. 378.

(*y*) *Ockendon v. Henly* (1858), 27 L. J. Q. B. 361; E. B. & E. 485; *Shuttleworth v. Clives* (1909), 79 L. J. C. 121; (1910) 1 Ch. 176.

(*z*) *Hodges v. Litchfield (Earl)* (1835), 1 Bing. N. C. 492; *Hanslip v. Padwick* (1850), 19 L. J. Ex. 372; 5 Ex. 615; *Compton v. Bagby* (1891), 61 L. J. C. 113; (1892) 1 Ch. 313. See *Hollivell v.*

Seacombe '1906', 75 L. J. C. 289; (1906) 1 Ch. 426.

(*a*) *Re Hargreaves and Thompson* (1887), 56 L. J. C. 199; 32 Ch. D. 451. See *Re Davis and Carey* (1888), 58 L. J. C. 143; 40 Ch. D. 601; *Re Archib and Glass* (1891), 60 L. J. C. 263; (1891) 1 Ch. 601.

(*b*) *Richardson v. Chasen* (1817, 16 L. J. Q. B. 341; 10 Q. B. 756.

(*c*) *Hodges v. Litchfield (Earl)* (1835), 1 Bing. N. C. 492; *Hanslip v. Padwick* (1850), 19 L. J. Ex. 372; 5 Ex. 615.

(*d*) *Godwin v. Francis* (1870), 39 L. J. C. P. 121; L. R. 5 C. P. 295.

(*e*) *Sherry v. Oke* (1831), 3 Dowl. 349; *Hodges v. Litchfield (Earl)* (1835), 1 Bing. N. C. 492. See *Sceetland v. Smith* (1833), 2 L. J. Ex. 190; 1 Cr. & M. 585.

PART V.

Deposit.

Damages for loss of bargain.

in equity by which the respective rights of the vendor and purchaser are ascertained by the contract, it would seem that *prima facie* the purchaser is entitled to interest upon the purchase-money as from the day fixed for completion (*f*). But it is difficult to see upon what principle the vendor can be fixed with the cost of raising the purchase-money, or any part of it, the vendor being in no wise concerned as to the source from which the purchase-money comes. The purchaser may also recover his deposit money, and interest on the deposit money from the day appointed for completion unless otherwise agreed in the conditions of sale (*g*); and if the contract fails for want of title in the vendor, interest may be charged from the day of the deposit (*h*). The rate of interest allowed has been 4 per cent., although the purchaser would have been bound by contract to pay a higher rate on unpaid purchase-money in case of default by him (*i*).

Where the breach consists only of a defect in title, the purchaser cannot claim damages for the loss of the profit or benefit of the contract; even though the vendor knew of the defect, provided he acted *bonâ fide*, and with reasonable grounds of belief that he had or could make a title (*k*): as where the vendor contracted to sell a lease which was not assignable without the licence of the lessor, in the belief that such licence would be given (*l*); and where a covenant to renew a lease at a certain rent could not be performed when the time came for renewal, because the rent was not then the best rent, as was required by the power of leasing of the covenantor (*m*). This rule applies to the sale of real estate of any kind that is held by title, as a contract to grant a right of way, or slag from tips (*n*). But it only applies to the case of failure to make a good title; and if the vendor, having or being able to give a good title, refuses to complete the sale, or will not do all in his power to enable the sale to be completed, the purchaser is entitled to full

(*f*) *Humphries v. Hayne* (1844), 3 Ha. 293; *Burroughes v. Bowne* (1852), 22 L. J. C. 148; 9 Ha. 609; *Rose v. Watson* (1864), 33 L. J. C. 385; 10 H. L. C. 672. See *Riley to Streetfield* (1887), 56 L. J. C. 442; 34 Ch. D. 386.

(*g*) *Farquhar v. Farley* (1817), 7 Taunt. 592. See *Powell v. Powell* (1875), 44 L. J. C. 311; L. R. 19 Eq. 422.

(*h*) *Re Hargreaves and Thompson* (1886), 56 L. J. C. 199; 32 Ch. D. 154.

(*i*) *Re Arnold* (1880), 14 Ch. D. 270. And see *post*, Pt. V., Chap. IV.

(*k*) *Bain v. Fothergill* (1874), 43 L. J. Ex. 243; L. R. 7 H. L. 158.

(*l*) *Bain v. Fothergill* (1874), 43 L. J. Ex. 243; L. R. 7 H. L. 158.

(*m*) *Gas Light Co. v. Towse* (1887), 56 L. J. C. 889; 35 Ch. D. 519.

(*n*) *Rowe v. London School Bd.* (1887), 57 L. J. C. 179; 36 Ch. D. 610; *Morgan v. Russell* (1908), 78 L. J. K. B. 187 (1909) 1 K. B. 357.

compensation for the loss of his bargain (*o*). In the case of a sale by mortgagees who made a good title, but refused to take the proceedings against the mortgagor necessary to deliver possession to the purchaser; it was held that the damages included the loss of bargain to the purchaser (*p*); and the loss of a tenant to whom he had contracted to give possession (*q*). So damages have been awarded for the loss of an anticipated letting (*r*). It is unusual for a lessee to investigate his landlord's title, and an agreement to let has been treated as an exception to the foregoing rule, with the result that the damages recoverable include those flowing from a loss of a bargain (*s*); and in the case of an agreement for a lease of business premises, may include the loss of anticipated profits to the lessee in his trade (*t*). Upon the same principle, if the purchaser is willing or is compelled to accept the property with compensation for a defect of title, the compensation must be valued at the full loss of bargain to the purchaser; as in the case of a right of way or other incumbrance over the property (*u*). In an action against an agent upon the warranty of his authority to sell, where the vendor repudiates the contract, the purchaser is entitled to recover against the agent the full benefit of the contract, as if it had been valid; and it will be presumed against the agent that the vendor would have been able and willing to complete (*x*).—Where the purchaser is entitled to claim as damages the benefit of the contract, the specific loss on an actual resale is not the measure of damage, but is *primâ facie* evidence of what is in fact the value of his bargain (*y*).

In an action for breach of a covenant for title in an executed conveyance, if the purchaser is evicted by reason of a defect in the title, the damages are the value of the estate; and if not evicted the damages are the deterioration in selling value by reason of the defect of title. *See* A covenant for title is a continuing covenant

Covenant
for title.

a) Day v. Singleton (1899), 68 L. J. C. 593; (1899) 2 Ch. 320.

per Engell v. Fitch (1869, 38 L. J. Q. B. 304; L. R. 4 Q. B. 659.

(*q. Royal Bristol Bg. Soc. v. Bamash*
(1887), 56 L. J. C. 840; 35 Ch. D. 392.

c) *James v. Gardiner* (1901), 71 L. J. C. 93; (1902) 1 Ch. 191.

v) *Lock v. Purr*: 1866), 35 L. J. C. P. 111; L. R. 1 C. P. 451.

(*t*) *Jacqu's v. Millar* (1878). 47 L. J. C. 511; 6 Ch. D. 153.

(*u*) *Royal Bristol Bg. Soc. v. Bomash* (1887), 56 L. J. C. 810; 35 Ch. D. 392. See *Hall v. London Real Prop. Co.* (1874), 43 L. J. Q. B. 75; L. R. 9 Q. B. 249. And see *post*, p. 842.

See *Simons v. Patchett* (1857), 26 L. J. Q. B. 199; 7 E. & B. 572.

(*q. Spalding v. Newell* (1869), 38 L. J. C. P. 183; *L. R.* 4 C. P. 212; *Godwin v. Francis* (1870), 39 L. J. C. P. 121; *L. R.* 5 C. P. 295.

2) *Kingdon v. Nott*, (1815), 4 M. & S.

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Covenant
against in-
cumbrances.Covenant for
quiet enjoy-
ment.

running with the land, and a defect of title is a continuing breach, upon which the tenant for the time being may sue as fresh damage arises. Upon the death of the purchaser to whom the lease was made his heir or devisee takes the estate with the lease, and to recover the damages accrued and accruing to the estate from a defect of title: his executor retains the right to recover the damages accrued to the personal estate of the purchaser in his lifetime. If the purchaser is evicted, there remains no descendible or devisible estate; and his executor can recover the full value of the estate. If the heir or devisee is evicted, he is entitled to recover the full value, though the defect of title existed in the lifetime of the purchaser (*a*). In an action upon the covenant against incumbrances, the damages are the diminution in value of the estate by reason of such incumbrances; and in an action upon a covenant to pay off specific incumbrances the damages are the whole amount of incumbrance covenanted to be paid, though no claim has been made by the incumbrancer, nor any present damage in fact proved (*b*). Under an absolute covenant for quiet enjoyment of land demised for a term of years, from which the lessee was evicted by a rightful claimant, the damages were assessed at the full value of the term unexpired, the costs of defending an action of ejectment, and the sum recovered for mesne profits (*c*). In such case if the lessee obtains a new lease from the rightful owner, the value of that lease may be taken in reduction of the damages (*d*). If the lessee is not evicted, he can recover damages only for the disturbance of the possession to the time of action: because the disturbance, though under a rightful title, may not continue (*e*). But the covenant, whether express or implied, is broken if a person cannot obtain possession by reason of an existing term (*f*). A right in a third party over the demised premises, as a right of way or a right of common, unless exercised in fact to the disturbance of the possession, is no

53; Jessel, M. R., *Child v. Stanning* (1879), 48 L. J. C. 392; 11 Ch. D. 86; *Turner v. Moon* (1901), 70 L. J. C. 822; (1901) 2 Ch. 825.

(*a*) *Kempden v. Nottle* (1813), 1 M. & S. 355; *James v. King* (1815), 4 M. & S. 188. See *Spoor v. Green* (1874), 43 L. J. Ex. 67; L. R. 9 Ex. 59.

(*b*) *Lethbridge v. Mutton* (1831), 9 L. J. O. S. K. B. 330; 2 B. & Ad. 772. See *Hodgson v. Wool* (1861), 33 L. J. Ex. 76; 2 H. & C. 519.

(*c*) *Williams v. Barrall* (1845), 11 L. J. C. P. 98; 1 C. B. 102.

(*d*) *Lock v. Forge* (1866), 35 L. J. C. P. 111; L. R. 1 C. P. 441.

(*e*) *Child v. Stanning* (1879), 48 L. J. C. 392; 11 Ch. D. 82.

(*f*) *Cloake v. Harper* (1673), Freem. K. B. 122; *Holder v. Taylor* (1613), Hob. 12; *Lodwell v. Newman* (1795), 6 T. R. 453. These cases were not referred to in *Wallis v. Woods* (1893), 62 L. J. C. 586; (1895) 2 Ch. 75.

breach of the covenant for quiet enjoyment; though it is a breach of covenant for title for which the lessee may recover damages in the diminished value of the possession (*g*). The covenant for quiet enjoyment applies only to the possession, and not to restrictions upon the use of the land; and it excludes any implied covenant against such restrictions (*h*). Under the usual covenant in a lease for quiet enjoyment restricted to the acts of the lessor and of those claiming under him, the lessee may recover damages for any interruption or interference with the possession by an act done by the lessor or under his authority, as by neglect of repair of a drain through the demised land whereby the possession was disturbed by an escape of drainage (*i*); or by the lessor claiming and in fact taking the rents of the lessee's subtenants (*k*). But damages cannot be claimed for an interruption of the possession as a consequence of the act of the lessor, which is not a natural consequence, nor within the contemplation of the parties in making the covenant; as an extraordinary influx of water into a mine from an unknown source, which was an accidental consequence of the lessor working the adjacent mine in a proper manner (*l*).—A covenant by a lessee to keep the demised premises in repair during the term is a continuing covenant, and non-repair is a continuing breach, for which an action may be brought and the damages assessed to the commencement of the action; but no damages can be claimed for a possible continuance of the breach (*m*). The measure of damages at any time during the term is the present diminution of the saleable value of the reversion due to the want of repair (*n*). The measure of damages at the end of the term is the sum required for the covenanted repairs (*o*). The recovery of damages in a former

Covenant to
repair.

(*g*) *Harvard v. Maitland* (1885), 53 L. J. Q. B. 42; 11 Q. B. D. 695. See *Smith*, p. 789.

(*h*) *Dunnett v. Athelston* (1872), 41 L. J. Q. B. 165; L. R. 7 Q. B. 316; *Robinson v. Kilebert* (1889), 58 L. J. C. 392; 41 Ch. D. 88; *Manchester, Sheff. & Lincs. Ry. v. Anderson* (1898), 67 L. J. C. 568; (1898) 2 Ch. 394. See *Spurling v. Bantoft* (1891), 60 L. J. Q. B. 745; (1891) 2 Q. B. 381.

(*i*) *Samleron v. Berwick (Corp.)* (1884), 53 L. J. Q. B. 559; 13 Q. B. D. 547; *Davis v. Town Properties Corp.* (1903), 72 L. J. C. 389; (1903) 1 Ch. 797; *Williams v. Gabriel* (1905), 75 L. J. K. B. 149; (1906) 1 K. B. 155.

(*k*) *Edge v. Baiton* (1885), 55 L. J. Q. B. 90; 16 Q. B. D. 117.

(*l*) *Harrison v. Manchester* (1891), 61 L. J. Q. B. 102; (1891) 2 Q. B. 680.

(*m*) *Lucmore v. Robson* (1818), 1 B. & Ald. 584; *Jacob v. Down* (1900), 69 L. J. C. 493; (1900) 2 Ch. 156.

(*n*) *Smith v. Peat* (1853), 23 L. J. Ex. 81; 9 Ex. 161; *Witham v. Kershaw* (1885), 16 Q. B. D. 613; *Conquest v. Ebbetts* 1896, 65 L. J. C. 808; (1896) A. C. 490.

(*o*) *Morgan v. Hardy* (1887), 56 L. J. Q. B. 363; 17 Q. B. D. 770; *Joyner v. Weeks* (1891), 60 L. J. Q. B. 510; (1891) 2 Q. B. 31.

PART V.

Covenant not
to assign.

Damages for
costs of
action.

action is no bar to an action for subsequent continuance of the breach; but the sum recovered in the former action may be considered in mitigation of damages (*p*). A covenant to put the demised premises in repair is not a continuing covenant, and is broken once for all by non-repair at the beginning of the lease (*q*). A covenant to repair is presumptively construed with reference to the condition of the premises at the time when the covenant begins to operate; hence covenants to repair in the same terms but made at different times vary in operation and in the measure of damages for a breach (*r*). But where the covenantor is aware that his covenantee is liable to a superior landlord upon a covenant to repair, the presumption is, and the covenant will be construed upon the footing, that an indemnity was intended (*s*).—In an action by a lessor against an assignee of the lease upon a covenant running with the land not to assign without licence of the lessor, the measure of damages is the value to the lessor of the personal liability of the assignee, which he has lost by the assignment, as compared with that of the unlicensed person to whom the lease has been assigned (*t*).

"The general rule is that the right to costs must always be considered as finally settled in the court where the question is adjudicated on to which it is accessory." So that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered as damages; or if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other courts (*u*). Accordingly, in an action against a vendor of land for not making a good title, the purchaser cannot claim as damages the costs of an action against the vendor for specific performance which was dismissed without costs (*x*); nor the costs of an action by the vendor for specific performance which was dismissed without costs; nor the extra costs beyond the taxed costs of such a bill

(*p*) *Conard v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153; *Henderson v. Thorne* (1893), 62 L. J. Q. B. 586; (1893) 2 Q. B. 164.

(*q*) *Conard v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153; *Jacob v. Duen* (1900), 69 L. J. Q. B. 493; (1900) 2 Ch. 156.

(*r*) *Lister v. Fane* 1892, 62 L. J. Q. B. 583; (1893) 2 Q. B. 212; *Torrens v.*

Walker (1906), 75 L. J. C. 645; (1906) 2 Ch. 166.

(*s*) *Conquest v. Ebbetta* (1896), 65 L. J. C. 808; (1896) A. C. 490.

(*t*) *Williams v. Earle* (1868), 37 L. J. Q. B. 231; L. R. 3 Q. B. 739.

(*u*) *Per cur. Malden v. Fyson* (1847), 11 L. J. Q. B. 85; 11 Q. B. 301.

(*x*) *Malden v. Fyson* (1847), 11 L. J. Q. B. 85; 11 Q. B. 292.

dismissed with costs (*g*).—The costs of an action are not given as damages in that action, because all damages recoverable must be in respect of a cause of action which accrued before the institution of proceedings (*z*). The taxed costs between party and party are generally considered to be a full compensation for the charges of litigation between the parties to an action to enforce a common law right (*a*), but the Court of Chancery possessed an original jurisdiction to award costs as between solicitor and client, but only exercised that jurisdiction under exceptional circumstances (*b*). In the case of costs recoverable under indemnities, the party liable to indemnify pays the costs incurred by the party entitled to be indemnified in defending the original action, as between solicitor and client (*c*). Taxation of costs is not a condition precedent to claiming them in an action as a debt or as damages; and if the amount is disputed judgment may be given for the costs, subject to taxation (*d*). In an action for breach of contract the costs of an action brought by a third party in consequence of the breach are in some cases recoverable as special damages: as where the buyer of goods with a warranty resells them with the like warranty, he may charge the seller with the costs of an action brought against him on the warranty, which he defends with the sanction of the seller (*e*). So where a buyer of goods as of a certain kind and quality, which the seller knows are bought for resale in his business, sells them again as of the same kind and quality, he may charge the seller with the costs which he has incurred in defending an action for defect in the goods delivered (*f*). So in an action by a lessee against his lessor for breach of a covenant for quiet enjoyment he may charge as damages the costs of an action by an adverse claimant, which after giving notice to the lessor he had defended (*g*).

(*g*) *Hodges v. Litchfield Earl* (1835), 1 Bing. N. C. 492.

(*z*) *Cockburn v. Edwards* (1881), 51 L. J. C. 46; 18 Ch. D. 419.

(*a*) *Do v. Fidler* (1811), 13 L. J. Ex. 275; 13 M. & W. 47. See *Rivers v. Gibson* (1891), 60 L. J. Q. B. 451; 1891 1 Q. B. 652.

(*b*) *Cockburn v. Edwards* 1881, 51 L. J. C. 46; 18 Ch. D. 419; *Andrews v. Barnes* (1888), 57 L. J. C. 694; 39 Ch. D. 133.

(*c*) *Post*, p. 794.

(*d*) *Holdsworth v. Wilson* (1863), 32 L. J. Q. B. 289; 4 B. & S. 1; *Metrop. Dist. Ry. v. Sharpe* (1880), 50 L. J. Q. B. 14; 5 Ap. Ca. 425.

(*e*) *Lewis v. Peake* (1816), 7 Taunt. 153.

(*f*) *Hammond v. Bussey* (1887), 57 L. J. Q. B. 58; 20 Q. B. D. 79; *Agius v. Great Western Coll.* (1899), 68 L. J. Q. B. 312; (1899) 1 Q. B. 413.

(*g*) *Rolph v. Crouch* (1867), 37 L. J. Ex. 8; L. R. 3 Ex. 44.

PART V.
Indemnity
against costs.

Contract. Indemnity against loss or damage in bringing or defending actions cover all the costs and charges which are necessarily and reasonably incurred, including the extra costs between solicitor and client (*h*). Such costs are recoverable under an indemnity, though no notice of the action is given; "the purpose of giving notice is not to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money" (*i*). But costs unnecessarily or unreasonably incurred are not chargeable under an indemnity; as in defending an action to which the defendant knew, or might by proper inquiry have discovered that he had no defence (*k*); or in defending an action upon a matter which had been decided against him in a previous action (*l*). And a contractor cannot charge the costs of defending an action for a breach of his own contract against a person who is liable to him upon a sub-contract for the same matter: because the contracts are separate and independent (*m*).

Indemnity by
agent for
defect of
authority.

Upon the above principle an agent, who by professing to act with a certain authority impliedly undertakes to indemnify the party dealing with him against a defect in that authority, is chargeable with the full costs of an action against the principal which fails for want of the professed authority to bind the principal (*n*). No notice of the action is required to be given to the agent, the contract made by him for the principal being sufficient authority from him to bring the action; but no costs are chargeable to him which have been incurred after the plaintiff has received notice of the want of authority (*o*). Nor can the costs

(*h*) *Hughes v. Gracme* (1863), 33 L. J. Q. B. 335; *Howard v. Lovegrove* (1870), 40 L. J. Ex. 14; L. R. 6 Ex. 43; *Born v. Turner* (1900), 69 L. J. C. 593; (1900) 2 Ch. 211. See *Maswell v. British Thomson-Houston Co.* (1904), 73 L. J. K. B. 644; (1904) 2 K. B. 312; *Shepherd v. Bray* (1906), 75 L. J. C. 633; (1906) 2 Ch. 235; compromised on appeal (1907), 76 L. J. C. 692; (1907) 2 Ch. 571.

(*i*) *Parke, J., Smith v. Compton* (1832), 1 L. J. K. B. 116; 3 B. & Ad. 497; *Jones v. Williams* (1811), 10 L. J. Ex.

129; 7 M. & W. 493.

(*k*) *Wrightup v. Chamberlain* (1839), 7 Scott, 598; *Walker v. Hutton* (1812), 11 L. J. Ex. 361; 10 M. & W. 249.

(*l*) *Smith v. Howell* (1851), 20 L. J. Ex. 377; 6 Ex. 530.

(*m*) *Baxendale v. L. C. & D. Ry.* (1874), 44 L. J. Ex. 20; L. R. 10 Ex. 35; *Fisher v. Val de Tavers Co.* (1876), 45 L. J. C. P. 479; 1 C. P. D. 511.

(*n*) *Hughes v. Gracme* (1861), 33 L. J. Q. B. 335.

(*o*) *Giles v. Francis* (1879), 39 L. J. C. P. 121; L. R. 5 C. P. 295.

CHAP. I.
SECT. II.

be charged to the agent if the action fails from causes independent of the want of authority: as where proof of the contract fails for want of evidence to satisfy the Statute of Frauds (*p*). In such actions against the agent the general measure of damages is the actual value of the contract which he professes to have made; but the agent warrants only the validity of the contract to bind the principal and not his capacity to perform it, upon which the value of the contract depends and which can only be presumed as against the agent in absence of proof to the contrary: the costs of the action to enforce the contract are recoverable as special damages (*q*). And the agent may limit his warranty to the receipt of the authority, as by signing "as agent by telegraphic message," which does not warrant the correctness of the message (*r*). An agent is impliedly entitled to indemnity by his principal for acting upon his authority; and if the principal repudiates the authority, the agent may recover the costs properly incurred in defending an action brought against him by reason of the repudiation (*s*).

Indemnity
of agent.

(*p*) *Port v. Bux* (1861), 30 L. J. Q. B. 257; 1 B. & S. 220.

(*q*) *Re National Coffee Palace Co.* (1883), 21 Ch. D. 367; *Forbank's Executors v. Humphreys* (1886), 56 L. J. Q. B. 57; 18 Q. B. D. 51; *Elkington v. Hucker*

(1892), 61 L. J. P. 511; (1892) 2 Ch. 452.

(*r*) *Lilly v. Santes*, (1892) 1 Q. B. 456.

(*s*) *Broom v. Hall* (1860), 7 C. B. N. S. 503. See *Hathorn v. International News Agency* (1902), 72 L. J. K. B. 90; 1903 1 K. B. 270.

CHAPTER I.

DAMAGES AND INTEREST.

SECT. III.—LIQUIDATED DAMAGES AND PENALTY.

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PART V.
Liquidated
damages.

Sum con-
tracted to
be paid for
doing certain
act.

There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point" (*a*). Accordingly charter-parties usually fix the sum to be paid daily for the demurrage or detention of the ship beyond the days allowed for loading and unloading (*b*). And building contracts stipulate for a fixed sum to be paid daily or weekly for delay in completing the work (*c*). The award of an arbitrator may provide that a party shall pay a fixed sum for every month's delay in performing the award (*d*).—A contract may also stipulate for the payment of a certain sum upon the doing of a certain act, which act is then not in itself a breach of the contract, nor can it be so charged, but it is a condition precedent to liability to pay the money (*e*): as

a *Per cur.*, *Kemble v. Farren* (1829), 7 L. J. O. S. C. P. 258; 6 Bing. 148.
b *Lockhart v. Falk* (1875), 44 L. J. Ex. 108; L. R. 10 Ex. 135.
c *Jones v. St. John's Coll.* (1870), 40 L. J. Q. B. 80; L. R. 6 Q. B. 115; *Law v. Redditch Loc. Bd.* (1891), 61 L. J.

Q. B. 172; (1892) 1 Q. B. 127.

d *Taylitt v. Chamber* (1872), 42 L. C. 6; L. R. 15 Eq. 36.

e *Leigh v. Little* (1860), 30 L. J. Ex. 25; 6 H. & N. 165. See *Pollitt v. For* (1848), 17 L. J. Q. B. 291; 11 Q. 949.

covenant to pay a fixed sum if the covenantor married any other person than the covenantee (*f*); a covenant in a farming lease to pay an increased rent for every ton of hay, straw, or manure carried off the land without consent of the lessor (*g*); or an increased rent per acre for over-lage with certain crops (*h*). A covenant in a lease to pay an increased rent for carrying on certain trades on the demised premises does not necessarily legalise the act, and may give rise to a right of re-entry (*i*).

A contract may fix a sum of money to be paid on a breach, with no intention of assessing the damages, but as a penalty to secure performance: as in the case of bonds, which acknowledge a sum of money to be due and payable, but are conditioned to be void on payment of a debt or performance of some stipulated act. The sum acknowledged is usually fixed at twice the amount of the debt or of the estimated value of the performance secured; the form of the instrument thus showing that it is intended as a penalty (*k*).—

The courts of common law originally awarded the full penalty of a bond as forfeited by a breach of the condition according to the strict construction of the terms. But in cases of penalty the Court of Chancery exercised a general jurisdiction to relieve against the judgment at law where the damage could be estimated in money upon payment of the sum really due, or the amount of damages actually sustained by the breach of contract; and for this purpose they directed an issue of *quantum damnificatus*, with an injunction against proceedings upon the judgment (*l*). And the statute law subsequently imposed similar restrictions upon proceedings in actions on bonds.—Common money bonds are regulated, in this respect, by the statute 4 & 5 Anne, c. 16, s. 12, which enacts that a payment made *post diem* may be pleaded in bar to an action on such bond with the same effect as if the money had been paid at the day and place according to the condition of the bond (*m*).—

Bonds with special conditions, and covenants or agreements in any deed or writing with a penal sum to be forfeited on breach,

Contracts with penalty.

Relief against penalty.

Money bonds.

Bonds with special conditions.

(*f*) *Low v. Peers* (1768), 4 Burr. 2225.

(*g*) *Irigh v. Lillie* (1860), 30 L. J. Ex. 25; 6 H. & N. 165.

(*h*) *Denton v. Richmond* (1833), 2 L. J. Ex. 269; 1 Cr. & M. 734.

(*i*) *Weston v. Metrop. Asylum Bd.* (1882), 51 L. J. Q. B. 399; 9 Q. B. D. 404. See *Nat. Prov. Bk. v. Marshall*

(1888), 58 L. J. C. 229; 40 Ch. D. 112.

(*k*) See *ante*, pp. 96, 97.

(*l*) *Prachy v. Somerset (Duke)* (1721), 1 Stra. 447; *Sloman v. Walter* (1784), 1 Bro. C. C. 418; 2 W. & T. L. C. 250.

(*m*) *Gerard v. Clowes* 1892, 61 L. J. Q. B. 187; (1892) 2 Q. B. 11. See *ante*, p. 97.

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872, 42 L. J.
30 L. J. Ex.
ollitt v. Forrest
291; 11 Q. B.

PART V.

Damages
restricted to
penalty.

are regulated by the statute 8 & 9 Will. 3, c. 11, s. 8, enacting that in all actions upon any bond, or on any penal sum for non-performance of any such covenants or agreements, the plaintiff may assign as many breaches as he shall think fit; and the judgment is restrained in operation to the damages assessed upon such breaches as the plaintiff shall prove; the judgment for the penalty remaining as security for any further breaches, for which damages may be assessed and execution had upon the judgment to the amount of the penalty (*n*).—The action upon a bond is always in point of form for the recovery of the penalty; at law the obligee could, in no case, recover more than the penalty; and the obligor could obtain a stay of proceedings with an entry of satisfaction upon payment of the penalty and costs (*o*). The same rule obtained in equity (*p*), unless it appeared that the bond was given as a collateral security as in the case of an advance secured by a mortgage of lands with a bond (*q*), or of an annuity granted by a distinct contract and secured by a bond (*r*), in which cases the obligee might, and may, recover sums in excess of the penalty of the bond. A judgment recovered upon a bond carries interest independently of the bond (*s*); but interest beyond the penalty will not be levied upon a judgment debt to the prejudice of a subsequent incumbrancer (*t*).

Covenants
and simple
contracts with
penalty.

Upon covenants and simple contracts with a penalty, the plaintiff may sue for and recover the penalty, which is deemed to be a satisfaction also for the liability upon the covenant, or he may proceed upon the covenant, and recover more or less than the penalty (*u*). As in the case of a charter-party with stipulations on both sides and concluding with a penalty for non-performance an action may be brought for a specific breach, and full damages may be recovered beyond the amount of the penalty (*x*). If the plaintiff sues for the penalty and the contract is within the above-

(*n*) Ord. XIII. r. 14; *Tutler v. Caralampi* (1888), 21 Q. B. D. 414. And see *ante*, p. 98; *Gainsford v. Griffith* (1667), 1 Wms. Saund. 67, n. (1).

(*o*) *Wilde v. Clarkson* (1795), 6 T. R. 394; *Branscombe v. Scarborough* (1844), 13 L. J. Q. B. 247; 6 Q. B. 13. See *Hutton v. Harris* (1867), 62 L. J. P. C. 21; (1892) A. C. 547.

(*p*) *Campbell v. Graham* (1830), 1 Russ. & M. 453; *Hughes v. Wignae* (1832), 2 L. J. C. 28; 1 M. & K. 24; *Walters v. Meredith* (1838), 3 Y. & C. Ex. 264; *Matheys v. Keble* (1868), 37 L. J. C.

657; L. R. 3 Ch. 691.

(*q*) *Clarke v. Abingdon* (Lord) (1810) 17 Ves. 106.

(*r*) *Jewdine v. Agate* (1829), 3 Sim. 129.

(*s*) *McClure v. Dunkin* (1801), 1 East 436.

(*t*) *Hutton v. Harris* (1892), 62 L. J. P. C. 24; (1892) A. C. 547.

(*u*) *Parke, B., Hurst v. Hurst* (1849) 19 L. J. Ex. 410; 4 Ex. 579.

(*x*) *Harrison v. Wright* (1811), 1 East, 343.

mentioned statute 8 & 9 Will. 3, c. 11, he must assign breaches under the statute, and the damages recoverable are limited by the judgment for the penalty (*y*). If the plaintiff recovers or accepts the penalty, it operates in full satisfaction of the contract and the other party is discharged from all further liability (*z*). A judgment for liquidated damages has the same conclusive operation *a*; and in the case of liquidated damages no relief can be obtained against payment of the full amount *b*).

The provision for compensation, either by way of penalty or of liquidated damages, does not exclude the remedy of specific performance or injunction, where that remedy is appropriate. There are some cases in which the court has treated a provision of this nature as entitling the party to do a particular act upon payment of the stipulated sum (*c*); but the general tendency of the decisions is to treat the act as unwarranted, and to give the party entitled to the penalty the option of accepting the money as compensation, or of specifically enforcing his rights (*d*). Thus the court will decree specific performance against the vendor of a contract for the sale of land, notwithstanding an offer to pay the penalty of the contract (*e*); and will not allow either party to claim the penalty from the other who remains willing to complete the sale (*f*). The court will grant an injunction to restrain a breach of a covenant, though protected by a provision for the payment of liquidated damages (*g*). And the court will grant an injunction where a provision be contained in a covenant or in a bond, and where the money payment be described as liquidated damages or a penalty; the primary intention being to prevent the act, and not to secure compensation for loss by reason of the breach of contract (*h*).

Specific performance of contract with penalty or liquidated damages.

(*y*) *Parke, B., Hurst v. Hurst* (1849), 19 L. J. Ex. 410; 4 Ex. 579; *Bramwell, B., Betts v. Burch* (1859), 28 L. J. Ex. 269; 4 H. & N. 510.

(*z*) *Bird v. Randall* (1762), 1 W. Bl. 387; 3 Burr. 1345.

(*a*) *Scintler v. Ferguson* (1719), 19 L. J. C. 170; 1 Mac. & G. 1. *Carnes v. Nisbett* (1862), 31 L. J. Ex. 273; 7 H. & N. 778.

(*b*) *Mansfield, C. J., Lowe v. Peers* (1768), 4 Burr. 2228. See ante, p. 737.

(*c*) *Woodward v. Gyles* (1690), 2 Vern. 119; *Carnes v. Nisbett* (1862), 31 L. J. Ex. 273; 7 H. & N. 778.

(*d*) *Fox v. Scard* (1863), 33 Beav.

327; *Gen. Accident Assoc. v. Noel* (1901), 71 L. J. K. B. 236; (1902) 1 K. B. 377.

(*e*) *Howard v. Hopkyns* (1742), 2 Atk. 371. See *Long v. Bourring* (1861), 33 Beav. 585.

(*f*) *Ex p. Hulse* (1873), 43 L. J. C. 261; L. R. 8 Ch. 1022.

(*g*) *French v. Macale* (1812), 2 Dr. & War. 269; *Coles v. Sims* (1854), 23 L. J. C. 258; 5 De G. M. & G. 1.

(*h*) *Loyau v. Wincholt* (1833), 1 Cl. & F. 611; *Jones v. Heavens* (1877), 4 Ch. D. 636; *National Provincial Bk. v. Marshall* (1888), 58 L. J. C. 229; 40 Ch. D. 112.

PART V.

Construction
as to penalty
or liquidated
damages.

Bonds.

Larger sum
payable in
default of
smaller.

Agreement
to take
smaller sum.

"It is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument" (*i*). The use of the terms "penalty," or "liquidated damages," or their equivalents in the agreement are not conclusive of the question, but constitute one element to be considered in ascertaining the intention of the parties, and cannot be disregarded (*k*). Bonds present no difficulty as regards the penal sum in which the obligor is bound, the form of the instrument clearly denoting that it is a penalty for securing the agreement expressed in the condition; and the plaintiff is restricted both in equity and by statute to the recovery of the damages actually sustained by breaches of the condition (*l*). But if the condition of the bond fixes a sum to be paid on a breach, the question may arise respecting that sum, whether it is to be treated as liquidated damages or a penalty, and must be decided upon the same principles as in any other form of contract (*m*).

Where a larger sum is agreed to be paid on non-payment of debt or liquidated money demand, it is presumptively a penalty, since no damages other than nominal are recoverable for the detention of a debt (*n*). Where a sale of an estate was made upon the terms that half the purchase-money should be paid at once, and the other half on a fixed day, and that if the whole was not paid off by that day the vendor should retain the estate and all the money then paid; it was held to be a penalty, as forfeiting the purchase-money paid for a default in part however small, and relief was given on payment of the unpaid balance with interest (*o*).—But if an agreement is made for the payment of a smaller sum at a certain time, and in a certain manner in discharge of an existing debt, with the condition that it

(*i*) *Wilde, C. J., Sainter v. Ferguson* (1849), 18 L. J. C. P. 217; 7 C. B. 727.

(*k*) *Keble v. Farren* (1829), 7 L. J. O. S. C. P. 258; 6 Bing. 141; *Law v. Redditch Loc. Bd.* (1891), 61 L. J. Q. B. 172; (1892) 1 Q. B. 127; *Pye v. Brit. Automobile Constr. Synd.* (1906), 75 L. J. K. B. 270; (1906) 1 K. B. 425; *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda* (1904), 74 L. J. P. C. 1; (1905) A. C. 6.

(*l*) See ante, p. 97.

(*m*) *Price v. Green* (1847), 16 L. J. E. 108; 18 M. & W. 316; *Ranger v. G. Ry.* (1854), 5 H. L. C. 72; *Mercey v. Irving* (1858), 27 L. J. Q. B. 291; E. & F. 563; *Protector Endowment Co. v. Grice* (1880), 49 L. J. Q. B. 49; 5 Q. B. D. 592.

(*n*) Per cur. *Keble v. Farren* (1829) L. J. O. S. C. P. 258; 6 Bing. 141; per cur. *Law v. Redditch Loc. Bd.* (1891) 61 L. J. Q. B. 172; (1891) 1 Q. B. 131.

(*o*) Ex p. *Hulse* (1873), 43 L. J. 261; L. R. 8 Ch. 1022.

default of payment the creditor shall be restored to his original rights, the condition is not a penalty, and no relief can be obtained against it (*p*); as is also the case where a present debt is contracted to be paid by instalments, subject to the condition that on default of any instalment the whole sum remaining due shall become payable at once (*q*); and the condition is not waived by accepting payment of an instalment after default (*r*).—A similar principle is applied in the case of mortgages, in which a provision that upon default in punctual payment a higher rate of interest shall be charged is construed as a penalty; and relief is given upon the terms of the debtor paying interest at the lower rate, with interest for the delay; but if a certain rate of interest is fixed, and the mortgagee agrees to take less if it be paid punctually, that is a valid agreement against which no relief is given (*s*). "Anything more irrational than the doctrine I think can hardly be stated. It entirely depended on form and not on substance" (*t*). Where a contract for the sale of land fixed the rate of interest on unpaid purchase-money at four per cent. from the time of taking possession until a fixed day, and after that day at five per cent., and after another fixed day at eight per cent.; it was held that the interest, being a measure of damages and not a penalty, must be paid in full (*u*).

Proviso for increased interest.

A fixed sum to be paid on a breach of contract which is of uncertain value is presumptively liquidated damages and not a penalty (*x*): as the sum contracted to be paid daily or weekly for delay in completing contracts for building or other like works; and the sum fixed in a charter-party for demurrage (*y*). A guarantee that a vessel should sail at a certain time "under penalty of forfeiting one-half of the freight" was construed as fixing the liquidated damages to be recovered in full (*z*). Agreements for the sale of

Damages for breach of uncertain value.

(*p*) *Ford v. Chest-field Earl* (1854), 19 Boar. 429; *Thompson v. Hudson* (1869), 38 L. J. C. 431; L. R. 1 H. L. 1; *Endicott Embroidered Lace Co. v. Grace* (1880), 49 L. J. Q. B. 498; 5 Q. B. D. 592.

(*q*) *Wallington v. Mutual Society* (1880), 50 L. J. Q. B. 49; 5 Ap. Ca. 685.

(*r*) *Kecke v. Biscoe* (1877), 47 L. J. C. 644; 8 Ch. D. 201; *Ex p. Burden* (1880), 16 Ch. D. 675.

(*s*) *Ex p. Paris Marq.* (1717), 3 Atk. 519; *Attwood v. Taylor* (1840), 1 Man. & G. 279; *Union Bank of London v.*

Ingram (1880), 50 L. J. C. 74; 16 Ch. D. 53; *Lords and Hoadley Theatre v. Broadbent* (1898), 67 L. J. C. 135; (1898), 1 Ch. 313. See *Wrigley v. Gull* (1904), 74 L. J. C. 160; (1905), 1 Ch. 211.

(*t*) *Jessel, M. R., Wallis v. Smith* (1882), 52 L. J. C. 113; 21 Ch. D. 261.

(*u*) *Herbert v. Salsbury and Yeovil Ry.* (1876), L. R. 2 Eq. 221.

(*x*) *Santer v. Ferguson* (1849), 18 L. J. C. P. 217; 7 C. B. 716.

(*y*) See *ante*, p. 796.

(*z*) *Spencer v. Paris* (1862), 31 L. J. Ex. 137; 7 H. & N. 591.

PART V.

Valued
policies of
insurance

Penalty
payable for
breaches of
various kinds
and value.

a trade or business, or for the partnership or the employment of a person, providing against the carrying on the same trade or business within certain limits by stipulating for the payment of a fixed sum for a breach of any such terms, are in general considered as settling the liquidated damages to be recovered in full (a). So a sum proportioned to the extent of the breach is *prima facie* liquidated damages and not a penalty (b); as the increased acreage rent payable by a tenant for overtillage (c).—Upon the like principle in marine insurance, though in general a contract of indemnity, the parties may agree beforehand in fixing the value of the subject insured; and in case of a loss the valuation in the policy is the sum recoverable, whether greater or less than the value in fact (d).—The excessive amount of the sum fixed to be paid for a breach of uncertain value is to be considered, but is not a conclusive ground for treating it as a penalty and not liquidated damages; as it is competent for the parties to form their own estimate of the value if not unreasonable (e).

Where a contract includes various stipulations which are of different fixed value, as money payments; or some of which are of fixed value and others of uncertain value; and one sum is fixed to be paid for a breach of any one of them, it is presumptively a penalty; because it cannot have been fixed with any regard to the value or extent of the breach (f). If the various stipulations contracted for are all of uncertain value, the fixed sum payable on a breach is presumptively liquidated damages; because the parties may be taken to have estimated the effect of a breach with reference to the entire contract (g). In an agreement for the sale of a public-house, containing various stipulations as to the transfer of licence, possession and goodwill of the business, trade fixtures and stock in trade and other matters, a provision that if either party should fail to perform the agreement he should pay to the

(a) *Price v. Green* (1847), 16 L. J. Ex. 108; 16 M. & W. 346; *Remolds v. Bridge* (1856), 26 L. J. Q. B. 12; 6 E. & B. 528; *Morse v. Irving* (1858), 27 L. J. Q. B. 291; E. B. & E. 563.

(b) *Cladbank Engineering Co. v. Yzquierdo y Castaneda* (1904), 74 L. J. P. C. 1; (1905) A. C. 6.

(c) *Denton v. Richmond* (1833), 2 L. J. Ex. 269; 1 Cr. & M. 734.

(d) Marine Insee. Act, 1906, s. 27; *Irving v. Manning* (1847), 1 H. L. C. 287. See ante, p. 549.

(e) *Eldon, C. J., Astley v. Widdon*

1801, 2 B. & P. 351; *Cotton, L. J. Wallis v. Smith* 1882, 52 L. J. C. 145; 21 Ch. D. 270; *Esher, M. R., Law v. Redditch Loc. Bd.* (1891), 61 L. J. Q. B. 172; (1892) 1 Q. B. 130.

(f) *Kemble v. Farnen* 1829, 7 L. O. S. C. P. 258; 6 Bing. 141; *Willis v. Lore* (1896), 65 L. J. Q. B. 620; (1896) 1 Q. B. 626.

(g) *Remolds v. Bridar* (1856), 26 L. Q. B. 19; 6 E. & B. 528; *Wallis v. Smith* (1882), 52 L. J. C. 145; 21 Ch. D. 243.

other a fixed sum of money was held to operate as a penalty (*h*). A sum of money may become payable upon the happening of a single event, as the failure to complete a contract to construct drainage works within a limited time, in which the condition may be satisfied by matters of varying importance, the construction of the contract may require the liability to be referred to the single event, and not to the independent circumstances of which it consists, and where this is the case, the liability is to pay liquidated damages, and is not a penalty (*i*).—But where under an agreement for the sale of property a fixed sum of money was deposited, to be paid to one or other of the parties on a breach of the contract, it might be recovered at law in full according to the event; having been already paid as the liquidated value of the contract to each party; but in equity, as the seller may resume possession, it has been customary to treat the right to forfeit the deposit as a penalty (*k*). In the case of a similar deposit in respect to other contracts, it would seem that in equity, as well as at law, it depends upon the construction to be put upon the contract whether the sum deposited may be forfeited or not (*l*).

Deposit
subject to
forfeiture.

(*h*) *Bell v. Burch* (1839), 28 L. J. Ex. 267; 4 H. & N. 506; *Magee v. Lovell* (1871), 43 L. J. C. P. 131; L. R. 9 C. P. 107.
(*i*) *Law v. Redditch Loc. Bd.* (1891), 61 L. J. Q. B. 172; 1892, 1 Q. B. 127.
(*l*) *Lee v. Whitaker* (1872), L. R. 8 C. P. 20; *Ex p. Hulce* (1873), 43

L. J. C. 261; L. R. 8 Ch. 1022.
(*k*) *Choper v. L. B. & S. C. Ry.* (1879), 48 L. J. Ex. 431; 4 Ex. D. 88; *Pye v. Brit. Automobile Comm. Synd.* (1906), 75 L. J. K. B. 270; (1906) 1 K. B. 425. See *Wallis v. Smith* (1882), 52 L. J. C. 145; 21 Ch. D. 243.

Cotton, L. J.,
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11; *Willson*
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145; 21 Ch.

CHAPTER I.

DAMAGES AND INTEREST.

SECT. IV.—INTEREST.

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PART V.
Interest by
contract.

Where interest is payable by contract, it becomes a debt which may be recovered by action, with or without the principal debt; as in the case of a debt contracted to be paid at a distant day with interest to be paid periodically in the interval, the interest may be claimed separately as it falls due (*a*). Interest contracted as a debt is considered as accruing from day to day, though agreed to be paid at fixed intervals; and therefore it is apportionable by law amongst parties who become entitled to the principal fund in succession; unlike rents and annuities which are apportionable only by statute (*b*).

Interest as
damages.

Interest payable as damages is not a debt, and it cannot be added to the principal as part of the debt, so as to make a sum sufficient to support a petition in bankruptcy (*c*). Where a contract is made for the payment of a sum of money on a certain day with interest at a certain rate to that day, there is no implied contract for the continuance of interest, in the absence of intention expressed to that effect; interest for delay beyond the day appointed

(*a*) *Duckett v. Harrison* (1811), 4 Pri. 711; *Hutton v. Fawcett* (1844), 13 L. J. C. P. 141, 7 Man. & G. 348; *Nordenstrom v. Pitt* 3245, 14 L. J. Ex. 150; 13 M. & W. 723.

(*b*) *Banner v. Lowe* (1806), 13 Ves. 135; *Ex p. Smyth* (1818), 1 Swanst. 33; Apportionment Act, 1870.

(*c*) *Cameron v. Smith* (1819), 2 B. Ald. 305.

can be claimed only as damages to be awarded by the court, and if awarded may be assessed at a different rate; but the contract rate is generally presumed to be the reasonable rate for the damages (*d*). A bond in a penal sum conditioned to be void upon payment of a lesser sum with interest at a certain date, carries interest (recoverable as such and not as damages) until the date of actual payment (*e*). Interest will not be allowed as damages during delay of payment caused by the plaintiff himself; as delay in taking out administration to the deceased creditor (*f*); or delay in completion of a purchase attributable to the default of the vendor (*g*).

Interest is in all cases an accessory to the principal, so that if the action for the principal debt is barred, as by the Statute of Limitations, the claim for future interest ceases with it (*h*). And payment or tender duly made of the principal debt bars any claim for future interest (*i*). But the principal debt may be discharged, leaving the claim for past interest; as upon the renewal of a bill by a new bill for the same sum, leaving interest upon the former then due and unpaid (*k*). And a judgment recovered for the principal debt, though it discharges the debt and all claim to future interest by merger, is no bar to the claim for interest accrued due before the recovery, if the interest could not have been recovered in the former action (*l*).

Interest
accessory to
principal.

By the general rule of the common law interest cannot be claimed as damages for the mere forbearance or detention of a debt: interest is allowed by law only where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances; and the rule is independent of the mere form of the instrument, whether in writing or under seal (*m*). Upon a contract to give a security

Debts and
contracts
bearing
interest.

(*d*) *Keene v. Keene* (1857), 27 L. J. C. P. 89; 3 C. B. N. S. 144; *Cook v. Farley* 1874, 13 L. J. C. 855; L. R. 7 H. L. 27; *R. Roberts* (1880), 11 Ch. D. 49.

(*e*) *Re Dixon* (1900), 69 L. J. C. 609; (1900) 2 Ch. 561.

(*f*) *Edwards v. Warden* (1876), 45 L. J. C. 713; 1 Ap. Ca. 281; *Webster v. British Empire Assoc.* 1880, 49 L. J. C. 769; 15 Ch. D. 169.

(*g*) *Jones v. Gardner* (1901), 71 L. J. C. 93; (1902) 1 Ch. 191.

(*h*) *Hollis v. Pitham* 1836, 5 L. J. C. P. 261; 2 Bing. N. C. 713.

(*i*) *Gyles v. Hall* 1726, 2 P. Wms. 377; *Parke, B., Norton v. Elton* (1837), 6 L. J. Ex. 121; 2 M. & W. 161; *Chiff v. Windsor* (1843), 2 Y. & C. Ch. 598.

(*k*) *Lovely v. Musgrave* (1837), 7 L. J. C. P. 19; 4 Bing. N. C. 9.

(*l*) *Florence v. Jennings* 1857, 26 L. J. C. P. 271; 2 C. B. N. S. 454.

(*m*) *Hoggins v. Sargent* (1823), 2 L. J. O. S. K. B. 33; 2 B. & C. 348; *L. C. & D. Ry. v. S. E. Ry.*, (1893) 63

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PART V.

which would carry interest, as a bill or note (*n*), or to pay securities which carry interest (*o*), a contract to pay interest may be inferred. The same rule applies in equity, in dealing with contracts and legal rights; but in dealing with trusts and matters of purely equitable cognizance, interest is awarded according to the principles and practice of that branch of jurisdiction (*p*). Since the Judicature Act, 1873, which provides that the rules of equity shall prevail where they conflict with the rules of the common law, interest may sometimes be recovered in common law actions, as in the case of a claim of a principal against an agent for money had and received, where the Court of Chancery would have ordered an account to be taken with interest (*q*).—Accordingly, interest is not allowed upon money deposited with a banker by a customer upon his current account, which is a simple loan (*r*). But advances by a banker, upon which interest is usually charged, carry interest in an action for the balance of account (*s*).—Interest is not generally allowed upon a debt for money paid (*t*); but where a person has paid money for another under an indemnity, express or implied, he is entitled to interest, because he is not fully indemnified unless he is put in the same position pecuniarily as if he had not paid the money (*u*): as in the case of a surety having paid money for his principal; or a surety claiming contribution from a co-surety (*x*).—Interest is not allowed upon a mere account stated; unless it is shown that the debts stated bear interest, as in the case of merchants' accounts (*y*).—Interest is not generally allowed upon the unpaid price of goods sold and delivered; though by the contract of sale a fixed period of credit

L. J. Ch. 93; (1893) A. C. 429. See *Re W. W. Dunlop & Co.* (1905), 74 L. J. C. 188; (1905) 1 Ch. 307.

(*n*) *Marshall v. Poole* (1810), 13 East, 98; *Fare v. Ward* (1837), 3 M. & W. 25; *Rhodes v. Selsey* (Lord, 1840), 2 Beav. 359; *Davis v. Smyth* (1841), 10 L. J. Ex. 473; 8 M. & W. 399.

(*o*) *Harper v. Williams* 1843, 12 L. J. Q. B. 227; 2 Q. B. 219.

(*p*) *Booth v. Lyster* (1838), 8 L. J. C. 49; 3 M. & Cr. 459; *Rhodes v. Rhodes* (1860), 29 L. J. C. 418; Johns. 653; *Hall v. S. Staffs. Ry.* (1871), 43 L. J. C. 560; L. R. 18 Eq. 154; *Re Drax* (1903), 72 L. J. C. 395; (1903) 1 Ch. 781.

(*q*) *Horsant v. Bloor* (1887), 56 L. J. Q. B. 512.

(*r*) See *Calton v. Bragg* (1812), 15 East 223; *Foley v. Hall* (1818), 2 H. L. C. 28.

(*s*) *Gwyn v. Godby* (1812), 4 Taunt. 346.

(*t*) *Carr v. Edwards* (1822), 3 Stark. 132; *Hicks v. Maceen* 1833, 5 Car. & P. 498.

(*u*) *Ex p. Bishop* (1880), 50 L. J. C. 18; 15 Ch. D. 400; *Sargood's claim* (1871), L. R. 15 Eq. 43.

(*x*) *Hitchman v. Stewart* (1855), 24 L. J. C. 690; 3 Drew. 271.

(*y*) *Ellenborough, C. J., Calton v. Bragg* 1812, 15 East, 228; *Petree v. Duncombe* 1851, 20 L. J. Q. B. 242.

is given (z). Nor is interest allowed upon a claim for work and labour or for services rendered (a).

Interest is allowed as damages upon bills of exchange and promissory notes and other mercantile instruments, according to mercantile usage now confirmed by statute; the rate of interest as damages varies with the value of money, but the rate expressed in the instrument, if any, is presumptively taken as the value to the parties; and if delay in payment is caused by default of the holder such damages may be disallowed (b). If the bill or note is expressly drawn payable "with interest," the interest is a debt accruing due from the date of the instrument, whether payable on demand or at a time specified; "the reason is, that the party who makes the promise must be expected to keep it; and if he does, no interest can be due from any other period than the date" (c). If interest is not expressed in the bill or note, it is recoverable only as damages and from the maturity of the instrument (d); and if the instrument is payable on demand interest is recoverable only from the time of demand, or from the commencement of an action, which operates as a demand (e). The drawer or indorser of a bill or note can be charged with interest as damages only from the time of his receiving notice of dishonour (f). But a person who guarantees payment of a bill or note without being a party is chargeable with all interest due upon it to the party guaranteed (g); and without notice of dishonour (h). Upon a contract to give a bill or note, or to pay by a bill or note, interest is recoverable in the same manner as if the bill or note had been given (i).

Contract to
give bill
or note.

A bond in a penal sum with a condition for the payment of a less sum carried interest; because the obligor being indebted in the whole penal sum unless he avoided it by performance of the condi-

Interest on
bonds.

(z) *Gordon v. Swan* 1810, 12 East, 119.

(a) *Techoway v. Thomas* 1789, 1 Hl. Bl. 305; *Milson v. Hayward* 1821, 9 Price, 131.

(b) Bills of Exchange Act, 1882, s. 57; *Bayley v. J., Cameron v. Smith* (1819), 2 B. & Ald. 308; *Keen v. Keen* (1857), 27 L. J. C. P. 59; 3 C. B. N. S. 141.

(c) *Bayley v. Gifford* 1839, 8 L. J. Q. B. 336; 10 A. & E. 222.

(d) *Cameron v. Smith* (1819), 2 B. & Ald. 305.

(e) *Price v. Guthrie* (1855), 2 Bing.

N. C. 167; *Re Hibernian Banking Co.* (1867), 36 L. J. C. 806; L. R. 4 Eq. 250; *Re East of England Banking Co.* (1868), 38 L. J. C. 121; L. R. 4 Ch. 11.

(f) *Walker v. Banks* (1813), 5 Taunt. 210; *Keen v. Keen* (1857), 27 L. J. C. P. 58; 3 C. B. N. S. 141.

(g) *Ackermann v. Florenspence* (1816), 16 L. J. Ex. 3; 16 M. & W. 59.

(h) *Walton v. Maswell* (1814), 11 L. J. Ex. 51; 13 M. & W. 152.

(i) *Marshall v. Pade* (1810), 13 East, 98; *Fair v. Ward* 1837, 13 M. & W. 25; *Rhodes v. Selby* (1840), 2 Beav. 359.

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B. 242.

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tion, could only obtain relief from the penalty upon equitable terms according to which interest was payable, and this rule is embodied in the statute 4 & 5 Anne, c. 16; but no greater sum is recoverable for the debt and interest than the amount of the penalty (*k*). Payment and acceptance of the debt *post diem* bars an action on the bond as if made according to the condition, by the statute 4 & 5 Anne, c. 16, and precludes recovery of interest for the delay in payment (*l*). A single bond without any condition of avoidance is a mere debt, which carries no interest (*m*).

Interest on mortgages.

In mortgages containing a covenant to pay the principal debt with interest at a certain rate on a certain day, if no interest is expressly stipulated on default of payment, interest after the day cannot be claimed under the covenant; but upon the presumed intention of the parties that the mortgage should bear interest during its continuance, it is an established practice to give interest by way of damages, and presumptively, but not necessarily, at the covenanted rate (*n*); if that rate is excessive it will be reduced to the usual commercial rate (*o*). And it is a settled rule of practice that after default of the mortgagor, the mortgagee is entitled to have six months' notice of payment or six months' interest as a condition of redemption if his mortgage is by deed (*p*). The same principles apply to an equitable mortgage by deposit of deeds with an agreement to execute a legal mortgage for the debt and interest (*q*). A deposit of deeds to secure a loan of money without any further agreement carries interest; but the rule as to six months' notice or interest does not apply (*r*). As already stated the mortgagee cannot stipulate for a higher rate of interest by way of penalty for default in punctual payment of the agreed interest, but he is allowed to attain the same object by fixing a high rate and agreeing that a lower rate of interest shall be accepted if paid punctually (*s*).

k *Re Deane* (1900), 69 L. J. 609; 1900, 2 Ch. 761. See *Crosse v. Bodnypfield* (1841), 10 L. J. C. 219; 12 Sim. 35.

l *Deane v. Pakes* (1794), 1 E.p. 110. See *Twiss v. Twiss* 1670., 2 Wms. Saund. 114, n. *l*.

m *Hogbin v. Page* 1798, 1 Bos. & P. 337; *Foster v. Weston* 1809, 8 L. J. O. S. C. P. 295; 6 Bing. 709.

n *Frost v. G. W. Ry.* 1847, 16 L. J. Ex. 87; 16 M. & W. 248; *Morgan v. Jones* (1853), 22 L. J. Ex. 232; 8 Ex. 620; *Goodwin v. Wignall* 1877, 11 L. J. C. 691; 5 Ch. D. 287.

o *Wallington v. Cook* 1878, 17 L. J. C. 508; *Re Roberts* 1880, 11 Ch. D. 1; *Mellorish v. Brown* 1890, 60 L. J. 43; 15 Ch. D. 225.

p *Bathell v. Franklin* (1867), L. J. C. 674; *Smith v. Smith* 1891, L. J. C. 691; 1891, 3 Ch. 550.

q *Re Wood's Estate* (1809), 38 L. J. 339; L. R. 8 Eq. 331; *Ex p. Fox* 1881, 17 Ch. D. 191.

r *Fitzgerald's Trustee v. M'Neil* 1891, 61 L. J. C. 231; 1892, 1 Ch. 385.

s See *note*, p. 801.

CHAP. I.
SECT. IV.

Interest on
purchase-
money.

Interest is payable for delay in payment of the purchase-money under a contract of sale of land from the time fixed for completion, or from the time of the vendor making a good title, but the vendor may avoid this liability by appropriating the money and giving notice to the purchaser (t). And interest is payable upon the lien for unpaid purchase-money from the time of the purchaser taking possession; provided a good title is then made (u). Interest is also payable upon the lien for the return of a deposit or of purchase-money which arises upon a rescission of the contract of sale (x); or during delay in completion by the vendor (y).

Interest by
statute.

Interest may be chargeable as damages by the Civil Procedure Act, 1833, s. 28, which enacts that "upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." By sect. 29, "The jury on the trial of any issue or on any inquisition of damages may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above all money recoverable in all actions on policies of insurance made after the passing of this Act" (z). Interest is not chargeable under the enactment until there is a person entitled to payment and to give a receipt; as in the case of a life insurance falling due and no administration taken out to the deceased (a).

(t) *Tyson v. Harbottle* 1851, 1 De G. & Sm. 181; *Kirshaw v. Kirshaw* 1869, L. R. 9 Eq. 56; *Hall v. Dutton* 1861, 10 L. J. C. 33; 1907 1 Ch. 590.

(u) *Rolland v. Shaw* 1880, 10 L. J. C. 618; 15 Ch. D. 122; *Re Stone and Birmingham* (1881), 51 L. J. C. 51; 27 Ch. D. 611.

(x) *Boss v. Watton* 1861, 33 L. J. C. 385; 10 H. L. C. 672; *Pearson v. Bolton* 1872, 41 L. J. C. 613; 11 Eq. 136.

(y) See ante, p. 786.

(z) See *Crosse v. Biddings* (1811), 10 L. J. C. 219; 12 Sim. 35; *Philips v. Houghton* 1892, 61 L. J. C. 210; 1892 1 Ch. 105; *McBeth v. N. & S. Wales Bk.* 1900, 75 L. J. K. B. 1026; (1906) 2 K. B. 718; *add.* on other grounds 1908, 77 L. J. K. B. 464; (1908) A. C. 137.

(a) *Wickham v. British Empire Assur.* (1880), 10 L. J. C. 769; 15 Ch. D. 169.

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PART V.

Interest under the statute can only be recovered as damages to be awarded and assessed by the jury in an action, or by the court acting as a jury (*b*). It cannot be awarded in a reference, unless power to award interest is given to the referee (*c*).

Construction
of the
statute:—
Certain sum.

The Act requires that the certainty of the sum and of the time shall appear in the written instrument. It is sufficient that the amount can be ascertained by mere calculation (*d*). A claim to payments under a building contract to be made monthly on the certificate of the engineer, the amounts being disputed, was held not to be a debt or sum certain (*e*). Nor is a balance of account,

Certain time.

claimed as such, a sum certain within the statute (*f*). A debt payable on a future contingent event is not sufficiently certain in time within the Act: as an account payable upon verification (*g*); freight payable "two months after the ship's report inwards" (*h*); the price of goods sold to be paid in cash on delivery (*i*). But death is not a contingent event within the meaning of the rule, and a sum payable within six months after the decease of the covenantor, carries interest from the expiration of the period

Written
instrument.

mentioned (*k*). The debt or liability must appear in the written terms: a letter asking for a loan of money, acceded to by lending the money, is not a debt payable by virtue of a written instrument within the statute, because it is not the writing but the money lent in compliance with it which creates the debt (*l*). A written demand of interest is sufficient, if it indicates the debt, though without stating the amount; and though it claims interest from a prior date and without expressly limiting it until the term of payment (*m*). An account delivered for goods supplied with a charge for interest, though not objected to and money paid on account, is not sufficient to support a claim for interest by agreement or under the statute; nor is an account for goods with the heading "Five

Demand of
interest.

(*b*) *Re State Fire Ins.* 1861, 34 L. J. C. 58; 2 H. & M. 722; *Lindell's case* 1867, 36 L. J. C. 510; L. R. 1 Eq. 188.

(*c*) *Berrington v. Phillips* (1836), 5 L. J. Ex. 127; 1 M. & W. 18.

(*d*) *L. C. & D. Ry. v. S. E. Ry.* (1893), 63 L. J. C. 93; 1893 A. C. 429.

(*e*) *Hill v. S. Staffs. Ry.* 1874, 13 L. J. C. 556; L. R. 18 Eq. 151.

(*f*) *Ward v. Epps* 1880, 19 L. J. C. 697; 15 Ch. D. 130.

(*g*) *L. C. & D. Ry. v. S. E. Ry.* 1893, 63 L. J. C. 93; 1893 A. C. 429.

(*h*) *Merchant Shipping Co. v. Armistead* (1873), 13 L. J. Q. B. 24; L. R. 9 Q. B. 114.

(*i*) See *L. C. & D. Ry. v. S. E. Ry.* (1891), 61 L. J. C. 291; 1892 1 Ch. 120.

(*k*) *Re Horner* 1896, 65 L. J. C. 694; (1896) 2 Ch. 188.

(*l*) *Taylor v. Holt* 1861, 34 L. J. Ex. 1; 3 H. & C. 152.

(*m*) *Mawatt v. Loughborough Lord* (1851), 23 L. J. Q. B. 177; 4 E. & B. 1; *Geake v. Ross* 1875, 11 L. J. C. P. 315.

per cent. interest charged after twelve months' credit " a sufficient demand of interest upon the items of the account within the statute (*n*). Notice of action claiming interest is a sufficient notice of claim from the date of the notice (*o*). But a writ of summons in the action indorsed with such claim is not a sufficient notice for the recovery of interest, because not made before action (*p*); nor is a claim made in an answer to a suit sufficient (*q*). --The calls made upon shares in a company giving a certain time for payment are a debt within the statute; but the payment and rate of interest are usually provided for in the articles of association (*r*). Calls made upon a contributory in the winding-up of a company payable at a certain time are debts within the statute upon which interest may be allowed (*s*); but they are not subject to the provisions for interest or other conditions of payment of original calls (*t*). The liquidator in making calls may give a notice within the statute of the rate of interest claimed; and in the absence of such notice interest will be allowed at the usual commercial rate (*u*). By the Attorneys and Solicitors Act, 1870, s. 21, a solicitor may be allowed interest on disbursements, and is liable to be taxed with interest on moneys of his client and improperly retained by the solicitor; the rate and period during which the interest is to be allowed being in the discretion of the taxing master. In respect of non-contentious business a solicitor is entitled to charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. This is by force of Rule 7 of the General Order made under the Solicitors' Remuneration Act, 1881. The mere delivery of a bill by the solicitor is a demand, although there is no specific claim to interest (*x*).

Calls on
shares.

Solicitors.

By the Judgments Act, 1838, s. 17, "every judgment shall carry interest at the rate of four pounds *per centum per annum*

Interest on
judgments.

(*n*) *Re Lloyd Edwards* (1891), 61 L. J. C. 22.

(*o*) See *Edwards v. G. W. Ry.* (1851), 21 L. J. C. P. 72; 11 C. B. 588.

(*p*) *Rhymer Ry. v. Rhymer Iron Co.* (1890), 59 L. J. Q. B. 414; 25 Q. B. D. 146.

(*q*) *Ward v. Fyfe* (1880), 49 L. J. C. 697; 15 Ch. D. 130.

(*r*) See *Stockton's case* (1868), 37 L. J. C. 220; L. R. 3 Ch. 112.

(*s*) *Barrow's case* (1868), 38 L. J. C. 15; L. R. 3 Ch. 784.

(*t*) *Re Welsh Flannel Co.* (1875), 44 L. J. C. 791; L. R. 20 Eq. 360; *Re Carden Gold Co.* (1891), 60 L. J. C. 701; (1891) 2 Ch. 580.

(*u*) *Lindell's case* (1867), 36 L. J. C. 510; L. R. 4 Eq. 181; *Re Welsh Flannel Co.* (1875), 44 L. J. C. 391; L. R. 20 Eq. 360.

(*x*) *Blair v. Gordon* 1887, 56 L. J. Q. B. 612; 19 Q. B. D. 516. And see *Re McHardy* (1896), 66 L. J. C. 67; (1897) 1 Ch. 119.

Arundell
R. 9 Q. B.

S. E. Ry.
192 1 Ch.

L. C. 694.

L. J. Ex.

High Lord
E. & B. 1;
C. P. 315.

PART V.

Interest on costs.

County Court and foreign judgments.

Interest before and after judgment.

from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." And by s. 18, "all decrees and orders of courts of equity and all rules of courts of common law, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable shall be deemed judgment creditors within the meaning of this Act." The entry of the judgment is dated as of the day on which the judgment is pronounced; and the judgment takes effect from that date (*y*). And in the case of an appeal interest is allowed for such time as execution is delayed by the appeal; unless the court orders otherwise (*z*).—The above statute applies to a judgment for costs against the defendant or against the plaintiff; and the interest upon costs is charged, not from the taxing master's certificate but from the date of the judgment (*a*). But the statute has no application to a judgment ordering costs to be paid out of a fund; nor is interest payable under such order without a direction in the order to that effect (*b*).—The statute does not apply to county court judgments; they do not carry interest (*c*). Interest is not allowed upon a foreign judgment debt, unless it forms part of the judgment (*d*).

The judgment includes all the interest payable under the contract or as damages up to the date, and not merely to the commencement of the action (*e*). The judgment then merges the debt, and interest continues payable only upon the judgment and at the statutory rate of four per cent., though the original debt carried a higher or different rate of interest (*f*). Upon the same principle a judgment recovered on a bond debt carries the statu-

(*y*) Ord. XLI. r. 3; *Barthwick v. Elderslie S.S. Co.* (1905), 71 L. J. K. B. 772; (1905) 2 K. B. 516. And see Ord. XLII. r. 16.

(*z*) Ord. LVIII. r. 19. See *Lancx & Yorks. Ry. v. Galloway* (1875), 45 L. J. Ex. 625; L. R. 7 H. L. 518.

(*a*) *Re London Wharf Co.* (1885), 51 L. J. C. 1137.

(*b*) *Att.-Gen. v. Nethercote* (1841), 10 L. J. C. 162; 11 Sim. 529; *Re Marsden's Estate* (1889), 58 L. J. C. 260; 40 Ch. D. 475.

(*c*) *Reg. v. Essex Co. Ct.* (1887), 56 L. J. Q. B. 315; 48 Q. B. D. 704.

(*d*) *Atkinson v. Braybrooke (Lord)* (1816), 1 Camp. 380; *Bank of Australasia v. Niox* (1851), 20 L. J. Q. B. 281; 16 Q. B. 717. See *Arnott v. Redfern* (1826), 4 L. J. O. S. C. P. 89; 3 Bing. 353.

(*e*) *Robinson v. Bland* (1760), 2 Burr. 1087. See *Kidd v. Walker* (183), 2 B. & Ad. 705.

(*f*) *Ex p. Oriental Financial Corp.* (1876), 46 L. J. C. 57; 4 Ch. D. 33; *Ex p. Fawcetts* (1881), 53 L. J. C. 515; 25 Ch. D. 338. See *Economic Life Assoc. v. Osborne* (1901), 71 L. J. P. C. 34; 1902 A. C. 147.

tory interest, irrespectively of the interest stipulated in the bond and of the amount of the penalty (*g*). And a creditor with a warrant of attorney to enter up judgment on a certain day for a certain sum with interest is allowed interest at four per cent. and no more from the day for entering judgment (*h*). Interest upon the judgment will cease to run after a tender of the amount; or after payment into court, from the time when the judgment creditor might have taken it out (*i*).

In the bankruptcy of the debtor, the creditor may prove his debt with the interest reserved or agreed for up to the date of the receiving order (*k*). And by the Bankruptcy Act, 1883, 2nd sched. r. 20, on any debt or sum certain whereon interest is not reserved or agreed for, the creditor may prove for interest at a rate not exceeding four per cent. per annum to the date of the order; but upon the same conditions upon which interest is allowed on such debts by the Civil Procedure Act, 1833, s. 28 (*l*).—By the Bankruptcy Act, 1883, s. 40 (4), it is provided that “all debts provable in the bankruptcy shall be paid *pari passu*.” And (*o*) “If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per cent. per annum on all debts proved in the bankruptcy.” The Bankruptcy Act, 1890, s. 23, further provides that on proof of a debt which includes interest, for the purposes of dividend, the interest shall be calculated at a rate not exceeding five per cent.; but “without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled, after all the debts proved have been paid in full.”

Interest in
bankruptcy.

A creditor cannot prove for interest accruing due after the receiving order; except in the case of a surplus as above provided (*m*). But in the proof of a debt payable at a future time, with interest in the meantime, the interest is provable as against the rebate deducted from the debt for present proof under the Bankruptcy Act, 1883, sched. 2, r. 21 (*n*). A secured creditor cannot apply sums attributable to capital in payment of future

Future
interest.

(*g*) *M'Charr v. Dunkin* (1801), 1 East, 436.

(*h*) *Cook v. Fowler* (1874), 43 L. J. C. 855; L. R. 7 H. L. 27.

(*i*) *Snelgar v. G. E. Ry.* 1870, 39 L. J. C. P. 224; L. R. 5 C. P. 391.

(*k*) See *ante*, p. 751.

(*l*) See *ante*, p. 809.

(*m*) *Ex p. Bath* (1883), 22 Ch. D. 450. See *S. C.* (1881), 27 Ch. D. 509.

(*n*) *Re Brumby and Wingrave* (1891), 61 L. J. Q. B. 15; (1891) 2 Q. B. 574.

PART V.

interest and thereby increase the proof for the balance of principal (*o*). And an annuity given for a loan as additional interest for the use of the money, cannot be proved for after the date of the order (*p*). In the case of the bankruptcy of joint and several debtors a creditor can get no interest accruing after the receiving order until all the creditors both of the joint and several estates have been paid their debts in full (*q*). The rules of bankruptcy apply to interest upon debts in the winding-up of companies (*r*).

Rate of interest.

The rate of interest in measuring damages depends upon the value of money with reference to the contract and the use to which the money is applicable; and there is no difference in law and equity in this respect, except as to the subjects of jurisdiction (*s*). The rate of interest is fixed in general by the practice of the court, but subject to variation with change of circumstances (*t*).

Contract rate.

—Where the contract expressly fixes a rate of interest up to the time of payment, the same rate is generally, but not necessarily, allowed for measuring the damages for non-payment, being the value of money as agreed by the parties themselves (*u*); and the same inference is drawn from the parties having agreed upon the same rate of interest upon former similar transactions (*x*). Thus the drawer of a bill payable with interest at ten per cent. twelve months after date, was held to be chargeable after dishonour with interest at the same rate (*y*).

Mercantile debts and dealings.

Upon mercantile instruments, as bills of exchange and promissory notes, the usual rate of interest as damages is five per cent.: and the same rate is generally allowed in mercantile and in industrial and speculative transactions (*z*); as on money expended in

(*o*) *Re Savin* (1872), 42 L. J. C. 15; L. R. 7 Ch. 760; *Quartermaine's case* (1892), 61 L. J. C. 273; (1892) 1 Ch. 639.

(*p*) *Ex p. Robinson* (1862), 31 L. J. Bk. 12. See *Ex p. Bath* (1834), 27 Ch. D. 509.

(*q*) *Ex p. Findlay* (1881), 50 L. J. C. 696; 17 Ch. D. 334.

(*r*) *Warrant Finance Co.'s case* (1869), L. R. 4 Ch. 643; *Ebbw Vale Co.'s case* (1870), 39 L. J. C. 363; L. R. 5 Ch. 112; *Hughes' claim* (1872), 41 L. J. C. 373; L. R. 13 Eq. 623.

(*s*) *Upton v. Fergus' Lord* (1801), 5 Ves. 801; Grant, M. R., *Loxndes v.*

Colless (1810), 17 Ves. 29.

(*t*) Jessel, M. R., *Re Roberts* (1880), 14 Ch. D. 52; Kekowich, J., *Capel v. Sims' Ships Comp. Co.* (1888), 57 L. J. C. 718; Kay, J., *Ex p. Wainwright* (1890), 59 L. J. C. 281.

(*u*) *Price v. G. W. Ry.* (1847), 16 L. J. Ex. 87; 16 M. & W. 244; *Cook v. Fowler* (1874), 43 L. J. C. 855; L. R. 7 H. L. 27.

(*x*) *Petre v. Duncombe* (1851), 20 L. J. Q. B. 242.

(*y*) *Keene v. Keene* (1857), 27 L. J. C. P. 89; 3 C. B. N. S. 144.

(*z*) See *ante*, p. 807; Kay, J., *Ex p. Wainwright* (1890), 59 L. J. C. 281.

winning coal (*a*); on the value of cargoes of merchandise wrongfully detained (*b*); on money advanced in a building speculation (*c*). A mercantile agent employed to receive money to account for on demand, if he refuses to account for the money after demand, becomes chargeable with interest at five per cent. from the time of demand (*d*).

In matters of equitable jurisdiction not involving the employment of money in mercantile or industrial transactions and not otherwise rated by law, the rate of interest generally allowed is four per cent.; but there was a prospect, at one time, that interest would be allowed in cases of purely equitable jurisdiction at three per cent. only, unless a higher rate was fixed by statute or the parties, or was called for by the circumstances (*e*). A trust to pay debts carries no interest beyond that which each debt itself bears; unless attended with a direction for the payment of interest (*f*). In an account of debts taken in an administration suit, interest is allowed at the rate of four per cent., if the assets are sufficient (*g*). Where a mortgagor covenanted to pay the mortgage debt at the end of twelve months with interest to that date at the rate of ten per cent. per annum, the interest awarded as damages after the day of payment was assessed at the rate of five per cent. per annum (*h*); and where a contract for the sale of land stipulated that the purchaser should pay interest at five per cent., he was only allowed four per cent. upon his deposit, which was ordered to be returned to him upon the contract being rescinded by the court (*i*).

Equitable
claims and
charges.

The interest on debts payable abroad is assessed at the rate of the place of payment (*k*); as in the case of bills of exchange the acceptor is presumptively liable for interest at the rate of the place where it is made payable; but the drawer or indorser is liable for interest at the rate of the place where it was drawn or indorsed (*l*). A creditor proving a debt carrying foreign interest against the

Foreign
debts.

(*a*) *Rokeby Lord v. Elliot* (1879), 49 L. J. C. 163; 13 Ch. D. 277.

(*b*) *Dreyfus v. Prussian Guano Co.* (1889), 58 L. J. C. 758; 42 C. D. 66.

(*c*) *Sargood's claim* (1872), L. R. 15 Eq. 43.

(*d*) *Harsant v. Bloom* 1887, 56 L. J. Q. B. 512.

(*e*) *Re Goodenough* (1895), 65 L. J. C. 71; (1895) 2 Ch. 537; *Re Lambert* (1897), 66 L. J. C. 624; (1897) 2 Ch. 169; *Rowls v. Bobb* (1900), 69 L. J. C. 562; (1900) 2 Ch. 107; *Re Dary* (1907), 77 L. J. C. 67; (1908) 1 Ch. 61.

(*f*) *Hamilton v. Houghton* (1820), 2 Bligh, 169; *Jenkins v. Perry* (1838), 3 Y. & C. Ex. 178; *Askew v. Thompson* (1858), 4 K. & J. 620.

(*g*) Ord. IV. r. 63.

(*h*) *Re Roberts* (1880), 14 Ch. D. 49.

(*i*) *Arnold v. Arnold* (1880), 14 Ch. D. 285.

(*k*) *Connor v. Bellamont (Earl)* (1742), 2 Atk. 382.

(*l*) *Cooper v. Waldegrave (Earl)* (1840), 2 Beav. 282; *Gibbs v. Fremont* (1853), 22 L. J. Ex. 302; 9 Ex. 25.

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estate of a deceased debtor which is being administered by the court in this country is allowed the foreign rate of interest to the time of the decree, afterwards he can only claim interest at the rate allowed upon judgments, that being the effect of a decree for administration (*m*).

Compound interest.

Interest upon interest or compound interest is not generally chargeable as damages. It may be charged by contract; or by a customary course of business assented to by the debtor, as where an agent delivers accounts made out with yearly or half-yearly rests, or balances, with the addition of the interest at each rest (*n*). Compound interest is customary in bankers' accounts of advances to customers, so long as the relation of banker continues; but it ceases upon the death or bankruptcy of the customer (*o*). An agent who is employed to receive money for his principal and hold it in trust to account on demand, and who uses the money in a trade or commercial business for his own profit, is chargeable with compound interest (*p*). A mortgage account presumptively carries only simple interest; but compound interest may become chargeable by special agreement (*q*). And a mortgagee in a foreclosure suit is entitled to charge subsequent incumbrancers with interest upon his whole claim for interest as well as principal and costs (*r*).

(*m*) *Finch v. Finch* (1876), 45 L. J. C. 816.

(*n*) *Bruce v. Hunter* (1813), 3 Camp. 467; *Eaton v. Bell* (1821), 5 B. & Ald. 34.

(*o*) *Ferguson v. Fyffe* (1841), 8 Cl. & F. 121; *Williamson v. Williamson* (1869), L. R. 7 Eq. 542. See *Mosse v. Salt* (1863), 32 L. J. C. 756; 32 Beav. 269.

(*p*) *Burdick v. Garrick* (1870), 39 L. J. C. 369; L. R. 5 Ch. 233.

(*q*) *Puge v. Broom* (1837), 4 Cl. & F. 436; *Daniell v. Sinclair* (1881), 50 L. J. P. C. 50; 6 Ap. Cas. 181; *Clarkson v. Henderson* (1880), 49 L. J. C. 289; 14 Ch. D. 348.

(*r*) *Ellon v. Curteis* (1881), 51 L. J. C. 60; 19 Ch. D. 49. See *Eardley v. Knight* (1889), 58 L. J. C. 622; 31 Ch. D. 537.

CHAPTER II.

SPECIFIC PERFORMANCE AND INJUNCTION.

SECT. I.—JURISDICTION IN SPECIFIC PERFORMANCE.

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The remedy for a breach of contract by specific performance places the parties so far as possible in the same position in which they would be if the contract had been exactly performed; it is therefore applied where practicable, unless the remedy by pecuniary compensation or damages is adequate to the case. "The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice" (a). The jurisdiction of specific performance was peculiar to the Court of Chancery until the Judicature Act, 1873, s. 24, conferred the same jurisdiction upon all Divisions of the High Court, although assigned to the Chancery Division of the Court by sect. 34 of the Act. And where an action brought in another Division of the Court upon such a contract involves a claim by either party for specific performance of the contract, the cause may be, and *prima facie* ought to be, transferred to the Chancery Division (b).

Where parties contract in express negative terms that a certain act shall not be done, specific performance takes the form of an Injunction.

(a) *Per cur.* *Wilson v. Northampton & Banbury Ry.* (1874), 43 L. J. C. 504; L. R. 9 Ch. 284; *Ld. Redesdale, Harnett v. Fielding* (1805), 2 Sch. & L. 553.

(b) Ord. XLIX. r. 3. See *Hillman v. Mayhew* (1876), 45 L. J. Ex. 334; 1 Ex. D. 132; *Holoway v. York* (1878), 2 Ex. D. 333; *Storrey v. Waddle* (1880), 4 Q. B. D. 289.

PART V.

Contracts
with
affirmative
and negative
terms.

injunction restraining the party acting in breach of his contract from doing the act (c). And an affirmative contract may be of such a kind that the court, though it cannot enforce affirmatively the performance of the contract, may restrain a breach by injunction (d). If there is a clear breach of contract in doing the act, the court may grant an injunction, without giving the option of paying damages, and though the damages are nominal; but unless there is a right of action the court will not enforce the contract indirectly by an injunction (e).

Accordingly the court will enforce by injunction a covenant in a lease not to carry on a trade upon the demised premises (f), though the court cannot specifically enforce an affirmative covenant to carry on a trade (g); a covenant not to build upon land (h); a covenant for the exclusive right of supplying beer to any public-house erected upon land of the covenantor, by restraining him from obtaining beer elsewhere (i); a contract to supply material to a manufacturer, and not to supply similar material to any other manufacturer (k). In the case of contracts for the rendering of personal services, the covenantee is entitled to an injunction restraining the covenantor from entering another employment, if, and only if, there is an express negative stipulation to that effect (l); but the engagement of an agent to sell a certain patent article upon stated terms was held to import an exclusive agency; and the employer was restrained from selling through another agent upon different terms (m). Upon the above principle, though the court cannot decree specific performance of the charter-party of a ship, it will grant an injunction restraining the owner of the ship from using it for any other purpose than that mentioned

(c) *Cairns, L. C., Doherty v. Allmon* (1878), 3 Ap. Ca. 720.

(d) *Manchester Ship Canal v. Manchester Racecourse Co.* (1901), 70 L. J. C. 468; (1901) 2 Ch. 37; *Metrop. Electric Supply v. Grindley* (1901), 70 L. J. C. 862; (1901) 2 Ch. 799.

(e) *Manners v. Johnson* (1876), 15 L. J. C. 404; 1 Ch. D. 673; *Krekl v. Burrell* (1879), 48 L. J. C. 252; 11 Ch. D. 146; *De Francesco v. Barnum* (1889), 59 L. J. C. 151; 43 Ch. D. 172.

(f) *Bramwell v. Lacey* (1879), 18 L. J. C. 339; 10 Ch. D. 691; *Rolls v. Miller* (1881), 53 L. J. C. 681; 27 Ch. D. 71; *Hobson v. Talbot* (1898), 67 L. J. C. 267; (1898) 1 Ch. 121.

(g) *Hooper v. Brodrick* (1840), 9

L. J. C. 321; 11 Sim. 47.

(h) *Western v. McDermott* (1866), 36 L. J. C. 76; 1 L. R. 2 Ch. 72; *Manners v. Johnson* (1876), 45 L. J. C. 404; 1 Ch. D. 673. See *Worsley v. Swann* (1882), 51 L. J. C. 576; *Webb v. Fagott* (1898), 79 L. T. 683.

(i) *Cutt v. Tourle* (1869), 38 L. J. C. 665; 1 L. R. 4 Ch. 651.

(k) *Dunnell v. Bennett* (1883), 52 L. J. C. 411; 22 Ch. D. 835.

(l) *Lumley v. Wagner* (1852), 21 L. J. C. 898; 1 De G. M. & G. 604; *Whitworth Chemical Co. v. Hardman* (1891), 60 L. J. C. 428; (1891) 2 Ch. 416.

(m) *Birchsen v. Cabburn* (1846), 5 Phill. 52.

in the contract (*n*). But upon a contract for the sale and delivery of goods the court will not interfere by injunction to restrain the seller from otherwise disposing of the goods, where the breach of contract may be fully compensated by the market price of the goods at the time of delivery (*o*). In all such cases as above the court, though unable to give specific performance, requires complete performance by the other party as a necessary condition of granting and continuing the injunction (*p*).—The court formerly enforced indirectly the affirmative terms of a contract, of which it could not directly enforce specific performance, by means of a "mandatory injunction" against the continuance of a contrary state of things; but according to the modern practice, the order is in an affirmative form, *e.g.*, that the defendant do pull down buildings, and does not merely restrain him from permitting them to remain on the land (*q*).

Mandatory
injunction.

Prior to the Judicature Act, 1873, a plaintiff who sued for specific performance and brought an action at law for the same matter, was put to his election in Chancery as to which remedy he would pursue (*r*); and in a vendor's action for specific performance would restrain proceedings by the purchaser to recover the deposit at law (*s*). Under the Judicature Acts, Ord. XX. r. 6, the plaintiff may claim the relief either simply or in the alternative; and it is not necessary to ask for general or other relief, which may always be given as the court may think just to the same extent as if it had been asked for. Where a plaintiff claims specific performance with an alternative claim for damages, the latter claim will only be available if specific performance is an inappropriate remedy, and it cannot be used as a substantive cause of action upon an essential failure of the claim to specific performance (*t*). So damages cannot be awarded in lieu of the specific performance of a contract for an interest in land where possession has already been given, and the effect of the Statute

Election to
claim specific
performance
or damages.

(*n*) *De Mattos v. Gibson* (1859), 28 L. J. C. 498; 4 De G. & J. 276; *Le Blanch v. Granger* (1866), 35 Beav. 187.

(*o*) *Fothergill v. Rowland* (1873), 43 L. J. C. 252; L. R. 17 Eq. 132; *Donnell v. Bennett* (1883), 52 L. J. C. 414; 22 Ch. D. 835.

(*p*) *Wood, V.-C., Stocker v. Wedderburn* (1857), 25 L. J. C. 717; 3 K. & J. 105.

(*q*) *Jackson v. Normanby Brick Co.* (1899), 68 L. J. C. 491; (1899), 1 Ch. 438.

(*r*) See *Fennings v. Humphery* (1841), 10 L. J. C. 251; 4 Beav. 1.

(*s*) *Beaufort (Duke) v. Glynn* (1856), 3 Sm. & G. 213; *Kell v. Nokes* (1863), 32 L. J. C. 785.

(*t*) *Hipgrave v. Case* (1885), 54 L. J. C. 399; 28 Ch. D. 356.

PART V.

Specific performance with damages.

of Frauds avoided (u). Where the liquidated damages recovered by the plaintiff represent the value of the whole contract, he is precluded from afterwards applying for specific performance or an injunction against a further breach (x).—But a plaintiff may claim damages for breaches up to the time of action brought, together with specific performance in the future; and a plaintiff may claim specific performance of such stipulations of a contract as admit of that remedy, and at the same time damages in respect of such stipulations as do not (y). Thus under a contract to take a lease for a certain term at a fixed rent, and upon the terms of the lessee pulling down a house upon the premises and building a new one upon the site, the lessor was given specific performance as to the lease, with damages for not building the house, as to which the court could not give specific performance (z). In electing to sue for damages the plaintiff converts his right to performance of the contract into compensation for non-performance; and the measure of damages is not the cost to the defendant of performance of the contract, but the value to the plaintiff if performed (a).

Debts and money claims.

The jurisdiction to give specific performance is necessarily limited to what is practicable and expedient for the court to execute: with contracts that result in a mere debt, or money claim, specific performance by payment of the money is substantially the same thing as damages for the detention of the money, the latter being merely the sum detained; and the ordinary remedy by action for the debt is sufficient both in law and in equity (b). The mere inability to enforce a debt at law, through a defect in the contract or in the proof of it, as the want of written evidence where required by law, or of a contract under seal, affords no ground of equity for claiming specific performance (c). And where a contract gives a party the option of paying damages instead of

(u) *Lavery v. Parsell* (1888), 57 L. J. C. 570; 39 Ch. D. 508.

(x) *Sainter v. Ferguson* (1849), 15 T. J. C. 170; 1 Mac. & G. 286; *General Accident Assce. v. Nal* (1901), 71 L. J. K. B. 236; (1902) 1 K. T. 377.

(y) *Fennings v. Humphery* (1841), 10 L. J. C. 251; 4 Beav. 1.

(z) *Soames v. Edge* (1860), Johns. 669; *London (Corp.) v. Southgate* (1868), 38 L. J. C. 141.

(a) *Wiggell v. Blind School* (1882), 51

L. J. Q. B. 330; 8 Q. B. D. 357; *Chifford* (1888), 58 L. J. C. 263; 40 Ch. D. 45.

(b) *Brough v. Oddy* (1829), 8 L. J. O. S. C. 23; 1 Russ. & M. 55; *Tamplin v. Tarnam Ry.* (1872), 41 L. J. C. 817; 1 L. R. 7 Ch. 562.

(c) *Kirk v. Bromley Union* (1848), 1 L. J. C. 127; 2 Phil. 640; *Crampton v. Tarnam Ry.* (1872), 41 L. J. C. 817; 1 L. R. 7 Ch. 562.

performance, the court has no jurisdiction to give specific performance; but the court may grant specific performance of contracts which are secured by penalties, where an option of payment instead of performance is not given (*d*).—Upon the same principle upon a contract to borrow money, or to lend money, the only remedy is pecuniary damages for the loss of the loan; which are merely nominal, if the loan can be obtained elsewhere upon equally favourable terms (*e*). By the Companies (Consolidation) Act, 1908, s. 105 (which embodies an earlier statutory amendment of this rule), "a contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance." But the court will specifically enforce an agreement to give security for a debt (*f*); as an agreement to execute a mortgage deed, notwithstanding it would contain a power of sale that might be exercised immediately, and in a proper case by the same decree to grant foreclosure (*g*). And the court will decree specific performance of an agreement to grant an annuity, and to charge it upon land, or other specific property (*h*).

"A court of equity decrees performance of a contract for land, because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." "And although the demand of the vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual" (*i*). The court will make an order upon an interlocutory application compelling a purchaser in possession to pay the purchase-money into court, with the option of giving up possession instead of paying; and if he has depreciated the property so as to diminish the security of the vendor, will compel him to pay the money into court without such option (*k*). Upon the same principle, the court will grant

Sale of land.

d) See *ante*, p. 799.

e) *Larios v. Gurety* (1873), L. R. 5 P. C. 316; *Western Wagon Co. v. West* (1891), 61 L. J. C. 211; (1892) 1 Ch. 271; *S. African Territories v. Wallington* (1898), 67 L. J. Q. B. 475; (1898) A. C. 309.

f) *Starkey v. Barton* (1908), 78 L. J. C. 129; (1909) 1 Ch. 281.

g) *Ashton v. Corrigan* (1871), 41 L. J. C. 96; L. R. 13 Eq. 76; *Hermann v. Hodges*, L. R. 16 Eq. 18; 43 L. J. C. 192.

h) *Wellesley v. Wellesley* (1839), 9 L. J. C. 21; 4 M. & Cr. 21; *Matthews v. Goodday* (1862), 31 L. J. C. 282.

i) *Lench, V.-C., Adderley v. Dixon* (1824), 2 L. J. O. S. C. 103; 1 Sim. & S. 610; *Eastern Counties Ry. v. Harkes* (1855), 21 L. J. C. 601; 5 H. L. C. 331.

k) *Lewis v. James* (1886), 56 L. J. C. 163; 32 Ch. D. 326; *Greenwood v. Turner* (1891), 60 L. J. C. 351; (1891) 2 Ch. 144.

PART V.

specific performance of a contract to grant a lease, or to renew a lease, or for the perpetual renewal of a lease (*l*). A covenant to grant a lease to renew with the same covenants is construed to be presumptively exclusive of the covenant for renewal (*m*). The court will order the specific performance of an agreement for a tenancy from year to year, and perhaps even of a shorter term (*n*). The court will specifically enforce a contract for the assignment of a lease, and will compel the purchaser to accept an assignment and to execute the usual covenant to indemnify the vendor against the rent and covenants (*o*). A company taking land under the compulsory powers of the Land Clauses Act, after notice given, and the price fixed according to the Act, but not before, is in the same position as a purchaser by contract against whom the vendor may claim specific performance under the ordinary conditions (*p*).

Sale of goods.

The Court of Chancery would not grant specific performance of a contract of sale of goods, where the breach satisfied by damages assessed at the market price for which such goods might be bought or sold (*q*). And the same rule applied to a contract for the sale of goods to be delivered at future times by instalments, although damages in such cases must be assessed upon conjecture as to the future market price (*r*); nor would the court grant an injunction to restrain the seller from disposing of the goods otherwise than according to the contract (*s*). By sect. 2 of the Mercantile Law Amendment Act, 1856, in actions for breach of contract to deliver specific goods, the court had a statutory power to order execution for the delivery of such goods without giving the defendant the option of retaining the same upon paying the damages assessed, and this right is now confirmed to the High Court by sect. 52 of the Sale of Goods Act, 1893 (*t*). But a sale of goods may be attended with exceptional circumstances, requiring specific performance to render it effectual: as where a foreign

(*l*) *Eldon, L. C., Willan v. Willan* 1810, 16 Ves. 84.

(*m*) *Swinburne v. Milburn* 1884, 54 L. J. Q. B. 6; 9 Ap. Ca. 841; *Leeds v. Stephenson* 1898, 67 L. J. Q. B. 296.

(*n*) *Lea v. Kiffner* 1901, 70 L. J. C. 395; 1901 1 Ch. 543; *Manchester Brewery v. Combs* 1901, 70 L. J. C. 811; 1901 2 Ch. 608.

(*o*) *Harding v. Metrop. Ry.* 1871, 41 L. J. C. 371; L. R. 7 Ch. 151.

(*p*) *Harding v. Metrop. Ry.* (1871, 41 L. J. C. 371; L. R. 7 Ch. 154; *Re*

Pagett & G. W. Ry. 1881, 50 L. J. 679; 18 Ch. D. 150.

(*q*) *Cudde v. Rutler* (1719, 5 Vin. 538; 1 P. Wms. 570; 2 Wh. & T. I. 416.

(*r*) *Pollard v. Clayton* 1855, 1 L. J. 462; *Fothergill v. Rowland* (1873, L. J. C. 252; L. R. 17 Eq. 132; *Dominion Iron & Steel Co. v. Rowland* 1909, A. C. 237; L. J. P. C. 115; 1909 A. C. 237).

(*s*) *Fothergill v. Rowland* (1873, L. J. C. 252; L. R. 17 Eq. 132.

(*t*) See Ord. XLVIII. r. 1.

had contracted to sell a ship, which was afterwards brought into an English port, the court granted an injunction against the removal of the ship, in order to prevent the contract from being defeated, because the buyer could not sue the foreign seller for damages in this country (*u*). Upon a sale of goods of a special mercantile value, as being exportable free of duty, no other like goods being in the market at the time, the buyer obtained an injunction against a disposal of the goods in breach of the contract (*x*). And in the case of an agent holding the possession of goods for a principal, to whom he stands in a fiduciary relation, the court will restrain the improper disposal of the goods and will compel a specific delivery (*y*). The court will also order the specific delivery up of a chattel, the possession of which has a special and peculiar value to the party entitled: as a valuable work of art (*z*); family pictures and furniture, and heirlooms (*a*); an antique horn used as a symbol of tenure of land (*b*); the tobacco box of a club (*c*); the dresses, decorations, papers, and effects of a Lodge of Freemasons (*d*).

Specific
delivery of
chattels.

The court will not give specific performance of a sale of government stocks which may be bought or sold in the market, and for which the market price is a sufficient remedy for buyer or seller (*e*). But the court decreed the specific delivery of certificates of a new stock to the holder of the scrip receipts of a subscriber, which gave the holder the right to claim the certificates (*f*). The court will give specific performance of a sale of shares in a railway or other special undertaking, as "there is not any analogy between a quantity of three per cents. or any other stock of that description (which is always to be had in the market), and a certain number of railway shares; which shares are limited in number, and are not always to be had in the market" (*g*). And the court has enforced a sale of shares at the suit of the buyer, though the directors of the company refuse to register him as a shareholder (*h*). An agree-

Sale of stocks
and shares.

(*u*) *Hart v. Harvey* (1873, 42 L. J. C. 457; 1 L. R. 8 Ch. 860.

(*x*) See *Hughes v. Grady* (1891), 33 L. J. Q. B. 333.

(*y*) *Wood v. Bainton* (1817, 17 L. J. C. 83; 2 Ph. 382.

(*z*) *Somerset (Duke) v. Cockson* (1735, 3 P. Wms. 389; 2 Wh. & T. L. C. 455.

(*a*) *Machefield (Earl) v. Davis* (1811, 3 V. & B. 16.

(*b*) *Pearce v. Pearce* (1884, 1 V. & C. 273; 2 Wh. & T. L. C. 154.

(*c*) *Tells v. Reed* (1796, 3 Ves. 70).

(*d*) *Lloyd v. Loring* (1802, 3 Ves. 773.

(*e*) *Cudde v. Butler* (1719, 5 Vin. Abr. 538; 1 P. Wms. 370; 2 W. & A. T. L. C. 416.

(*f*) *Dobson v. Rothsch* (1821, L. J. O. S. C. 125; 1 Sim. 590.

(*g*) *Duncraft v. Albrecht* (1841, 12 Sim. 189.

(*h*) *Poul v. Meddison* (1861, 10 B. & C. 646.

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to be pre-
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132; *Domarion*
Steel Co. 1909,
(9) A. C. 293,
and (1873), 13
Eq. 192.
r. 1.

PART V.

ment to transfer shares, though for no other consideration than the acceptance of the shares with their liabilities, is sufficient to support a claim for specific performance (*i*). A sale of shares to be completed at a future day passes the equitable interest, with all subsequent profits and dividends, from the date of the contract (*k*). And it is no defence to the claim for specific performance that the company has been wound up since the contract and before the time for completion (*l*). The court will also enforce specific performance of an agreement with a company, made by application and allotment, to accept shares allotted, and if required by the contract to sign the articles of association of the company (*m*).

Contracts for personal services.

The court does not give specific performance of contracts involving personal services, skill, or confidence; nor will the court restrain a party by injunction from putting an end to such contracts, or dismissing an agent or servant (*n*). "It is obvious that if specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders and a general superintendence, which could not conveniently be undertaken by any court of justice; and therefore contracts of that sort have been ordinarily left to their operation at law" (*o*). The court has refused to interfere specifically with a contract to write reports of cases in the law courts for publication (*p*); to carry out articles of apprenticeship, as to the work of the apprentice, or the instruction by the master (*q*); though where in such cases the party has contracted, expressly or impliedly, not to do anything contrary to the stipulated performance the court may interfere by injunction to restrain him (*r*). Where a contract was made for the lease of a wharf upon the terms of employing the lessor as manager in the business, the court refused to enforce

(*i*) *Chode v. Kenward* (1858), 27 L. J. C. 781; 3 De G. & J. 27.

(*k*) *Black v. Homersham* (1878), 48 L. J. Ex. 79; 4 Ex. D. 24.

(*l*) *Paine v. Hutchinson* (1868), 37 L. J. C. 485; L. R. 3 Ch. 388; *Cross v. Paine* (1879), 38 L. J. C. 225; L. R. 4 Ch. 411. See *Re Orchard Building Soc.* (1891), 60 L. J. Q. B. 752; (1891) 2 Q. B. 463.

(*m*) *New Brunswick & Canada Ry. v. Muggenridge* (1859), 4 Drew. 686.

(*n*) *Pickering v. Ely* (1843), 12 L. J. C. 27; 2 Y. & C. C. 249; *Stocker*

v. Brocklebank (1851), 20 L. J. C. 401; 3 Mac. & G. 250; *Chinnock v. Sainsbury* (1861), 30 L. J. C. 409; *Ryan v. Mutual Tontine Ass.* (1892), 62 L. J. C. 252; (1893) 1 Ch. 116.

(*o*) *Selborne, L. C., Walsingham & W. Ry. v. L. & N. W. Ry.* (1873), 43 L. J. C. 133; L. R. 16 Eq. 439.

(*p*) *Clarke v. Price* (1819), 2 Wilson C. C. 157.

(*q*) *Webb v. England* (1860), 30 L. J. C. 222; 29 Beav. 44.

(*r*) *Lumley v. Wagner* (1852), 21 L. J. C. 898; 1 De G. M. & G. 601.

the contract specifically even as to the lease, because it could not enforce the employment (*s*).

Upon this principle the court will not in general give specific performance of contracts for buildings; as a covenant to lay out a certain sum in buildings of a certain value (*t*). But upon a contract to build a house and accept a lease of the premises, the court may grant specific performance of the contract as to the lease, with damages under Lord Cairns' Act (21 & 22 Vict. c. 27) for not building the house (*u*). And the court will decree the execution of a lease with covenants to build according to an agreement to that effect in order to secure to the lessor the remedy upon the covenants (*x*). The court will not enforce specifically a contract for the construction of a railway either against or at the suit of the railway company (*y*); nor a contract to work a railway and keep the engines and rolling stock in repair (*z*); nor a right, whether derived from a contract or statute to use the lines of a railway company for other traffic than that of the company (*a*). The court will not give specific performance of a covenant to work mines and minerals, because it would involve the direction and management of the working by the court (*b*); and for the same reason the court will not grant an injunction against working contrary to such covenant (*c*). And the court will not enforce specifically the affirmative covenants in a farming lease as to repairs, fences, and cultivation of the land (*d*). Upon like principles the court refused to decree specific performance of a charter-party, involving the choice of the crew and the repairing of the ship to make it seaworthy (*e*). But the court will grant specific per-

(*s*) *Ogden v. Fossick* 1862, 32 L. J. C. 73.

(*t*) *Brace v. Wilmott* (1858), 27 L. J. C. 572; 25 Beav. 318.

(*u*) *Sumner v. Edge* (1860), Johns. 669; *London (Corp.) v. Southgate* (1868), 38 L. J. C. 111.

(*x*) *Kay v. Johnson* (1861), 2 H. & M. 118; *London (Corp.) v. Southgate* (1868), 38 L. J. C. 111; *Oxford v. Provan* (1868), L. R. 2 P. C. 135.

(*y*) *South Wales Ry. v. Wyllys* (1851), 24 L. J. C. 87; 5 De G. M. & G. 880; *Peto v. Brighton & Tunbridge Ry.* 1863, 32 L. J. C. 677; 1 H. & M. 468.

(*z*) *Johnson v. Shrewsbury Ry.* (1853), 22 L. J. C. 921; 3 De G. M. & G. 914.

(*a*) *Powell Coal Co. v. Taff Vale Ry.*

(1871), 43 L. J. C. 375; L. R. 1 Ch. 331; *Blackett v. Bates* (1866), 35 L. J. C. 321; L. R. 4 Ch. 117. See *Woodroff v. Beccan & Merthyr Ry.* (1885), 54 L. J. C. 620; 28 Ch. D. 190.

(*b*) *Wheatley v. Westminster Coal Co.* 1869, 39 L. J. C. 175; L. R. 9 Eq. 538.

(*c*) *Minger (Lord) v. Ashton* (1874), L. R. 17 Eq. 358. See *Stedley v. Pearson* (1880), 49 L. J. C. 406; 15 Ch. D. 113.

(*d*) *Rapier v. Stone* (1762), 2 Eden, 128; *Deury v. Molins* (1801), 6 Ves. 328; *Phipps v. Jackson* 1887, 56 L. J. C. 550. See *Moss v. Colley* (1892), 61 L. J. C. 119; (1892) 2 Ch. 253.

(*e*) *De Mattax v. Gibson* (1869), 28 L. J. C. 198; 4 De G. & J. 276.

PART V.

formance of a defined work for the benefit of another where the defendant has obtained possession of land on the footing of the agreement, and damages are not an adequate compensation; as an agreement to build houses in accordance with plans submitted and agreed to by the parties (f); or where the work to be performed is otherwise sufficiently defined (g). So specific performance will be granted of an agreement by a railway company respecting "accommodation works," as an archway under a railway (h); or roads, bridges, sidings, and other easements (i); and the building of a station upon the land; but in a case where the railway company built the station near to, instead of on the spot stipulated, the court gave damages instead of specific performance (k). Upon this principle the court decreed that the elevation of a house should be altered to correspond with the adjoining houses according to the covenant of the lessee to that effect (l).

Contracts to repair.

Upon the above principles the court does not specifically enforce covenants to repair (m). In the case of a demise of a gravel-pit with a licence to dig gravel, the remedy upon a covenant to make good the land at the end of the lease is not specific performance, but damages measured by the sum it would cost to restore the land (n). But the court will give specific performance of an agreement to execute a lease with a covenant to repair, in order to give the remedy upon the covenant (o). So the court compelled the defendant to repair a canal in order that the plaintiff might enjoy a right which was the subject of a distinct covenant, namely, a supply of water from the canal (p).

Sale of goodwill of business.

The court refused specific performance of a contract for the sale of the goodwill of a business or trade, consisting in serving

(f) *Wolverhampton (Corp.) v. Emmons* (1901), 70 L. J. K. B. 129; (1901) 1 K. B. 515.

(g) *Molyneux v. Richards* (1905), 75 L. J. C. 39; (1906) 1 Ch. 34.

(h) *Storr v. G. W. Ry.* 1842, 12 L. J. C. 65; 2 Y. & C. C. 18.

(i) *Sanderson v. Cockermonth & Workington Ry.* (1849), 11 Beav. 497; (1850), 19 L. J. C. 503; 2 H. & Tw. 327; *Raphael v. Thames Valley Ry.* 1866, 36 L. J. C. 209; L. R. 2 Ch. 117; *Wilson v. Furness Ry.* (1869), 39 L. J. C. 19; L. R. 9 Eq. 28; *Greene v. West Cheshire Ry.* (1871), 41 L. J. C. 17; L. R. 13 Eq. 44.

(k) *Hood v. N. E. Ry.* 1870, L. R. 5 Ch. 525; *Wilson v. Northampton Ry.* (1871), 43 L. J. C. 503, L. R. 9 Ch. 279.

(l) *Manners v. Johnson* (1876), 45 L. J. C. 401; 1 Ch. D. 673.

(m) *Rayner v. Stone* (1762), 2 Eden, 128; *Norris v. Jackson* (1860), 1 J. & H. 319.

(n) *Flint v. Braddon* 1803, 8 Ves. 159. See *Whitham v. Kershaw* (1886), 16 Q. B. D. 613.

(o) *Parton v. Newton* (1854), 2 Sm. & G. 437.

(p) *Law v. Newdigate* (1801), 10 Ves. 192.

clients or customers who are free to deal with whom they please, and who may be actuated by personal reasons, as in consulting a solicitor, or a medical practitioner (*q*). But in more recent times, the court has given to the purchaser of a business the right to restrain the vendor from soliciting the trade of the customers of the old business, although it will not restrain him from dealing with them, and there seems to be no reason why the court should not give a like remedy upon an agreement to sell (*r*). Where the goodwill of a business is annexed to the premises upon which it is carried on, by reason of the position or habit of frequenting the premises, a sale of the premises with the goodwill annexed is a fit subject for specific performance (*s*); and a mortgage of business premises carries with it the goodwill which is annexed to the use of the premises, as against other creditors of the mortgagor (*t*). By special agreement between landlord and tenant the goodwill annexed to premises may be valued separately as the property of the tenant, and secured to him on quitting the premises (*u*).—Where the sale of a goodwill is secured by a covenant of the seller against carrying on the same business or any like business, the court will, as before stated, interfere by injunction to restrain a breach of the covenant according to its terms (*x*). But if there be no covenant restrictive of his general right, the seller of the goodwill may carry on a similar business, and deal with the former customers, but he will be restrained from representing that it is the same as that sold, and from soliciting the custom of former customers (*y*). And where the goodwill consists in a trade secret, the court will restrain the seller from disclosing or using it (*z*). The sale of goodwill carries the name of the business in order to show its identity; but subject to the

Covenants
restrictive of
trade or
business.

(*q*) *Bozon v. Farrow* (1816), 1 Mer. 459; *Mau v. Thomson* (1882), 51 L. J. C. 917; 20 Ch. D. 705; *Arundell v. Bell* (1883), 52 L. J. C. 537.

(*r*) See *Trego v. Hunt* (1895), 65 L. J. C. 1; (1896) A. C. 7; *Gillingham v. Biddow* (1900), 69 L. J. C. 527; (1900) 2 Ch. 212; *Carl Bros. v. Webster* (1901), 73 L. J. C. 540; (1904) 1 Ch. 685; *Hill v. Farris* (1905), 71 L. J. C. 237; (1905) 1 Ch. 466.

(*s*) *Kindersley, V.-C., Darbey v. Whitaker* 1857, 4 Drewry, 139.

(*t*) *Pile v. Pile* (1876), 45 L. J. C. 841; 3 Ch. D. 36; *County of Gloucester Bk. v. Rudry Merthyr Colliery* (1895),

64 L. J. C. 451; (1895) 1 Ch. 629. See *Re Bennett* (1898), 68 L. J. C. 101; (1899) 1 Ch. 316.

u *Howe v. Rutherford* 1875, 41 L. J. C. P. 281; L. R. 10 C. P. 456.

x See ante, p. 817.

(*y*) *Trego v. Hunt* (1895), 65 L. J. C. 1; (1896) A. C. 7; *Jennings v. Jennings* 1897, 67 L. J. C. 190; (1898) 1 Ch. 378; *Gillingham v. Biddow* (1900), 69 L. J. C. 527; (1900) 2 Ch. 242; *Carl Bros. v. Webster* (1901), 73 L. J. C. 540; (1904) 1 Ch. 685.

(*z*) *Bryson v. H. Hitchhead* (1822), 1 S. & S. 71; *Haag v. Barben* 1878, 47 L. J. C. 567.

PART V.

condition of not exposing the seller to any liability by the use of the name (*a*).—A covenant by the purchasers of building land that the vendor should have the exclusive right of supplying beer to every public-house built on the premises was enforced by an injunction against a breach (*b*). But under a covenant not to sell the water from a well “to the injury” of the proprietors of certain waterworks, the court refused to interfere, on the ground that it would be necessary to quire on every occasion of selling, whether it was done with or without injury (*c*). Where several persons in the same trade combined to tender for a public contract under an agreement between themselves to supply the goods in equal shares, and one of them tendered separately in breach of the agreement and obtained the contract, the court granted an injunction against his carrying it out (*d*).

Contracts of partnership.

As a general rule, the court will not specifically enforce a contract to enter into and carry on a partnership (*e*). But during a partnership the court can restrain by injunction a breach of the partnership articles (*f*); and can restrain a partner acting for and on the credit of the firm beyond the scope of the articles (*g*). The court can specifically enforce articles of the partnership which admit of that remedy, as a presumptive right to a share in the partnership (*h*); or a right to nominate a successor (*i*). The court will specifically enforce the execution of an instrument containing articles of partnership agreed upon by the parties; provided they are sufficiently certain as to time, place, and mode of operation (*k*). But the court will not enforce execution of an agreement for a partnership for an indefinite time or partnership at will, which either party might dissolve immediately (*l*). A company differs from a partnership in the shareholder not being able to withdraw without procuring another to take his shares, and therefore he

(*a*) *Lory v. Walker* (1879), 48 L. J. C. 273; 10 Ch. D. 436; *Thynne v. Shore* (1890), 59 L. J. C. 509; 45 Ch. D. 577; *Burchell v. Widd* 1900, 69 L. J. C. 314; (1900) 1 Ch. 551.

(*b*) *Cutt v. Taylor* (1869), 38 L. J. C. 665; L. R. 4 Ch. 651.

(*c*) *Collins v. Plum* 1810, 16 Ves. 451.

(*d*) *Jones v. North* (1875), 44 L. J. C. 388; L. R. 19 Eq. 426.

(*e*) *Scott v. Raymond* (1868), 38 L. J. C. 48; L. R. 7 Eq. 112.

(*f*) *Watney v. Trist* (1876), 45 L. J. C. 412.

(*g*) *Clements v. Norris* (1878), 47 L. J. C. 546; 8 Ch. D. 129.

(*h*) *Honfray v. Fothergill* (1866), L. R. 1 Eq. 567. See *Const v. Harris* (1824), T. & R. 496.

(*i*) *Byrne v. Reid* (1902), 71 L. J. C. 830; 1902, 2 Ch. 735.

(*k*) *England v. Cowling* (1844), 8 Beav. 129; *Downs v. Collins* (1848), 6 Hare, 418.

(*l*) *Herey v. Birch* 1804, 9 Ves. 357.

may be specifically compelled to take the shares allotted to him (*m*).

A sale or assignment for valuable consideration of property to be thereafter acquired is valid as a contract, for breach of which there is a remedy in damages (*n*); and when the property described is acquired the remedy of specific performance becomes applicable, if the subject of contract admits of it; and the contract then operates upon the property by transferring the beneficial interest to the assignee or purchaser (*o*). The property intended must be sufficiently described in the instrument of contract for the court to be able to identify and transfer it when it comes into existence: as all the machinery to be placed in a mill or factory (*p*); all the fixtures, furniture, and goods, or all the stock in trade, to be brought on certain premises (*q*); all future book debts of a trader, though not limited to a particular business (*r*); all the future crops on a farm (*s*); all money that may be acquired under a will or as next of kin of a certain person (*t*); or an agreement to assign the copyright in a book not yet in existence (*u*). An assignment of after-acquired property is divisible, and may be enforced as to such property as becomes ascertained, though remaining indefinite as to the residue (*x*); and an assignment of the whole future property of a person *primâ facie* attaches on capital and not on income and will be specifically enforced to that extent (*y*). The interest of the assignee is equitable only, until a legal transfer is made; and consequently an intermediate sale or pledge to another person accompanied with possession taken, without notice of the assignment, has priority over it (*z*). A bill of sale of after-acquired property is void, except as against the grantor (*a*).

CHAP. II.
SECT. I.

Sale of after-
acquired
property.

(*m*) *New Brunswick and Canada Ry. v. Muggieridge* (1859), 4 Drew. 686.

(*n*) *Collyer v. Isaacs* (1881), 51 L. J. C. 14; 19 Ch. D. 342.

(*o*) *Hobroyd v. Marshall* (1862), 33 L. J. C. 193; 10 H. L. C. 191.

(*p*) *Hobroyd v. Marshall* (1862), 33 L. J. C. 193; 10 H. L. C. 191; *Leatham v. Amor* (1878), 47 L. J. Q. B. 581.

(*q*) *Collyer v. Isaacs* (1881), 51 L. J. C. 14; 19 Ch. D. 342; *Lozorns v. Andrade* (1880), 49 L. J. C. P. 847; 5 C. P. D. 318.

(*r*) *Tilley v. Off. Receiver* (1888), 58 L. J. Q. B. 75; 13 Ap. Ca. 523.

(*s*) *Clements v. Matthews* (1883), 52 L. J. Q. B. 772; 11 Q. B. D. 808.

(*t*) *Re Clarke* (1857), 56 L. J. C. 931;

36 Ch. D. 348. See *Re Crayshaw* (1891), 60 L. J. C. 583; 1891; 3 Ch. 176.

(*u*) *Ward, Lock & Co. v. Long* (1906), 75 L. J. C. 732; (1906) 2 Ch. 550.

(*x*) *Re Turcan* (1888), 58 L. J. C. 101; 40 Ch. D. 5.

(*y*) *Finlay v. Darling* (1897), 66 L. J. C. 348; (1897) 1 Ch. 719; *Re Clutterbuck* (1904), 73 L. J. C. 698; (1905) 1 Ch. 200.

(*z*) *Clements v. Matthews* (1883), 52 L. J. Q. B. 772; 11 Q. B. D. 808; *Joseph v. Lyons* (1884), 54 L. J. Q. B. 1; 15 Q. B. D. 280; *Hallux v. Robinson* (1885), 54 L. J. Q. B. 364; 15 Q. B. D. 288.

(*a*) Bills of Sale Act, 1882, s. 5; *Thomas v. Kelly* (1888), 58 L. J. Q. B. 66; 13 Ap. Ca. 506. See *Seed v. Bratley*

PART V.
Foreign
contracts.

The court can give specific performance against a party within the jurisdiction, though the subject of the contract is without the jurisdiction of the court; but in the case of land situate out of the jurisdiction, it will only be exercised where the land is situate in a British Colony or Dependency (b). And the court will grant an injunction to restrain a party from suing abroad in breach of a contract. "The jurisdiction is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the court" (c). The same jurisdiction *in personam* to compel performance of a contract concerning property without the jurisdiction may be exercised by the Palatine Court of Lancaster (d).

(1894), 63 L. J. Q. B. 387; (1894) 1 Q. B. 319.

(b) *Penn v. Baltimore (Lord)* (1750), 1 Ves. 444; 1 Wh. & T. L. C. 755; *Re Hawthorne* (1883), 52 L. J. C. 750; 23 Ch. D. 743; *Black Point Synd. v. Eastern Concessions, Ltd.* (1899), 79 L. T. 658;

Brit. S. Africa Co. v. De Beers Consolidated Mines (1910), 80 L. J. Ch. 65; (1910) 2 Ch. 502.

(c) *Portarlington (Lord v. Soulby)* (1834), 4 L. J. C. 241; 3 M. & K. 104.

(d) *Re Longdendale Cotton Co.* (1878), 48 L. J. C. 54; 8 Ch. D. 150.

CHAPTER II.

SPECIFIC PERFORMANCE AND INJUNCTION.

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The application of specific performance instead of compensation in damages is in the discretion of the court (a). But the discretion is governed by rules and principles according to which, specific performance, in a case within the jurisdiction of the court, becomes as much a matter of course as a judgment for damages. Hence in treating of the discretion of the court it is sufficient to consider the grounds for refusing specific performance; and it is necessary here to consider such grounds only as affect the specific remedy, exclusively of the grounds, hereinbefore treated, which affect the validity of the contract, and admit no discretion as to remedy. "In all cases where a court of equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident, or mistake, enter into contracts, the jurisdiction should be exercised" (b).

Discretion of court in specific performance.

(a) *Scott v. Alvarez* (1895), 64 L. J. C. 821; (1895) 2 Ch. 603.

(b) *Jessel, M. R., Leach v. Schuchard* 1874, 43 L. J. C. 488; L. R. 9 Ch.

467, n. See *Hester v. Pearce* (1899), 69 L. J. C. 146; 1900 1 Ch. 341; *J. Jones & Sons, Ltd. v. Tankerville (Earl)* (1909), 78 L. J. C. 674; (1909) 2 Ch. 440.

PART V.

Grounds for refusing:—
Want of jurisdiction against plaintiff.

"The court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to, be something which the court cannot give him, it certainly has been the generally understood rule, that that is a case in which the court will not interfere" (c). Thus under an agreement for the lease of a wharf and for the employment of the lessor as manager during the lease, the court refused specific performance to the lessee upon the ground that it could not enforce the personal engagement against him (d). If it was the intention that performance on the part of the plaintiff should rest in contract only, specific performance may be decreed; because the court can compel the plaintiff to execute a deed with the stipulated covenants, though they may be such as not to admit of a decree for specific performance (e). But if the defendant has stipulated for actual performance by the plaintiff, the court will not compel him to be satisfied with the mere security of a covenant (f).—If everything has been done on the part of the plaintiff and it only remains for the defendant to perform his part, specific performance may be decreed, although the contract was originally, on the part of the plaintiff, beyond the jurisdiction of the court, unless the contract is tainted with illegality (g). Accordingly, under an agreement to build houses on several plots of ground and with a right to call for separate leases of the plots as soon as the houses should be finished, the court may enforce the granting of the leases if and so soon as the houses are finished, although it could not specifically enforce the contract for building (h). So although the court will not grant specific performance of contracts to lend money, where the money has been in fact advanced, the borrower will be compelled to give the security which he may have promised (i). Upon a like principle a defendant charged upon a contract within the Statute of Frauds which he has duly signed,

(c) *Wigram, V.-C. Waring v. Manchester, Sheff. and Lincol. Ry.* (1819), 18 L. J. C. 450; 7 Hare, 492.

(d) *Ogden v. Fossick* (1862), 32 L. J. C. 73.

(e) *Wilson v. West Hartlepool Ry.* (1865), 34 L. J. C. 241; 2 De G. J. & S. 475; *Onions v. Cohen* (1865), 34 L. J. C. 339; 2 H. & M. 354.

(f) *Stocker v. Wedderburn* (1857), 26 L. J. C. 713; 3 K. & J. 353.

(g) *Cottenham, L. C., Duttrichsen v.*

Cabburn (1846), 2 Phill. 57; *Hope v. Hope* (1857), 26 L. J. C. 417; 8 De G. M. & G. 731.

(h) *Wilkinson v. Clements* (1872), 42 L. J. C. 38; L. R. 8 Ch. 96; *Louth v. Heaver* (1889), 58 L. J. C. 482; 11 Ch. D. 248.

(i) *Ashton v. Corrigan* (1871), 41 L. J. C. 96; L. R. 13 Eq. 76; *Hermann v. Hodges* (1873), 43 L. J. C. 192; L. R. 16 Eq. 18.

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SECT. II.Conditions of
injunction.

cannot object the want of mutuality of remedy for want of the signature of the plaintiff; because the plaintiff admits the contract by suing on it and is bound to perform it as a condition of obtaining specific performance (*k*). The same principle is applied in granting an injunction against a breach of a negative contract. "Where a party seeks such an injunction the terms on which it is granted are, his acting up to the agreement in all respects on his part: the moment he fails on his part to perform any of the acts which he has stipulated to do, the injunction is dissolved, and the parties are *in statu quo*" (*l*). If the circumstances of the case are such that the party would not be restored to his original condition by the removal of the injunction, the ordinary rule applies, and the court will not grant it to a plaintiff who cannot be compelled to specific performance on his part (*m*).

Incapacity of
plaintiff.

The court will not execute a contract in favour of a plaintiff who is incapable or disqualified to perform it on his part, as in the case of a bankrupt; and an act of bankruptcy available for a petition is a valid objection to a suit for specific performance, either by a vendor or a purchaser (*n*). But where the defendant, by his act or default, is responsible for the plaintiff's inability to perform the contract, the latter may obtain the assistance of the court (*o*). Insolvency is a sufficient objection to the specific performance of an agreement to grant a lease, which involves personal liabilities and covenants on the part of the lessee; and it is not essential that the party should have become insolvent in a statutory sense, or should have conveyed all his property to his creditors, if there is such proof of general insolvency as the court can act upon (*p*). But a solvent assignee of a contract for a lease may have specific performance, though the original contracting party has become insolvent, provided the contract was not entered into upon considerations personal to the original intended lessee (*q*). Upon this principle a vendor who became in-

(*k*) *Plamer, M. R., Martin v. Mitchell* (1820), 2 J. & W. 327; *ante*, p. 187.

(*l*) *Wood, V.-C., Scooter v. Wedderburn* (1857), 26 L. J. C. 517; 3 K. & J. 105.

(*m*) *Peto v. Brighton, Uckfield & Tunbridge W'ls. R.* (1863), 32 L. J. C. 677; 1 H. & M. 468.

(*n*) *Lowes v. Lush* (1808), 14 Ves. 547; *Franklin v. Bironville (Lord)* (1808), 14 Ves. 550.

(*o*) *G. W. Ry. v. Birmingham & Oxford Ju. Ry.* (1848), 17 L. J. C. 273; 2 Ph. 597.

(*p*) *Price v. Ashton* (1834), 4 L. J. Ex. Eq. 3; 1 Y. & C. Ex. 441; *Neale v. Mackenzie* (1837), 1 Keen, 474.

(*q*) *Crosbie v. Take* (1833), 2 L. J. C. 83; 1 M. & K. 431; *Morgan v. Rhodex* (1834), 1 M. & K. 433; *Buckland v. Pupillon* (1867), 36 L. J. C. 81; L. R. 2 Ch. 67.

PART V.

Contract in
breach of
trust.

capable of making a good title by the accidental destruction of the title deeds, of which he was unable to prove the execution and contents, was refused specific performance (*r*).—Upon the same principle trustees cannot have specific performance of a contract which they could not execute on their part without a breach of trust; as where trustees of two distinct properties, held upon different trusts, contracted to unite them in one lease, the court refused to compel the lessee to take such a lease, because the lessors were disqualified to grant it (*s*). So trustees cannot enforce a contract to take a lease which is in excess of their power of leasing; unless the lessee will accept it to the extent of the power (*t*).

Default of
plaintiff in
performance.

The court refuses specific performance to a plaintiff who has made material default in performance on his part (*u*); as in the case of a plaintiff claiming the execution of a lease to himself, after having committed breaches of covenants and conditions which would be ground of forfeiture of the lease if executed (*x*); and although the breaches are of a kind for which the court might give relief against the forfeiture of an executed lease (*y*). Upon the same principle where a vendor contracted to sell land with immediate possession, and pending a dispute about the title turned the purchaser out of the possession, specific performance was refused (*z*). And where the purchaser of a business at a price to be measured by the future profits during a certain period, discontinued the business before the price had been ascertained, he was refused an injunction to restrain the seller from continuing the business on his own account (*a*). Long delay, although not amounting to a repudiation of the contract, is sufficient to disentitle the plaintiff to have the contract specifically performed (*b*).

Default of
plaintiff in
collateral
agreement.

If the plaintiff has made default in a collateral agreement upon faith of which the defendant contracted, the court refuses specific performance, upon the principle that a plaintiff seeking equity

(*r*) *Bryant v. Bask* (1827), 4 Russ. 1.

(*s*) *Tolson v. Sherrill* (1877), 46 L. J. C. 815; 5 Ch. D. 19.

(*t*) *Harnett v. Fiddling* (1805), 2 Sch. & L. 518. See *Neale v. Mackenzie* (1857), 1 Keen, 471; *Thomas v. Dering* (1837), 6 L. J. C. 267; 1 Keen, 729.

(*u*) *Wigram v. C.*, *Walker v. Jeffreys* (1842), 11 L. J. C. 209; 1 Hare, 352; *Jessell, M. R.*, *Besant v. Wood* (1879), 12 Ch. D. 627.

(*x*) *Lewis v. Bond* (1853), 18 Beav. 85;

Boslin v. Redwell (1881), 18 Ch. D. 238.

(*y*) *Contrafort v. Johnson* (1885), 55 L. J. Q. B. 220; *Gilbert v. Parker*, (1910), 79 L. J. P. C. 86; (1910) A. C. 335.

(*z*) *Knatchbull v. Groucher* (1817), 3 Mer. 121.

(*a*) *Telegraph Despatch Co. v. McLean* (1873), L. R. 8 Ch. 658.

(*b*) *Cornwall v. Henson* (1900), 69 L. J. C. 551; (1900) 2 Ch. 298.

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must do equity (*e*). And where a written contract is executed upon the faith of a parol agreement making some addition or variation in the terms, the court will refuse specific performance of the written contract, unless the plaintiff submits to carry out the terms as altered, though the court could not otherwise enforce them because not in writing (*d*). Where a written contract was signed for a lease, upon a condition, not expressed in the writing, that the lessee should pay a premium, it was held that he was entitled to specific performance only upon payment of the premium (*e*). Upon the same principle if a vendor or lessor in obtaining the contract, represents that something shall be done about the subject of contract, or indirectly affecting that subject matter (as expressions of intention respecting intended improvements upon the land sold or let, or upon adjoining land), he can only obtain specific performance upon fulfilling his expressions of intention whether they amount to a contract or not (*f*). Maps and plans exhibited by the vendor for the purpose of the sale may operate as representations, but will not in general be construed to have that effect (*g*). If expressions of intention amount to a contract, a purchaser who has completed the contract on his part and entered into possession will be entitled to specific performance of such representations, if that be an appropriate remedy (*h*).

Representations by plaintiff.

—Upon the same principle a misrepresentation or suppression of fact made by the plaintiff in obtaining the contract, may disentitle him from claiming specific performance, although it may not afford sufficient ground for avoiding the contract on the ground of fraud; or may entitle the defendant to exact compensation or an indemnity as the price of performing the contract (*i*).—The principle that the plaintiff must do equity in the matter in order to claim an equitable remedy, applies only to equities arising out of

Misrepresentations by plaintiff.

(*e*) *Cranworth v. C.*, *Myers v. Watson* (1851), 1 Sim. N. S. 529; *Turner, L. J.*, *Gibson v. Goldsmid* (1854), 21 L. J. C. 284; 5 De G. M. & G. 757.

(*d*) *Clarke v. Grant* (1877), 14 Ves. 519; *Clowes v. Hugginson* (1813), 1 V. & B. 524; *Micklethwait v. Nightingale* (1848), 12 Jur. 638.

(*e*) *Martin v. Pyecraft* (1852), 22 L. J. C. 94; 2 De G. M. & G. 785.

(*f*) *Brammont v. Dukes* (1822), Jacob, 422; *Myers v. Watson* (1851), 1 Sim. N. S. 523; *Lamare v. Dixon* (1873), 43 L. J. C. 203; 1 R. 6 H. L. 414.

(*g*) *Squire v. Campbell* (1836), 6 L. J.

C. 41; 1 M. & C. 459; *Fracock v. Peniston* (1848), 18 L. J. C. 57; 11 Beav. 355; *Randall v. Hall* (1851), 4 De G. & S. 343; *Tucker v. Foulke* (1852), 62 L. J. C. 172; (1893) 1 Ch. 195.

(*h*) *Piggott v. Stratton* (1859), 29 L. J. C. 1; 1 De G. F. & J. 33; *Spicer v. Martin* (1888), 58 L. J. C. 309; 11 Ap. Ca. 12; *Whitehouse v. Hugh* (1906), 75 L. J. C. 677; (1906) 2 Ch. 283.

(*i*) *Caldman v. Hower* (1810), 18 Ves. 10; *Re Banister* (1879), 48 L. J. C. 837; 12 Ch. D. 131. See *Greenhalgh v. Brindley* (1901), 70 L. J. C. 710; (1901) 2 Ch. 324.

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Independent
agreements
and repre-
sentations.

the same transaction. In the case of independent agreements and representations which are not mutually conditioned, a breach on one side is no answer to claiming specific performance on the other (*k*). Upon a like principle where a contract is divisible into independent parts, specific performance may be given of part without performance of the whole; as where a vendor contracted to sell land, with a stipulation that he should retain a tenancy, he was given specific performance of the sale, though he failed to take the tenancy (*l*). And under an agreement for a lease with an option to purchase, the lessee after forfeiting the lease was held entitled to retain the option of purchase and to claim specific performance (*m*).

Incapacity
of defendant.

The court necessarily refuses the remedy of specific performance where the act is impossible to be done, leaving to the plaintiff his remedy in damages; but "if the thing be reasonably possible it must be done; the difficulty and expense of performing the contract do not necessarily form an objection" (*n*). A plaintiff claiming against a company to have an allotment of shares, cannot have specific performance if all the shares have been already validly allotted (*o*). And a contract which essentially depends upon the valuation or approval of a person named, who dies before acting, cannot be specifically performed (*p*). Upon this principle a lessee who is under a covenant not to assign without licence and has contracted to assign his lease, cannot be compelled to execute an assignment if the licence is refused (*q*). And specific performance cannot be had against trustees who have contracted in breach of their trust, or in excess of their powers (*r*). So a purchaser cannot have specific performance of a contract for the re-sale of property of one of several trustees for sale, entered into before completion of the original contract for sale of the same property (*s*).—But the court may give specific performance of so

Partial
incapacity.

(*k*) *Gibson v. Goldmid* (1854), 21 L. J. C. 281; 5 De G. M. & G. 757.

(*l*) *Lucd v. Stephens* (1835), 1 Y. & C. Ex. 222.

(*m*) *Green v. Low* (1856), 22 Beav. 625; *Raffety v. Schofield* (1897), 66 L. J. C. 418; (1897) 1 Ch. 937.

(*n*) *Knight-Brace, V.-C., Storer v. G. W. Ry.* (1812), 12 L. J. C. 65; 2 Y. & C. Ch. 52; *Columbine v. Chichester* (1816), 2 Ph. 27.

(*o*) *Ferguson v. Wilson* (1866), L. R. 2 Ch. 77.

(*p*) *Firth v. Midland Ry.* (1875), 14 L. J. C. 313; L. R. 20 Eq. 100. See *ante*, p. 696.

(*q*) *Willmott v. Barber* (1883), 49 L. J. C. 792; 15 Ch. D. 96.

(*r*) *Belbringer v. Blagrove* (1817), 1 De G. & S. 63; *Naylor v. Goodall* (1877), 47 L. J. C. 53; *Oceanic Steam Nav. Co. v. Sutherland* (1880), 50 L. J. C. 308; 16 Ch. D. 236.

(*s*) *Delves v. Gray* (1902), 71 L. J. C. 808; (1902) 2 Ch. 606.

much of a contract as the defendant can perform, with compensation or damages for the part which he cannot perform unless the case involves hardship on the defendant (*l*). Where a tenant for life has contracted to give a lease for twenty-one years, the lessee is entitled to have such a lease executed, though it would be valid only during the lessor's interest (*n*). And where the defendant had contracted to grant a lease of the entirety of certain premises, having title to an undivided moiety only, the plaintiff was given specific performance of the lease of that moiety, at a moiety of the contract rent (*x*). Where the plaintiff had contracted to give a lease, upon the condition of the lessee building a house on the demised premises, the court gave specific performance for the lease, with damages for not building the house (*y*). So where a contract was made for the sale of an estate at an agreed price, together with certain goods to be taken at a valuation, and the vendor refused to appoint a valuer, the court gave specific performance except as to the goods (*z*). If after judgment for specific performance either party becomes unable, or refuses to complete the contract, the court on application of the other party will rescind the contract, and order the party in default to pay the costs; but will not at the same time give damages for breach of the rescinded contract (*a*).

The court will not grant specific performance where it would operate with unreasonable hardship upon the defendant; and what is unreasonable depends on the circumstances of each particular case, having regard to the comparative loss to the plaintiff and his alternative remedy in damages (*b*). Thus the court will not compel a vendor who has contracted to sell land free from incumbrances, to pay personally sums in excess of the purchase-money, in order to discharge the land (*c*). Where a mortgagor contracted to grant a lease of the mortgaged premises, and the mortgagee

Hardship on
defendant.

l *Howell v. George* (1815), 1 Madd. 1.
u *Neale v. Mackenzie* (1837), 1 Keen, 474.

x *Barrow v. Scammell* (1881), 51 L. J. C. 296; 19 Ch. D. 175. See *post*, p. 842.

y *Sutton v. Edge* (1860), Johns. 669; *London (Corp.) v. Southgate* (1868), 38 L. J. C. 101.

z *Richardson v. Smith* (1850), 30 L. J. C. 877; L. R. 5 Ch. 618.

a *Henty v. Schröder* (1879), 48 L. J.

C. 793; 12 Ch. D. 666; *Hutchings v. Humphreys* (1885), 54 L. J. C. 650; *Baker v. Williams* (1892), 62 L. J. C. 315; *Olde v. Olde* (1903), 73 L. J. C. 81; (1904) 1 Ch. 33.

b *Howell v. George* (1815), 1 Madd. 1; *Talbot v. Ford* (1842), 13 Sim. 173; *Re Har and O'More* (1900), 70 L. J. C. 46; (1901) 1 Ch. 93.

c *Wedgevood v. Adams* (1843), 6 Beav. 600; *Re G. N. Ry. and Sanderson* (1881), 53 L. J. C. 445; 25 Ch. D. 788.

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intervened to prevent it, the court refused to decree the mortgagor to redeem the mortgage in order to perform the contract (*d*). Upon this ground the court refused specific performance of an agreement to purchase a piece of land to which a defined right of way could not be shown (*e*). And where a vendor sold property which was subject to onerous covenants affecting the use of it, the court refused to compel him to part with the property without an indemnity by the purchaser; but gave the purchaser an election either to rescind the contract, or to take a conveyance with like covenants on his part (*f*).

Performance causing forfeiture.

Upon this principle the court will not compel a performance that would impose on the party the risk of a forfeiture; unless the risk is caused by acts of the defendant subsequent to the contract, of which he must himself bear the consequences (*g*). Thus the purchaser of a lease will not be compelled to take a lease which is subject to the covenants in a superior lease comprising other property, the breach of which by other parties would cause a forfeiture (*h*); or to take a lease subject to forfeiture for continuing breaches of covenant, which have been waived by the lessor only to the date for completing the contract (*i*). Upon the same principle the court refused to compel a purchaser of leaseholds to complete his contract, upon the ground that the reversion to which the rents were incident was the subject of litigation in which he would be involved (*k*). So where by reason of the property sold being used as a brothel the purchaser might have been subjected to a criminal prosecution, specific performance was refused (*l*).

Defect and inadequacy of consideration.

The adequacy of the consideration is not material to the validity of a contract, or to the claim for specific performance unless there be some other circumstance affecting the validity of the contract; but great inadequacy, as evidence of fraud, mistake, or hardship, may raise a question touching the validity upon which the court

d) *Hove v. Hunt* 1862, 32 L. J. C. 36; 31 Beav. 420.

e) *Donne v. Light* (1857), 26 L. J. C. 159; 8 De G. M. & G. 774.

f) *Morhay v. Underwick* (1847), 1 De G. & S. 708; *Lokey v. Briggs* (1855), 24 L. J. C. 195. See *Re White and Smith* (1896), 65 L. J. C. 181; (1896) 1 Ch. 637; *Re Poole and Clarke* (1904), 73 L. J. C. 612; (1901) 2 Ch. 173.

g) *Peacock v. Penson* (1818), 18 L. J. C. 57; 11 Beav. 355; *Helling v. Lumley*

(1858), 28 L. J. C. 249; 3 De G. & J. 493.

h) *Fildes v. Hooker* (1818), 3 Madd. 193; *Hyde v. Warden* (1877), 47 L. J. Ex. 121; 3 Ex. D. 72.

i) *Nonville v. Flight* (1811), 13 L. J. C. 414; 7 Beav. 521.

k) *Pegler v. White* (1864), 33 L. J. C. 569; 33 Beav. 403.

l) *Hope v. Walter* (1899), 69 L. J. C. 166; (1900) 1 Ch. 257.

will refuse specific performance, leaving the parties to an action for damages (*n*).

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The court may refuse specific performance upon the ground of uncertainty in the construction or in the application of the terms of the contract (*n*) : as an agreement for a lease not stating when the term is to begin, or the duration of the term (*o*) ; an agreement for a lease to a lessee not named (*p*) ; an agreement for a lease of mining rights of which the area is not defined (*q*). In the case of a lease for lives, the lessee *prima facie* has the right to nominate them, and provided they were in existence when the agreement was entered into, and there is no general answer to an action for specific performance on the ground of delay or otherwise, the intended lessee is entitled to that remedy (*r*). A contract to take a house "if put into thorough repair," the drawing-room to be "handsomely decorated according to the present style," was held too uncertain for specific performance (*s*). Where a contract was made for the sale of an estate, the vendor reserving "the necessary land for making a railway through the estate," it was held that as the entire land would be conveyed and the reservation would be void for uncertainty, the purchaser could not have specific performance (*t*). Upon this principle the court refuses to compel a purchaser to take a doubtful title depending upon the construction of deeds or wills or other documents (*u*). Specific performance cannot be resisted upon the ground that the provisions of a contract are uncertain, where it has been confirmed by Act of Parliament (*x*). A party who has insisted on one

Uncertainty
of contract.

m) *Abbott v. Scordor* (1851), 4 De G. & S. 448; *affd.* 1852, 22 L. J. C. 235; *Harrison v. Guest* (1860), 8 H. L. C. 481; *Fry v. Lane* 1888, 58 L. J. C. 113; 40 Ch. D. 312.

n) *Higginson v. Chowers* (1808), 15 Ves. 516; *Clowes v. Higginson* (1813), 1 V. & B. 521; *Price v. Salusbury* (1862), 32 Beav. 416; 32 L. J. C. 411; *affirmed in H. L.* (1866), 14 L. T. 110; *Donglox v. Bagges* (1908), 78 L. J. P. C. 13; (1908) A. C. 177.

o) *Dolling v. Evans* 1867, 36 L. J. C. 174; *Marshall v. Berridge* (1881), 51 L. J. C. 329; 19 Ch. D. 233; *Re Lander and Bagley* (1892), 61 L. J. C. 707; (1892) 3 Ch. 41; *Oxford Corp. v. Crow*, (1893) 4 Ch. 535.

p) *Williams v. Brisco* (1882), 22 Ch.

D. 411.

q) *Price v. Griffith* (1851), 21 L. J. C. 78; 1 De G. M. & G. 80; *Haywood v. Cope* (1858), 27 L. J. C. 471; 25 Beav. 151; *Lancaster v. De Trafford* (1862), 31 L. J. C. 551.

r) *Kensington Local v. Phillips* 1817, 5 Dow, 61; *Fitzgerald v. Vicars* (1839), 2 Dr. & Wal. 298.

s) *Taylor v. Portington* (1855), 7 De G. M. & G. 328. See *Faulkner v. Llewellyn* (1861), 9 L. T. 557.

t) *Leake v. Wells* (1875), 44 L. J. C. 492; L. R. 20 Eq. 192. See *Chattock v. Muller* (1878), 8 Ch. D. 177.

u) See *ante*, p. 608.

x) *Manchester Ship Canal v. Manchester Rivecourse Co.* 1901, 70 L. J. C. 168; (1901) 2 Ch. 37.

PART V.

Contract
subject to
reference.

construction of an obscure document is not afterwards allowed specific performance according to the opposite construction (*y*). Upon the same principle the court refuses to execute contracts of which essential terms are left to be determined by reference to, or are subject to the approval or decision of, third parties (*z*). But where the terms of an agreement are complete, a provision therein for the arbitration of differences is no objection to specific performance (*a*). And the courts will specifically enforce an agreement to execute a deed "with usual clauses" or "with usual covenants": meaning such as are usual according to the practice of conveyancers (*b*).

Performance
useless.

The court will not grant specific performance under circumstances which would render it useless: as the execution of a lease after the expiration of the term; unless the execution is still necessary to secure some right of the plaintiff (*c*). The court will not enforce the execution of a lease, by the terms of which the lessee would have already incurred a forfeiture of which the lessor might avail himself (*d*).

Specific
performance
with com-
pensation.

The remedy for a breach of contract by specific performance necessarily imports some compensation, nominal or substantial, for the defect in time or manner of the performance which constitutes the breach. And the Court of Chancery, though it did not exercise an original jurisdiction to award damages, strictly so called, yet in exercise of the jurisdiction to give specific performance awarded supplementary damages or compensation for deficiencies in the performance decreed (*e*). Under the Judicature Acts, the High Court has jurisdiction to give specific performance with compensation or damages, as the case may require, according to the principles formerly applied in the courts of common law and in the Court of Chancery (*f*).

cu *Clayton v. Higginson* (1813), 1 V. & B. 524; *Marshall v. Berridge* (1881), 51 L. J. C. 329; 19 Ch. D. 233. See *Preston v. Lock* (1881), 27 Ch. D. 497.

z See *ante*, p. 696.

(*a*) *Hart v. Hart* (1881), 50 L. J. C. 697; 18 Ch. D. 670.

(*b*) *Hart v. Hart* (1881), 50 L. J. C. 329; 18 Ch. D. 233; *Harrison v. Harrison* (1887), 56 L. J. P. 76; 12 P. D. 150.

(*c*) *Nichol v. Mepp* (1818), 1 Swans. 223; *Watkinson v. Tockington* (1837), 7

L. J. Ex. Eq. 30; 2 Y. & C. Ex. 726.

(*d*) *Grogan v. Wilson* (1852), 22 L. J. C. 159; 9 Harc. 683; *Cotsworth v. Johnson* (1885), 55 L. J. Q. B. 220; *Givelle v. Parker* (1910), 79 L. 1 P. C. 86; (1910) A. C. 335.

(*e*) *Prothero v. Phelps* (1855), 25 L. J. C. 105; 7 De G. M. & G. 722; *Royal Bristol Perm. Ry. Soc. v. Bamish* (1887), 56 L. J. C. 840; 35 Ch. D. 390.

(*f*) Judicature Act, 1873, s. 21. *Emphre v. Jones* (1880), 15 Ch. D. 215.

In the exercise of the jurisdiction of specific performance, so long as the contract can be substantially carried out, the time is generally considered as not being of the essence of the contract, and mere delay is immaterial (*g*). The principle of the jurisdiction is to administer the rights of the parties as if everything had been done which ought to have been done at the time and in the manner agreed. As between vendor and purchaser, the land sold is treated as the property of the purchaser, and the purchase-money as the property of the vendor from the time for completion (*h*). The vendor remaining in possession after the time for completion is bound to account to the purchaser for the rents and profits but is not liable on occupation rent; and the purchaser retaining the purchase-money is bound to pay interest to the vendor: thus both parties are compensated for delay in performance (*i*). These cross rights are usually the subject-matter of express provision; but so firmly is the rule established that the vendor receiving part payment of the purchase-money has been made to pay interest on a proportionate part of rents received by him (*k*). The purchaser is also entitled to compensation for deterioration of the property from want of reasonable care during the delay (*l*); and for the loss of a contract to let to a tenant for immediate possession (*m*). Time may be made of the essence of the contract by express stipulation or by notice given to that effect; and the subject of the contract may make it essential: as where a house is purchased for immediate residence or for immediate use in a trade or business; and in sales of annuities, reversions, and subjects of wasting or fluctuating value; in which cases specific performance is refused if delay has frustrated the object of the contract (*n*).—There is no limit of time within which the party must sue, but “specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly, and as the nature of the case will permit” (*o*).

CHAP. II.
SECT. II.

Compensation for delay.

Time essential.

Limitation of remedy.

g. Judicature Act, 1873, s. 25 (7). See *ante*, p. 615.

h. Eldon, L. C., *Seton v. Slade* (1802), 7 Ves. 274; 2 Wh. & T. L. C. 475; Jessel, M. R., *Lysaght v. Edwards* (1876), 45 L. J. C. 559; 2 Ch. D. 506.

i. *Harford v. Pavier*, 1816, 1 Madd. 532; *Todd v. Gee* (1818), 1 Swanst. 255; *Bennett v. Stane* (1903), 72 L. J. C. 240; (1903) 1 Ch. 509.

k. See *Todd v. Gee* (1818), 1 Swanst. 255.

l. *Phillips v. Silvester* 1872, 42 L. J. C. 235; L. R. 8 Ch. 173; *Egmont (Earl) v. Smith* (1877), 46 L. J. C. 356; 6 Ch. D. 469; *Clayke v. Ramuz* (1891), 60 L. J. Q. B. 679; (1891) 2 Q. B. 456.

m. *Royal Bristol Perm. Bq. Soc. v. Bomash* (1887), 56 L. J. C. 810; 35 Ch. D. 390.

n. See *ante*, pp. 616, 617.

o. *Cranworth, L. C., Eads v. Williams* (1855), 24 L. J. C. 535; 4 De G. M. & G. 691; *Mills v. Haywood* (1877),

PART V.

Compensation for defective performance.

Compensation against purchaser :

Defects in subject of sale.

If a contract can be substantially performed, specific performance may be given with compensation with defects of quantity, or quality, or title, or any other matter which admits of it (*p*). And the principle applies on both sides of the contract; against a vendor who is compelled to perform the contract as far as he is able; and against a purchaser who is bound to accept a substantial performance. But it is subject to different considerations in the two cases: for the purchaser is entitled, if he pleases, to take performance with a defect, which the vendor would not be able to enforce against him. A purchaser will be compelled to take compensation for a small part of the property sold which the vendor is unable to convey; provided that it is not material in relation to the whole property (*q*). And he will be compelled to take compensation for a defect in the described quantity or acreage; provided the defined property can be conveyed; though a large defect of quantity may become sufficiently material to entitle the purchaser to refuse the whole (*r*). Where land was sold with an express condition for compensation the purchaser was compelled to take the defined land with compensation for a deficiency of acreage of a large amount (*s*). But a condition of sale excluding compensation was construed as applying to slight errors of description only, and not as excluding the purchaser from compensation for errors so great as to be attributable to carelessness (*t*). Where defined land is sold as "containing by estimation forty-one acres be the same more or less," or other similar expressions are used negating exact measurement, the purchaser will be compelled to take it without compensation (*u*). In the case of mere deficiency of quantity the compensation is presumptively to be measured by the proportion of the price due to the defective quantity (*x*). Compensation is also allowed in specific perform-

6 Ch. D. 196; *Cornwall v. Huson* (1900), 69 L. J. C. 581; (1900) 2 Ch. 298.

p Grant, M. R., *Dyer v. Hargrave* 1850, 10 Ves. 507; *Halsey v. Grant* 1806, 13 Ves. 77.

q *McQueen v. Farquhar* (1805), 11 Ves. 167; *Re Ansell* (1880), 14 Ch. D. 270.

r *Hill v. Buckley* (1811, 17 Ves. 391; *Belbany v. Debenham* (1891), 60 L. J. C. 166; 1891, 1 Ch. 412; *Jacobs v. Revell* 1900, 69 L. J. C. 879; (1900) 2 Ch. 858.

s *Re Farcott and Holmes* (1889), 58

L. J. C. 763; 42 Ch. D. 150. See *Leslie v. Thompson* (1851), 20 L. J. C. 561; 9 Hare, 273.

t *Whittemore v. Whittemore* (1868), 38 L. J. C. 17; L. R. 8 Eq. 603. See *Re Terry and White* (1886), 55 L. J. C. 345; 32 Ch. D. 14.

u *Winch v. Winchester* (1812), V. & B. 375; *Jolyffe v. Baker* (1883), 5 L. J. Q. B. 609; 11 Q. B. D. 255.

x *Hill v. Buckley* (1811), 17 Ves. 391. See *Leslie v. Thompson* (1851), 20 L. J. C. 561; 9 Hare, 273.

CHAP. II.
SECT. II.Material
defect.

ance for defects of quality and condition, as compared with the description in particulars of sale; in regard to repair of buildings or cultivation and state of land (*g*); or in regard to the rents and profits derived (*z*). A defect in the property sold which is material to the enjoyment of the whole does not lie in compensation, and is an answer to a claim for specific performance; as where a wharf was sold together with a jetty, which was essential to the wharf, and the jetty could not be conveyed (*a*); where the defect was a strip of land separating the rest of the land sold from a public road (*b*); or a wall which was sold as inclosing the property (*c*). And where the defective part was used as a brickfield and was essential to the rest of the property sold in order to protect it from the nuisance of brick-burning the purchaser was not compelled to specific performance with compensation (*d*). But where the purchaser could get the defective part by the exercise of statutory powers, independently of the contract, it was held that he was precluded from objecting to take the rest upon the ground merely of the essential defect, and he was compelled to specific performance with compensation (*e*).

Defect in
tenure.

A purchaser will not be compelled to take land of different tenure than that contracted for; as copyhold instead of freehold or freehold instead of copyhold (*f*). But a purchaser of land as freehold was compelled to take commuted copyhold which was scarcely different from freehold, there being a clause for compensation for any misstatement of the tenure, and the mistake not being wilful (*g*). A purchaser who buys land described merely as "partly freehold and partly copyhold," is compelled to take the land as it is, without definition of boundaries or quantities of each (*h*); and if the description gives the proportion of each a variation in the proportion may be the subject of compensation (*i*). A purchaser of freehold cannot be compelled to

150. See
L. J. C.
1868,
q. 603. See
55 L. J. C.

(1812), 1
r (1883), 52
D. 255. See
1), 17 Ves.
n (1851), 20

(*g*) *Tiger v. Hargrave* (1815), 10 Ves. 305; *Grant v. Munt* (1815), G. Coop. 173; *Scott v. Hanson* (1829), 1 Russ. & M. 128.

(*z*) *Cann v. Cann* (1830), 3 Sim. 447; *Pocell v. Elliot* (1875), L. R. 10 Ch. 421.

(*a*) *Price v. Lambart* (1841), 7 Beav. 546. See *Jacobs v. Rell* (1900), 69 L. J. C. 879; (1900) 2 Ch. 858.

(*b*) *Perkins v. Eds* (1852), 16 Beav. 193.

(*c*) *Brewer v. Brown* (1885), 54 L. J.

C. 605; 28 Ch. D. 309.

(*d*) *Knatchbull v. Grueber* (1815), 1 Mudd. 153; affd. (1817), 3 Mer. 124.

(*e*) *Wells v. Chelmsford Loc. Bd.* (1880), 49 L. J. C. 827; 15 Ch. D. 108.

(*f*) See ante, p. 609.

(*g*) *Price v. Macaulay* (1852), 2 De G. M. & G. 339.

(*h*) *Munro v. Taylor* (1852), 21 L. J. C. 525; 3 Mac. & G. 713.

(*i*) *Romilly, M. R., Hudson v. Cook* (1872), 41 L. J. C. 306; L. R. 13 Eq. 120.

PART V.

Charges and
incum-
brances.

Easements.

Defects
known to
purchaser.

take a leasehold, however long; or an estate of which a substantial part is leasehold (*k*). A purchaser of a leasehold term may be compelled to take the term with compensation for a slight deficiency in the duration of the term as described (*l*); but not an underlease, though for a term less by only a day or two, because the title is materially different from that of the original term (*m*).

The court will not compel the purchaser to take an estate sold as tithe free, which is subject to tithe; but where a small portion of a large estate is subject to tithe, the purchaser may be compelled to take the estate with compensation (*n*). The court will also compel a purchaser to take compensation for quit rents, rent charges, and other fixed charges of small amount (*o*). Mortgages are not objections to the title but matter of conveyance, even where they exceed the value of the purchase-money *p*.—Easements exercisable over the land sold in general so far affect the enjoyment of the land as not to lie in compensation; as in the case of land sold as building land which is found to have a public right of way over it (*q*). A purchaser was not compelled to take land subject to the servitude of supplying water for the use of adjoining land (*r*); or land subject to restrictive covenants as to the use and occupation (*s*).

Compensation is not allowed for a defect in the property as described of which the purchaser had full knowledge at the time of contracting: as where the estate was described as being in a ring fence, and the purchaser had seen the estate and knew it not to be so (*t*). But the doctrine of constructive notice does not apply between vendor and purchaser to obviate the effect of description of the property, and representations made by the vendor (*u*).

(*k*) *Landre v. Ford* 1793, 1 Bro. C. C. 491; *Dowse v. Corp* (1801), 9 Ves. 368; 1 Sim. & S. 201, n. See *Calcraft v. Rochford* 1790, 1 Ves. jun. 221.

(*l*) *Eldon, L. C.*, *Marllock v. Buller* (1801), 10 Ves. 306; *per random*, *Halsey v. Grant* (1806), 13 Ves. 77. See *Belworth v. Russell* 1815, 4 Camp. 140.

(*m*) *Madeley v. Barth* (1848), 2 De G. & Sm. 718; *Re Boyfus and Masters* (1888), 39 Ch. D. 110. See *Waring v. Scotland* 1888, 57 L. J. C. 1016.

(*n*) *Ricks v. Rokeby Lord*, (1814), 2 Swanst. 222. See *Smith v. Tolcher* (1828), 4 Russ. 302.

(*o*) *Esch v. Stephenson* (1822), 1 Sim. & S. 122. See *ante*, p. 611.

(*p*) *Turnsall v. Chumperdown* (1827), 1 Y. & J. 449; *Att.-Gen. v. Cox* 1850,

3 H. L. C. 210; *Manufact (Duke) Giffen* (1856), 3 Sm. & G. 213.

(*q*) *Dykes v. Blake* 1838, 7 L. C. P. 282; 4 Bing. N. C. 463.

(*r*) *Shucklton v. Sutcliffe* (1817), De G. & Sm. 609.

(*s*) *Cato v. Thompson* (1882), 9 Q. B. 616; *Re Higgins and Hitchman* (1885), 51 L. J. C. 772; 21 Ch. D. 95; *Re Dab and Carey* (1888), 58 L. J. C. 143;

Ch. D. 601; *Re Elsworth and To* (1889), 58 L. J. C. 665, 42 Ch. D. 2

Rodd v. Laxelles (1900), 69 L. J. 396; 1900 1 Ch. 815.

(*t*) *Dyer v. Hargrave* 1805, 10 V. 505.

(*u*) *Caballero v. Henty* (1874), 43 L. C. 635; L. R. 9 Ch. 447.

purchaser was held entitled to abatement for a misrepresentation of quantity, though he was the tenant in possession at the time of the purchase; because he would not necessarily know the measurement, and might rely upon the representation (*c*). The purchaser of premises in the occupation of a tenant is not bound to inquire the terms of the tenancy as against the vendor, and to take his purchase subject to it (*x*). And a purchaser of leasehold is not affected with notice of the terms of the lease so as to be compelled to take the premises subject to restrictive covenants contained in it (*y*). A purchaser who has contracted absolutely for a good title cannot be compelled to accept a title subject to defects or incumbrances, merely because he knew of them at the time of contracting (*z*).

A purchaser can compel the vendor to specific performance of the contract to the extent of his ability, with an abatement of price or compensation for any deficiency in the performance: "speaking generally every purchaser has a right to take what he can get, with compensation for what he cannot get" *a*. Compensation for a deficiency of acreage is presumptively measured by a rateable abatement of the price (*b*); but the purchaser may bind himself by the conditions of sale to take the measurement as stated and exclude compensation (*c*); if the amount of compensation is so large as to inflict a hardship upon the vendor, the court will give the purchaser the option either to rescind the contract, or to take the land without compensation (*d*). On the other hand, where there is a material excess in the acreage above the contract quantity, the purchaser may be refused specific performance unless he allows compensation to the vendor for the excess (*e*). A purchaser is allowed in some cases compensation for incorrect statements made by the vendor as to the state of repair and

Compensation against vendor.

(*c*) *King v. Wilson* (1843), 6 Beav. 124.

(*x*) *Cabrero v. Benty* (1874), 13 L. J. C. 635; 1 L. R. 9 Ch. 417.

(*y*) *Re Davis and Carey* (1888), 58 L. J. C. 113; 40 Ch. D. 601.

(*z*) *Cato v. Thompson* (1882), 9 Q. B. D. 616.

(*a*) *Turner, L. J., Hughes v. Jones* (1861), 31 L. J. C. 89; 3 De G. F. & J. 315.

(*b*) *Hill v. Buckley* (1811), 17 Ves. 394; *Leslie v. Thompson* (1851), 20 L. J.

C. 561; 9 Hare, 273. See *McKenzie v. Basketh* 1878, 17 L. J. C. 231; 7 Ch. D. 675.

(*c*) *Cordingley v. Cherscough* (1862), 31 L. J. C. 617; 4 De G. F. & J. 379; *Re Tovey and White* (1886), 55 L. J. C. 345; 32 Ch. D. 11.

(*d*) *Durham (Earl) v. Legard* (1865), 31 L. J. C. 589; 34 Beav. 611.

(*e*) *Leslie v. Thompson* (1851), 20 L. J. C. 561; 9 Hare, 273. See *Re Orange and Wright* (1885), 54 L. J. C. 590.

PART V.

Defect of
interest.

improvements on the property; and the measure of compensation is the difference of value of the property if such representations were made good (*f*). In the case of a charge of money upon land sold the purchaser is entitled to have the charge paid off out of the purchase-money (*g*); but he is not entitled to call upon the vendor to pay the excess of the charge over the purchase-money (*h*), unless perhaps where the contract has been entered into upon the footing that the charge does not exceed a named amount (*i*).

Upon the same principle where a vendor, having only a particular estate or partial interest, contracts to sell the entirety, the purchaser may compel him to convey all his estate and interest and to allow compensation for as much as he cannot convey (*k*). Where parties purport to deal with the entirety, and the vendor or lessor has not been guilty of misrepresentation or misconduct, it has been said that specific performance will not be decreed against him; but the exception should be restricted to those cases where the abatement in the purchase-money or rent is so great as to inflict a hardship upon the vendor or lessor (*l*). A vendor has been compelled to convey an undivided moiety with an abatement of half the price (*m*); to grant a lease of an undivided moiety with an abatement of half the rent (*n*); and to convey an estate with the exception of the minerals, which had been reserved to a third party, with compensation for the exception (*o*). "If a person possessed of a term contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term; and the court will arrange the equities between the parties" (*p*). So the purchaser of a fee simple may compel the vendor to convey a life estate, with compensation for the remainder (*q*); or to convey a remainder with compensation for

f) *Pincock v. Pinson* (1818), 18 L. J. C. 57; 41 Beav. 355; *Re Chifford* (1888), 58 L. J. C. 263; 40 Ch. D. 45. See *ante*, p. 835.

g) *Re Jackson and Oakstall* (1880), 49 L. J. C. 523; 11 Ch. D. 851.

h) *Wedgwood v. Adams* (1843), 6 Beav. 600.

i) *Att.-Gen. v. Cox* (1856), 3 H. L. C. 210; *Horrocks v. Ryaby* (1878), 47 L. J. C. 800; 9 Ch. D. 180.

k) *Eldon, L. C., Mather v. Fuller* (1801), 10 Ves. 316; *Western v. Russell* (1811), 3 V. & B. 187; *Rudd v. Lascelles* (1900), 69 I. J. C. 396; 1900 1 Ch. 815.

l) *Price v. Griffith* (1851), 21 L. J.

Ch. 78; 1 De G. M. & G. 80; *Lamb v. Rowncroft* (1895), 64 L. J. Q. 1411; (1895) 1 Q. B. 683. This case was not cited in *Hester v. Paver* (1899), 68 L. J. C. 116; (1900) 1 Ch. 341.

m) *Hooper v. Smart* (1871), L. R. 1 Eq. 683; *Baden v. Piper* (1874), 43 L. J. C. 704; *Horrocks v. Ryaby* (1878), 47 L. J. C. 800; 9 Ch. D. 180.

n) *Burrow v. Seawell* (1881), 51 L. J. C. 296; 19 Ch. D. 175.

o) *Seamon v. Fandry* (1810), 16 Ves. 390.

p) *Eldon, L. C., Wood v. Griffith* (1818), 1 Swainst. 51.

q) *Burnes v. Wood* (1865), 38 L. J. Ch. 683; 1 L. R. 8 Eq. 421.

life estate (*r*). The purchaser of renewable leasehold was held entitled to specific performance with compensation for the right of renewal which was deficient (*s*). The purchaser of an estate sold as title free was held entitled to have the estate with compensation for titles charged upon it; but not to compel the vendor to purchase the titles (*t*).—The court will not enforce a partial execution of a sale, where it would be prejudicial to other persons interested in the property, but not parties to the contract (*u*); nor against a vendor who is a trustee in prejudice of the trust, though he may himself have a beneficial share in the property (*x*).

A defect of title or other defect of performance may import a contingency of loss or disturbance which is not suitable for pecuniary compensation; "and the proper compensation is an indemnity by which the loss, if it happens, will be made good; and if it does not happen there is no occasion for compensation" (*y*). The court cannot compel a purchaser to take an indemnity or the vendor to give it, unless it forms part of the contract; but the purchaser may claim it as a condition of accepting a defective performance; and the vendor may submit to specific performance so far as he is able, with indemnity for the deficiency (*z*). In the case of a contract of sale of leasehold, with a covenant for renewal which could not be enforced to the extent stated in the particulars of sale, the purchaser was decreed to have specific performance, with a security to be settled by the master to indemnify him against the risk of not obtaining the renewal contracted for (*a*). In the case of a rent charged upon land, part of which was afterwards sold as free from incumbrance, indemnity was given by an equivalent charge upon other land contingent upon the rent being levied out of the land sold (*b*). Upon a purchase in fee simple free of incumbrance, indemnity against the claim of dower

Specific performance with indemnity

(*r*) *Nethorpe v. Holgate* (1814), 1 Coll. 203; *Baker v. Carr* (1876), 46 L. J. C. 62; 4 Q. D. 464.

(*s*) *Mallan v. Cooke* (1808), 16 Ves. 1; *Painter v. Newby* (1853), 22 L. J. C. 871; 11 Hare, 26.

(*t*) *Toll v. Gee* (1810), 17 Ves. 273.

(*u*) *Laugdale, M. R., Thomas v. Dering* (1837), 6 L. J. C. 267; 1 Kern, 747. See *Graham v. Oliver* (1810), 3 Beav. 121; *Ridgway v. Gray* (1849), 1 Mac. & G. 109.

(*v*) *Naylor v. Goodall* 1877, 47 L. J. C. 53. See *Scott v. Alvarez* (1895), 61 L. J. C. 821; (1895) 2 Ch. 603.

(*w*) *Eldon, L. C., Mallan v. Cooke* (1808), 16 Ves. 13.

(*z*) *Eldon, L. C., Ralmon v. Lumley* (1813), 1 V. & B. 225. See *Wood v. Bernal* (1812), 19 Ves. 220.

(*a*) *Mallan v. Cooke* 1808, 16 Ves. 1.

(*b*) *Halsey v. Grant* (1806), 13 Ves. 73; *Hornblow v. Sharkey* 1806, 13 Ves. 81.

PART V.

by the vendor's wife was given by the court ordering a sufficient portion of the purchase-money to be set aside to meet the contingency (c). Where leasehold was sold, which was found to be subject to forfeiture under the covenants in a superior lease, the court refused specific performance, upon the ground that the defect was not the proper subject of compensation or indemnity, because the purchaser was liable to be entirely deprived of the property (d). Under an agreement to grant a lease with usual covenants, the lessor having no title to the minerals, the lessee was held entitled to have a lease executed with an absolute covenant for quiet enjoyment, in order to indemnify him against risk of loss from the mines being worked during the term (e).

c) *Wilson v. Williams* (1857), 3 Jur. N. S. 810.

d) *Fildes v. Hooker* (1818), 3 Madd.

193. See *Nonville v. Flight* (1844), 1 L. J. C. 111; 7 Beav. 521.

(e) *Onions v. Odion* (1865), 31 L. J. 339; 2 H. & M. 351.

PART VI.

ASSIGNMENT OF CONTRACTS.

CHAPTER I.

PRINCIPLES OF ASSIGNMENT.

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AN assignment of the rights and liabilities arising out of contracts may occur: by act or agreement of the parties; by the assignment of estates and interests in land to which covenants running with the land are annexed; by death, upon the occurrence of which the estate, rights and liabilities of the deceased are transferred to his representatives; by bankruptcy operating as an assignment in law for the benefit of creditors. Formerly marriage operated as an assignment of the wife's *choses in action*, provided the husband reduced them into possession in his wife's lifetime, or became her personal representative, but the law has since been altered as hereafter mentioned (a).

By the rule of common law *choses in action*, under which class are included rights arising from a contract, and rights of action for breach of contract, are not assignable by act of the parties (b);

Assignment
at common
law.

(a) See *post*, p. 915.

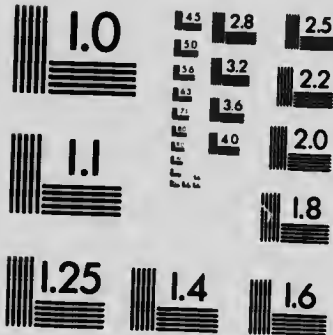
(b) Co. Litt. 214 a. 232 b; Buller, J.,

Master v. Miller (1791), 4 T. R. 340;
1 Sm. L. C. 747.



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PART VI.

and it is not competent for parties, though contracting in express terms with "assigns," to dispose with the rule and render the right of action assignable at law (c). Exceptions occur to this rule with bills of exchange, which were negotiable by the law merchant or general custom of merchants; and some other exceptions occur by custom and some by statute. These exceptions are referred to in this and the following chapter.

Assignment in equity.

The Court of Chancery treated the assignment of a legal chose in action as importing an agreement that the assignee should use the name of the assignor in proceedings at law to realise the chose in action; which agreement, if supported by a valuable consideration, the court would specifically enforce, and compel the assignor to allow his name to be used in proceedings at law

Effect in law.

on an indemnity against costs (d).—And the courts of law gave effect indirectly to an assignment in the exercise of their summary jurisdiction over suitors, by setting aside or controlling any legal proceedings founded upon an intervention of the assignor in breach of his agreement to assign; as a plea of release given by him to the debtor, or of payment by the debtor to the assignor, in fraud of the assignee (e). The courts of law also gave a right of action to the assignee for any such intervention of the assignor which operated in breach of his agreement (f). Now under the Judicature Acts express provision is made for the assignment of a legal debt or chose in action; and the rules and practice of the courts of common law in protection of assignments are superseled in all courts by the rules of equity (g).

Assignment under the Judicature Act.

By the Judicature Act, 1873, s. 25 (6), "any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and

(c) *Wetherell v. Langston* (1847), 17 L. J. Ex. 338; 1 Ex. 634.

(d) *Durham Bros. v. Robertson* (1898), 67 L. J. Q. B. 484; (1898) 1 Q. B. 765; *Re Griffin* (1898), 68 L. J. C. 220; (1899) 1 Ch. 408.

(e) *Legh v. Legh* (1799), 1 Bos. & P.

447. See *ante*, p. 679.

(f) *Gerard v. Lewis* (1867), 36 L. J. C. P. 173; L. R. 2 C. P. 345; *Re Patrick* (1890), 60 L. J. C. 111; (1891), 1 Ch. 82.

(g) See Judicature Act, 1873, s. 25 (6), (11).

transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor"; but with the proviso that if the debtor has notice that such assignment is disputed by the assignor or any one claiming under him or of any other opposing claims he may require the parties to interplead or he may pay the money into court. The provisions of this section are retrospective and apply to an assignment of a chose in action made before the Act came into operation (h).

A voluntary assignment was effectual in equity to transfer the rights of the assignor to the assignee (i); and a valuable consideration is not essential to the validity of an assignment under the statute as against the assignor, or as against his debtor or a trustee of the fund (k). The assignment of an indefinite and unascertained part of a debt, is insufficient, and there are conflicting decisions whether the statute permits the assignment of anything less than the entirety of the debt (l). A debt payable at a future date, or upon a contingent event, is a chose in action and assignable within the Act: as an assignment of money becoming due for work in progress of completion (m); an assignment of the assignor's present or future balance at his banker's (n). An assignment by deed of the benefit of a contract for the purchase of a reversionary interest is within the Act (o); and compensation payable under the Lands Clauses Consolidation Act, 1845, may also be validly assigned (p). The assignment of a debt by way of mortgage to secure a smaller debt, with a proviso for redemption and reconveyance, is an "absolute assignment not purporting to be by way of charge only" within the Act (q). And the

Construction of Act.

h. *Dibb v. Walker* (1893), 62 L. J. C. 536; (1893) 2 Ch. 429.

i. *Ellison v. Ellison* (1802), 6 Ves. 659; *Kirkewich v. Manning* (1851), 21 L. J. C. 577; 1 De G. M. & G. 176; *Re Griffin* (1898), 68 L. J. C. 220; 1899 1 Ch. 408.

k. *Walker v. Bradford Old Bk.* (1884), 53 L. J. Q. B. 280; 12 Q. B. D. 511; *Harding v. Harding* (1886), 55 L. J. Q. B. 462; 17 Q. B. D. 442.

l. *Skipper and Tucker v. Holloway* 1909, 79 L. J. K. B. 91; (1910) 2 K. B. 630; *Forster v. Baker* (1910), 79 L. J. K. B. 664; (1910) 2 K. B. 636.

m. *Brice v. Bannister* (1878), 47 L. J.

Q. B. 722; 3 Q. B. D. 569; *Hughes v. Pump House Hotel* (1902), 71 L. J. K. B. 630; (1902) 2 K. B. 190. See *Western Wagon Co. v. West* (1891), 61 L. J. C. 244; (1892) 1 Ch. 271.

n. *Walker v. Bradford Old Bk.* (1884), 53 L. J. Q. B. 280; 12 Q. B. D. 511.

o. *Torkington v. Magee* (1902), 71 L. J. K. B. 712; (1902) 2 K. B. 427; reversed on other grounds (1903), 72 L. J. K. B. 336; (1903) 1 K. B. 614.

p. *Dawson v. G. N. and City Ry.* (1904), 74 L. J. K. B. 190; (1905) 1 K. B. 260.

q. *National Prov. Bk. v. Harle* (1881), 50 L. J. Q. B. 437; 6 Q. B. D. 626;

PART VI.

Notice to
the debtor.

Contracts
incapable of
assignment.

assignment of a debt upon trust to receive the amount, and after retaining a certain sum due to the assignee to pay the surplus to the assignor, is an absolute assignment within the Act (*r*). So an assignment of debts by several creditors to a trustee for collection, and payment rateably among the assignors, is good (*s*). Where the interest of the assignee was made to depend upon the state of accounts between him and the assignor, and on a future uncertain event coming to an end, the assignment was held not to be absolute (*t*). So where the assignment was expressed to be by way of security and contained an appointment of the assignee as the attorney of the assignor, it was also held to be outside the Act (*u*).—The notice to the debtor or trustee required by the Act may be given after the death of the assignor (*x*). And it is not required that the debtor or trustee should accept the notice in the sense of agreeing to be bound by it (*y*).

Some contracts are of a kind incapable of assignment either at law, or in equity, by reason of importing the consideration of personal skill or confidence: as the contract of an artist to paint a picture, or of an author to write a book, or of a publisher to publish a book; which do not admit of the contractor substituting the skill or capacity or credit of an assignee (*z*). A contract, by its terms, or upon a review of the surrounding circumstances, be incapable of assignment, as in the case of a manufacturer of a special quality of goods, who cannot assign the execution of an order to another manufacturer and entitle him by supplying his own goods to charge the customer (*a*). An insurance company advanced money upon security of a bond conditional for the payment of premiums upon a policy issued by it, and forming part of the security for the loan, the contract was held under the circumstances to be not assignable (*b*). So too a contract to supply

Tanner v. Dighton Bay Ry. (1889), 58 L. J. Q. B. 459; 23 Q. B. D. 239.

(*r*) *Burlinson v. Hall* (1881), 53 L. J. Q. B. 222; 12 Q. B. D. 317.

(*s*) *Conford v. Betts* (1891), 60 L. J. Q. B. 656; (1891) 1 Q. B. 737; *Fitzroy v. Carr* (1905), 74 L. J. K. B. 829; (1905) 2 K. B. 301.

(*t*) *Durham Brass v. Robertson* (1898), 67 L. J. Q. B. 484; (1898) 1 Q. B. 765.

(*u*) *Mercantile Bk. v. Eans* (1899), 68 L. J. Q. B. 921; (1899) 2 Q. B. 613.

(*v*) *Walker v. Bradford Old Bk.* (1884), 53 L. J. Q. B. 280; 12 Q. B. D. 511.

(*y*) *Brace v. Bonmister* (1878), 47 L. J. Q. B. 722; 3 Q. B. D. 569.

(*z*) *Sterious v. Becking* (1855), 24 L. J. C. 153; 6 De G. M. & G. 233; *H. v. Broadbent* (1879), 48 L. J. C. 650; 12 Ch. D. 886; *Griffith v. Taver Publishing Co.* (1896), 66 L. J. C. 12; (1897) 1 Ch. 21.

(*a*) *Per cur. British Wagon Co. v. I.* (1880), 49 L. J. Q. B. 321; 5 Q. B. D. 152. See *Johnson v. Rayton* (1881), 50 L. J. Q. B. 753; 7 Q. B. D. 438.

(*b*) *Atkinson v. Gylly* (1852), 21 L. J. C. 848; affd. (1852), 2 De G. M. & G. 670.

eggs, with a corresponding obligation not to purchase them from any other dealer was held to be not assignable (c). But a contract that certain work shall be done, or goods supplied, without regard to the persons engaged, is assignable; and upon performance of all the conditions stipulated for, the assignee is entitled to the benefit of the contract; as a contract to let railway wagons for a term of years and to keep them in repair during the term for an annual payment (d); or a contract by a quarry owner to supply chalk to a cement manufacturing company (e).

The same rules apply to the assignment of foreign contracts within the realm, unless assignable by universal custom; as is the case with the scrip and bonds of foreign governments issued as payable to bearer (f). The validity of an assignment of foreign contracts which are assigned abroad is governed by the law of the country where the assignment is made (g).

Foreign contracts.

Formerly the remedy of an assignee of a legal debt or chose in action was identical with that of his assignor, and must have been pursued in the court and with the proceedings appropriate to the cause of action; unless the circumstances of the case gave him a special claim to the intervention of the Court of Chancery in his own right (h). The assignee of a debt is considered as the real creditor for the purpose of presenting a petition in bankruptcy, unless the assignee be a trustee, in which event the beneficiary must join with him (i); also for the purposes of set-off by and against the debtor (k). The assignee of a judgment debt becomes entitled to put in force all the remedies of the assignor upon the judgment, subject to the observance of any matters relating to procedure (l); but he is not within the terms

Remedies of assignee.

c. *Kemp v. Baerselman* (1906), 75 L. J. K. B. 873; (1906) 2 K. B. 691.
d. *British Wagon Co. v. Lea* (1880), 49 L. J. Q. B. 321; 5 Q. B. D. 152.
e. *St. v. Ass. Portland Cement Works* (1903), 72 L. J. K. B. 834; (1903) A. C. 414.
f. *Goodwin v. Roberts* (1876), 45 L. J. Ex. 748; 1 Ap. Ca. 476.
g. *Innes v. Dunlop* (1800), 8 T. R. 595; *Lee v. Ashby* (1886), 17 Q. B. D. 309; *Alcock v. Smith* (1891), 61 L. J. C. 161; 1892 1 Ch. 238; *Embircos v. Angl.-Austrian Bk.* (1905), 74 L. J. K. B. 326; (1905) 1 K. B. 677.
h. *Hammond v. Messenger* (1838), 7

L. J. C. 310; 9 Sim. 327; *Hoskins v. Holland* (1875), 44 L. J. C. 273; *Roburghe v. Cor* (1881), 50 L. J. C. 772; 17 Ch. D. 520. See *Durham Bros. v. Robertson* (1898), 67 L. J. Q. B. 484; (1896) 1 Q. B. 765.
i. *Ex p. Cooper* (1875), 44 L. J. P. 126; L. R. 20 Eq. 762; *Ex p. Darle* (1884), 54 L. J. Q. B. 74; 14 Q. B. D. 184.
k. See *ante*, p. 742.
l. *Goodman v. Robinson* (1887), 56 L. J. Q. B. 394; 18 Q. B. D. 332; *East End Bq. Soc. v. Slack* (1891), 60 L. J. Q. B. 359.

PART VI.

Specific performance.

of a provision only applicable to a "creditor who has obtained a final judgment" (*m*). And he is in no better position than the judgment creditor, where, as in bankruptcy, the consideration of the judgment may be inquired into (*n*).—Only the immediate parties to a contract are concerned with its performance, but as a contract is assignable in equity, the assignor and assignee may join in a claim of specific performance to the assignee, where that remedy is applicable (*o*). A similar principle is applicable in the case of a sub-purchase of part of the land sold; the purchaser may compel an assignment to one or more sub-purchasers provided he does not alter the contract to the detriment of the vendor, but notice of the sub-purchase does not prevent the vendor from completing the sale to the original purchaser according to its terms (*p*); nor can the sub-purchaser be charged by the vendor (*q*); and a conditional assignment of a contract of sale, as an agreement to assign upon request, is not available against the vendor, until the assignee has made a request and given notice of it to the vendor (*r*). The assignee of an agreement for a lease is entitled to specific performance if the original contracting party joins in the lease to covenant for the performance of the terms of the agreement, or security is given for the same (*s*). And the lessor may object to grant the lease to the assignee upon the ground that he is bankrupt or insolvent, or not a proper person to take it; but he cannot object to grant the lease to a solvent and proper assignee upon the ground of the bankruptcy or insolvency of the assignor (*t*). The assignee of an agreement for a lease with a condition against assignment cannot compel the lessor to grant it, unless the lessor has waived the breach and consented to the assignment (*u*). An agreement for a lease passes to the intended lessee's trustee in bankruptcy, who may assign it to a purchaser.

(*m*) *Ex p. Blanchett* (1886), 55 L. J. Q. B. 327; 17 Q. B. D. 303.

(*n*) *Ex p. Seaton* (1891), 60 L. J. Q. B. 411.

(*o*) *Tasker v. Small* (1837), 3 M. & Cr. 63; *Wood v. White* (1839), 8 L. J. C. 209; 4 M. & Cr. 460; *Nelthorpe v. Holgate* (1841), 1 Coll. 217.

(*p*) *Crabtree v. Poole* (1871), 10 L. J. C. 468; L. R. 12 Eq. 13; *Egmont (Earl) v. Smith* (1877), 46 L. J. C. 356; 6 Ch. D. 469.

(*q*) *Cutts v. Thoday* (1842), 13 Sim. 206; affd. (1844), 1 Coll. 223; *Chadwick*

v. Muden (1852), 21 L. J. C. 870; 9 Hare, 188.

(*r*) *Shaw v. Foster* (1872), 42 L. J. C. 49; L. R. 5 H. L. 321.

(*s*) *Dowell v. Daw* (1842), 1 Y. & C. C. C. 345; affd. (1843), 12 L. J. C. 158.

(*t*) *Crosbie v. Tooke* (1833), 2 L. J. C. 83; 1 M. & K. 431; *Morgan v. Rhodes* (1834), 1 M. & K. 435; *O'Hertley v. Hedges* (1803), 1 Sch. & Lef. 123.

(*u*) *Weatherall v. Geering* (1806), 12 Ves. 504; *Dowell v. Daw* (1842), 1 Y. & C. C. C. 345; affd. (1843), 13 L. J. C. 158.

and the latter may have specific performance against the lessor (x). CHAP. I.

A voluntary assignment is within the Judicature Act, 1873, s. 25 (6); and if made by writing and with notice as therein required is effectual in law to pass the debt or chose in action and all legal remedies (y). But the court does not enforce an assignment of a debt or chose in action which is not complete and effectual in law, unless it is supported by a valid consideration; such an assignment is considered as a mere voluntary agreement for the assignee to use the name and the remedies of the assignor, and the court never specifically enforces voluntary agreements, or compels completion of imperfect gifts (z); as a voluntary gift of promissory notes without indorsement, or without delivery (a); and the voluntary delivery of a bond, with the intention of passing the sums recoverable (b). An imperfect gift of personality may be made good, where the donee is appointed executor (c). If the transaction can be construed as a complete declaration of trust of the beneficial interest in the chose in action, the court will enforce the trust against the party making it, though made voluntarily and gratuitously (d). But the court will not uphold the transaction as an implied declaration of trust merely on account of the imperfection and failure as a gift; because the intention of giving negatives the intention of retaining as trustee (e). A covenant to settle certain specified funds upon certain defined trusts is complete and will be enforced by the court (f). An expectancy is incapable of assignment in equity as well as at law; and a document purporting to assign an expectancy can only be regarded as a contract so to do, and if voluntary will not be enforced in a court of equity even if the document be under seal (g).

Voluntary
assignments
and trusts.

(f) *Buckland v. Papillon* (1876), 36 L. J. C. 81; L. R. 2 Ch. 67.

(g) *Walker v. Bradford Old Bk.* 1881, 53 L. J. Q. B. 280; 12 Q. B. D. 511; *Harding v. Harding* (1886), 55 L. J. Q. B. 462; 17 Q. B. D. 412.

(z) *Turner, L. J., Milroy v. Lord* (1862), 31 L. J. C. 794; 4 De G. F. & J. 271.

(a) *Richardson v. Richardson* 1867, 36 L. J. C. 653; L. R. 3 Eq. 686.

(b) *Edwards v. Jones* (1836), 5 L. J. C. 194; 1 M. & Cr. 226.

(c) *Re Griffin* (1898), 68 L. J. C. 220; (1899) 1 Ch. 168; *Re Stewart* (1908), 77

L. J. C. 525; 1908 2 Ch. 251.

(d) *Elison v. Elison* (1892), 6 Ves. 656; *Fletcher v. Fletcher* 1844, 14 L. J. C. 66; 1 Hare, 67; *Re Thompson* (1910), 79 L. J. C. 340; 1910 1 Ch. 669.

(e) *Milroy v. Lord* (1862), 31 L. J. C. 98; 4 De G. F. & J. 26; *Richards v. Delbridge* (1871), 43 L. J. C. 59; L. R. 18 Eq. 11; *Re Barton's will* (1881), 50 L. J. C. 369; 17 Ch. D. 116.

(f) *Johnstone v. Mappin* (1891), 60 L. J. C. 211.

(g) *Re Ellenborough* 1893, 72 L. J. C. 218; (1903) 1 Ch. 697.

PART VI.
Security of
debt.

—The property in a document which is the security of a debt, as a bond, debenture or policy of insurance, may be validly assigned and transferred separately from the debt; in which case the party entitled to the debt may not be able to recover the document, whilst the party holding the document may not be able to recover the debt (*h*). And an assignment of a debt may be complete, and would presumptively carry the securities for it although not expressly assigned; and if the assignor afterwards gets in the debts, he is accountable for the amount to the assignee (*i*).

Donatio
mortis causâ.

If an imperfect gift be made in expectation and upon condition of death, the court, if the security for a debt is actually delivered, will compel the representatives of the donor to complete the gift upon the death happening (*k*): as the delivery of a bond with the above intention (*l*); or the deeds and securities of a mortgage debt (*m*): or a policy of insurance on life (*n*); or the written receipt for a loan delivered by the creditor to the debtor with the intent to release the debt (*o*); or the deposit note of money at a bank (*p*). A cheque of the donor upon his banker is not a subject for a *donatio mortis causâ*; being a mere order revoked by death (*q*); but if paid, or if negotiated for value before the death, the gift is complete and valid (*r*). So a promissory note of the donor passes no more than the right of action upon the note, and is not the donation of any debt or fund (*s*). But the delivery of a promissory note, or a cheque, or bill of exchange of a third party, payable to the donor, and though drawn payable to order and not indorsed by him, may be the subject of a good *donatio mortis causâ* (*t*). A receipt for stock and a certificate of stock, not being in themselves securities, are not subjects of a *donatio mortis causâ* (*u*); but a post office savings bank book is a good subject.

(*h*) *Barton v. Gains* (1858), 27 L. J. Ex. 390; 3 H. & N. 387; *Rammens v. Hare* (1876), 46 L. J. Ex. 30; 1 Ex. D. 169. See *Swanley Coal Co. v. Denton* (1906), 75 L. J. K. B. 1009; (1906) 2 K. B. 873.

(*i*) *Re Patrick* (1890), 60 L. J. C. 111; (1891) 1 Ch. 82.

(*k*) *Ward v. Turner* (1752), 2 Ves. sen. 431; 1 Wh. & T. L. C. 413.

(*l*) *Gardner v. Parker* (1818), 3 Madd. 184.

(*m*) *Duffield v. Elwes* (1827), 1 Bli. N. S. 497.

(*n*) *Witt v. Amiss* (1861), 30 L. J. Q. B. 318; 1 B. & S. 109; *S. C.* (1863), 33 Beav. 619.

(*o*) *Moore v. Dutton* (1851), 20 L. J. C. 626; 4 De G. & Sm. 517.

(*p*) *Re Dutton* (1880), 59 L. J. C. 420; 44 Ch. D. 76.

(*q*) *Re Beaumont* (1902), 71 L. J. C. 478; (1902) 1 Ch. 889.

(*r*) *Boulton v. Ellis* (1853), 4 De G. M. & G. 249; *Rolls v. Pearce* (1877), 46 L. J. C. 791; 5 Ch. D. 730.

(*s*) *Tate v. Hilbert* (1793), 2 Ves. jun. 111.

(*t*) *Clement v. Chessman* (1884), 54 L. J. C. 158; 27 Ch. D. 631.

(*u*) *Ward v. Turner* (1752), 2 Ves. sen. 431; 1 Wh. & T. L. C. 413; *Moore v. Moore* (1874), 43 L. J. C. 617; 1 R. 18 Fq. 474. See *Re Weston* (1902), 71

although a banker's pass book is not (x). And in general a gift intended to be an immediate gift *inter vivos*, if imperfect, fails altogether, and cannot be completed as a *donatio mortis causâ* (y).—The delivery of a locked box, the donor retaining the key, does not constitute a *donatio mortis causâ*, but if the process be reversed there is a valid donation (z).

An equitable assignment of a chose in action, supported by a valid consideration, may be made in any form of words, with or without deed or writing, expressing the intention to assign (a). An order by a creditor upon his debtor, or upon his agent holding funds at his disposal for payment out of such funds, or by a beneficiary upon a trustee, operates as an equitable assignment of so much of the debt or fund to the person to whom the order is given (b). An order for payment delivered to the debtor or trustee of the fund, without notice to the assignee, is a mere authority to pay, and may be revoked at any time before acted upon; either by an express revocation, or by any disposition of the fund inconsistent with it (c). The payment of money to an agent for the purpose of paying a debt of the principal, as in the case of money paid into a bank to meet bills, gives an authority to the agent, for the due execution of which he is liable to his principal; but it gives the creditor no right to the money, nor any claim against the agent; and the death of the principal before payment of the debt revokes the authority (d). And an authority to an agent to pay debts and to pay over the amount to another, is not an assignment of the debt to the latter; nor does it affect the debt, but enables him to discharge the debt by payment (e).—There must be a definite debt or fund

Form of equitable assignment.

Fund assigned.

L. J. C. 343; (1902) 1 Ch. 680; *Re Andrews* 1902, 71 L. J. C. 676; 1902 2 Ch. 591.

(c) See *Re Weston* (1902), 71 L. J. C. 313; (1902) 1 Ch. 680.

(y) *Tate v. Hilbert* (1793), 2 Ves. jun. 111.

(z) *Jones v. Selby* (1710), Prec. Ch. 360; *Mustapha v. Wollake* (1891), W. N. 201; *Re Johnson* (1901), 72 L. T. 357.

(a) *Roe v. Dawson* (1749), 1 Ves. sen. 331; 1 Wh. & T. L. C. 95; *Marchant v. Morton, Deane & Co.* (1901), 70 L. J. K. B. 820; (1901) 2 K. B. 829; *Ex p. Wright* (1906), 75 L. J. K. B. 591; (1906) 2 K. B. 209.

(b) *Laure v. Orton* 1860, 29 L. J. C. 319; 1 Dr. & Sm. 125; *Webb v. Smith* 1885, 55 L. J. C. 343; 30 Ch. D. 192; *Alcock v. Stenhardt* (1903), 72 L. J. K. B. 490; (1903) 2 K. B. 208; *Brandt v. Dudgeon Rubber Co.* (1905), 71 L. J. K. B. 898; (1905) A. C. 151. *See Ex p. Hall* (1879), 18 L. J. Bk. 79; 10 Ch. D. 615.

(c) *Scott v. Patches* (1817), 3 Mer. 652; *Marrell v. Wootton* (1852), 16 Beav. 197.

(d) *Hill v. Rids* (1869), 38 L. J. C. 538; L. R. 8 Eq. 290.

(e) *Rodick v. Grandell* (1852), 1 De G. M. & G. 763.

PART VI.

Order
requiring
stamp.

Notice to
debtor.

as the subject of assignment (*f*); an order upon a person to pay a third party, not referring to any fund for payment, assigns nothing; nor is it binding upon the person on whom it is made, unless he accepts and undertakes to pay it; as in the case of a bill of exchange drawn upon him (*g*); or a cheque (*h*). A bill of exchange in the usual form, though for the exact amount of a fund of the drawer held by the drawee at his disposal, does not effect an equitable assignment or appropriation of the fund (*i*). Nor does a mere representation upon the faith of which a bill is purchased, that the drawee holds funds of the drawer to meet it, operate as an equitable assignment or bind any funds in his hands (*k*).—An order for payment of money, though expressed to be payable out of a definite debt or fund, must be properly stamped as a bill of exchange; and if not stamped at the time of issue, cannot be stamped afterwards (*l*). But an order for payment out of a debt accruing under a contract, as for goods sold, or for work and labour or the like, is an assignment of a debt which must be stamped as a transfer of property; and therefore may be stamped after issue upon payment of the penalty (*m*).

The assignment of a debt is valid between assignor and assignee without any notice to the debtor (*n*); and if the assignor afterwards obtains payment to himself, he must account for the proceeds to the assignee (*o*). But until the debtor has notice, he may discharge the debt by payment or satisfaction to his original creditor or to any other assignee from him (*p*). A notice duly given binds the debtor by precluding him from afterwards defeating the assignment by paying or settling with the assignor (*q*).

(*f*) *Hughes v. Walmsley* (1831, 12 Jur. 834, n.; *Lamb v. Orton* (1860, 29 L. J. C. 319; 1 Dr. & Sm. 125. See *Ex p. Hall* (1879, 48 L. J. Bk. 79; 10 Ch. D. 615).

(*g*) *Braybrooke (Lord) v. Meredith* (1813, 12 L. J. C. 289; 13 Sim. 271; *Percival v. Dunn* (1885, 54 L. J. C. 570; 29 Ch. D. 128. See Bills of Exchange Act, 1882, ss. 3 (3), 53 (1).

(*h*) *Hopkinson v. Foxster* (1871, L. R. 19 Eq. 74).

(*i*) *Shand v. Du Ruisson* (1874, 13 L. J. C. 508; L. R. 18 Eq. 233).

(*k*) *Citizens' Bank of Louisiana v. Bank of New Orleans* (1873, 13 L. J. C. 269; L. R. 6 H. L. 352).

(*l*) *Griffin v. Weatherby* (1868, 37 L. J. Q. B. 280; L. R. 3 Q. B. 753; *Ex p. Shelbourn* (1873, 43 L. J. B. 3; L. R. 17 Eq. 190. See Stamp Act, 1831, s. 37.

(*m*) *Buck v. Robson* (1878, 18 L. J. Q. B. 250; 3 Q. B. D. 686. See Stamp Act, 1831, ss. 15, 37.

(*n*) *Buen v. Carvalho* 1839, 9 L. J. C. 65; 4 M. & Cr. 630; *Gervaise v. Truett Rubber Works* (1886, 56 L. J. C. 85; 34 Ch. D. 128).

(*o*) *Hughes v. Walmsley* 1831, 12 Jur. 834, n.; *Fortune v. Patnick* 1834, 1 L. J. C. 106; 3 My. & K. 36; *B. Patnick* (1890, 60 L. J. C. 111; 1891, 1 Ch. 82).

(*p*) *Storcks v. Dobson* (1853, 22 L. J. C. 811; 4 De G. M. & G. 11. See *Tanner v. Smith* (1900, 70 L. J. C. 114; 1901, 1 Ch. 213).

(*q*) *Brice v. Bannister* (1878, 47 L. J. Q. B. 722; 3 Q. B. D. 569. See *West London Comm. Bk. v. Reliance Eq. Soc.* (1882, 54 L. J. C. 1081; 29 Ch. D. 954).

And the notice binds the debtor in respect of the sum due without any proof of assent on his part, and notwithstanding his express dissent (*r*). If the debtor has notice that the assignor disputes the assignment he may withhold payment, and claim an interpleader, and an injunction against an action brought at the suit of one of the parties without joining the other: or he may pay the money into court (*s*). Where a debt was payable by instalments, subject to the whole amount becoming payable on default, and the assignor disputed the assignment, the debtor was held justified after notice in continuing to pay him the instalments to save default, until the assignee obtained an injunction (*t*).

Where several successive assignments are made of the same debt or fund, the assignees presumptively take in order of date: because each assignment is presumed to operate only upon the beneficial interest left in the assignor after the prior assignments; but an assignee who takes without notice of any prior assignment may secure his own assignment by giving notice to the debtor, and thereby obtain priority over the prior assignee who has omitted to give notice (*u*). This priority may be gained by a subsequent assignee, notwithstanding that in omitting to give notice the prior assignee was not guilty of negligence (*x*). Where notices of several assignments are given simultaneously, the assignments take priority in order of date according to the presumptive rule (*y*). And where notices are sent to a bank which in the course of business are read at the opening of the bank on the same day, they are held to be simultaneous (*z*). An assignee takes subject to any prior assignment of which he had notice, and cannot afterwards disturb the priority (*a*). But if he had no notice at the time of taking the assignment to himself, he may obtain priority over an earlier assignee by priority of notice to the debtor, notwithstanding that at the time of giving notice he had himself

Effect of
notice on
priority.

(*r*) *Yeates v. Greaves* (1791), 1 Ves. jun. 280; *McGowan v. Smith* (1856), 26 L. J. C. 8; *Bruce v. Bannister* (1878), 47 L. J. Q. B. 722; 3 Q. B. D. 569.

(*s*) See Judicature Act, 1873, s. 25 (6), ante, p. 850; *Prudential Assoc. v. Thomas* (1867), 37 L. J. C. 202; L. R. 3 Ch. 74; *Ducham Bros. v. Robertson* (1898), 67 L. J. Q. B. 484; (1898) 1 Q. B. 765.

(*t*) *Aplin v. Cates* (1860), 30 L. J. C. 6.

(*u*) *Beale v. Hall* (1828), 3 Russ. 1; *Foster v. Corkerell* (1835), 3 Cl. & F. 456; *Ward v. Duncombe* (1893), 62 L. J. C.

881; 1893. A. C. 569; *Re Winstale* (1898), 68 L. J. C. 117; (1899) 1 Ch. 163. See *Lloyds Bil. v. Pearson* (1901), 70 L. J. C. 422; 1901 1 Ch. 865.

(*x*) *Re Dallas* (1901), 73 L. J. C. 565; 1901 2 Ch. 385.

(*y*) *Johnstone v. Cox* (1881), 50 L. J. C. 216; 16 Ch. D. 571.

(*z*) *Cutshery v. Forbes* (1871), 41 L. J. C. 50; L. R. 1 Ch. 10.

(*a*) *Re Adams* (1885), 55 L. J. C. 33; 29 Ch. D. 786.

PART VI.

Notice to
companies.Judgment
creditor.

notice of the prior assignment (*b*). Upon the above principle an assignee of the executor of a deceased person, who has made a prior assignment of the same debt in his lifetime, may obtain priority over the assignment by the deceased by giving a prior notice to the debtor (*c*).—A claim of lien upon a document which is the evidence of a debt does not depend upon notice given to the debtor, because the retention of the document is notice to an assignee of the debt of the existence of an outstanding claim which precludes him from obtaining priority (*d*).—By sect. 27 of the Companies (Consolidation) Act, 1908, "no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland." This does not affect the validity of a notice given to a company of a transfer, which the company ought to recognize so far as not to register a transfer subsequent in date; and as between two assignments of the same registered shares which are not perfected by transfer and registration, and in some cases notwithstanding registration, the prior in time prevails (*e*); and the company cannot claim a lien under their articles upon registered shares for a debt due to them from an unregistered assignee of the shares (*f*); but notice of an assignment precludes the company from acquiring a lien upon the shares as against the assignee in respect of transactions with the registered shareholder subsequent to the notice (*g*). By sect. 20 of the Companies Clauses Acts, 1845, a company to which that statute applies is not bound to see "to the execution of any trust, whether express, implied, or constructive," to which any shares may be subject.—A judgment creditor can charge the property of the debtor only to the extent of his beneficial interest, and can gain no priority over former charges by notice of the judgment; and therefore an attachment of debts owing to the judgment debtor is subject to prior assignments, though no notice has been given of them (*h*). And a trustee in bankruptcy takes the debts

(*b*) *Mutual Life Assce. v. Langley* (1876), 32 Ch. D. 460.

(*c*) *Re Freshfield's Trusts* (1879), 11 Ch. D. 198.

(*d*) *West of England Bk. v. Batchelor* (1881), 51 L. J. C. 199. See *Horn v. Mill* (1806), 13 Ves. 111.

(*e*) *Roots v. Williamson* (1888), 57 L. J. C. 995; 38 Ch. D. 485; *Peat v. Clayton* (1906), 75 L. J. C. 341; (1906) 1 Ch.

659. See *Moore v. North Western Fk* (1891), 60 L. J. C. 627; (1891) 2 Ch. 59.

(*f*) *Re Perkins* (1890), 59 L. J. Q. B. 226; 24 Q. B. D. 613.

(*g*) *Bradford Bk. v. Briggs* (1887), 56 L. J. C. 361; 12 Ap. Ca. 29.

(*h*) *Robinson v. Nesbitt* (1868), 37 L. J. C. P. 124; L. R. 3 C. P. 264; *Parr v. Freethy* (1890), 59 L. J. Q. B. 518; 24

and choses in action of the bankrupt only to the extent of his beneficial interest, and subject to prior assignments; over which he can gain no priority by notice to the debtor (*i*); nor after an assignment of debts has been perfected by notice to the debtor can the trustee claim them as remaining in the order and disposition of the bankrupt (*k*).

CHAP. I.
Trustee in
bankruptcy.

Notice may be given by the assignee to the debtor or trustee without writing or other formality, and without the expressed intention of securing the assignment (*l*). Notice of an assignment received by the debtor in a manner or upon an occasion which makes it his duty to attend to it, though received casually and without the intervention of the assignee, is sufficient to bind the debtor and to secure the assignee against a subsequent assignment (*m*). But such casual notice is not sufficient to give the assignee priority over a prior assignment; for which purpose a notice given by the assignee himself is necessary (*n*). The notice may be in general terms; but if it gives particulars of the amount of the charge or of the fund charged, it will not operate constructively beyond the express terms (*o*). By the Judicature Act, 1873, s. 25 (6), express notice in writing is required to make an assignment of a debt or chose in action effectual in law to transfer the legal right and remedies (*p*). And by the Policies of Assurance Act, 1867, a written notice of assignment of a policy of life assurance is required. Where a fund is brought into court a stop order must be put upon the fund, which gives priority over future notices to the trustees of the fund (*q*). But if the party entitled to a fund in court is a trustee for a third party notice must be given to the trustee to secure priority (*r*). If a trust fund is partly in court and partly held by trustees, an assignee

Form of
notice.

Q. B. D. 519; *Cole v. Eby* (1891), 63 L. J. Q. B. 682; 1894 2 Q. B. 180; *Fotes v. Terry* 1902, 71 L. J. K. B. 282; (1902) 1 K. B. 527.
Gilmer v. Moore 1869, 39 L. J. C. 98; *Ex p. Banks* 1902, 71 L. J. K. B. 165; (1902) 1 K. B. 719.
Re Irving 1877, 47 L. J. Bk 38.
7 Ch. D. 419. See *post*, Pt. VI., Chap. VI.

Ex p. Aqua Bank 1868, 37 L. J. Bk. 23; L. R. 3 Ch. 555; *Re Wapell* 1891, 61 L. J. C. 178; (1892) 1 Ch. 188; affirmed *non*, *Ward v. Ducombe* 1894, 62 L. J. C. 881; 1893 A. C. 369.

m Lloyd v. Banks (1868), 37 L. J.

C. 881; L. R. 3 Ch. 488. See *supra* *Wadden Imp. Soc. v. Sawyer* 1880, 49 L. J. C. 165; 11 Ch. D. 106.

o *Alden v. Alden* 1885, 54 L. J. C. 655; 23 Ch. D. 702.

p *Re Bergh's Trusts* 1856, 25 L. J. C. 119; 21 Bay. 100; *Woodburn v. Grant* 1856, 22 Bay. 183.

q *Stoddart v. English Fibres Industries* 1899, 68 L. J. Q. B. 839.

r *Swanwick v. Swanwick* 1818, 11 Bay. 163; *Pennock v. Badger* 1883, 52 L. J. C. 889; 23 Ch. D. 497. See *Re Holmes* 1885, 55 L. J. C. 374; 2 Ch. D. 783.

s *Stephens v. Green* 1895, 64 L. J. C. 516; 1895 2 Ch. 118.

PART VI.
Notice of
future debt.

must obtain a stop order for the one part, and give notice to the trustees for the other (*s*).—Notice given to a merely expectant debtor or trustee, before any debt is incurred or any fiduciary relation created in respect of the fund, does not affect the order of priority in time (*t*). But if the debtor or trustee is under a contract or trust at the time of the notice, it is not material whether his liability is then absolute or conditional; and the notice is sufficient to secure priority against the fund, if and when it becomes due and payable (*u*).

Notice to
agent.

Notice of an assignment may be given to an agent who is authorised by position or circumstances to receive it (*x*): as to the solicitor acting for the debtor in the matter of the assignment (*y*): but notice to a solicitor who is merely employed generally by the debtor is no notice to the latter, unless in fact communicated to him (*z*). Notice of assignment of a policy of insurance may be given to the secretary of the company, but the notice must be in writing (*a*). Notice may be given to directors of a company of a matter which it would be their duty to communicate to the board: provided it is a matter of which the company is capable of taking notice (*b*); and it seems that directors may be personally affected with notice and its consequences as to a matter which does not affect the company by notice (*c*). Notice may be given to the trustee in bankruptcy of a debtor, and to the liquidator of a company (*d*).

Notice to
joint debtor
or co-trustee.

Notice of assignment given to one of several joint debtors, or partners, or trustees, is effectual to give priority to the assignment so long as the person receiving the notice continues in the same relation to the others (*e*). "Notice to one trustee is sufficient,

(*s*) *Mutual Life Asser. v. Langley* (1886), 32 Ch. D. 460.

(*t*) *Johnstone v. Cox* (1881), 19 Ch. D. 17; *Re Dallas* (1904), 73 L. J. C. 365; 1901 2 Ch. 385.

(*u*) *Addison v. Cox* (1872), 42 L. J. C. 291; L. R. 8 Ch. 76; *Brice v. Barnister* 1878, 47 L. J. Q. B. 722; 3 Q. B. D. 569; *Southwell v. Scott* (1880), 49 L. J. Ex. 356. See *Western Wagon Co. v. West* 1891, 61 L. J. C. 244; (1892) 1 Ch. 271.

(*x*) *Gardner v. Lachlan* (1838), 8 L. J. C. 82; 4 M. & Cr. 129; *Ex p. Portsea Island Ry. Soc.* (1896), 65 L. J. C. 860; 1896 2 Ch. 713.

(*y*) *Gale v. Lewis* (1816), 16 L. J. Q. B. 119; 9 Q. B. 730.

(*z*) *Saffron Walden Bg. Soc. v. Rayner* (1880), 49 L. J. C. 465; 14 Ch. D. 406.

(*a*) *Alletson v. Chichester* (1875), 44 L. J. C. P. 153; L. R. 10 C. P. 319. See Policies of Assurance Act, 1867, ss. 3, 5.

(*b*) See *ante*, p. 860.

(*c*) See *Soc. Gén. de Paris v. Tramways Union* (1885), 54 L. J. Q. B. 177; 11 Q. B. D. 424.

(*d*) *Wragge's case* (1867), L. R. 5 Eq. 284.

(*e*) *Smith v. Smith* (1833), 3 L. J. Ex. 42; 2 Cr. & M. 231; *Meux v. Bell* (1812), 11 L. J. C. 77; 1 Hare, 73.

because a subsequent inoumbrancer or assignee would be under obligation to inquire of every one of the trustees" (f). Notice to one, not in fact communicated to the others, is only effectual to maintain priority so long as the person to whom it is given remains a trustee (g). But where notice has been given to all the trustees, a priority gained by notice is retained notwithstanding the deaths of the parties to whom notice has been given (h). Where one of several trustees is also a beneficiary and assigns his interest, his knowledge of the transaction as assignor is not sufficient to protect it, because he is interested to suppress it; but if he assigns to a co-trustee, the knowledge of the latter as assignee is sufficient (i). An assignment by the beneficiary of a fund to the trustee is valid against a subsequent assignee; and a subsequent order upon the trustee to pay "the balance due," was construed as referring to the balance after deducting the prior claim of the trustee (k).—Upon a change in the trustees, the new trustees are not affected by notices previously given which are not in fact communicated to them; and it is not the duty of the new trustees to inquire respecting such notices; nor is it the practice of the court, in appointing new trustees, to make inquiry, but priorities actually acquired are not affected (l). It is not the duty of a trustee either to the *cestui que trust*, or to an intended assignee, to answer inquiries about notices of prior dealings by the *cestui que trust*; and if he does answer such inquiries in good faith to the best of his knowledge and belief, he in general incurs no liability; but if he makes a positive statement that the fund is unincumbered, which is acted upon, he is estopped from afterwards denying it (m).

Change of trustees after notice.

If an assignor has a defective title at the date of an assignment for value, any interest which he may acquire subsequently thereto in the property assigned will be made available in equity to make the assignment effectual according to its purport and the expressed

Assignment passes interest of the assignor.

f) *Westbury, L. C., Willes v. Greenhill* (1861), 31 L. J. C. 1; 4 De G. F. & J. 147.

g) *Tolson v. Ramsbottom* 1837, 2 Keen, 35; *Re Phillips' Trust* (1902), 72 L. J. C. 94; (1903) 1 Ch. 183.

(h) *Ward v. Dancombe* (1893), 62 L. J. C. 881; (1893) A. C. 369; *Re Wasdale* 1898, 68 L. J. C. 117; (1899) 1 Ch. 163.

i) *Broune v. Savage* (1859), 4 Drew.

635; *Lloyd's Bk. v. Pearson* (1901), 70 L. J. C. 422; (1901) 1 Ch. 865.

(k) *Ex p. Garrard* (1877), 46 L. J. Bk. 70; 5 Ch. D. 61.

(l) *Phelps v. Lovegrove* (1873), 42 L. J. C. 892; L. R. 16 Eq. 80. See note (h), *supra*.

(m) *Low v. Bouverie* (1891), 60 L. J. C. 594; (1891) 3 Ch. 82. See *Re Tillott* (1891), 61 L. J. C. 38; (1892) 1 Ch. 86.

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intentions of the parties, notwithstanding the defect in title is apparent upon the face of the assignment (*n*). Conversely the assignee of a debt or chose in action takes it subject to all equities that may arise against it between the assignor and the debtor before notice given to the latter of the assignment (*o*). According to this rule upon the assignment of a mortgage debt, without the concurrence of the mortgagor, the assignee stands in the same position as the mortgagee and can claim no more than is justly due upon an account taken between the mortgagor and mortgagee at the time of notice given to the mortgagor (*p*). And the assignee of a bond or debenture of a company takes it subject to the conditions upon which it was given by the company to the assignor, unless the debenture was issued in a negotiable form (*q*). Where debentures were given to the promoter of a company in payment of his undertaking to form the company, and were assigned by him to several assignees, it was held that a set-off against the promoter for unpaid charges was chargeable against the assignees of the debentures rateably (*r*).

Equities chargeable

The equities chargeable against the assignee are such only as arise out of the same transaction as the debt and are available in reduction of the claim of the assignor: as payment or satisfaction made on account of the debt; failure of the consideration for the debt, as in the case of a vendor failing to convey the estate sold after assigning the debt for the purchase-money (*s*); defective execution of the consideration for the debt, as defects in the quality of goods sold, or of work done (*t*); a lien or set-off arising from the terms of the agreement with the assignor, as a banker's lien upon the money assigned, or the lien of a company upon shares for claims on the shareholder who has assigned his shares (*u*). But the debtor cannot charge the assignee with a set-off or counterclaim which arises against the assignor from transactions independent

(*n*) *Re Bridgewater's Settlement* (1910), 79 L. J. C. 746; 1910; 2 Ch. 342. See *Drew v. Norbury (Earl)* (1816), 3 Jo. & Lat. 267.

(*o*) *Maughey v. Dixon* 1852, 3 H. L. C. 702; *Rochburgh v. Cox* (1881), 50 L. J. C. 772; 17 Ch. D. 520; *Christie v. Taitton & Co.* (1893), 62 L. J. C. 385; (1893) 2 Ch. 175. See *Re Garwood's Trusts* (1902), 72 L. J. C. 208; 1903, 1 Ch. 236.

(*p*) *Turner v. Smith* 1900, 70 L. J. C. 144; (1901) 1 Ch. 213.

(*q*) *Financial Corp.'s claim* (1868), 37

L. J. C. 362; L. R. 3 Ch. 355. See *post*, p. 881.

(*r*) *Ex p. James* 1869, 38 L. J. C. 616; L. R. 8 Eq. 225.

(*s*) *Financial Corp.'s claim* 1868, 37 L. J. C. 362; L. R. 3 Eq. 355.

(*t*) *Young v. Kitchin* (1878), 47 L. J. Ex. 579; 3 Ex. D. 127; *Newfoundland Gov. v. Newfoundland Ry.* (1887), 57 L. J. P. C. 35; 13 Ap. Ca. 199.

(*u*) *Rochburgh v. Cox* (1881), 50 L. J. C. 772; 17 Ch. D. 520; *Horsfall v. Hubback Bk.* (1883), 52 L. J. C. 599.

of the debt assigned (*x*).—The assignee of a debt also takes it subject to any right or equity in the debtor to avoid it or have it set aside upon the ground of fraud or other sufficient ground (*y*). So the assignee of a mortgage debt acquires no right if the mortgage was given by trustees in breach of trust to the knowledge of the mortgagee (*z*). And if the debt was originally void, as being illegal in matter or in form, the assignee is in no better position than the assignor and has no claim; as in the case of bonds issued by the directors of a company which are *ultra vires*, or in fraud of the company; and though the assignee gave value for them and had no notice of the invalidity (*a*).—The debtor can assert no equity against the assignee arising out of any transaction with the assignor after receiving notice of the assignment; but he can assert claims accruing at the time of notice though not due and payable until afterwards (*b*). And it was held that the debtor could not claim against the assignee for advances made to the assignor after notice of the assignment though the advances were made and expended for the purpose of completing the consideration upon which the debt became payable (*c*). Where a shareholder assigned debentures of a company after the commencement of winding-up, it was held that the company might set off subsequent calls upon the shares, because the liability to contribution accrued with the winding-up and before the assignment (*d*).

Equities arising after notice.

The debtor may be barred of any equity against the assignee by the conditions of the original debt or contract with the assignor; "he may contract himself out of the right of resorting, as against the assignee of the creditor, to his equities against the creditor himself" (*e*): as was held in the case of debentures of a company issued under their articles of association in payment of the purchase-money of estates conveyed to the company, and expressed to be payable to the vendor and his assigns (*f*). So where debent-

Equities barred by conditions of debt.

(*x*) *Ex p. Theys* (1881), 53 L. J. C. 1038; 25 Ch. D. 587; *Lee and Chapman's case* (1885), 51 L. J. C. 460; 30 Ch. D. 216.

(*y*) *Turton v. Benson* (1718), 1 P. Wms. 496; *Graham v. Johnson* (1869), 33 L. J. C. 374; L. R. 8 Eq. 36; *Judd v. Green* (1875), 45 L. J. C. 108.

(*z*) *Burt v. Trueman* (1860), 29 L. J. C. 902.

(*a*) *Athenæum Life Assce. v. Pooley* (1858), 28 L. J. C. 119; 3 De G. & J. 291. See *Davis v. Bolton & Co.* (1894), 63 L. J. C. 743; (1894) 3 Ch. 678.

(*b*) *Jeffries v. Agra Bk.* 1866, 35 L. J. C. 686; L. R. 2 Eq. 674; *Watts v. Driscoll* (1901), 70 L. J. C. 157; (1901) 2 Ch. 294.

(*c*) *Brice v. Bannister* (1878), 47 L. J. Q. B. 722; 3 Q. B. D. 569.

(*d*) *Ex p. Mackenzie* (1869), 38 L. J. C. 199; L. R. 7 Eq. 240.

(*e*) *Rolt, L. J., Ex p. New Zealand Bkg. Corp.* (1868), 37 L. J. C. 418; L. R. 3 Ch. 158; *Re Goy & Co.* (1900), 69 L. J. C. 481; (1900) 2 Ch. 149.

(*f*) *Higgs v. N. Assam Tea Co.* (1869), 38 L. J. Ex. 233; L. R. 4 Ex. 387.

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Equities
barred by
conduct of
debtor.

tures were issued to a person for the purpose of raising money, under a contract by him to indemnify the company, it was held to be contrary to the intention of the parties that an assignee of a debenture should be met by a claim against the assignor upon the indemnity (*g*).—The debtor may also be barred by his own conduct from setting up equities against the assignee. Thus a company which did not inform the assignee of a bond, upon receipt from him of a notice of assignment, that the validity of the bond was disputed as having been fraudulently issued to the assignor, was held to be estopped from disputing it against the assignee (*h*). And where the debtor accepted a written order upon him to pay out of the first money that should come to his hand on account of the assignor, and delivered it to the assignee, he was held barred from any prior claim upon the fund as against the assignee (*i*). Upon this principle a company by accepting an assignee of their debentures or shares, and registering him as proprietor, were held to be estopped from disputing his title and charging the debentures with any liability of the assignor (*k*). And a corporation who have issued assignable debentures, though in pursuance of an illegal contract with the person to whom they were issued, are estopped from denying their validity against his assignee who has taken them for value and without notice of the illegality (*l*).

Assignment
of debt by
new agree-
ment of all
parties.

To the rule of the common law, that an assignment of a debt was illegal and void as savouring of maintenance, there was one exception, namely, where by an agreement of all the parties, that the debtor, in consideration of his discharge by the assignor, bound himself to pay the debt to the assignee. In effect B. pays his debt to C., by assigning to him the debt of A., who contracts to pay C. instead of B. But unless the condition of agreement of all parties to the discharge of the debt of the assignor and to the undertaking of the debt to the assignee is fully satisfied, the resulting assignment of the debt is imperfect (*m*). When the agree-

(*g*) *Dickson v. Swansea Vale Ry.* (1868), 38 L. J. Q. B. 17; L. R. 4 Q. B. 41.

(*h*) *Brenton's claim* (1875), 44 L. J. C. 450; L. R. 19 Eq. 302. See *Horsfall v. Halifax Bk.* (1883), 52 L. J. C. 599.

(*i*) *Macfarlane v. Lister* (1887), 57 L. J. C. 92; 37 Ch. D. 88.

(*k*) *Higgs v. N. Assam Tea Co.* (1869), 38 L. J. Ex. 233; L. R. 4 Ex. 387; *Ex p. Universal Life Assur.* (1870), 39

L. J. C. 829; L. R. 10 Eq. 458; *Morton's case* (1873), 42 L. J. C. 786; L. R. 16 Eq. 104.

(*l*) *Webb v. Hynes Bay Commrs.* (1870), 39 L. J. Q. B. 221; L. R. 5 Q. B. 642. See *Re Romsford Canal Co.* (1883), 52 L. J. C. 729; 24 Ch. D. 85.

(*m*) *Curon v. Chadley* (1821), 3 L. J. O. S. K. B. 63; 3 B. & C. 591; *Price v. Easton* (1832), 2 L. J. K. B. 51; 1 B. &

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ment is complete the assignment of the debt and authority to pay the assignee is final and irrevocable (*n*).—In the same manner an assignment may be made of a future or contingent debt, so that the assignee becomes entitled and can recover against the debtor only upon satisfaction of the conditions by which the debt becomes absolute: as in the case of an order upon the charterer of a ship to pay out of the freight to become due on the loading and sailing of the ship; or an order for payment out of the price of future supplies of goods (*o*). An order for payment out of future rent is within sect. 4 of the Statute of Frauds (*p*).—In the case of a debt for money received to the use of another, the assent of the debtor to the assignment of the whole, or a certain amount of the debt, expressed to the assignee, operates as an effectual appropriation of the money to the use of the assignee, and entitles him to recover such money under a claim for money received to his use (*q*).—The contract or promise of the debtor to pay according to the order or assignment of his creditor, is a promise to pay his own debt, though it operates in discharge of the debt of his creditor; it is therefore not a promise to pay the debt of another within the Statute of Frauds, and does not require written evidence (*r*). An order in writing upon a debtor in general terms to pay a sum of money to another may constitute a bill of exchange, or order requiring a stamp, under the Stamp Act (*s*).

Debt for money received.

Statute of Frauds.

Stamp.

Assignment of liability.

By the same process of agreement of all parties, the liability for a debt may be assigned from one debtor to another. Such a transaction occurs upon a change in a firm of partners by retirement or death, where the debt of the original firm is assigned to the new firm: and the creditor, by continuing to deal with the firm after notice of the change, presumptively accepts the liability of the new

Ad. 133; *Liversidge v. Broadbent* (1859), 28 L. J. Ex. 332; 4 H. & N. 603; *Cochrane v. Green* (1860), 30 L. J. C. P. 97; 9 C. B. N. S. 448.

(*n*) *Hutchinson v. Heyworth* (1838), 8 L. J. Q. B. 17; 9 A. & E. 375; *Walker v. Rostron* (1842), 11 L. J. Ex. 173; 9 M. & W. 411; *Hamilton v. Spottiswoode* (1848), 18 L. J. Ex. 393; 4 Ex. 200.

(*o*) *Walker v. Rostron* (1812), 11 L. J. Ex. 173; 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849), 18 L. J. Ex. 393; 4 Ex. 200; *Hudson v. Bilton* (1856), 26

L. J. Q. B. 27; 6 E. & B. 565. See *Malden v. Scott* (1850), 5 Ex. 601; in equity (1850), 20 L. J. C. 17; 3 Mac. & G. 29.

(*p*) *Ex p. Hall* (1879), 48 L. J. B. 79; 10 Ch. D. 615.

(*q*) *Lilly v. Hays* (1836), 6 L. J. K. B. 6; 5 A. & E. 518; *Griffin v. Weatherby* (1868), 37 L. J. Q. B. 280; L. R. 3 Q. B. 753.

(*r*) *Hodgson v. Anderson* (1825), 3 B. & C. 812.

(*s*) See *ante*, p. 858.

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firm in substitution for his claim against the former partners (*l*). Upon this principle, according to usage of the building trade, the liability of the building owner to the surveyor for taking out the quantities of the specification for tenders is transferred to the builder whose tender is accepted (*u*).

(*l*) See *ante*, pp. 578, 645.

(*u*) *North v. Bassett* (1891), 61 L. J. Q. B. 177; (1892) 1 Q. B. 333.

CHAPTER II.

ASSIGNABLE CONTRACTS.

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SOME contracts are negotiable or assignable in various degrees in exception to the before-mentioned rules; either at common law or by statute. Instances of assignable contracts.

Bills of exchange were originally negotiable by the custom of merchants, which in this respect was incorporated in the common law; they are now defined and regulated by the Bills of Exchange Act, 1882. The statute expressly provides (sect. 97) that "the rules of common law, including the law merchant, save 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." The following are the chief provisions of the Act relating to the negotiation of bills and notes:— Bills of exchange.

Sect. 3 (1). "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer" (a). Drawing.

(a) See *Williams v. Ayres* (1877), 47 L. J. P. C. 1. 3 Ap. Ca. 133; *Chamberlain v. Young* (1893), 63 L. J. Q. B. 28; (1893) 2 Q. B. 206.

- PART VI.** --Sect. 17 (1.) "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. (2.) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient" *b*).
- Acceptance.**
- Contract of acceptor.** Sect. 54. "The acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance."
- Drawer.** Sect. 55 (1.) "The drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken." And by the same section, sub-s. (2), the indorser of a bill by indorsing it engages to the same effect as the drawer, to the holder or to a subsequent indorser who is compelled to pay *c*). But the bill must be complete on the face of it before a person can incur liability as an indorser under this section unless it is in the hands of a holder in due course *d*).
- Indorser.**
- Negotiation.** Sect. 8 (1.) "When a bill contains words prohibiting transfer, or indicating an intention that it shall not be transferable, it is valid as between the parties thereto, but is not negotiable *e*).
- (2.) A negotiable bill may be payable either to order or to bearer. (3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. (4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer" *f*).
- Sect. 7 (3.) "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer" *g*).
- Sect. 31 (1.) "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. (2.) A bill payable to bearer is negotiated by delivery. (3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery" *h*).
- Delivery and indorsement.**

b) See *Hindlaugh v. Blakey* (1878), 47 L. J. C. P. 345; 3 C. P. D. 136; *Steele v. McKintay* (1880), 5 Ap. Ca. 754.

c) *Id.* *Blackburn, Steele v. McKintay* (1880), 5 Ap. Ca. 769. As to notice of dishonour, see *ante*, p. 464.

d) *Jenkins v. Cumber* (1898), 67 L. J. Q. B. 780; (1898) 2 Q. B. 168; *Glenie v. Bruce Smith* (1907), 77 L. J. K. B. 193; (1908) 1 K. B. 263.

e) *National Bk. v. Silke* (1890), 60

L. J. Q. B. 199; (1891) 1 Q. B. 145.

f) See *Meyer & Co. v. Decroix, Farley et Co.* (1891), 61 L. J. Q. B. 205; (1891) A. C. 520.

g) See *Bk. of England v. Fagiano* (1890), 60 L. J. Q. B. 145; (1891) A. C. 107; *Clutton v. Attenborough* (1896), 66 L. J. Q. B. 721; (1897) A. C. 90; *N. and S. Wales Bk. v. Macbeth* (1908), 77 L. J. K. B. 464; (1908) A. C. 137.

h) See *Bromage v. Lloyd* (1817), 16

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Sect. 32 (1.) "An indorsement must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill without additional words is sufficient. (6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive." Sect. 34 (1.) "An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. (2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable." Sect. 35 (1.) "An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof." Sect. 36 (1.) "Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment or otherwise. (2.) Where an overdue bill is negotiated it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*i.*). (4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue."

Overdue bill.

Sect. 58 (1.) "Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery.' (2.) A transferor by delivery is not liable on the instrument. (3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless."—Sect. 31 (4.) "Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor" (*k*). Sect. 37. "Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the

Negotiation without indorsement.

Negotiation to prior party.

L. J. Ex. 257; 1 Ex. 32; *Day v. Long-*
hurst (1893), 62 L. J. C. 334.
Ex p. Swan (1868), L. R. 6 Eq.
341. *Ex p. Oriental Commercial Bk.*
(1876), 33 L. J. C. 588; L. R. 5 Ch.
358. See *Alecock v. Smith* (1891), 61
L. J. C. 161; (1892) 1 Ch. 238.

(*k*) See *Whistler v. Forster* (1863), 32
L. J. C. P. 161; 14 C. B. N. S. 218;
Good v. Walker (1892), 61 L. J. Q. B.
736; *Herdman v. Wheeler* (1902), 71
L. J. K. B. 270; (1902) 1 K. B.
361.

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provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable" (l).

Holder in due course.

Sect. 29 (1.) "A holder in due course is a holder who has taken (m) a bill, complete and regular on the face of it, under the following conditions, namely: (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured; (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it." (3.) "A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder." Sect. 38. "The rights and powers of the holder of a bill are as follows:—(1.) He may sue on the bill in his own name. (2.) Where he is a holder in due course he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties amongst themselves, and may enforce payment against all parties liable on the bill. (3.) Where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill." Sect. 30 (2.) "Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill" (n).

Forged and unauthorised signature.

Sect. 23. "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such." And sect. 24. "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly

(l) *Wilkinson v. Urrin* (1881), 50 Q. B. 224.
 L. J. Q. B. 338; 7 Q. B. D. 636.
 (m) *Lewis v. Clay* (1897), 67 L. J. L. J. Q. B. 432; 23 Q. B. D. 315.
 (n) See *Tatum v. Hester* (1899), 68

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inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature; unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority." — Upon the principle of this enactment where a bill is accepted payable at a bank, and the banker pays to a forged indorsement, he cannot charge his customer with the amount, although he is guilty of no breach of duty to his customer, giving rise to an independent cause of action, by reason of having paid the bill (*n*); unless the customer is estopped by his own negligence in accepting and negotiating the bill from asserting the forgery (*p*).

Sect. 73. "A cheque is a bill of exchange drawn on a banker payable on demand"; and "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque"; accordingly a cheque is negotiated by delivery or by indorsement in the same manner as a bill of exchange and with similar liabilities (*q*). Sect. 74. A reasonable time is allowed for the presentment of a cheque for payment: having regard to "the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case"; and if not presented within a reasonable time the holder keeps it at his own risk against loss through the delay, as by failure of the banker: the drawer is discharged of the cheque to the extent of the loss, and the holder becomes a creditor, in lieu of the drawer, of the banker to the extent of such discharge (*r*). But the negotiation of an overdue cheque does not affect the holder with notice of a defective title in the person from whom he took it, as in the case of taking an overdue bill of exchange: the delay in presentment is merely a fact which has to be considered upon the question of such notice arising (*s*).

A banker is bound by the customary contract with a customer to pay cheques drawn upon him, so long as he has funds of the customer applicable to the purpose, under the penalty of substantial damages if he neglects or refuses to do so (*t*). But a

Banker's
cheques.

Presentment.

Rights and
liabilities of
banker.

(*n*) *Roberts v. Tucker* (1851), 20 L. J. Q. B. 270; 16 Q. B. 560. And see s. 60, *post*, p. 875.

(*p*) *Bk. of England v. Vagliano* (1890), 60 L. J. Q. B. 115; (1891) Ap. Ca. 107. See *post*, p. 875.

(*q*) *Keene v. Beard* (1860), 29 L. J.

C. P. 287; 8 C. B. N. S. 372; *McLean v. Clydebank Bk.* (1883), 9 Ap. Ca. 95.

(*r*) See *ante*, p. 656.

(*s*) See *London and County Bk. v. Groome* 1882, 51 L. J. Q. B. 221; 8 Q. B. D. 238.

(*t*) *Marzetti v. Williams* 1830, 9 L. J.

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cheque does not operate as an assignment of so much of the funds to the payee; the money deposited with a banker being a loan at his absolute disposal, and not a trust or bailment of the specific fund (*n*). By sect. 75. "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment (*x*), (2) notice of the customer's death." When a negotiable cheque is paid into a bank and credited to the customer's account, the banker becomes presumptively the holder for value in due course, and not merely agent to collect and he may sue the drawer or indorser in his own name (*y*).

Crossed
cheques.

Sect. 76 (1.) "Where a cheque bears across its face an addition of (a) the words 'and company,' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'non-negotiable'; or (b) two parallel lines simply, either with or without the words 'not negotiable'; that addition constitutes a crossing, and the cheque is crossed generally. (2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially and to that banker." Sect. 77 provides that a cheque may be crossed generally or specially and with the words "not negotiable," as above, by the drawer or by the holder. And sect. 78 makes the crossing a material part of the cheque; which it is not lawful for any person to obliterate or alter. Sect. 79. "Where the banker pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid" (*z*). Sect. 80. "Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it to a banker or to the special banker according to the crossing, the banker paying the cheque and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had

O. S. K. B. 42; 1 B. & Ad. 415; *Rolin v. Steward* (1851), 23 L. J. C. P. 118; 11 C. B. 595; *Rogers v. Whiteley* (1889), 58 L. J. Q. B. 416; 23 Q. B. D. 236.

(n) *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74.

(x) *Cartier v. London City & Midland Bk.* (1907), 77 L. J. K. B. 311; (1908), 1 K. B. 293.

(y) *Ex p. Richdale* (1882), 51 L. J. C. 462; 19 Ch. D. 409; *McLean v. Clydesdale Bk.* (1883), 9 Ap. C. 95; *National Bk. v. Silke* (1900), 60 L. J. Q. B. 199; (1891) 1 Q. B. 425.

(z) See *Smith v. Union Bk. of London* (1875), 44 L. J. Q. B. 117; 1 Q. B. D. 31; *Robbitt v. Pankett* (1879), 45 L. J. Ex. 555; 1 Ex. D. 368.

been made to the true owner thereof." Sect. 81. "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had" (a). Sect. 82. "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment" (b); and by the Bills of Exchange (Crossed Cheques) Act, 1906, s. 1, a banker receives payment of a crossed cheque for a customer, notwithstanding he credits the customer's account with the amount of the cheque before receiving payment thereof (c). Sect. 60. "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the cheque in due course, although such indorsement has been forged or made without authority" (d). This enactment applies to indorsements purporting to be made by an agent with authority, though in fact unauthorised (e). It does not protect any other banker or person who receives the proceeds of a forged or unauthorised indorsement through the banker on whom the bill or cheque is drawn; and the rightful owner may recover the money from such receiver (f). A cheque may be post-dated, subject to the objection that it should be stamped as a bill of exchange; but this objection can only be taken whilst it remains apparent on the face of the instrument, and not after the date has

Non-negotiable cheque.

Forged indorsement.

Post-dated cheques.

(a) See *National Ek. v. Selk* (1890), 60 L. J. Q. B. 190; (1891) 1 Q. B. 435; *G. W. Ry. v. London and County Bk.* (1901), 70 L. J. K. B. 915; (1901) A. C. 414.

(b) See *G. W. Ry. v. Lond. & Co. Bk.* (1901), 70 L. J. K. B. 915; (1901) A. C. 414.

(c) See *Capital & Cos. Bk. v. Gordon* (1903), 72 L. J. K. B. 151; (1903) A. C. 210; *Alcock v. Munn* v. *Economic Bk.* (1904), 73 L. J. K. B. 742; (1901) 2 K. B. 465.

(d) See *Hatfield Union v. Wheelwright* (1875), 11 L. J. Ex. 121; L. R. 10 Ex. 183; *Capital & Cos. Bk. v. Gordon* (1903), 72 L. J. K. B. 151; (1903) A. C. 210. And see sect. 23, *ante*, p. 872.

(e) *Charles v. Bucknell* (1876), 16 L. J. C. P. 368; 2 C. P. D. 151.

(f) *Ogden v. Bruns* (1871), 43 L. J. C. P. 259; L. R. 9 C. P. 513; *Arnold v. Cheque Bk.* (1876), 45 L. J. C. P. 562; 1 C. P. D. 578; *Patent Gun Cotton Co. v. Wilson* (1880), 49 L. J. C. P. 713.

PART VI. — elapsed and it has become due and payable on demand; and though the bearer took it before it was due, and therefore with notice of the post-dating (*g*). The drawer of a post-dated cheque is under no obligation to stop its payment for the benefit of a third party, as it may have got into the hands of a *bonâ fide* holder for value to whom he would be liable (*h*).

Promissory notes.

Sect. 83 (1.) "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer (*i*). (2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker." Sect. 84. "A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer." Sect. 88. "The maker of a promissory note by making it engages that he will pay it according to its tenor." Sect. 86. A note payable on demand must be presented within a reasonable time, as against an indorser, having regard to the nature of the instrument, the usage of trade, and the facts of the particular case; but it is not deemed to be overdue for the purpose of affecting a holder with defects of title by reason of a reasonable time for payment having elapsed (*k*). Sect. 89 (1.) "The provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. (2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order."

Presentment.

Bills of lading.

A bill of lading is the document signed by the master of a ship upon the shipment of goods for carriage, acknowledging the receipt of the goods on board, and undertaking to deliver them to the consignee "or to his order or assigns," upon payment of the freight and satisfaction of the conditions stipulated. By the common

Transfer of the property

(*g*) *Gatty v. Fry* (1877), 46 L. J. Ex. 605; 2 Ex. D. 265. See *Clarke v. Roche* (1877), 47 L. J. Q. B. 117; 3 Q. B. D. 170.

(*h*) *Fr v. Richdale* 1882), 51 L. J. C. 462; 19 Ch. D. 409; *Bence v. Shearman*

(1898), 67 L. J. C. 513; 1898) 2 Ch. 582.

(*i*) *Kirkwood v. Carroll* (1903), 72 L. J. K. B. 208; (1904) 1 K. B. 531.

(*k*) See *an* 463.

law, founded upon the custom of merchants, the bill of lading represents the goods; and the indorsement and delivery of the bill of lading by the shipper or owner of the goods presumptively transfers the property to the indorsee (*l*). But the contracts contained in the bill of lading for the carriage and delivery of the goods and for the payment of freight, by the general rule of common law, were not assignable, and the indorsee could neither sue nor be sued in his own name (*m*). The common law rule was altered by the Bills of Lading Act, 1855, which enacts as follows:—By sect. 1, “every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.”—By sect. 2, “nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.”—By sect. 3, “every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board.”

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by indorsement.

Transfer of the contract.

A bill of lading is not affected by the terms of the charter-party or any other liability of the charterer, except so far as it is referred to in the bill of lading (*n*); and a consignee or an indorsee accepting the goods under the bill of lading is bound by that document only (*o*). Hence an indorsee is presumptively entitled to delivery of the goods on payment of the freight stipulated in the bill of

Rights and liabilities of indorsee.

(*l*) *Lickbarrow v. Mason* (1787), 2 T. R. 63; 6 East, 21; 1 Sm. L. C. 674.

(*m*) *Thompson v. Dornin* (1845), 14 L. J. Ex. 320; 14 M. & W. 403; *Howard v. Shepherd* (1850), 19 L. J. C. P. 219; 9 C. B. 297.

(*n*) *Ledue v. Ward* (1888), 57 L. J.

Q. B. 379; 20 Q. B. D. 475; *Turner v. Haji Goolam Mohamed Azam* (1904), 74 L. J. P. C. 17; (1904) A. C. 826.

(*o*) *Chappel v. Comfort* (1861), 31 L. J. C. P. 58; 10 C. B. N. S. 802. See *Moller v. Young* (1855), 25 L. J. Q. B. 94; 5 E. & B. 755.

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lading, though a different rate of freight is stipulated in the charter-party, and though a lien for the whole freight is therein stipulated (*p*). A bill of lading with the condition "freight payable as per charter-party" binds the holder to the charter-party freight for the goods contained in the bill of lading; but it does not incorporate conditions of the charter-party relating to demurrage, unloading or other matters (*q*); nor does it incorporate a stipulation of the charter-party for a general lien for freight upon the whole cargo (*r*). A bill of lading "for delivery to order against payment of freight and other conditions as per charter-party" includes only the conditions of the charter-party which are to be performed by the consignee (*s*). If the bill of lading incorporates by reference the conditions of the charter-party, and the conditions of the two documents are inconsistent, the bill of lading prevails as between the shipowner and the shipper of the goods under the bill of lading or his indorsee (*t*). And it is the duty of the charterer to protect the shipowner by presenting for the master's signature, bills of lading which accord with the terms of the charter-party (*u*). But if the charterer is also the shipper of the goods, the contracts being between the same parties must be construed together according to the general intention; and the charter presumptively prevails (*x*). An indorsee of the bill of lading may be affected by having express notice of the charter-party; as where he had himself made it as agent for the charterer (*y*). But a shipper of goods has in general no constructive notice of a charter-party; nor is he bound to inquire (*z*). Where a bill of lading was signed for goods shipped on the shipowner's account at a nominal rate of freight, a buyer of the goods,

(*p*) *Foster v. Colby* (1858), 28 L. J. Ex. 81; 3 H. & N. 705; *Shand v. Sandersen* (1859), 28 L. J. Ex. 278; 4 H. & N. 381.

(*q*) *Chappel v. Comfort* (1861), 31 L. J. C. P. 58; 10 C. B. N. S. 802; *Fowler v. Knoop* (1879), 48 L. J. Q. B. 333; 4 Q. B. D. 299.

(*r*) *Fry v. Chartered Bk. of India* (1866), 35 L. J. C. P. 306; L. R. 1 C. P. 689. See *Gray v. Carr* (1871), 40 L. J. Q. B. 257; L. R. 6 Q. B. 522.

(*s*) *Serrano v. Campbell* (1890), 60 L. J. Q. B. 303; (1891) 1 Q. B. 283; *Diederichsen v. Farquharson* (1897), 67 L. J. Q. B. 103; (1898) 1 Q. B. 150; *The Portsmouth*, (1910) P. 293.

(*t*) *Gardner v. Trechmann* (1885), 54

L. J. Q. B. 515; 15 Q. B. D. 151; *Serrano v. Campbell* (1890), 60 L. J. Q. B. 303; (1891) 1 Q. B. 283; *The Northumbria* (1909), 78 L. J. P. 90; (1909) P. 219.

(*u*) *Kruger & Co. v. Mool Trypan Ship Co.* (1907), 76 L. J. K. B. 985; (1907) A. C. 272.

(*x*) *Temperley S.S. Co. v. Smyth* (1905), 74 L. J. K. B. 876; (1905) 2 K. B. 791.

(*y*) *Kern v. Deslandes* (1861), 30 L. J. C. P. 297; 10 C. B. N. S. 205.

(*z*) *Peck v. Larsen* (1871), 40 L. J. C. 763; L. R. 12 Eq. 378; *The Stornaway* (1881), 51 L. J. Adm. 27. See *Tharvis Sulphur Co. v. Culliford* (1873), 22 W. R. 46.

to whom the bill of lading was indorsed, was held entitled to delivery at the bill of lading freight from a mortgagee of the ship who subsequently took possession; though the contract of sale had in terms assessed a part of the price as freight, which was to be paid upon delivery of the goods (*a*). The original shipper of the goods remains liable for the freight, though he has indorsed and delivered over the bill of lading; and though it may have been afterwards indorsed to the shipowner by way of security (*b*). And where the consignee named in the bill of lading indorsed it with the express condition that the indorsee should pay freight and all charges, "without recourse to us," it was held that the shipowner might refuse to deliver to such substituted liability; but that if he assented to the indorsement and delivered under it he could not afterwards charge the consignee (*c*). An indorsee remains liable on the bill of lading under the statute only so long as he holds the bill, and if he indorses it over with the property, his liability ceases (*d*). If he sells the goods without indorsing and delivering the bill of lading he remains liable under the statute (*e*).

CHAP. II.

Continued liability of shipper.

An indorsement and delivery of a bill of lading as a pledge for bills of exchange or for an advance of money operates by common law only, and does not pass the property in the goods with the liabilities under the statute, so as to charge the indorsee with the freight (*f*); but if such indorsee demands and takes delivery of the goods under the bill of lading he becomes bound by its terms (*g*). So an indorsement under an agreement to accept bills drawn against the bill of lading gives no title to the indorsee, unless the condition of accepting the bills is satisfied (*h*). Acceptance of the bills under such agreement gives the acceptor the right to have the bill of lading indorsed and delivered; and if the bill of lading is disposed of contrary to the agreement, he may claim the proceeds or value of the goods (*i*). It is not a usual condition in

Indorsement of bill of lading as security.

(*a*) *Keith v. Burrows* (1877), 46 L. J. C. 801; 2 Ap. Ca. 636; See *Swan v. Barber* (1880), 49 L. J. Ex. 253; 5 Ex. D. 130.

(*b*) *For v. Nott* (1861), 30 L. J. Ex. 259; 6 H. & N. 630. See sect. 2, *ante*, p. 877.

(*c*) *Lewis v. McKee* (1868), 38 L. J. Ex. 62; L. R. 4 Ex. 58.

(*d*) *Smithwaite v. Wilkins* (1862), 31 L. J. C. P. 214; 11 C. B. N. S. 842.

(*e*) *Fowler v. Knoop* (1879), 48 L. J. Q. B. 333; 4 Q. B. D. 299.

(*f*) *Swell v. Birdick* (1884), 53 L. J.

Q. B. 399; 10 Ap. Ca. 74. See *Bristol Bank v. Midland Ry.* (1891), 61 L. J. Q. B. 115; (1891) 2 Q. B. 653.

(*g*) *Allen v. Collart* (1883), 52 L. J. Q. B. 686; 11 Q. B. D. 782.

(*h*) *Shepherd v. Harrison* (1871), 40 L. J. Q. B. 148; L. R. 5 H. L. 116.

(*i*) *Lutscher v. Comptoir d'Escompte* (1876), 1 Q. B. D. 709. See *Gibbaron v. Krefft* (1875), 44 L. J. Ex. 238; L. R. 10 Ex. 274; *Marabta v. Imp. Ottoman Bk.* (1878), 47 L. J. Ex. 118; 3 Ex. D. 164.

PART VI.

Discharge of
bill of lading.Bills of
lading in
sets.Stoppage
of goods
in transitu
against bill
of lading.

such agreements that the title of the indorsee should further depend upon his taking up the acceptances at maturity (*k*).

A bill of lading retains its negotiable quality until discharged by a complete delivery of the goods to the person having the right to claim under it (*l*). But the shipowner does not discharge the bill by delivery to the consignee named in it, without the production of the bill (*m*). Goods delivered at a wharf or warehouse to be held under a stop order for the freight remain in the same position as during the carriage in relation to the bill of lading, which continues in force for passing the property and liabilities by indorsement until the stop is removed and the goods duly delivered (*n*). An indorsement and delivery of a bill of lading carries with it the right of action for a wrongful delivery of the goods by the carrier or warehouseman whose duty it was to hold the goods under the bill of lading, though the wrongful delivery took place before the indorsement (*o*).—Where a bill of lading is drawn in a set of two or three, the shipowner is discharged by delivering the goods to the first presented before he has notice of the indorsement of another of the set; but the delivery by him does not affect the right of property as between the several indorsees (*p*). As between indorsees, the first indorsee for value of one of the set acquires a *primâ facie* title to the goods as against subsequent indorsees of other bills of the set; and mere notice that the bill is one of a set is immaterial to the priority (*q*).

The Bills of Lading Act, s. 2, saves the right of stoppage *in transitu* of an unpaid vendor against the original shipper or owner. There is no such right against a subsequent indorsee of the bill of lading who takes it *bonâ fide* and for value; and though it was indorsed to him as security for a past debt (*r*). But subject to the right of such indorsee the unpaid vendor may claim the right of stoppage as against any surplus value of the goods beyond the

(*k*) *Coventry v. Gladstone* (1867), 37 L. J. C. 30; L. R. 4 Eq. 493.

(*l*) *Hatherley, L. C., Barber v. Meyerstein* (1870), 39 L. J. C. P. 187; L. R. 4 H. L. 329.

(*m*) *The Stettin* (1889), 58 L. J. P. 81; 14 F. D. 142. See *Howard v. Shepherd* (1850), 19 L. J. C. P. 249; 9 C. B. 297.

(*n*) *Barber v. Meyerstein* (1870), 39 L. J. C. P. 187; L. R. 4 H. L. 317.

(*o*) *Bristol Bk. v. Midland Ry.* (1891), 61 L. J. Q. B. 115; (1891) 1 Q. B. 653.

(*p*) *Barber v. Meyerstein* (1871), 39 L. J. C. P. 187; L. R. 4 H. L. 317. *Glyn v. E. & W. India Docks* (1882), 52 L. J. Q. B. 146; 7 Ap. Ca. 591.

(*q*) *Barber v. Meyerstein* (1870), 39 L. J. C. P. 187; L. R. 4 H. L. 317. *Sanders v. Maclean* (1883), 52 L. J. Q. B. 481; 11 Q. B. D. 327.

(*r*) *Pease v. Glooshee* (1866), 35 L. J. P. C. 66; L. R. 1 P. C. 219; *Leish v. Scott* (1877), 46 L. J. Q. B. 576; 2 Q. B. D. 376; *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899), 68 L. J. Q. B. 515; (1899) 1 Q. B. 643.

claim of the indorsee, or against any unpaid purchase-money if the indorsee is a sub-purchaser (*s*). The lien of an unpaid vendor is not affected by his giving a bill of lading or a delivery order, so long as he remains in possession of the goods as vendor (*t*).

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The Act, sect. 3, binds the master or other person signing a bill of lading to the indorsee for the goods therein represented to have been shipped (*u*). This section does not prevent the shipowner from showing a discrepancy between the statement of marks in a bill of lading and those actually on the goods shipped, provided the marks do not affect or denote substance, quality, or commercial value (*x*). He does not discharge his liability by shipping them or part of them by another ship (*y*). But he is not bound by an erroneous measurement of the goods in fact shipped (*z*). A bill of lading with the condition, "quantity value and contents unknown," presumptively excludes any description therein given as against the master signing it; who is taken to accept them for whatever in fact they are (*a*).

Estoppel as to goods shipped.

By the Policies of Assurance Act, 1867, being "An Act to enable assignees of policies of life assurance to sue thereon in their own names," sect. 1, "Any person or corporation now being or hereafter becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy, for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."—Sect. 3. No assignment shall confer on the assignee any right to sue "until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of busi-

Assignment of policies of life insurance.

Notice of assignment.

Ex p. Golding 1880, 13 Ch. D. 628; *Kemp v. Falk* (1882), 52 L. J. C. 167; 7 Ap. Cr. 573.

(*t*) *Imperial Bk. v. London & St. Kath. Docks* (1877), 46 L. J. C. 335; 5 Ch. D. 200.

(*u*) *Ante*, p. 877; *Smith v. Belvoir Steam Nav.* (1895), 65 L. J. P. C. 8; (1896) A. C. 70; *Manchester Trust Co. v. Furness* (1895), 64 L. J. Q. B. 766; (1895) 2 Q. B. 539.

(*x*) *Parsons v. New Zealand Shipping*

Co. (1901), 70 L. J. Q. B. 401; (1901) 1 Q. B. 518.

(*y*) *Smith v. Eegathen* (1887), 56 L. J. Q. B. 437. See *Lashman v. Christie* (1887), 56 L. J. Q. B. 538; 19 Q. B. D. 333.

(*z*) *Blanchet v. Parrell's Plantavit Coll.* (1871), 43 L. J. Ex. 50; L. R. 9 Ex. 74.

(*a*) *Lebon v. Gen. Steam Nav.* (1872), 42 L. J. C. P. 1; L. R. 8 C. P. 88. See *Tully v. Terry* (1873), 42 L. J. C. P. 240; L. R. 8 C. P. 675.

PART VI. ness; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed."— Sect. 5. "Any such assignment may be made either by indorsement on the policy, or by a separate instrument in the words or to the effect set forth in the schedule hereto, such indorsement or separate instrument being duly stamped."— Sect. 6. Every assurance company shall, upon the request in writing of any person by whom any such notice was given deliver an acknowledgment in writing of their receipt of such notice; and every such written acknowledgment, if duly signed, shall be conclusive evidence against the company of their having duly received the notice.

Form of assignment.

Construction of the Act.

The effect of the statute is restricted to enabling the assignee to sue in his own name; it does not give the assignee a better title than his assignor, nor does it discharge him from any claims and equities subsisting against the assignor respecting the policy, or from the effect of misrepresentation in obtaining it (*b*). The statute binds the assurance company as debtors to pay the sum assured to the assignee, and they are not in the position of trustees, who can pay the money into court (*c*). Where a policy is assigned as security for a debt, the assignee may recover the sum assured upon his legal title by the assignment; but where the title of the assignee is equitable, as in the case of a mortgage by deposit, as the assured retains the legal interest, the company is not bound to pay to the assignee without the receipt of the assured or his representative, or without a dispensation from the Court (*d*). And a deposit of a policy of insurance as security for a debt is not rendered equivalent to an assignment within the Act by a formal notice given to, and acknowledged by, the company (*e*). And an agreement to assign upon request is not an assignment within the Act (*f*). An express condition in the policy "that it

(*b*) See sect. 2; *British Equitable Insce. v. G. W. Ry.* (1869), 38 L. J. C. 314; *Re Weniger's Policy* (1910), 79 L. J. C. 546; (1910) 2 Ch. 291.

(*c*) *Matthew v. Northern Assee.* (1878), 47 L. J. C. 562; 9 Ch. D. 80.

(*d*) *Solicitors & Gen. Life Assee. v. Lamb* (1864), 33 L. J. C. 425; 2 De G.

J. & S. 251; *Curtis v. Caledonian Insce.* (1881), 51 L. J. C. 80; 19 Ch. D. 531.

(*e*) *Crossley v. City of Glasgow Life Assee.* (1871), 46 L. J. C. 65; 4 Ch. D. 421; *Webster v. British Empire Assee.* (1880), 49 L. J. C. 769; 15 Ch. D. 169.

(*f*) *Spencer v. Clarke* (1878), 47 L. J. C. 692; 9 Ch. D. 139.

shall not be assignable" excludes it from the operation of the Act; but it does not prevent the assured dealing with the beneficial interest in the policy (*g*). The date of the notice of assignment given to the assurance company regulates the priority of claims for payment as between the company and the parties giving the notice; but it does not determine the priority of claimants to the money between themselves *h*. Policies issued by friendly societies are also assignable *i*.

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The liability under a policy of life assurance may be transferred from one assurance company to another by the agreement of all parties operating as a novation, or by acceptance by the assured of the liability of the transferee company in place of the original company, which acceptance must now be in writing signed by the assured or his agent by force of the Life Assurance Companies Act, 1872, s. 7 (*k*).

Transfer of liability under policy.

By the Marine Insurance Act, 1906, ss. 50, 51, which codifies the law and in part embodies the provisions of the Policies of Marine Assurance Act, 1868, a marine policy (that is generally, a policy upon ship goods or profits arising therefrom or liability to compensate a person for losses arising from maritime perils) is assignable, unless it contains terms expressly prohibiting assignment, and it is in terms enacted: "Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name: and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected" (*l*). The right to raise any defence available against the original assured does not include a set off or counterclaim (*m*).

Policies of marine insurance.

If the owner of a ship or goods has effected a policy of insurance upon the subject-matter, and assigns his property in the ship or goods without assigning or agreeing to assign the policy to the

Assignment of benefit of insurance.

(*g*) *Re Turean* (1888), 58 L. J. C. 101; 10 Ch. D. 5.

(*k*) See *ante*, p. 573.

(*h*) *Newman v. Newman* (1835), 54 L. J. C. 538; 28 Ch. D. 674.

(*l*) *Swan v. Maritime Insee.* (1906), 76 L. J. K. B. 169; (1907) 1 K. B. 116.

(*i*) Friendly Societies Act, 1875; Friendly Societies Act, 1896; *Re Griffin* (1901), 71 L. J. C. 112; (1902) 1 Ch. 137.

(*m*) See *Pillay v. Nepione Marine Insee.* (1879), 19 L. J. C. P. 153; 5 C. P. D. 34.

PART VI. buyer, he cannot recover for a subsequent loss in his own right (*n*). No particular form need be observed to effect a valid assignment of a marine policy (*o*); and it may be inferred from the circumstances that the parties have agreed to assign the policy, as ... it is delivered upon the sale of the subject-matter, or where upon a sale and purchase, the price is fixed by reference to the insurance, as a purchase c. i. f. (*i.e.*, cost, insurance, freight); otherwise the contract of sale will not include the benefit of the insurance (*p*). But an assignment may be made of the policy with all rights under it after a loss for which an action has accrued, upon which the assignee may sue under the statute; as in the case of the sale of cargo during the voyage with the insurance, whether lost or not lost; or upon the sale of a ship after partial loss (*q*).

Debentures of company. By the Companies Clauses Consolidation Act, 1845, ss. 38-49, mortgages and bonds may be issued by a company under the Act, which are transferable by deed and registration in the books of the company; and an action must be brought in the name of the transferee (*r*). By the Mortgage Debenture Act, 1865, and the Amendment Act, 1870, mortgage debentures upon real securities may be issued by companies, which are transferable by indorsement and registration.—By the Local Loans Act, 1875, s. 5, local authorities may raise loans by the issue of debentures payable to bearer and transferable by delivery; and by sect. 6, may issue debenture stock with registered title, and with a certificate entitling the bearer to the stock and transferable by delivery.

Local loan debentures.

Construction of debentures.

A debenture or bond of a company does not import any charge upon the property of the company, unless expressly mentioned to be so charged; and a debenture which charges all the current property of the company for the time being gives no specific charge upon any portion, which would prevent the company dealing with it within their powers (*s*). And where a debenture contains a

(*n*) Marine Insurance Act, 1906, s. 51; *Powles v. Imux* (1843), 12 L. J. Ex. 163; 11 M. & W. 10; *North of England Odeake Co. v. Archangel Insce.* (1875), 41 L. J. Q. B. 141; L. R. 10 Q. B. 249.

(*o*) Marine Insurance Act, 1906, s. 51.

(*p*) Marine Insurance Act, 1906, s. 51; *Parke, B., Powles v. Imux* (1843), 12 L. J. Ex. 163; 11 M. & W. 13; *Ralli v. Universal Marine Insce.* (1862), 31 L. J. C. 313; 4 De G. F. & J. 1; *Landauer v.*

Asser (1905), 74 L. J. K. B. 659; (1905) 2 K. B. 181.

(*q*) Marine Insurance Act, 1906, s. 51; *Lloyd v. Fleming* (1872), 41 L. J. Q. B. 93; L. R. 7 Q. B. 299.

(*r*) *Testur v. East Anglian Ry.* (1850), 19 R. R. 255; 5 Ex. 280.

(*s*) *Wharfen v. Silkstone Coal Co.* (1885), 54 L. J. C. 778; 29 Ch. D. 715; *Re Horne and Hillard* (1885), 54 L. J. C. 919; 29 Ch. D. 736; *Hubback v. Helms*

CHAP. II.

clause prohibiting a charge in priority over that created by the debenture, the clause is ineffective as against a purchaser for value without notice (*t*). But debenture holders, whether the debentures have been issued or only agreed to be issued, are entitled to priority over creation creditors who have not realised their debts, as to property covered by the debentures (*u*). Debentures of a company, though secured upon the goods, chattels and effects of the company for the time being, are excepted from the application of the Bills of Sale Acts (*x*). An instrument issued by a company entitled "a debenture" expressed to be payable to a person or order, with coupons for interest attached, was held to be insufficiently stamped with a promissory note stamp, and to require a debenture stamp under the Stamp Act, 1870; though no definition of a debenture is given in that Act or elsewhere (*y*).

The certificates of ownership of shares and stock of companies which are transferable by deed and registration are not negotiable, and convey no title by delivery; but as a general rule the production of the certificate is a condition of obtaining registration, and a deed of transfer duly executed with delivery of the certificate gives a title to registration, and an equitable title to the shares or stock to the transferee (*z*). A share certificate issued by a company estops the company from denying the title under it (*a*).—Scrip certificates of shares in a company, purporting to entitle the bearer to be registered as the holder upon payment of the amount of the shares, are transferable by delivery according to mercantile usage, and convey a good title to a transferee who takes them *bonâ fide* and for value (*b*). And in general a person who negotiates

Certificates of shares.

1887, 56 L. J. C. 556; *Beardon v. Electrical Engineering Corp.* (1892), 61 L. J. C. 256; 1892) 1 Ch. 431.

(*t*) *English and Scottish Merc. Inver. v. Beardon* (1892), 62 L. J. Q. B. 136; 1892) 2 Q. B. 700; *Re Castell and Reoru* (1897), 67 L. J. C. 169; (1898) 1 Ch. 315. See *Wilson v. Holland* 1910, 79 L. J. C. 580; (1910) 2 Ch. 305.

(*u*) *Re Opera Co.* (1891), 60 L. J. C. 879; 1891) 3 Ch. 260; *Taunton v. Wareckshire Sheriff* (1895), 61 L. J. C. 497; (1895) 2 Ch. 319; *Dacey v. Wetherhamston* (1898), 67 L. J. Q. B. 699; (1898) 2 Q. B. 191; *Spaldham v. Printing Synd. v. Fawcaker* (1901), 70 L. J. Q. B. 453; 1911) 1 Q. B. 771.

(*x*) See Bills of Sale Act, 1882, s. 17; *Re Standard Co.* (1891), 60 L. J. C. 292; (1891) 1 Ch. 627.

(*y*) *British India Co. v. Indian Revenue* (1881), 50 L. J. Q. B. 517; 7 Q. B. D. 165. See *Re Bolton* (1891), 61 L. J. C. 31.

(*z*) *Soc. Gén. de Paris v. Walker* (1885), 55 L. J. Q. B. 169; 11 Ap. Ca. 20. See *Williams v. Colonial Bk.* (1888), 57 L. J. C. 826; 58 Ch. D. 388; *Rimford v. James Keith & Blackman Co.* (1905), 71 L. J. C. 531; (1905) 2 Ch. 147; *Lindlar's case* (1910), 79 L. J. C. 193; (1910) 1 Ch. 312.

(*a*) *Bulkin Co. v. Tomkinson* (1893), 63 L. J. Q. B. 134; (1893) A. C. 396; *Dixon v. Kennaway* (1900), 69 L. J. C. 501; 1900) 1 Ch. 835; *Louman v. Bath Electric Trans.* (1907), 71 L. J. C. 424; (1905) 1 Ch. 616.

(*b*) *Rimbail v. Metrop. Bk.* (1877), 46 L. J. Q. B. 316; 2 Q. B. D. 194.

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an instrument purporting to be transferable by delivery is estopped by the representation on the face of it from disputing the title of a *bonâ fide* holder for value, though the instrument is not in itself negotiable (c).

Public stock certificates.

By the National Debt Act, 1870, s. 26, "A stockholder may obtain a stock certificate, that is, a certificate of title to his stock or any part thereof, with coupons annexed, entitling the bearer of the coupons to the dividends on the stock." By sect. 32, "a stock certificate, unless a name is inscribed therein, shall entitle the bearer to the stock therein described, and shall be transferable by delivery." The bearer of a stock certificate may convert the same into a nominal certificate, which is then not transferable, by inserting therein the name of some person. — Dividend warrants issued by the Bank of England, which are drawn payable to the stockholder named, and bearing a receipt to be signed by him before issue, are payable to bearer as against the bank, but are not negotiable by delivery with the effect of passing the title as against the true owner (d). Exchequer bills, which are drawn in blank and payable to bearer, are negotiable and give a good title by delivery to a *bonâ fide* holder (e). Postal orders are not negotiable in form, being payable to the signed receipt of a named payee; nor are they made negotiable by the regulation that they are payable through a banker without the signature of the payee; but they are discharged by payment, to whomever paid (f).

Dividend warrants

Exchequer bills.

Postal orders.

Foreign Government bonds.

Bonds and scrip of foreign governments, purporting to be payable to bearer, are negotiable by general custom of merchants (g); but bonds of this kind without the interest coupons attached, are held to require a special custom to prove them to be negotiable (h). And generally the court will give effect to an established usage to treat particular securities as negotiable (i).

(c) *Per cur.* *Goodwin v. Roberts* (1876), 45 L. J. Ex. 748; 1 Ap. Ca. 176; *Randall v. Metrop. Bk.* (1877), 46 L. J. Q. B. 346; 2 Q. B. D. 191; *Easton v. London St. Stock Bk.* (1887), 56 L. J. C. 569; 34 Ch. D. 95; *Baker v. Nottingham Bk.* (1891), 60 L. J. Q. B. 512; *Beckmannsland Exploration Co. v. London Trading Bk.* (1898), 67 L. J. Q. B. 986; (1898) 2 Q. B. 658.

(d) *Partridge v. Bank of England* (1816), 15 L. J. Q. B. 395; 9 Q. B. 396.

(e) *Wookey v. Pole* (1820), 4 B. & Ald. 1.

(f) *Finch v. Sec. v. Union Bk.* 1886, 56 L. J. Q. B. 70; 17 Q. B. D. 703.

(g) *Gorgier v. Morille* (1821), 2 L. J. O. S. K. B. 206; 3 B. & C. 15; *Goodwin v. Roberts* (1876), 45 L. J. Ex. 748; 1 Ap. Ca. 176.

(h) *Picker v. London & County Bk.* (1887), 56 L. J. Q. B. 259; 18 Q. L. D. 515.

(i) *Edehstein v. Schuler* (1902), 71 L. J. K. B. 572; (1902) 2 K. B. 141.

CHAPTER III.

COVENANTS RUNNING WITH LAND.

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CERTAIN covenants relating to the title or to the use of land are said to run with the land, because the benefit, and in some cases the burden, of the covenants pass upon a conveyance of the land to which they relate. Covenants become thus annexed to the possession of land by rules of common law and by statute; and they also may become binding upon the possessor upon principles of equity. Covenants run with the land at common law for or against the possessor by reason of the relation of the matter of the covenant to the land, without express limitation of the terms of the covenant to the heirs or executors or assigns of the parties (*a*); and on the other hand, covenants which by this rule would run with the land may, by force of the expressions used, be restricted in operation to matters arising during the life or the possession of the

Covenants running with land.

^a) *Sacheverell v. Froggatt* (1671), 2 Wms. Saund. 751; *Morshull v. Oakes* (1858, 27 L. J. Ex. 158; 2 H. & N. 793. See now Conveyancing Act, 1881, s. 58.

PART VI. covenantor, for limited time (*b*). Covenants running with land are not restricted by the rule against perpetuities, which applies only to limitations of estates and interests in property (*c*). These covenants are peculiar to land, and there is no analogous transfer of liability or benefit in the case of chattels (*d*).

Benefit of covenants running with land.

By the common law the benefit of covenants running with land passes to the grantee or assignee of the land in all cases: as the covenants for title and for further assurance in a deed of conveyance in fee which pass to the heir or assignee of the grantee, who may sue in his own name or in his own right; and the same rule applies to the covenants implied by force of sect. 7 of the Conveyancing Act, 1881 (*e*); and the covenant for quiet enjoyment in a lease which runs with the demised land for the benefit of the executor of the lessee or of his assignee for the time being (*f*). Where land is granted in fee to the covenantor, the benefit of his covenant may be made to run with land which the covenantee has retained, and to which the covenantor is a stranger in title, and which the covenantor has not conveyed to the covenantee (*g*). In the case of a lease, it is essential that there should be privity of estate between the covenantor and covenantee. If a person having no interest in the land grants a lease, and the covenants are made with him and his assigns, the true owner of the land cannot maintain an action on the covenants although they are of such a character as to run with the land (*h*); but a lease by a stranger operates by estoppel between the parties, and this estate will establish a sufficient privity of estate to support an action by the parties or their representatives (*i*). If the owner of the land does not execute the lease there is no estate to which a covenant can attach (*k*); unless there is a contract to grant a lease of which specific performance would be granted (*l*); or unless the action is main-

(*b*) *Gaskin v. Balls* (1879), 13 Ch. D. 321; *Re Farewell and Holmes* (1889), 58 L. J. C. 763; 12 Ch. D. 150; *Muller v. Trafford* (1900), 70 L. J. C. 72; (1901) 1 Ch. 51.

(*c*) *L. & S. W. Ry. v. Gomm* 1882, 51 L. J. C. 530; 20 Ch. D. 562; *Mackenzie v. Childers* (1889), 59 L. J. C. 191; 43 Ch. D. 265; *Re Ashforth* (1905), 74 L. J. C. 361; (1905) 1 Ch. 535; *S. E. Ry. v. Associated Portland Cement Manuf.* (1909), 79 L. J. C. 159; (1901) 1 Ch. 12.

(*d*) *McGruther v. Fitcher* (1904), 73 L. J. C. 653; (1904) 2 Ch. 306.

(*e*) *Middlemore v. Goudale* (1638), Cro. Car. 503; *David v. Sabin* (1893), 62

L. J. C. 317; (1893) 1 Ch. 523.

(*f*) *Nake v. Audey* (1594), Cro. 137; 373; *Campbell v. Lewis* (1820), 2 B. & Ald. 392.

(*g*) *The Prior's case*, Y. B. 12 Edw. III. fo. 3, cited *Spencer's case* 1581, 5 Co. 17 b; 1 Sm. L. C. 52; *S. E. Ry. v. Associated Portland Cement Manuf.* (1909), 79 L. J. C. 159; (1910) 1 K. B. 12.

(*h*) *Walt v. Russell* (1789), 3 T. R. 393; Co. Lit. 385 a.

(*i*) *Cuthbertson v. Irving* (1860), 29 L. J. Ex. 485; 6 H. & N. 135.

(*j*) *Pitman v. Woodbury* (1818), 3 Ex. 1.

(*k*) *Walsh v. Lonsdale* (1882), 52 L. J. C. 2; 21 Ch. D. 9.

tainable under sect. 5 of the Real Property Act, 1845, there is no remedy on the covenant (*m*). In conveyances operating under the Statute of Uses in which the covenants for title are made with the grantee to uses, the statute transfers the seisin with the covenants to the uses as they arise, whether limited by the deed or by subsequent appointment; but covenants made with a person to whom a use is limited, pass with his estate only. Hence if land is limited to such uses as the purchaser shall appoint and in default of appointment to him in fee, covenants for title pass with his estate, but not with estates appointed under his power, because the appointment defeats his estate with which the covenants run (*n*).

At the common law the benefit of covenants made upon a purchase runs with the land, but not the burden, except in the case of a lease, when the assignee would, as a matter of course, refer to the lease itself, and find the restriction set down (*o*). But another possible explanation is that this distinction was introduced by the Statute of *Quia Emptores*, which applies to alienations of the fee and not to grants of a particular estate (*p*). As mentioned before, upon a conveyance of land in fee the grantor may obtain a covenant from the grantee in respect of other land of the grantor, and the benefit of this covenant will run with the land so retained by the grantee, although the burden does not run with the land conveyed, and is, as regards the covenantor, a collateral covenant; if, however, the covenantor is a corporation, the covenant may be enforced until the corporation is dissolved (*q*). But the grantor of the fee could not obtain a covenant running with the land, in respect of land of a stranger to the title (*r*). This seems to confirm the view that these covenants depended in some measure upon the power to create tenure which the before mentioned statute of *Quia Emptores* abolished. So where a tenant in fee simple granted a rent-charge out of the land and

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Burden of covenants.

^m See *Forster v. Fretwell*, (1908, 77 L. J. K. B. 521; 1908 1 K. B. 629; affd., *supra*, *Dyson v. Forster*, 1908, 78 L. J. K. B. 216; (1909 A. C. 98).

ⁿ *Leach v. Wadhams* (1805, 5 East, 289). See Gilbert, *Uses*, by Sugd. 185, n. (9), and see *Sherrwood v. Ashburn* 1815, 3 M. & S. 382.

^o *Perreux Bennett v. Atherton* 1872, 11 L. J. Q. B. 167; L. R. 7 Q. B. 326; Mellish, L. J., *Leach v. Sherrwood* 1874, L. R. 9 Ch. 175; *Austerberry v. Oldham* 1889, 55 L. J. C. 633; 23 Ch. D. 750.

^p Leake, *Law of Land*, pp. 12, 29.

^q *S. E. Ry. v. Associated Portland*

Cement Manuf. 1909, 79 L. J. K. B. 150; (1910 1 K. B. 12). The point was probably concluded by the *Trusts' case*, cited in *Spencer's case* (1581), 5 Co. at p. 17 b; 1 Sm. L. C. 52; religious communities being at that date corporations. See *Horn's case*, Y. B. 4 Hen. IV, 6 b., also cited in *Spencer's case*, and per Finchden, *Hecker v. Provost of Cambridge*, Y. B. M. 11 Hen. VIII, at fo. 3.

^r *Horn's case*, cited as *Anonymous* in *Spencer's case* 1581, 5 Co. at p. 18 a; 2 Sm. L. C. 52.

PART VI. covenanted to pay the same, and afterwards conveyed away the land, the covenant was held to be a mere personal liability, which did not pass with the conveyance or bind the grantee at law (s). Where land was conveyed in fee in consideration of a rent-charge out of it and of a covenant by the grantee to the grantor to erect and keep in repair buildings upon it, it was held that the covenant did not pass with the land so as to bind an assignee of the grantee (t). The effect of the Statute of Sewers (23 Hen. 8, c. 5) is to impose a statutory burden upon the land, by which owners for the time being may be made to contribute a rateable proportion of the cost of maintaining sea-walls (u). But where the purchaser or assignee of the land is affected by notice of the covenants, the court, upon equitable principles, will restrain him from using the land in a manner inconsistent with them (x).

Covenants
between lessor
and lessee
running with
the land.

By the common law the burden as well as the benefit of covenants which run with the land, if contained in a lease, pass to the assignee of the term, by reason of the privity of estate with the lessor; but such covenants did not pass to an assignee of the reversion until made or declared to do so by the statute 32 Hen. 8, c. 34 (y). Where the question arises between landlord and tenant it is essential that there should be a defined subject-matter to which the covenant can attach (z); and that subject-matter must be land or an interest in land; but an incorporeal hereditament conferring no interest in the land, as a rent, is not a sufficient subject-matter (a). It was formerly thought that these covenants, if occurring in leases, were restricted in operation to cases where the act to be done on the property demised was for the benefit of the demised property, but it has been held recently that a covenant will run with the land notwithstanding that the benefit is to accrue to persons who have no interest in the property

(s) *Brewster v. Kitchin* (1697), 1 Ld. Raym. 317; 12 Mod. 166.

(t) *Milnes v. Branch* (1816), 5 M. & S. 411; *Haywood v. Brunswick Bg. Soc.* (1881), 51 L. J. Q. B. 73; 8 Q. B. D. 403.

(u) *Rex v. Essex Commrs.* (1823), 1 L. J. O. S. K. B. 169; 1 B. & C. 177. See *Reg. v. Fobbing Commrs.* (1886), 56 L. J. M. C. 1; 11 App. Ca. 449; *Hardman v. Child* (1885), 51 L. J. C. 695; 28 Ch. D. 712.

(x) See *post*, p. 910.

(y) *Spencer's case* (1584), 5 Co. 16;

2 Sm. L. C. 52; *Thursby v. Plant* (1666), 1 Wms. Saund. 300.

(z) *Flight v. Glossop* (1835), 1 L. J. C. P. 268; 2 Bing. N. C. 125. See *Frank Warr & Co., Ltd. v. L. C. C.* (1901), 73 L. J. C. 362; (1904) 1 K. B. 713.

(a) *Milnes v. Branch* (1816), 5 M. & S. 411; *Martyn v. Williams* (1857), 26 L. J. Ex. 117; 1 H. & N. 817; *Haywood v. Brunswick Perm. Bg. Soc.* (1881), 51 L. J. Q. B. 73; 8 Q. B. D. 403; *Hastings (Lord) v. N. E. Ry.* (1898), 67 L. J. C. 590; (1898) 2 Ch. 674; *McGruther v. Pitcher* (1901), 73 L. J. C. 653; (1901) 2 Ch. 306.

demised (*b*).—Tenure is also essential in order that covenants may run with the land as between lessor and lessee (*c*). If the lessee grants an interest which does not exhaust his entire interest under the lease, there is no privity of estate between the owner of the particular estate so created and the original lessor, but only between the owner of the particular estate and his immediate lessor (*a*). On the other hand, if a freehold reversion in fee be broken up in interest, there is no break in the tenure, for an immediate particular estate of freehold and a freehold reversion constitute but one seisin, and upon that seisin the term was originally dependent (*e*). Where the lessee alienates part of the property leased, there is no break in the tenure (*f*); and conversely the assignee of the reversion expectant upon the determination of the lease in part of the property may maintain an action (*g*). There is no equitable remedy founded upon possession and enjoyment of the property against a person who is not in law and in fact an assign of the lessee (*h*).—The statute of 32 Hen. 8, c. 34, applies only to covenants of a kind that run with the term at common law, and does not extend to collateral covenants; so that if the covenant be such that the lessor could sue, or be sued by, the assignee of the lessee at common law, the assignee of the lessor can sue or be sued on a similar covenant under the statute (*i*). If tenants in common execute a joint lease with covenants to them jointly, the covenants will not pass to the assignee of the share of one of them; so if tenants in common demise severally, and the covenants are made to them jointly, or if joint tenants demise and the covenants are made with one severally, such covenants do not run with the reversion (*k*), but it has been held that where

b *Forster v. Elvet Coll.* (1908), 77 L. J. K. B. 521; (1908) 1 K. B. 629; affd. *sub. Dyson v. Forster* (1908), 78 L. J. K. B. 216; (1909) A. C. 98. See *post*, p. 892.

c *White v. Southend Hotel Co.* (1897), 66 L. J. C. 387; (1897) 1 Ch. 767; *Moller v. Tufford* (1900), 70 L. J. C. 72; (1901) 1 Ch. 54; *Dewar v. Goodman* (1908), 78 L. J. K. B. 209; (1909) A. C. 72.

d *Derby (Earl) v. Taylor* (1801), 1 East, 502; *Dewar v. Goodman* (1908), 78 L. J. K. B. 209; (1909) A. C. 72.

e *Atter v. Hummings* (1616), 2 Bulstr. 281; *Isbergwood v. Oldknow* (1813), 3 M. & S. 382; *Wright v. Burroughes* (1846), 16 L. J. C. P. 6; 3 C. R. 685. See Leake, Law of Land, pp. 32, 34.

f *Polmer v. Edwards* 1783, 1 Dougl. 186, n.; *White v. Southend Hotel Co.* (1897), 66 L. J. C. 387; (1897) 1 Ch. 767.

g *Tugman v. Pickard* (1818), 2 B. & A. 105; *Swanson (Corp.) v. Morgan* (1882), 52 L. J. Q. B. 340; 10 Q. B. D. 48; *Roberts v. Holland* (1893), 62 L. J. Q. B. 621; (1893) 1 Q. B. 665.

h *Ramage v. Wemmark* (1899), 69 L. J. Q. B. 40; (1900) 1 Q. B. 116.

i *Spencer's case* (1584), 5 Co. 16; 2 Sm. L. C. 52; *per cur.* *Martyn v. Williams* (1857), 26 L. J. Ex. 121; 1 H. & N. 817; *Kindersley, V.-C., Norral v. Pascoe* (1864), 34 L. J. C. 85.

k *Thompson v. Bakewell* (1865), 35 L. J. C. P. 18; 19 C. B. N. S. 713.

PART VI.

a lease is made by parties entitled for several interests, they or the survivors may join in an action of covenant against the lessee or his assignus (*l*).

Parol tenancies.

The above rule of the common law by which covenants run with the land demised for and against an assignee of the lease applies only to covenants in indentures of lease, and not to simple contracts contained in parol agreements of tenancy (*m*). And the above statute of 32 Hen. 8, in which covenants are made to run with the reversion, applies in terms only to indentures of lease, and has no application to parol tenancies (*n*). But if, after the determination of a lease by parol by lapse of time the parties agreed to continue upon the terms of the original agreement, which might be evidenced by payment and acceptance of rent, a renewed tenancy might be implied between the parties importing the original terms, and if the term or reversion were assigned, and rent paid or accepted, the assignee might sue or be sued in his own name and right as upon a new lease (*o*). Covenants now run with the land and with the reversion in the case of parol leases by force of sect. 10 of the Conveyancing and Law of Property Act, 1881.

What covenants run with the land.

The above rules were formerly restricted to covenants which in their matter related to the land demised (*p*); or, as it was variously described, "when the covenant extends to a thing *in esse* parcel of the demise" (*q*); when it "touches and concerns" the thing demised (*r*) or the "profits" of the land (*s*); when it "tends to the support and maintenance of the thing demised" (*t*); "if it affects the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affects the mode of enjoying it" (*u*). But it has been held recently that

T. Wakefield v. Brown (1846), 15 L. J. Q. B. 373; 9 Q. B. 209; *Magnay v. Edwards* (1853), 22 L. J. C. P. 170; 13 C. B. 179.

(*m*) *Elliott v. Johnson* 1866, 36 L. J. Q. B. 11; L. R. 2 Q. B. 120.

(*n*) *Stunden v. Christmas* (1817), 10 Q. B. 135; 16 L. J. Q. B. 265. See *Rickford v. Pearson* (1818), 17 L. J. C. P. 192; 5 C. B. 930; *Smith v. Eynaghall* (1874), 43 L. J. C. P. 110; L. R. 9 C. P. 145; *Allen v. Marchant* (1882), 9 Q. B. D. 366.

(*o*) *Buckworth v. Simpson* (1835), 4 L. J. Ex. 104; 1 Cr. M. & R. 834; *Arden v. Sutteran* (1815), 19 L. J. Q. B. 268; 11 Q. B. 832; see *Cornish v. Stubbs* (1870), 39 L. J. C. P. 202; L. R. 5

C. P. 202. See *Rickford v. Pearson* (1818), 17 L. J. C. P. 192; 5 C. B. 930.

(*p*) *Dewar v. Gouldman* (1908), 78 L. J. K. B. 209; (1909) A. C. 72.

(*q*) *Spencer's case* (1584), 5 Co. 16; 1 Sm. L. C. 52.

(*r*) *Per cur. Mortyn v. Williams* 187, 26 L. J. Ex. 117; 1 H. & N. 828.

(*s*) *Per cur. Williams v. Earle* 1808, 37 L. J. Q. B. 231; L. R. 3 Q. B. 719.

(*t*) *Per cur. Sampson v. Eastley* 1829, 9 B. & C. 505; affirmed *nom. Eastley v. Sampson* (1830), 6 Bing. 611; 1 Cr. & J. 105.

(*u*) *Ellenborough, C. J., Congleton (Corp) v. Pittson* (1808), 10 East. 135; *per cur. Ackroyd v. Smith* (1850), 19 L. J. C. P. 315; 10 C. B. 187.

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upon a demise of mines the benefit of a covenant respecting the support of the superjacent land runs with the superjacent land, and the burden with the mines, not only where the owner of the superjacent mines is also owner of the mines, but where he is a stranger to the title to the mines (*x*). The question is of more than academical interest, because, although the surface owners may have a remedy for damage caused by subsidence (*y*), the measure of damage is not necessarily the same. In the case adverted to the question arose upon sect. 5 of the Real Property Act, 1845, of which the material words are: "under an indenture executed after the 1st day of October, 1845, the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." In the Court of Appeal it was held that this provision could only apply to covenants running with the land, and this view seems to be justified having regard to the rules of interpretation applied to statutes designed to amend the law (*z*), but in the House of Lords doubts were expressed whether the language of the section did not embrace all covenants, whether they ran with the land or not. Both courts, however, held that the covenant was one which ran with the land to the extent above stated. It is true that at the common law, upon a conveyance in fee the benefit of services could be reserved affecting other lands of the conveying party, but the burden could not be made to run with the land conveyed. Only by reason of the Statute *Quia Emptores* (*a*). But there is a material distinction between the tenure of a freeholder and of a leaseholder. An estate of freehold, whether for life or of inheritance, was recoverable by an assize or other real action, whereas a leaseholder's only remedy was an action of ejectment in which he did not recover the land, but only recover damages until the end of the reign of Edward IV. (*b*).—Covenants for title and for quiet enjoyment in a conveyance in fee and in a lease run with the land, and pass with the estate of the covenantee, whether express or implied, in a conveyance by force of the Conveyancing Act, 1881, s. 7 (*c*).

Covenants for title.

(*x*) *Forster v. Elvet Coll.* (1908), 77 L. J. K. B. 521; (1908) 1 K. B. 629; affd. *nom.* *Dyson v. Forster* (1908), 78 L. J. K. B. 246; (1909) A. C. 98. See *Aspden v. Siddons* (1876), 46 L. J. Ex. 354; 1 Ex. D. 496.

(*y*) *Darley Main Coll. v. Mitchell*

(1886), 55 L. J. Q. B. 529; 11 Ap. Ca. 529.

(*z*) See *Hagton's case* 1584, 3 Co. 7 b.

(*a*) See *ante*, p. 889.

(*b*) See Leake, *Law of Land*, pp. 31, 31, 42.

(*c*) *Middlemore v. Goodale* (1638), Cro.

PART VI.

Acknowledgment to produce title deeds.

Covenant for rent and services.

Covenant for renewal of lease.

A covenant by a lessor to indemnify his lessee against breaches of covenants in a superior lease is not equivalent to a covenant for quiet enjoyment, and does not run against an assignee of the reversion (*d*).—Acknowledgments for the production of title deeds run with the land in favour of a subsequent purchaser; and the burden of such covenants runs with the land with which they are retained (*e*).—A covenant in a lease to pay the rent reserved runs, as to the burden of it, with the term; and, as to the benefit of it, with the reversion; the law transfers the covenant as incident to the rent (*f*). A reservation in a lease of a suit to a mill of the lessor, has been held to import a covenant to render such service and to be incident to the reversion at common law and pass to the assignee, but a similar result would have followed upon a bare covenant between strangers, a suit to a mill being a peculiar and anomalous right (*g*).

A covenant for renewal of a lease runs with the term, and, as to the burden of it, with the reversion (*h*). A covenant to renew at the request of the lessee entitles his executors to a renewal at their request (*i*); but a request during the term is a condition precedent to the liability (*k*). An agreement with a tenant to grant a new lease upon certain specified terms, when required to do so, is assignable; it passes to the trustee in bankruptcy of the tenant, who also may assign it to a purchaser (*l*). But a covenant to renew a lease with all the covenants of the former lease presumptively does not import that the new lease is to contain a like covenant for renewal (*m*). Where a lease was granted to two persons containing joint and several covenants by the lessees, and a covenant by the lessor to grant a new lease at the end of the term subject to the same covenants, and one of the

Car. 503; *Campbell v. Lewis* (1820), 3 B. & Ald. 392; *David v. Sabiu* (1893), 62 L. J. C. 317; (1893, 1 Ch. 523.

(*d*) *Daughtry v. Bowman* (1848, 17 L. J. Q. B. 111; 11 Q. B. 441.

(*e*) See Conveyancing Act, 1881, s. 9. And see as to covenants for the like purpose, *Sugden, Venl. & Purch.* 480, 11th ed. See *Barclay v. Raine* (1823), 1 Sim. & S. 449; *Fain v. Ayers* (1826), 4 L. J. O. S. C. 166; 2 Sim. & S. 533.

(*f*) *Sicheverell v. Froggatt* (16), 2 Wms. Saund. 751; *N. E. Ry. v. Hastings* (1900), 69 L. J. C. 516; (1900) A. C. 260.

(*g*) *Fyfe v. Arthur* (1823), 1 L. J. O. S. K. B. 138; 1 B. & C. 410. See

Coryton v. Lithelye (1670), 2 Wms. Saund. 361, and notes.

(*h*) *Best, J., Vernon v. Smith* (1821), 5 B. & Ald. 11. See *Muller v. Trafford* (1900), 70 L. J. C. 72; (1901) 1 Ch. 54.

(*i*) *Hude v. Skinner* (1723), 3 P. Wms. 195; 4 Y. & C. Ex. 562.

(*k*) *Nicholson v. Smith* (1883), 52 L. J. C. 191; 22 Ch. D. 640.

(*l*) *Buckland v. Papillon* (1866), 36 L. J. C. 81; L. R. 2 Ch. 67.

(*m*) *Copper Mining Co. v. Beach* (1823), 13 Beav. 478; *Stimberne v. Milbourn* (1884), 54 L. J. Q. B. 6; 9 Ap. Ca. 841; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296.

lessees assigned his interest in the lease to the other; it was held that the lessor was not bound to grant a new lease to the one only, having stipulated for covenants of both in the renewed lease (*n*). — Upon the like principle a proviso in a lease for determining it by notice to be given by either party runs with the term and with the reversion, so as to entitle the assignee of either to act upon it (*o*).

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Proviso to determine lease.

An option to purchase the freehold reversion expectant on the determination of the lease does not run with the land if the land be not settled (*p*). In the case of land in settlement, a tenant for life may grant a building lease, or agreement for a building lease, containing an option to purchase, to be exercised at any time within an agreed number of years not exceeding ten (*q*); and in this case it is binding on the settled land, and enforceable against those entitled in remainder (*r*).

Option to purchase.

A covenant by the lessee that he and his assigns will not assign, underlet, or part with the possession, without the consent of the lessor, runs with the term, and the lessor can sue an assignee of the lease for a breach of it by him (*s*). The covenant applies only to assignments of the legal estate (*t*). An underlease is not within a covenant not to assign which presumptively refers to the whole interest (*u*). In practice it is usual to insert a provision that the consent shall not be withheld in the case of a respectable and responsible assignee; this is not an independent contract but a qualification on the covenant (*v*). Where a lessee under a lease containing a covenant not to let or assign without consent of the lessor agreed with his consent to grant an underlease upon the like terms as in the original lease; the agreement was construed as intending that the covenant against assignment in the underlease should be subject to the consent of the immediate lessor only, and

Covenant against assignment.

(*n*) *Finch v. Underwood* (1876), 45 L. J. C. 522; 2 Ch. D. 310.

(*o*) *Roe v. Hayley* (1810), 12 East, 461. See *Re Hollis' Hosp. Trustees v. Hayne* (1894), 78 L. J. C. 673; (1899) 2 Ch. 540.

(*p*) *Woodall v. Clifton* (1905), 71 L. J. C. 555; (1905) 2 Ch. 257.

(*q*) Settled Land Act, 1889, s. 2.

(*r*) Settled Land Act, 1882, s. 31, sub-s. 2.

(*s*) *Williams v. Earle* (1868), 37 L. J. Q. B. 231; L. R. 3 Q. B. 739; *McEacharn v. Colton* (1901), 71 L. J. P. C. 20; (1902) A. C. 104. See *West v. Dobb* (1870), 30 L. J. Q. B. 190; L. R. 5 Q. B. 460; *Grove v. Portet* (1902), 71

L. J. C. 299; (1902) 1 Ch. 727.

(*t*) *Coe v. Bishop* (1857), 26 L. J. C. 389; 8 De G. M. & G. 515; *Gentle v. Faulkner* (1900), 69 L. J. Q. B. 777; (1909) 2 Q. B. 267. See *Ramsay v. Womack* (1899), 69 L. J. Q. B. 40; (1900) 1 Q. B. 116.

(*u*) *Derby (Earl) v. Taylor* (1801), 1 East, 502; *Bryant v. Hancock* (1898), 67 L. J. Q. B. 507; (1898) 1 Q. B. 716; affirmed on other grounds (1899), 68 L. J. Q. B. 889; 1899 A. C. 412. See *ante*, p. 891.

(*v*) *Taylor v. Bigge* (1874), 43 L. J. Ex. 95; L. R. 9 Ex. 151; *Bates v. Donabbon* (1896), 65 L. J. Q. B. 578; (1896) 2 Q. B. 241.

PART VI.
Condition
against
assignment.

not to that of the original lessor (*y*). An assignment is valid to pass the term, though it may be a breach of the covenant against assignment; but the lease may contain a condition that the term shall cease upon assignment, which would render the assignment void; or a condition of re-entry upon assignment, which would render it voidable (*z*). The power of the court to grant relief against forfeiture conferred by the Conveyancing and Law of Property Act, 1881, s. 14, does not extend to a right of re-entry or forfeiture for breach of covenant or condition against assigning or underletting or disposing of the land leased. And sect. 3 of the Conveyancing Act, 1892, provides that "no fine or sum of money in the nature of a fine" shall be payable for a licence to assign, unless the lease contains an express provision to the contrary (*a*). At common law, a condition against assignment without licence was determined by a licence once given; but it is now provided by sect. 1 of the Law of Property Amendment Act, 1859, that a licence shall extend only to the actual assignment or underlease or other matter specifically authorised to be done (*b*).—A covenant against assignment is superseded by an assignment by act of law: as the assignment to a trustee in bankruptcy (*c*); or a compulsory purchase under the Lands Clauses Act (*d*).

Covenants to
repair and
insure.

A covenant by the lessee to repair the demised premises, and to keep and leave them in repair, runs with the land and charges the assignee (*e*); so also a covenant to repair new buildings when built (*f*); and also runs with the reversion, entitling the assignor to sue (*g*). A covenant to repair, renew, and replace tenant's fixtures, and machinery fixed to the demised premises, runs with the land and binds the assignee of the term; but a similar covenant as to movable chattels used upon the premises does not pass to the

(*y*) *Williamson v. Williamson* (1874), 43 L. J. C. 738; L. R. 9 Ch. 729; *Hawood v. Silber* (1885), 30 Ch. D. 401.

(*z*) *Paul v. Nurse* (1828), 7 L. J. O. S. K. B. 12; 8 B. & C. 486. See *Elliott v. Johnson* (1876), 36 L. J. Q. B. 44; L. R. 2 Q. B. 120.

(*a*) *Re Cook's contract* (1896), 66 L. J. C. 28; (1897) 1 Ch. 9; *Waste v. Jennings* (1906), 75 L. J. K. B. 512; (1907) 2 K. B. 11; *Andrew v. Bridgman* (1908), 77 L. J. K. B. 212; (1908) 1 K. B. 596.

(*b*) *Dumpro's case* (1603), 4 Co. 119; 1 Sm. L. C. 31.

(*c*) *Doe v. Smith* (1814), 5 Tunt. 795;

Re Ruggs (1901), 70 L. J. Q. B. 541; (1901) 2 K. B. 16. See *Wadham v. Marlowe* (1785), 8 East, 311, n.; *Weatherall v. Gearing* (1806), 12 Ves. 504.

(*d*) *Slipper v. Tottenham & Hampstead Junction Ry.* (1867), 36 L. J. C. 811; L. R. 4 Eq. 112. See *ante*, p. 508.

(*e*) *Martin v. Clay* (1852), 22 L. J. Q. B. 147; 18 Q. B. 661.

(*f*) *Minshall v. Oakes* (1858), 27 L. J. Ex. 194; 2 H. & N. 793.

(*g*) *Easterby v. Sampson* (1829), 9 B. & C. 505; (1830), 6 Bng. 641; *Martin v. Williams* (1857), 26 L. J. C. 117; 1 H. & N. 817.

assignee (*h*).—A covenant to insure the demised premises against fire, where the sum insured is to be laid out in rebuilding or repairing the premises, runs with the land and an assignee of the reversion is entitled to sue upon it (*i*).—In the above cases it seems to be immaterial to the question of running with land, whether the covenant is expressed in terms to bind the assignee of the covenantor (*k*). But it is material to the construction of the covenant, whether the covenantor expressly covenants not only that he himself shall do the act, but that his assigns also shall do it; which will bind himself for their act, but does not purport to bind them (*l*).

CHAP. III.

Covenants
for assigns.

Covenants in a lease relating to the use and occupation of the demised premises run with the land and with the reversion: as a covenant for the residence of the tenant upon the premises (*m*); for the preservation of game (*n*); and covenants regulating the mode of cultivation or user (*o*); and by the express provisions of 56 Geo. 3, c. 50, s. 11, the trustee in bankruptcy or purchaser of a tenant in husbandry is bound by a covenant against the removal and sale of crops, manure and dressings, and for their consumption upon the demised premises, to the same extent as is the tenant (*p*). But a railway company or other public body cannot enter into a covenant restrictive of the user of land if inconsistent with its statutory powers and duties (*q*). Upon the same principle the liability of a landlord to an outgoing tenant to pay the customary valuation of the crops and tillages left on the land is incident to the reversion; and a devisee of the landlord has no claim for indemnity against the estate of the landlord (*r*). A covenant by the lessor to supply the demised premises with water runs with the premises, and an assignee of the lessee may sue for a breach (*s*);

Covenants
relating to
the use of
the land.

(*h*) *Williams v. Earle* (1868), 37 L. J. Q. B. 231; L. R. 3 Q. B. 739.

(*i*) *Vernon v. Smith* (1821), 5 B. & Ald. 1.

(*k*) *Martyn v. Clue* (1852), 22 L. J. Q. B. 147; 18 Q. B. 661; *Minshull v. Gokes* 1858, 27 L. J. Ex. 191; 2 H. & N. 793. See the Conveyancing Act, 1881, s. 58.

(*l*) *Doughty v. Bowman* (1848), 17 L. J. Q. B. 111; 11 Q. B. 444; *Gaskin v. Balls* (1879), 13 Ch. D. 324; *Re Fawcett & Holmes* (1889), 58 L. J. C. 763; 42 Ch. D. 150.

(*m*) *Tatam v. Chaplin* (1793), 2 H. Bl. 138.

(*n*) *Hooper v. Clark* (1897), 36 L. J.

Q. B. 79; L. R. 2 Q. B. 200.

(*o*) *Cockson v. Cock* (1605), Cro. Jac. 125; *Hyde v. Warden* (1877), 47 L. J. Ex. 121; 3 Ex. D. 82; *Chapman v. Smith* (1907), 76 L. J. C. 394; (1907) 2 Ch. 97.

(*p*) *Wilmot v. Rose* (1854), 23 L. J. Q. B. 281; 3 E. & B. 563; *Lybbe v. Hart* (1885), 51 L. J. C. 860; 29 Ch. D. 8. See *Hawkins v. Walbond* (1876), 45 L. J. C. P. 772; 1 C. P. D. 280.

(*q*) *Re S. E. Ry. & Wiffen* (1907), 76 L. J. C. 481; (1907) 2 Ch. 366.

(*r*) *Mansel v. Norton* (1883), 52 L. J. C. 357; 22 Ch. D. 769.

(*s*) *Jonidain v. Wilson* (1821), 4 B. & Ald. 266.

PART VI.

Covenants
restrictive of
trading.

Covenants
collateral to
the land.

so also a covenant by the lessor of a factory to supply steam power for machinery (*l*).—A covenant not to carry on any trade or business on the demised premises, or a covenant regulating or restricting the carrying on of particular trades is a covenant which runs with the land at law (*u*): as a covenant by the lessee of a public-house not to sell any beer other than that bought of the lessor (*x*); but such a covenant is impliedly conditional upon the lessor or his assignee continuing ready and willing to supply all such beer as the tenant may require (*y*).

It was formerly considered that covenants in a lease which are merely collateral, or did not relate to the land demised, did not run with the land at common law, and consequently not with the reversion under 32 Hen. 8; but according to more recent cases, it is no objection that the covenant is extended to the benefit of property which is not demised (*z*). According to the older common law cases the following were regarded as collateral covenants: a covenant to build or not to build upon land which is no parcel of the demise, or to pay money which is not reserved out of the land demised (*a*); a covenant by a lessee not to cut down timber trees which are expressly excepted from the demise; being in effect "a covenant not to cut down trees growing upon an adjoining estate of the lessor" (*b*). So also a covenant by the lessor of a public-house not to build or keep any public-house upon land adjoining the demised premises is collateral as not affecting the demised land (*c*). A covenant to make and maintain a road as a public road upon land purchased from the covenantee, adjacent to land reserved by him, was held to be collateral to the latter, and not to pass to an assignee of the covenantee (*d*). Upon the same principle, a condition of re-entry in a lease reserving the game, in case the lessee should be convicted of any offence against the game laws, was held to be collateral to the land demised, so

(*l*) See *Smith v. Eglington* (1874), 43 L. J. C. P. 149; L. R. 9 C. P. 145.

(*u*) *Per cur. Congleton (Corp.) v. Pattison* (1898), 10 East. 130. See *Doe v. Keeling* (1872), 1 M. & S. 95; *Doe v. Spry* (1818), 1 B. & Ald. 617.

(*x*) *White v. Southend Hotel* (1897), 66 L. J. C. 287; (1897) 1 Ch. 767; *Manchester Brewery v. Combs* (1901), 70 L. J. C. 814; (1901) 2 Ch. 608.

(*y*) *Laker v. Dennis* (1877), 47 L. J. C. 174; 7 Ch. D. 227. *Edwick v. Hawkes* (1881), 50 L. J. C. 577; 18 Ch. D. 199.

(*z*) *Dyson v. Forster* (1908), 78 L. J.

K. B. 246; (1909) A. C. 98. See *ante*, p. 892.

(*a*) *Spencer's case* (1584), 5 Co. 16 b; 1 Sm. L. C. 52; *Canham v. Rust* (1818), 8 Taunt. 227; *Davis v. Town Prop. Corp.* (1903), 72 L. J. C. 389; (1903) 1 Ch. 797.

(*b*) *Goodright v. Virian* (1807), 8 East, 190.

(*c*) *Thomas v. Hayward* (1869), 38 L. J. Ex. 175; L. R. 4 Ex. 311.

(*d*) *Austerberry v. Oldham Corp.* (1885), 65 L. J. C. 633; 29 Ch. D. 759.

that an assignee of the reversion could take no advantage of it (e). There are three cases, and apparently only three, in which a covenant touching property not demised has been held to run with the property demised upon the ground that the covenant enured for the benefit of the latter property (f). But this extension must be regarded as applicable only to exceptional cases (g).

CHAP. III.

Covenants may be made to run with incorporeal hereditaments; as in a lease of tithes with a covenant not to let the occupiers of the lands titheable have any part of the tithes (h); a lease of a licence to take minerals, with a covenant to keep the works in repair (i), or with a wayleave over freehold land for the purpose of making a railway with a covenant to pay an annual rent (k); a lease of the right of shooting with a covenant to leave the land stocked with game (l). A covenant to pay a rent-charge granted out of land or of rent issuing out of land may be assigned so as to entitle an assignee of the rent to sue the covenantor (m). But here the action rests on privity of contract and not on privity of estate (n). A covenant to build upon land charged with a rent and to keep the buildings in repair does not run with the rent or with the land (o).

Covenants running with incorporeal hereditaments.

A lessee or his assignee holding possession under an indenture of lease is estopped from denying that the lessor had an interest sufficient to grant the lease with a reversion to which the rent reserved is incident, and with which the covenants will run; and this reversion by estoppel is *primâ facie* assignable and carries with it the rent and covenants as against the lessee and his assignees (p). But the estoppel ceases in the case of the lessee or his assignee being evicted by a superior title; and it does not exclude the lessee from asserting that the lessor had a reversion in

Reversion by estoppel.

(e) *Stevens v. Copp* (1868), 38 L. J. Ex. 31; L. R. 1 Ex. 20.

(f) *Fyrgun v. Arthur* (1823), 1 L. J. O. S. K. B. 138; 1 B. & C. 410; *Easterby v. Simpson* (1830), 6 Bing. 641; *Ricketts v. Epfield (Churchwardens)* (1909), 78 L. J. C. 294; (1909) 1 Ch. 541.

(g) *Lord Collins, Dewar v. Goodman* (1908), 78 L. J. K. B. 209; (1909) A. C. 72.

(h) *Bully v. Wells* (1769), 3 Wils. 25; *Wilmot*, 341.

(i) *Martyn v. Williams* (1837), 26 L. J. Ex. 117; 1 H. & N. 817.

(k) *N. F. Ry. v. Hastings* (1900), 69 L. J. C. 516; (1900) A. C. 260.

(l) *Hooper v. Clark* (1866), 36 L. J. Q. B. 79; L. R. 2 Q. B. 200.

(m) *Holt, C. J., Brewster v. Kitchen* (1697), 1 *Id.* Raym. 317; 12 Mod. 166; *Alden v. Bryan* (1826), 4 L. J. O. S. K. B. 210; 5 B. & C. 512; *Williams v. Haywood* (1859), 28 L. J. Q. B. 374; 1 E. & E. 1040.

(n) *Marle v. Fluke* (1700), 3 Salk. 118.

(o) *Milnes v. Branch* (1816), 5 M. & S. 411; *Haywood v. Brunswick Perm. Ry. Soc.* (1881), 51 L. J. Q. B. 73; 8 Q. B. D. 403.

(p) *Cuthbertson v. Irvings* (1860), 29 L. J. Ex. 495; 6 H. & N. 135.

PART VI.

Estoppel fed
by interest.Reversion
from year
to year.Covenants in
lease of
personal
chattels.

fact which has determined; as that the lessor had an estate tail, or an estate for life only, which ceased upon his death, or an estate for years which expired by lapse of time (*q*). Accordingly where a mortgagor in possession, having only the equity of redemption, leases by deed as if he was the legal owner, the lease operates by estoppel; and the reversion by estoppel is assignable, with the benefit and burthen of the covenants running with the land (*r*). But if it appears in the terms of the lease that the lessor is a mortgagor with no legal title, there is no estoppel; and the covenants are merely personal covenants which are not assignable (*s*). If a lessor executes a lease, having at the time no interest in the land, the lease operates by estoppel only; but if he afterwards acquires a sufficient interest, the estoppel is said to be fed by the interest; that is to say, the lease takes the same legal effect, and the covenants run with the land and with the reversion in the same manner, as if the lessor had the interest at the time of making the lease (*t*).

The interest of a tenant from year to year is regarded as an interest for a year with a growing interest during every year thereafter, springing out of the original contract and parcel of it, though defeasible by notice to quit from the superior landlord; accordingly, a tenant from year to year has a reversion where he demises for a term of years, and this reversion, whilst it continues, is assignable and carries the covenants of the lease to the assignee (*u*).—But if a lessor, having only a term of years, purports to grant a lease for a longer term, it operates as an assignment of his whole interest and not as a lease; a rent reserved in such demise is a rent-charge which is assignable; and the assignee may sue upon the reservation without attornment of the tenant, but not upon the personal covenant to pay the rent, which is not assignable (*x*).

A covenant cannot be made to run with chattels personal *y*.
“If a man lease sheep, or other stock, or any other personal goods

(*q*) *Andrew v. Pearce* (1805), 1 B. & P. N. R. 158; *Weld v. Barter* (1856), 26 L. J. Ex. 112; 1 H. & N. 568.

(*r*) *Cuthbertson v. Irving* (1860), 29 L. J. Ex. 495; 6 H. & N. 135.

(*s*) *Pargeter v. Harris* (1845), 15 L. J. Q. B. 113; 7 Q. B. 768.

(*t*) *Sturgeon v. Wingfield* (1816), 15 L. J. Ex. 212; 15 M. & W. 224. See *Gen. Finance Co. v. Liberator Perm. Bg. Soc.* (1878), 10 Ch. D. 17.

(*u*) *Orley v. James* (1844), 13 L. J. Ex. 258; 13 M. & W. 209. See *Bacon v. Anderson*, (1891) 1 Q. B. 164.

(*x*) See *Brewster v. Kitchen* (1697), 1 Id. Raym. 317; 12 Mod. 166; *Wallaston v. Hakerell* (1841), 10 L. J. C. P. 303; 3 Man. & G. 297; *Williams v. Hayward* (1859), 28 L. J. Q. B. 374; 1 E. & E. 1640.

(*y*) *McGruther v. Pitcher* (1904), 73 L. J. C. 653; (1904) 2 Ch. 306.

for any time, and the lessee covenant for him and his assigns at the end of the time to deliver the like cattle or such price for them, and the lessee assign the sheep over, this covenant shall not bind the assignee, for it is but a personal covenant and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion" (z). So a covenant in a farming lease against selling hay, straw and other produce off the land does not run with such things against a buyer at common law; but it is protected by statute (a). And a covenant in the lease of a factory, including movable articles and machinery, that if articles of the same kind left at the end of the term should exceed a certain value the lessor should pay the excess, was held not to run with the reversion; and therefore the executor of the lessor could not be charged as assignee of the reversion, but only as executor to the extent of the assets (b).

The "assignee" of a term, who becomes entitled or chargeable upon covenants running with the land, includes "the assignee of the assignee, the executor of the assignee, the assignee of the executor of the assignee"; and the tenant by *elegit* of a term, until his title as tenant by *elegit* is displaced, and the purchaser of a lease under a sale in execution are such assignees though they come to the term by act of law (c). And where lessee for a term of years underlets or grants a lease for the whole term or for a longer term, it operates as an assignment, and his grantee or lessee may be charged as assignee of the original term, the excess granted beyond that term being void (d). An assignee becomes liable whether he has taken possession of the land, or has not done so (e).—An underlessee for a shorter term, leaving a reversion in his lessor, or a lessee for a term granted by a tenant from year to year, is not such assignee, because he does not take the whole estate to which the covenants are annexed (f); but an underlease for a term of years, however long, granted by a tenant for life or

Assignee of term.

Underlessee.

z) *Spencer's case* (1584), 5 Co. 16 b; 1 Sm. L. C. 52.

(a) See *ante*, p. 897.

b) *Gorton v. Gregory* (1862), 31 L. J. Q. B. 302; 3 B. & S. 00.

c) *Spencer's case* (1584), 5 Co. 17; 1 Sm. L. C. 52; *John v. Pink* (1899), 69 L. J. C. 98; (1900) 1 Ch. 296.

d) *Wollaston v. Hakewill* (1841), 10 L. J. C. P. 503; 3 Man. & G. 297; *Beardman v. Wilson* (1868), 38 L. J.

C. P. 91; L. R. 4 C. P. 57.

(e) *Williams v. Bosanquet* (1819), 1 Br. & B. 238.

(f) *Holford v. Hatch* (1779), 1 Dougl. 183; *Ozley v. James* (1844), 13 L. J. Ex. 356; 13 M. & W. 209. See *Bryant v. Hancock* (1898), 67 L. J. Q. B. 507; (1898) 1 Q. B. 716; *affd. on other grounds* (1899), 68 L. J. Q. B. 507; (1899) A. C. 442.

PART VI.
Mortgagee.

lives, is not deemed in law to be co-extensive with the freehold estate of the grantor (*g*).—The mortgagee by assignment of a term, though subject to an equity of redemption and not in possession, takes the whole legal interest and is liable as assignee to the covenants in the lease (*h*). But a mortgagee by deposit of a lease is not an assignee at law, nor liable as such in equity (*i*); unless there is an agreement to execute an assignment of the term (*k*). And a person coming into the land by a superior title takes it discharged of all covenants running with it under the former title: as in the case of land taken by a railway company under their statutory powers (*l*). An assignment operates presumptively to pass the interest to the assignee and render him liable to the covenants running with it, without any act of acceptance on his part: but subject to a right of disclaimer (*m*). The same rule applies to the statutory assignment in bankruptcy, but the right to disclaim only applies to onerous property and can be exercised only by leave of the court (*n*).

Disclaimer of assignee.

Executor as assignee.

The position of an executor or administrator, in respect of land of which the deceased was a lessee, is peculiar. If in an action for the rent, it is sought to charge him personally as assignee of the term, and as such liable *de bonis propriis*, he is not liable to pay rent in excess of the real value of the property demised (*o*); and an administrator *ad colligenda* is under a similar liability (*p*). If he is sued in his representative capacity his liability is fixed by reference to the rent reserved, but execution must be limited to the amount of the estate of the deceased (*q*). In the case of a tenancy from year to year, the continued possession of the per-

(*g*) *Barby v. Earl v. Taylor* (1801), 1 Eas., 592.

(*h*) *Williams v. Bosanquet* (1819), 1 Br. & B. 338.

(*i*) *Moore v. Greg* (1848), 18 L. J. C. 15; 2 Ph. 717; *Coe v. Bishop* (1857), 26 L. J. C. 389; 8 De B. M. & G. 305.

(*k*) See *Walsh v. Lonsdale* (1882), 52 L. J. C. 2; 21 Ch. D. 9; *Zumbler v. Abrahams* (1903), 72 L. J. K. B. 793; (1903) 1 K. B. 577.

(*l*) *Body v. De Crespigny* (1868), 38 L. J. Q. B. 98; L. R. 1 Q. B. 180. See *Tredyng Union v. Danton* (1891), 61 L. J. C. 82; (1891) 3 Ch. 265.

(*m*) *Williams v. Bosanquet* (1819), 1 Br. & B. 338; *White v. Hunt* (1870), 40 L. J. Ex. 23; L. R. 6 Ex. 52; *Stein v. Pope* (1902), 71 L. J. K. B. 322; (1902) 1 K. B. 595.

(*n*) *Titterton v. Cooper* (1882), 51 L. J. Q. B. 472; 9 Q. B. D. 473; *Ex p. Oph. Rev.* (1889), 59 L. J. Q. B. 16; 21 Q. B. D. 65. See *Ex p. Day* (1906), 75 L. J. Q. B. 595; (1906) 2 K. B. 68; *post*, pp. 915, 946.

(*o*) *Robery v. Stevens* 1852, 2 L. J. K. B. 16; 4 B. & Ad. 211; *Hornaby v. Wilson* (1849), 9 L. J. Q. B. 72; 11 A. & E. 615; *Hopwood v. Whaley* 1848, 18 L. J. C. P. 13; 6 C. B. 711; *Re Bowes* (1887), 57 L. J. C. 455; 7 Ch. D. 128.

(*p*) *Whithead v. Palmer* 1907, 77 L. J. K. B. 60; (1908) 1 K. B. 151.

(*q*) *Body v. Hargrave* (1600), Cro. El. 711; *Wigley v. Ashton* 1819, 3 B. & Ald. 161. See *Gordon v. Gillingham* 1862, 31 L. J. Q. B. 302; 2 B. & S. 90.

sonal representative accompanied by payment of rent is evidence of a new tenancy between him and the landlord, upon which he is liable personally (*r*). It is the duty of the personal representative to relieve the estate of the deceased from liability for onerous leases, by assigning to a third party if necessary, and if he is guilty of negligence in this respect he may become liable to indemnify the estate of the deceased against the loss incurred (*s*). But the personal representative is liable *de bonis propriis* as assignee upon the other covenants running with the land, as a covenant to repair (*t*). So an executor *de son tort* by taking possession becomes chargeable with the covenants of the lease as assignee; and he may assign over to another (*u*). An executor cannot in general waive the term without renouncing the executorship altogether (*x*); but where the land is of less value than the rent, and there are no other assets, he may waive the lease altogether by notice to the landlord to that effect (*y*). And an executor is enabled by the Law of Property Amendment Act, 1859, ss. 27, 28, to discharge himself from all future claims under a lease by setting aside a sufficient sum to meet them, and assigning the lease to a purchaser and distributing the assets; but the statute reserves to the lessor or his assigns the right to follow the assets.

The grantee, or devisee, or heir of the reversioner, or, if the reversion is a term of years, the executor or legatee, are assignees within the statute 32 Hen. 8, c. 34, and as such become entitled to and chargeable upon the covenants annexed to the reversion for breaches after the assignment (*z*). A covenant to pay rent reserved during the term passes to the heir or devisee of the lessor as an incident of the reversion in fee, though the rent is not extended in terms to his heirs and assigns *u*. The grantee of a particular estate, as for life or for a term of years, in a reversion in

Assignee of reversion.

(*r*) *Buckworth v. Simpson* (1835), 4 L. J. Ex. 104; 1 Cr. M. & R. 834.

(*s*) *Rosley v. Adams* 1839, 9 L. J. C. 34; 4 M. & Cr. 534.

(*t*) *Tilney v. Morris* (1701), 1 Ld. Raym. 553; *Trimmer v. Morrison* (1834), 3 L. J. C. P. 260; 1 Bing. N. C. 89; *Shap v. Newman* (1862), 12 C. B. N. S. 116.

(*u*) *Paul v. Simpson* (1846), 15 L. J. Q. B. 382; 9 Q. B. 365; *Walliams v. Holes* (1874), 43 L. J. C. P. 80; L. R. 9 C. P. 177.

Per cur. *Rubery v. Stevens* (1832), 2 L. J. K. B. 46; 4 B. & Ad. 214; *L. Lord and Follerton* 1895, 65 L. J. C. 184; 1896 1 Ch. 228.

(*y*) *Per cur.* *Hornidge v. Wilson* (1840), 9 L. J. Q. B. 72; 11 A. & E. 655.

(*z*) *Durley v. Costance* (1790), 4 T. R. 75; *Johnson v. St. Peter (Churchwardens)* (1836), 5 L. J. K. B. 116; 4 A. & E. 620. See *Rand v. Goddwin* 1825, 3 L. J. O. S. K. B. 128.

(*a*) *Scherevell v. Froggatt* (1671), 2 Wms. Saund. 751.

PART VI.

Mortgagee of
reversion.Reversioner
of leases
under powers.

fee, is an assignee within the statute 32 Hen. 8, c. 34, and is entitled to the benefit of covenants and conditions of the lease (b).

—The mortgagee of the reversion subject to an existing lease becomes entitled to all the remedies upon the lease and covenants, as being assignee of the legal reversion. But where a mortgagor remaining in possession leases, the mortgagee may in cases not falling within sect. 18 of the Conveyancing and Law of Property Act, 1881, treat the lessee as a trespasser; or by accepting rent may acknowledge him as tenant to himself; but he is not assignee of the reversion or entitled to the remedies of the lease (c). If the mortgagor and mortgagee join in leasing and the covenants are made with the mortgagor only, the mortgagee or his assignees are not entitled to sue upon the covenants, to which they are strangers (d). And where the mortgagee is entitled to the covenants as assignee of the reversion, the mortgagor retains sufficient interest in the equity of redemption to entitle him to restrain the lessee from doing any acts in contravention of the covenants to the injury of the reversion (e).—Where a lease is made under a power, as by the tenant for life in a settlement, the reversion of the lease presumptively follows the limitations of the settlement; and upon the death of the tenant for life pending the lease the remainderman is an assignee within the statute 32 Hen. 8, c. 34, and succeeds to the benefit and the burden of the covenants (f). If the lease is not in accordance with the power, it may be valid as between the parties, either as taking effect out of the interest of the lessor or by way of estoppel against the lessee; but it is not binding for or against persons claiming under the settlement (g). Upon the death of the lessor it is absolutely void, and a subsequent assignment of the term conveys no interest, nor any claim upon the covenants against the executor of the lessor (h). The lessee, or his assignee by an assignment made before the death of the lessor,

(b) *Allot v. Hemmings* (1616), Bulst. 28; *Wright v. Bayroughs* (1846), 16 L. J. C. P. 6; 3 C. B. 685. See *Tuite v. Gosling* (1879), 48 L. J. C. 397; 11 Ch. D. 273.

(c) *Kerch v. Hall* (1778), Dougl. 21; 1 Sm. L. C. 494; *Thunder v. Belcher* (1803), 3 East, 449; *Rogers v. Humphreys* (1835), 5 L. J. K. B. 65; 4 A. & E. 299.

(d) *Webb v. Russell* (1789), 3 T. R. 393.

(e) *Fairclough v. Marshall* (1878), 48 L. J. Ex. 146; 4 Ex. D. 37.

(f) *Isherwood v. Oldknow* (1815), 3 M. & S. 382; *Rogers v. Humphreys* (1835), 5 L. J. K. B. 65; 4 A. & E. 299; *Bringle v. Goodson* (1838), 8 L. J. C. P. 116; 4 Bing. N. C. 726; *Greenaway v. Hart* (1854), 23 L. J. C. P. 115; 11 C. B. 340.

(g) *Yellowly v. Gower* (1855), 24 L. J. Ex. 289; 11 Ex. 274.

(h) *Andrew v. Pearce* (1805), 1 B. & P. N. R. 158. See *Bangor (Bp.) v. Parry* (1891), 60 L. J. Q. B. 646; 1891 2 Q. B. 277.

can charge the executor upon the express covenants of the lease; as upon the covenant for quiet enjoyment, under which he can recover damages for loss of the whole term (*i*); but not upon the covenants merely implied in law, because such covenants are implied only during the continuance of the lessor's interest (*k*).—

CHAP. III.

At common law where a reversionary estate to which covenants were annexed became merged in the ulterior reversion, the covenants were extinguished together with the estate (*l*). But by the Real Property Act, 1845, s. 9, "when the reversion expectant on a lease shall be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease" (*m*).

Merger of reversion.

The grantee of the reversion in part of demised premises is an assignee within the statute 32 Hen. 8 of covenants apportionable to the part granted; as the covenant to pay rent (*n*), and the covenant to repair (*o*). And if the lessor devises the reversion to two or more as tenants in common, each may maintain an action for damages to his share of the entire reversion, without joining his co-tenants as plaintiffs (*p*). At common law he could not take the benefit of conditions of entry and other conditions, because they were incident to the entire reversion only, and destroyed by the severance (*q*). It is now expressly provided by the Conveyancing and Law of Property Act, 1881, s. 10, that rent reserved by a lease and the benefit of every covenant having reference to the subject-matter thereof and every condition of re-entry or other condition "shall be annexed and shall go with the reversionary estate in the land or in any part thereof, notwithstanding severance

Severance of reversion.

(*i*) *Williams v. Burrell* (1845), 14 L. J. C. P. 98; 1 C. B. 402.

(*k*) *Adams v. Gibney* (1830), 8 L. J. O. S. C. P. 243; 6 Bing. 656; *Penfold v. Abbott* (1862), 32 L. J. Q. B. 67.

(*l*) *Webb v. Russell* (1789), 3 T. R. 393. See *Burton v. Barclay* (1835), 9 L. J. O. S. C. P. 231; 7 Bing. 745.

(*m*) *S. of England Dairies v. Baker* (1906), 76 L. J. C. 78; (1906) 2 Ch. 631.

(*n*) *Stevenson v. Lambard* (1802), 2

East, 575; *Swansen (Corp.) v. Thomas* (1883), 52 L. J. Q. B. 340; 10 Q. B. D. 48. See *Roberts v. Snell* (1840), 1 Man. & G. 577.

(*o*) *Trynam v. Pickard* (1818), 2 B. & Ald. 105.

(*p*) *Roberts v. Holland* (1893), 62 L. J. Q. B. 621; (1893) 1 Q. B. 665.

(*q*) *Knight's case* (1588), 5 Co. 55 b; *Holroyd, J., Trynam v. Pickard* (1818), 2 B. & Ald. 105.

PART VI. of that reversionary interest" (r). And by sect. 11, it is provided to the same effect as to the obligation of a covenant by a lessor with reference to the subject-matter of the lease (s).—Where tenants in common of land in undivided shares join in demising the entirety, the covenants made in terms with all the lessors run with the entire reversion and not with the separate shares; and all persons interested in the reversion are necessary parties in an action for a breach (t). If an undivided share in the reversion becomes merged in the possession, the covenants and conditions of the lease run with the residuo of the reversion, and the damages are apportioned to the remaining interest therein (u).

Severance of
the demise.

The assignee of the term in part of the demised premises takes the benefit and the burden of the covenants running with the land, so far as they relate to the part assigned: he is liable to that extent upon the covenant for rent (x); and upon a covenant running with the reversion (y); and to the same extent he is entitled to sue the lessor or the assignee of the reversion for the breach of a covenant to find materials for the repair (z). An assignment of the term in the demised premises to tenants in common in undivided shares leaves the tenement and the rent and services entire in relation to the reversion (a); and each tenant being possessed of the whole may be sued separately upon covenants running with the land, as a covenant to repair: subject formerly to a plea in abatement and now to the joinder of the co-tenants under an order of the court (b). Where an undivided share became merged in the reversion, it was held that the liability on the covenant to repair was not apportionable, but the damages were assessed proportionately to the reversion which remained (c). Where a lease was made to three persons in joint tenancy and the covenants were made by them jointly and severally, it was held that an assignee of two of the lessees was

(r) See *Turner v. Walsh* (1909), 78 L. J. K. B. 753; (1909) 2 K. B. 484; *Rickett v. Green* (1909), 79 L. J. K. B. 197; (1910) 1 K. B. 258.

(s) See *Davis v. Town Prop. Corp.* (1903), 72 L. J. C. 389; (1903) 1 Ch. 797.

(t) *Foley v. Addenbrooke* (1843), 12 L. J. Q. B. 163; 4 Q. B. 197; *Thompson v. Hakevill* (1865), 35 L. J. C. P. 18; 19 C. B. N. S. 713.

(u) *Badley v. Fignis* (1854), 23 L. J. Q. B. 377; 4 E. & B. 71.

(x) *Stevenson v. Lambard* (1802), 2

East, 575; *Holliston v. Hakevill* (1811), 10 L. J. C. P. 303; 3 Man. & G. 297.

(y) *Coughlin v. King* (1631), Cro. Car. 222; *White v. Southend Hotel* (1897), 66 L. J. C. 387; (1897) 1 Ch. 767.

(z) *Palmer v. Edwards* 1783, 1 Dougl. 187, n.

(a) *Perour, Holloway v. Berkeley* (1826), 5 L. J. O. S. K. B. 1; 5 B. & C. 10.

(b) *Merceron v. Doiron* (1826), 4 L. J. O. S. K. B. 211; 5 B. & C. 479. See Ords. XVI. r. 11, XXI. r. 20.

(c) *Badley v. Fignis* (1854), 23 L. J. Q. B. 377; 4 E. & B. 71.

liable upon the covenant to repair for the whole amount of damages (*d*). CHAP. III.

The personal liability of the original lessee on the express covenants in the lease remains to him after his assignment of the lease (*e*); and upon his death the liability devolves upon his executor (*f*). But the liability of the lessee in debt and on covenants implied in law, which is founded upon privity of estate with the lessor, ceases upon the assignment (*g*); and conditions affecting the occupying tenant no longer apply to the lessee, as a condition of re-entry upon the bankruptcy of the lessee or his assigns (*h*). In like manner, in a lease for years under seal, a lessor who has assigned his reversion remains liable upon his express covenant, notwithstanding it is one that runs with the land (*i*); and upon covenants founded upon privity of estate the liability ceases upon the destruction of the reversion (*k*). A lessor who assigns the reversion cannot sue upon the covenants that run with the reversion, for any breaches occurring after the assignment (*l*). But he retains the right to sue for breaches committed before the assignment (*m*); and the right upon the covenants which do not run with the reversion (*n*). The lessor might sue upon a parol agreement of tenancy after assignment; because the contracts connected with a tenancy not under seal did not pass with the reversion (*o*). The assignee of the reversion cannot sue for breaches of covenant committed before the assignment to him (*p*).

Liability of
lessee after
assignment.

Rights of
lessor after
assignment
of the
reversion.

The liability of the assignee of a lease on covenants running with the land continues so long as he remains assignee, and ceases upon his assignment of the lease to another; and he may assign to an insolvent assignee for the mere purpose of getting rid of his liability (*q*). And an assignment is valid, though it is a breach

Continuance
of liability of
assignee of
term.

(*d*) *Norval v. Pascoe* (1861), 31 L. J. C. 82.

(*e*) *Kenyon, C. J., Anriol v. Mills* (1790), 4 T. R. 91; *Ington v. Morgan* (1888), 58 L. J. Q. B. 139; 22 Q. B. D. 71.

(*f*) *Swansea (Corps.) v. Thomas* (1883), 52 L. J. Q. B. 310; 10 Q. B. D. 18.

(*g*) *Walker's case* (1597), 3 Co. 22 a; *Wadhams v. Marlowe* (1785), 8 East, 314, n. See *Pitman v. Woodbury* (1848), 3 Ex. 4.

(*h*) *Smith v. Gronow* (1891), 60 L. J. Q. B. 776; (1891) 2 Q. B. 391.

(*i*) *Stuart v. Jay* (1903), 73 L. J. K. B. 97; (1904) 1 K. B. 362.

(*k*) *Andrew v. Pattee* 1803, 1 Bos. & P. N. R. 158.

(*l*) *Green v. James* (1840), 10 L. J. Ex. 73; 6 M. & W. 656. See *Thursha v. Platt* (1869), 1 Wms. Saund. 277.

(*m*) *Middletons v. Lovelace* (1695), 12 Mod. 45; Carth. 289.

(*n*) *Stokes v. Russell* (1791), 3 T. R. 678; *Cankam v. Rust* (1818), 8 Taunt. 227.

(*o*) *Bickford v. Parson* (1818), 17 L. J. C. P. 192; 5 C. B. 920.

(*p*) *Johann v. St. Peter (Churchwardens)* (1836), 5 L. J. K. B. 116; 4 A. & E. 520.

(*q*) *Taylor v. Shaw* 1797, 1 B. & P.

PART VI. of a covenant against assignment, for which the assignor may be liable in damages for the loss to the lessor of the personal security of his tenant (*r*). But the liability of an assignee for breaches committed during his tenancy remains after he has assigned away the lease (*s*). An assignee is not liable for breaches of covenant committed before the assignment to him (*t*); unless the breach is continuing, as a breach of covenant to keep the demised premises in repair, in respect of defects continuing after the assignment (*u*); and where there is a continuing breach of covenant for title the assignee for the time being may sue for the damages accruing to himself (*x*).

Indemnity of
assignor by
assignee.

The assignee of a lease impliedly indemnifies his assignor against breaches of the covenants and conditions of the lease, in the absence of express agreement to the contrary (*y*). And the assignee for the time being during his tenancy impliedly indemnifies the original lessee against breaches of the covenants in the lease which run with the land; and this indemnity is independent of the covenants and stipulations made between him and his immediate assignor (*z*). These implied indemnities continue only so long as the assignee is in possession of the lease, and cease upon his assigning it to another; unless he has given an express indemnity for the whole term (*a*). An assignor is not entitled to a judgment against the assignee containing a general declaration of the assignor's right to an indemnity, with liberty to apply from time to time in case of future breaches, but is limited to an account and payment of the amount due in respect of actual breaches (*b*).—An underlease, subject to the terms of the original lease, operates as a contract of indemnity to the lessor; upon which he may recover against his underlessee all the costs of reasonably and properly defending an action by his lessor upon the covenants (*c*). But if the

21: *Paul v. Nurse* (1828), 7 L. J. O. S. K. B. 12; 8 B. & C. 486; *Hopkinson v. Loeving* (1883), 52 L. J. Q. B. 391; 11 Q. B. D. 92.

(*r*) See *ante*, pp. 792, 896.

(*s*) *Harley v. King* (1835), 4 L. J. Ex. 144; 2 Cr. M. & R. 18; *Stein v. Pope* (1902), 71 L. J. K. B. 323; (1902) 1 K. B. 595.

(*t*) *Coward v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153.

(*u*) *Coward v. Gregory* (1866), 36 L. J. C. P. 1; L. R. 2 C. P. 153.

(*x*) *Kingdon v. Nettle* (1815), 4 M. & S. 53; *King v. Jones* (1814), 5 Taunt. 418; *affirmed nom. Jones v. King* (1815),

4 M. & S. 188; *Spoor v. Green* (1874), 43 L. J. Ex. 57; L. R. 9 Ex. 99.

(*y*) *Burnett v. Lynch* (1826), 4 L. J. O. S. K. B. 274; 5 B. & C. 583.

(*z*) *Moule v. Garrett* (1872), 41 L. J. Ex. 62; L. R. 7 Ex. 101.

(*a*) *Wooleridge v. Steward* (1834), 3 L. J. Ex. 360; 1 Cr. & M. 644; *Gough v. Chatterback* (1899), 78 L. J. Q. B. 808; (1899) 2 Q. B. 148.

(*b*) *Lloyd v. Dimmock* (1878), 47 L. J. 398; 7 Ch. D. 398.

(*c*) *Hornby v. Cardwell* (1881), 51 L. J. Q. B. 89; 8 Q. B. D. 329. See *ante*, p. 794.

underlease is not subject to the terms of the original lease, there is no implied indemnity, and the costs of an action by the lessor are not recoverable (*d*).

CHAP. III.

If a covenant runs with the land at law, it may be enforced specifically, in the case of lands held in fee, in favour of the covenantee and his representatives or assigns, but not so as to fix the burden upon the land of the covenantor (*e*); and if the question arises between landlord and tenant, in respect of land demised for a term, to the extent that the obligation would have been effective in common law courts, the equitable remedy by specific performance is available, and the rule against perpetuities is out of the question (*f*). If a covenant does not run with the land at law, a further question arises whether it is in fact assignable (*g*); as if it be assignable, an assignment, express or implied, is necessary to transfer the benefit of it (*h*).—But where land is sold in lots and with similar covenants by each purchaser restrictive of building or of otherwise using the land, the construction of the contract may require that there should be imputed to the parties an intention that the covenants should be for the mutual benefit of all, and each purchaser severally takes the benefit of the covenants; and in such case it is not material whether the lots are sold and the covenants entered into contemporaneously or at different times, because each purchaser is induced to buy in faith that the covenants will be observed; but “it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others” (*i*). And in such a transaction there is an implied covenant by the vendor with every purchaser not to sell any of the

Assignment in equity of the benefit of covenants.

Land sold in lots with covenants.

(*d*) *Pendley v. Watts* (1841), 10 L. J. Ex. 229; 7 M. & W. 601; *Walker v. Hutton* (1842), 11 L. J. Ex. 361; 10 M. & W. 249. See *Conquest v. Ebbetts* (1896), 65 L. J. Ch. 808; (1896) A. C. 490.

(*e*) *L. & S. W. Ry. v. Gomm* (1882), 51 L. J. C. 530; 20 Ch. D. 562; *S. E. Ry. v. Associated Portland Cement Manuf.* (1909), 79 L. J. C. 150; (1910) 1 Ch. 12.

(*f*) *Bridges v. Hitchcock* (1715), 5 Bro. P. C. 6; *Shelburne (Earl) v. Bid-dulph* (1718), 6 Bro. P. C. 356; *Nicholson v. Smith* (1883), 52 L. J. C. 191; 22 Ch. D. 640.

(*g*) *Wilson v. Hart* (1866), 35 L. J. C. 569; L. R. 1 Ch. 463; *Gaskin v. Bulls* (1879), 13 Ch. D. 324; *Groves v. Loomes* (1885), 55 L. J. C. 52; *Re Fawcett and*

Holmes (1889), 58 L. J. C. 763; 42 Ch. D. 159.

(*h*) *Keates v. Lyon* (1869), 38 L. J. C. 357; L. R. 4 Ch. 218; *Renals v. Coughlin* (1879), 48 L. J. C. 830; 11 Ch. D. 866; *Holloway Bros. v. Hill* (1902), 71 L. J. C. 818; (1902) 2 Ch. 612; *Oshorne v. Bradley* (1903), 73 L. J. C. 49; (1903) 2 Ch. 446.

(*i*) *Esher, M. R., Nottingham Brick Co. v. Butler* (1886), 55 L. J. Q. B. 280; 16 Q. B. D. 785; *Rowell v. Satchell* (1903), 73 L. J. C. 20; (1903) 2 Ch. 212; *Elliston v. Reacher* (1908), 78 L. J. C. 87; (1908) 2 Ch. 665; *Roid v. Bickerstaff* (1909), 78 L. J. C. 753; (1909) 2 Ch. 305. See *Willé v. St. John* (1910), 79 L. J. C. 239; (1910) 1 Ch. 385.

PART VI.

Burden of covenant.

Purchaser with and without notice of covenants.

lots without the restrictive covenants, and not to release the covenants to any of the purchasers (*k*).

The burden of a covenant which does not run with the land at common law, may be extended in equity so as to bind a purchaser of land with notice of the covenant, and he will be restrained from using the land in a manner inconsistent with the covenant. In such case "the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor with notice of which he purchased;" and "that the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased" (*l*). The principle applies to persons taking the land for any interest: as a tenant for years, or from year to year (*m*); or a mere occupier as tenant at will, or as *cestui que trust*, or by permission of the owner; who take possession with notice of the restrictive covenant (*n*); also to persons claiming to sell the land to satisfy a charge upon it (*o*). But it does not apply to a purchaser of land under compulsory powers for public purposes (*p*). A person acquiring a title by adverse possession is bound by restrictive covenants entered into prior to his taking possession (*q*). A restrictive covenant is a valid objection to the title, and entitles a purchaser who has contracted without notice to rescind the contract (*r*). A purchaser who contracts subject to restrictive covenants, or with notice of such covenants, cannot have specific performance without indemnifying the vendor by executing a conveyance with like

(*k*) *Spicer v. Martin* (1888), 58 L. J. C. 309; 14 Ap. Ca. 12; *Mackenzie v. Childers* (1889), 59 L. J. C. 188; 43 Ch. D. 265.

(*l*) *Tulk v. Moxhay* (1848), 18 L. J. C. 83; 2 Phill. 774; *Cole v. Sims* (1854), 23 L. J. C. 258; 5 De G. M. & G. 1; *Western v. McHermott* (1866), 36 L. J. C. 76; L. R. 2 Ch. 72. See *Formby v. Barker* (1903), 72 L. J. C. 716; (1903) 2 Ch. 539.

(*m*) *Wilson v. Hart* (1866), 35 L. J. C. 569; L. R. 1 Ch. 463; *Hallway Bros. v. Hill* (1902), 71 L. J. C. 818; (1902) 2 Ch. 612.

(*n*) *Mauder v. Fatcke*, (1891) 2 Ch. 554.

(*o*) *Tendring Union v. Docton* (1891), 61 L. J. C. 82; (1891) 3 Ch. 265.

(*p*) *Newington Loc. Bd. v. Cottingham Loc. Bd.* (1879), 48 L. J. C. 226; 12 Ch. D. 731; *Manchester, S. & L. Ry. v. Anderson* (1898), 67 L. J. C. 568; 1898) 2 Ch. 394.

(*q*) *Re Nisbet and Potts* (1905), 74 L. J. C. 310; (1905) 1 Ch. 391.

(*r*) *Re Cox and Neve* (1891), 2 Ch. 109; *Bishop v. Taylor* (1891), 60 L. J. Q. B. 556; and see *ante*, p. 611.

covenants, or indemnifying him against the non-performance thereof (*s*); and though he had no notice at the time of contracting, he must execute a conveyance with like covenants, unless he rescinds the contract altogether (*t*). A purchaser with notice is not liable to his vendor upon the covenants without an express stipulation in the conveyance; the liability by reason of notice extending only to the covenantees and their successors who take the benefit of the covenants (*u*). And the liability by reason of notice continues only during his possession of the land to which the covenants relate, and ceases upon a transfer of the possession to another (*x*). A purchaser who, at the time of paying his purchase-money and of taking his conveyance (*y*), had no notice of restrictive covenants is not affected by them, and can convey the land discharged from them even to a purchaser with notice (*z*).

Upon the above principle a purchaser of land may become bound by the restrictive covenants of a former owner: that the land shall not be built over (*a*); or that no building shall be erected beyond a certain line of frontage (*b*); or no building except houses of a certain kind (*c*); or preventing an invasion of privacy (*d*). So a purchaser may become bound by a covenant against carrying on the sale of beer or spirituous liquors (*e*). But a purchaser of land is affected by notice of covenants only so far as they are negative and restrictive of the use of the land, and can be enforced by injunction restraining the use of the land in the manner covenanted against; he is not affected by affirmative covenants which could only be enforced by specific performance or damages against the covenantor: as a covenant to spend money on build-

Restrictive
covenants.

Affirmative
covenants.

(*) *Morhay v. Underwick* (1817), 1 De G. & Sm. 708; *Pollock v. Rabbits* (1882), 21 Ch. D. 166; *Re Poole and Clarke* (1904), 73 L. J. C. 612; (1904) 2 Ch. 173. See *Harris v. Boots, Ltd.* (1901), 73 L. J. C. 708; (1904) 2 Ch. 376.

(t) *Lukey v. Higgs* (1855), 24 L. J. C. 495.

(u) *King v. Dickson* (1889), 58 L. J. C. 464; 40 Ch. D. 596.

(x) *Hall v. Ewin* (1887), 57 L. J. C. 95; 17 Ch. D. 74. See *Clements v. Welles* (1866), 35 L. J. C. 265; L. R. 1 Eq. 200; *Ashby v. Wilson* (1899), 69 L. J. C. 47; (1900) 1 Ch. 66.

(y) *Jackson v. Rowe* (1830), 9 L. J. O. S. K. B. 32; 4 Russ. 514.

(z) *Att.-Gen. v. Biphosphated Guano*

Co. (1879), 49 L. J. C. 68; 11 Ch. D. 327. See Leake, *Law of Land*, pp. 351 et seq.

(a) *Tulk v. Moshay* (1848), 18 L. J. C. 83; 2 Phil. 771; *McLean v. McKay* (1873), L. R. 5 P. C. 327.

(b) *Cole v. Sims* (1854), 23 L. J. C. 258; 5 De G. M. & G. 1; *Manners v. Johnson* (1876), 45 L. J. C. 404; 1 Ch. D. 673; *Gaskin v. Balls* (1879), 13 C. D. 324.

(c) *Palman v. Harland* (1881), 50 L. J. C. 642; 17 Ch. D. 353; *Rogers v. Hosegood* (1900), 69 L. J. C. 652; (1900) 2 Ch. 388.

(d) *Manners v. Johnson* (1876), 45 L. J. C. 404; 1 Ch. D. 673.

(e) *Nicoll v. Fenning* (1881), 57 L. J. C. 166; 19 Ch. D. 238.

PART VI. ings or repairs (*f*): a covenant to maintain and repair a road (*g*).

Constructive notice.

Constructive notice of a restrictive covenant is sufficient to affect the purchaser with liability. "A purchaser is bound to inquire into the title of his vendor, and will be affected with notice of what appears upon the title if he does not so inquire"; and this rule applies to a purchaser or mortgagee of freehold and leasehold estates, and to a lessee for a term of years, including a tenant from year to year (*h*). The equitable doctrine of constructive notice has been remodelled by sect. 3 of the Conveyancing Act, 1883, which is retrospective in operation, and is, so far as material, in the following terms: "(1) A purchaser shall not be prejudicially affected by notice of any instrument, act, or thing unless—(i) it is within his own knowledge, or would have come to his knowledge, if such enquiries and inspections had been made as ought reasonably to have been made by him, or (ii) if in the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent as such, if such enquiries and inspections had been made, as ought reasonably to have been made by the solicitor or other agent. (2) This section shall not exempt any purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision or restriction contained in any instrument under which his title is derived mediately or immediately; and such liability or obligation may be enforced in the same manner, and to the same extent, as if this section had not been enacted. (3) A purchaser shall not by reason of this section be affected by notice in any case where he would not have been affected if this section had not been enacted." And the statute incorporates sect. 2 of the Conveyancing and Law of Property Act, 1881, which defines the word "purchaser" as including "a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property." Construc-

(*f*) *Haywood v. Brunswick Pyrm. Bldg. Soc.* (1881), 51 L. J. Q. B. 73; 8 Q. B. D. 403.

(*g*) *Austerberry v. Oldham (Corp.)* (1886), 55 L. J. C. 633; 29 Ch. D. 750.

(*h*) *Turner, L. J., Wilson v. Hart* (1866), 35 L. J. C. 569; L. R. 1 Ch. 467; *English & Scottish Merc. Invt. Trust v. Brunton* (1892), 62 L. J. Q. B. 636; (1892) 2 Q. B. 700. See Leake, *Law of Land*, p. 355.

tive notice operates in favour of the persons entitled to the benefit of the covenant; though the conditions of the contract of sale exclude inquiry into the title as against the vendor, or limit the title to a period which does not contain the covenants (*i*); and though the vendor prevents inquiry by express representations that the title or a deed affecting the title contains no restrictive covenant (*k*); and though the Vendor and Purchaser Act, 1874, s. 2, excludes a contracting lessee or assignee of a term of years from calling for the title to the freehold without an express stipulation in the contract (*l*). A purchaser is not affected with notice of covenants in a collateral deed, which is not part of or referred to in the title (*m*). In the case of freehold lands a long and continuous user in a manner wholly inconsistent with the tenor and purpose of a restrictive covenant is tantamount to a release of the covenant (*n*). But in the case of land registered under the Land Transfer Act, 1875, building conditions entered on the register can only be modified or discharged by an order of the court (*o*).

(*i*) *Robson v. Flight* (1865), 31 L. J. C. 225; 4 De G. J. & S. 608; *Re Cox and Nerr*, (1891) 2 Ch. 109.

(*k*) *Putman v. Harland* (1881), 50 L. J. C. 642; 17 Ch. D. 353.

(*l*) *Putman v. Harland* (1881), 50 L. J. C. 612; 17 Ch. D. 353.

(*m*) *Carter v. Williams* (1870), 39 L. J.

C. 560; L. R. 9 Eq. 678; *English & Scot. Merc. Incl. Trust v. Bruntton* (1892), 62 L. J. Q. B. 136; (1892) 2 Q. B. 700.

(*n*) *Hepworth v. Pickles* (1899), 69 L. J. C. 55; (1900) 1 Ch. 108.

(*o*) See sect. 84; *Ground Rent Co. v. West* (1902), 71 L. J. C. 354; (1902) 1 Ch. 674.

CANADIAN NOTES.

Assignment.

In *Holcombe vs. Nixon*, 5 Grant's Ch., 278, 373, the owner of several steamers, carrying on business as a forwarder, sold one of them to another forwarding firm, and, upon the sale, covenanted that he would not, directly or indirectly, have any interest in any vessel navigating the St. Lawrence below Ogdensburg at any time thereafter. There was a similar covenant against selling other steamers for the purpose of such navigation. The owner afterwards transferred his business as forwarder and sold the steamers to the defendants, who had full knowledge of the covenant. It was held that the purchasers were bound by the covenant entered into by the original proprietors.

In *Grant vs. Johnson et al.*, 1 Oldright, 493 (N. S.), the plaintiff, by agreement under seal, contracted to serve the testator in the business of bookseller and stationer as he should direct for the term of three years only, two of which had expired at testator's death. It was also agreed that the testator should pay the plaintiff in consideration of such services a fixed yearly salary, but no mention was made in the agreement of personal representatives of either party nor any provision made therein in the case of the death of either party. It was held that the agreement was a mere personal contract, determinable by the death of either party.

CHAPTER IV.

ASSIGNMENT BY MARRIAGE.

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At common law marriage operated as an absolute gift to the husband of all chattels personal of the wife in possession in her own right; but as to choses in action, including rights of contract and for breaches of contract, the husband only took the right of reducing them into possession by recovering or receiving payment; and if not reduced into possession during the marriage, they remained the property of the wife if she survived the husband, but passed to her husband beneficially if he survived her (*a*). The same rule applied to choses in action accruing to the wife during marriage (*b*); but it did not apply to property held by the wife as trustee, in which the husband had no interest; though the wife could not sue alone as trustee without joining the husband (*c*).—Upon contracts with the wife before marriage the husband could only sue in right of his wife, joining her as co-plaintiff; upon contracts with her during marriage, he could sue alone or join her as co-plaintiff. The wife could sue alone upon contracts made to her before or during marriage, subject only to objection of the irregularity of procedure in non-joinder of the husband (*d*).

Rights of wife before marriage at common law.

Actions by wife.

(*a*) Co. Lit. 300 a, 351 b; *Partington v. Att.-Gen.* (1869), 38 L. J. Ex. 201; L. R. 4 H. L. 100; *Fleet v. Perrins* (1869), 38 L. J. Q. B. 257; L. R. 4 Q. B. 500.

(*b*) *Fleet v. Perrins* (1869), 38 L. J. Q. B. 257; L. R. 4 Q. B. 500; *Jones v. Cuthbertson* (1873), 42 L. J. Q. B. 221; L. R. 8 Q. B. 504.

(*c*) *Proctor v. Brotherton* (1851), 23 L. J. Ex. 116; 9 Ex. 486; *Kingsman v. Kingsman* (1880), 50 L. J. Q. B. 81, 5 Q. B. D. 152.

(*d*) See *Furwest v. Tremann* (1670), 2 Wms. Saund. 633, n. (x); *Morgan v. Painter* (1795), 6 T. R. 265; *Bendis v. Wakeman* (1843), 13 L. J. Ex. 15; 12 M. & W. 97.

PART VI.
 Separate
 rights under
 Married
 Women's
 Property Act.

Now by the Married Women's Property Act, 1882, s. 1, a married woman is made capable of acquiring, holding and disposing of any real or personal property as her separate property, without the intervention of any trustee. By sect. 2, every woman married after the 1st January, 1883, is entitled to have and to hold and to dispose of as her separate property all real and personal (e) property which shall belong to her at the time of marriage or shall be acquired after marriage. By sect. 5, every woman married before the Act is entitled to hold as her separate property all real and personal property which shall accrue to her after the commencement of the Act. By sect. 1 (2), a married woman is made capable of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant (f). And by sect. 12, every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole* (g).

Debts and
 liabilities of
 wife before
 marriage at
 common law.

Under
 Married
 Women's
 Property Act.

At common law the husband, who took all the personal property of the wife by marriage, became liable to be sued for the debts and liabilities of the wife contracted before the marriage, and whether the wife had in fact any property or not; but this liability of the husband continued only during the marriage and ceased upon his death, or upon the death of the wife (h).—Now by the Married Women's Property Act, 1882, s. 13, it is declared that a woman after her marriage shall continue to be liable, in respect and to the extent of her separate property, for all debts contracted and all contracts entered into by her before her marriage (including any sums for which she may be liable as a contributory under the Joint Stock Companies Acts (i)); and she may be sued for any such debt and for any liability in damages or otherwise under any such contract; and all sums recovered against her in respect thereof, or for any costs relating thereto, are payable out of her separate property; and as between her and her husband, unless

(e) See *Witherby v. Rackham* (1891), 60 L. J. C. 511.

(f) *Per cur.* *Butler v. Butler* (1885), 55 L. J. Q. B. 55; 14 Q. B. D. 837.

(g) *Winnell v. Leggatt* (1896), 65 L. J. C. 240; (1896) 1 Ch. 554.

(h) *Heard v. Stamford* (1745), 3 P. Wms. 409; *Bell v. Stocker* (1882), 52 L. J. Q. B. 49; 10 Q. B. D. 129.

(i) See *Ex p. Hatcher* (1879), 48 L. J. C. 723; 12 Ch. D. 264.

there be any contract between them to the contrary, her separate property is primarily liable for all such debts or contracts, and for all damages or costs recovered in respect thereof.

CHAP. IV.

By sect. 14, "a husband shall be liable for the debts of his wife contracted and for all contracts entered into and wrongs committed by her before marriage, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount or value of such property."

Liability of husband for debts of wife before marriage.

By sect. 15, "a husband and wife may be jointly sued in respect of any such debt or other liability contracted or incurred by the wife before marriage as aforesaid; and if in any such action it is not found that the husband is liable in respect of any property of the wife as aforesaid, he shall have judgment for his costs of defence whatever may be the result of the action against the wife; and if it appears that the husband is liable for the debt or damages recovered or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, the judgment shall be a separate judgment against the wife as to her separate property only."

Husband and wife sued jointly.

The husband and wife may be sued jointly under the above section, or they may be sued severally without joining the other as a party to the action (*k*). And it seems that the liability of the husband to the extent of property derived from the wife is absolute, not ceasing upon the death of either party (*l*). The husband may be charged in an action as *primâ facie* liable for the debt, leaving him as defendant to plead and prove the limitation of liability to the property derived from the wife (*m*). And in action against husband and wife jointly, the costs payable to the husband in respect of a successful defence may be added to the debt of the wife, and recovered against her separate estate (*n*). The action

Construction of Act.

(*k*) *Buck v. Pierce* (1889), 58 L. J. Q. B. 516; 23 Q. B. D. 316.

(*l*) *Per cur. Buck v. Pierce* (1889), 58 L. J. Q. B. 516; 23 Q. B. D. 316.

(*m*) See *Matthews v. Whittle* (1880), 49 L. J. C. 359; 13 Ch. D. 811.

(*n*) *London and Prov. Bank v. Bug* (1878), 47 L. J. C. 301; 7 Ch. D. 773.

PART VI.

against the husband in respect of property derived from the wife is distinct from that against the wife in respect of her separate estate, and therefore a judgment recovered against the wife without satisfaction is no bar to another action against the husband; but the liability of the husband being for the debt of the wife, he may make any defence which would be available for the wife; and the limitation of the action dates from the original cause of action against the wife, subject to its having been renewed by her before the marriage, and not from the date of the marriage (o). So bankruptcy of the husband discharges his liability only, and does not discharge the wife, except so far as the debt may have been paid under the bankruptcy (p). Debts contracted by a woman during a former marriage are debts contracted before marriage relatively to a second marriage within the above sections; and also within sect. 19, which avoids the effects of a restraint on alienation contained in a settlement made by the wife of her own property, as against such debts (q). The liability of a husband married in this country for the wife's debts is limited to property derived from the wife, though the debts were incurred in a foreign country where the husband's liability is unlimited (r).

Husband
marrying his
debtor.

These sections do not apply to a debt or liability of the wife contracted to the husband himself before the marriage, which by the common law is released by the intermarriage of the parties (s). Hence a husband may sue his wife and recover against her separate estate for money lent after the marriage, and for money paid for her after the marriage at her request, whether the request was made before or after the marriage; but he cannot recover for money lent or for money paid before the marriage, for which the marriage operates in law as a release (s).

Death of
husband.

At common law choses in action, whether they accrued to the wife before or after marriage, if not reduced into possession by the husband in his lifetime, survived to the wife upon his death: as in the case of bonds, promissory notes and contracts made to the wife in her own right (t).—Upon the death of the wife the

Death of
wife.

(o) *Beck v. Pierce* (1889), 58 L. J. Q. B. 516; 23 Q. B. D. 316. See *ante*, p. 733.

(p) *Chubb v. Stretch* (1870), 39 L. J. C. 329; L. R. 9 Eq. 555.

(q) *Jay v. Robinson* (1890), 59 L. J. Q. B. 367; 25 Q. B. D. 467. See *ante*, p. 398.

(r) *De Grouchy v. Wills* (1879), 48 L. J. C. P. 726; 4 C. P. D. 362.

(s) *Butler v. Butler* (1885), 55 L. J. Q. B. 55; 14 Q. B. D. 837.

(t) *Richards v. Richards* (1831), 9 L. J. O. S. K. B. 319; 2 B. & Ad. 447; *Gaters v. Maleley* (1840), 9 L. J. Ex. 173; 6 M. & W. 427; *Scarpellini v.*

husband was entitled to her choses in action upon taking out administration to his deceased wife, and he also took the beneficial interest in her personal estate: and upon the death of the surviving husband administration must have been taken out to the wife of the estate unadministered (*u*); and if another took out administration to her, it was only as a trustee for the husband (*x*). And where property was limited to the separate use of a married woman, the husband surviving her was entitled to the property as administrator in preference to the next of kin (*y*).—By Married Women's Property Act, 1882, s. 23, "For the purpose of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she was living." Under this section the husband is the legal personal representative in respect of the chattels real of the wife which he succeeds to *jure mariti* without taking administration, as well as the personal assets which he takes as administrator; and he is liable for the debts of the wife to the extent of such property, as she would be if she was living (*z*).—The law concerning the rights of a husband to the wife's choses in action and reduction into possession during marriage has been practically superseded by the enactments of the Married Women's Property Act, 1882, above referred to, which came into force 1st January, 1883; therefore it seems no longer necessary to treat it as existing law, nor to refer in detail to the equitable rights devised for her protection by the Court of Chancery by means of "separate use" or "equity to a settlement."

CHAP. IV.

Personal
representative.

Rights of
husband
during
marriage.

Atcheson (1845), 14 L. J. Q. B. 333; 7 Q. B. 864; *Howard v. Oakes* (1819), 18 L. J. Ex. 485; 3 Ex. 136.

(*u*) *Fleet v. Perrins* (1869), 38 L. J. Q. B. 257; L. R. 4 Q. B. 500; *Partridge v. Att.-Gen.* (1869), 38 L. J. Ex. 205; L. R. 4 H. L. 100; *Smart v. Tranter* (1889), 59 L. J. C. 383; 43 Ch. D. 587.

(*x*) *Humphrey v. Bullen* (1737), 1 Atk. 458; *Watt v. Watt* (1794), 3 Ves. 214. See *Elliott v. North* (1901), 70 L. J. C. 217; (1901) 1 Ch. 424.

(*y*) *Proudley v. Fielder* (1833), 2 M. & K. 57; *Cooper v. Macdonald* (1877), 47 L. J. C. 373; 7 Ch. D. 288.

(*z*) *Sarman v. Wharton* (1891), 60 L. J. Q. B. 233; (1891) 1 Q. B. 491.



CHAPTER V.

ASSIGNMENT AT DEATH.

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DEATH operates as an assignment in law of all the personal estate of the deceased to his executor or administrator; subject to the debts and liabilities of the deceased chargeable against it. The title of the executor is derived from the will of the deceased and is vested immediately upon his death; but the only admissible evidence of the title is the probate of the will containing the appointment, which is conclusive as long as it exists unrevoked, and must be produced, if required, in support of the acts and authority of the executor (*a*). The title of the administrator is derived from the grant of letters of administration and takes effect from the date of the grant; before which date he cannot do any act as administrator, although his title relates back to the death of the intestate (*b*). Accordingly, where the deceased has left a valid will appointing an executor, his title is elder to that of an administrator obtaining a grant by the non-disclosure of the will (*c*). The

Title of
executor and
adminis-
trator.

a *Wankford v. Wankford* (1699), 1 Salk. 299; *Newton v. Metrop. Ry.* (1861), 1 Dr. & Sm. 583. See *Turn v. Commercial Bkq. Co. of Sydney* (1884), 12 Q. B. D. 294; *Mohamadu Mohideen Hadjiar v. Fitchey* (1894), 63 L. J. P. C. 90; (1894) A. C. 437.

(b) *Das v. Glenn* (1831), 3 L. J. K. B. 161; 1 A. & E. 49; *Foster v. Bates* (1843), 13 L. J. Ex. 88; 12 M. & W. 226; *Mellers v. Brown* (1863), 32 L. J. Ex. 138; 1 H. & C. 686.

(c) *Ellis v. Ellis* (1905), 74 L. J. C. 296; (1905) 1 Ch. 613.

PART VI.

Transmission
of title.

probate of a will or a grant of administration, though improperly obtained, is valid until revoked, as regards transactions in a due course of administration with the executor or administrator by persons having no notice of the defective title (*d*).—The executor of an executor, provided the latter has proved the will, represents the original testator as to his personal estate and liabilities, but the administrator of an executor does not; nor does the executor or administrator of an administrator represent the original deceased or take his estate: therefore it is necessary in such cases to take out administration of the goods unadministered, or *de bonis non* as it is technically termed, which is in effect a continuance of the former administration, if any (*e*).

Joint
executors.

If several executors are appointed they represent the testator and take his estate and liabilities jointly, and they must sue and be sued jointly; but the non-joinder of a co-executor is only an irregularity of procedure which, if material, may be amended by the court (*f*). An executor may renounce probate, unless he has intermeddled or taken out probate, and the representation and estate will pass as if he had not been appointed (*g*). The renunciation to be valid must be of the whole executorship; "he cannot assume the executorship for part, and refuse for part" (*h*). Each of joint executors acts on behalf of all in disposing of the personal estate, the payment of debts and legacies, and the general administration of the personal estate of the testator (*i*). But one cannot make a new contract to bind the others (*k*). And all executors who have proved the will are required to join in the transfer of public stocks (*l*); and as shareholders in public companies they all must join in executing a transfer of shares (*m*). Upon the

(*d*) *Allen v. Dundas* (1789), 3 T. R. 125; *Barrell v. Barrell* (1881), 53 L. J. C. 838; 27 Ch. D. 220; *Mahomed Mahomed Hadjee v. Patchey* (1891), 63 L. J. P. C. 90; (1894) A. C. 137; *Ellis v. Ellis* (1905), 75 L. J. C. 296; (1905) 1 Ch. 613.

(*e*) *Re Gaynor* (1869), 38 L. J. P. & M. 79; L. R. 1 P. & D. 723; *Moseley v. Rendell* (1871), 40 L. J. Q. B. 111; L. R. 6 Q. B. 338; *Re Watson* (1884), 53 L. J. C. 305; *Clark v. Metrop. Gas Co.* (1885), 54 L. J. C. 259.

(*f*) Ord. XVI. r. 11. See *Latch v. Latch* (1875), 44 L. J. C. 415; L. R. 10 Ch. 464; *Drage v. Hartopp* (1885), 54 L. J. C. 434; 28 Ch. D. 415.

(*g*) 20 & 21 Viet. c. 77, s. 79; *Re Veiga*

(1862), 32 L. J. P. 9; 2 Sw. & T. 13; *Re Bademuch* (1861), 53 L. J. P. 179; 3 S. & T. 465; *Morham v. Clarke* (1890), 38 L. J. P. 45; L. R. 1 P. & D. 592; *Re Stevens* (1897), 66 L. J. C. 155; (1897) 1 Ch. 422.

(*h*) *Bolton v. Conham* (1676), 1 Vent. 271; *Re Lord and Fallerton* (1895), 65 L. J. C. 181; (1895) 1 Ch. 228. See *Brooke v. Haynes* (1868), L. R. 6 Eq. 25; *Re Bennett* (1905), 75 L. J. C. 122; (1906) 1 Ch. 216.

(*i*) *Shep. Touch.* 484.

(*k*) *Turner v. Horley* (1842), 11 L. J. Ex. 277; 9 M. & W. 770.

(*l*) 34 & 34 Viet. c. 71, s. 23.

(*m*) *Barton v. N. Staffs. Ry.* (1888), 57 L. J. C. 890; 38 Ch. D. 458; *Barton*

death of a joint executor the representation and estate vests in the survivors or survivor or in the executor of the last survivor (*n*). And by the Conveyancing Act, 1881, s. 38, it is expressly provided that a power or trust vested in two or more executors may be exercised or performed by the survivor or survivors of them for the time being (*o*).

CHAP. V.

"As a general rule, the executor represents the person of his testator with respect to all his rights and liabilities upon all his contracts" (*p*); but some contracts are personal to the contracting parties and incapable of assignment, and in that case, there is no transmission of right or liability (*q*). If the deceased has assigned the benefit of a debt or contract in his lifetime, or bequeathed it by will, the legal right of action vests in his executor or administrator, who alone is entitled to sue for and recover it at law, as trustee for the assignee or legatee, unless the case falls within sect. 25 of the Judicature Act, 1873 (*r*); and a refusal of the legal personal representative to sue is not alone sufficient without special circumstances to entitle the beneficiary to sue in his own name (*s*). It is immaterial that the executors or administrators are not named in the contract; the omission having no effect except so far as in construing the contract it may show an intention of restricting it to a personal act of the deceased (*t*).

Rights and liabilities of deceased on contracts.

The rights of action for wrongs independent of contract at common law died with the person by or against whom the wrong was committed: according to the maxim, "*actio personalis moritur cum personâ*"; and the executor could neither sue nor be sued. But early statutes gave to the executor or administrator the same action for trespass to goods and chattels of the deceased as he would have had if he were alive; and these statutes are construed to apply to all cases of injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to

Rights of action for injuries to estate of deceased.

v. *L. & N. W. Ry.* (1889), 59 L. J. Q. B. 33; 21 Q. B. D. 77.

(*n*) *Re Reid* (1896), 65 L. J. P. 60; (1896) P. 129.

(*o*) See *R. Mainwaring* (1891), 60 L. J. C. 683; (1891) 2 Ch. 681.

(*p*) *Parke, B., Wall v. Murray* (1810), 19 L. J. Ex. 209; 1 Ex. 865; *Wilson v. Harper* (1908), 77 L. J. C. 607; (1908) 2 Ch. 370.

(*q*) *James v. Morgan* (1909), 78 L. J. K. B. 471; (1909) 1 K. B. 564.

(*r*) *Brendt v. Heutig* (1818), 2 Moore, 184; *Bishop v. Curtis* (1852), 21 L. J. Q. B. 391; 18 Q. B. 878. See *ante*, p. 850; and see Ord. XVI. r. 8.

(*s*) *Yeatman v. Yeatman* (1877), 47 L. J. C. 6; 7 Ch. D. 210.

(*t*) Co. Lit. 209 a; *Anderson v. Martindale* (1801), 1 East, 497; *Wills v. Murray* (1840), 19 L. J. Ex. 209; 4 Ex. 865; *Cooper v. Simmonds* (1862), 31 L. J. M. C. 138; 7 H. & N. 707. And see *ante*, p. 897.

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the executor or administrator (*u*). Accordingly an action lies by the executor where the deceased has been induced by a fraudulent prospectus issued by the directors of a company to take shares which were valueless, to the loss of the money paid upon them (*x*); and where a deceased person has suffered special damage from slander of title to a trade mark used in his trade (*y*). But where the cause of action is an injury to the person independent of contract, the executor cannot recover the expense the deceased was put to in his lifetime by reason of the injury; as the cost of medical attendance (*z*). In the case of a statutory right to compensation by a dependant, under the Workmen's Compensation Act, the right is transmissible to the dependant's representatives (*a*). If an action has been commenced by the deceased in his lifetime for an injury to the personal estate, for which an action is given to the executor under the above-mentioned statutes, the executor may obtain an order to continue the action (*b*).—By the Civil Procedure Act, 1833, s. 2, an action was given to the executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime for which he might have maintained an action; provided such injury was committed within six months before his death, and the action brought within one year after the death; and the damages when recovered are made part of the personal estate.

**Liabilities of
deceased for
injuries to
property.**

By the same section of the statute an action was given against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property real or personal; provided such injury was committed within six months before his death, and the action brought within six months after such executors or administrators have taken the administration; and the damages recovered are payable in order of administration as simple contract debts.—An action for an injury within the above section commenced by or against a person in his lifetime, who dies pending the action more than six months after

(*u*) 4 Edw. 3, c. 7; 31 Edw. 3, c. 11. See *Wheatley v. Lane* (1669), 1 Wms. Saund. 239.

(*x*) *Twyeross v. Grant* (1878), 48 L. J. C. P. 1; 4 C. P. D. 45. See *Pick v. Gurney* (1873), 43 L. J. C. 19; L. R. 6 H. L. 377; *Young v. Wallingford* (1853), 52 L. J. C. 599.

(*a*) *Hatchard v. Mege* (1887), 56 L. J. Q. B. 397; 18 Q. B. D. 771.

(*z*) *Palling v. G. E. Ry.* (1882), 51 L. J. Q. B. 453; 9 Q. B. D. 110.

(*b*) *Darlington v. Roscoe and Sons* (1906), 76 L. J. K. B. 371; (1907) 1 K. B. 219; *United Col. v. Simpson* (1909), 78 L. J. P. C. 129; (1909) A. C. 383.

(*b*) Ord. XVII. rr. 1, 4, 8; *Twyeross v. Grant* (1878), 48 L. J. C. P. 1; 4 C. P. D. 45.

the commencement, cannot be continued by or against the executor of the deceased; because the action, given by or against the executor, is limited to injuries committed within six months before the death (c). And where such an action was referred to arbitration, subject to a clause that the award might be delivered to the executors in case of the death of the parties, the plaintiff having died pending the arbitration, the clause was held void, and the executor could not take up an award made after the death (d).

CHAP. V.

The common law rule that an action for a wrong dies with the person does not apply to the implied debt arising from pecuniary benefit derived by the wrongdoer. Where goods have been wrongfully taken, or timber or minerals or other products of real estate wrongfully severed, and converted by the wrongdoer to his own use, the implied debt which arises upon a waiver of the tort for the value or proceeds of sale of the property survives to or against the executor, independently of the above rule and of the above statute, and is therefore free from the limitations imposed (e). But such debts are implied only in respect of some definite property or profit wrongfully taken and appropriated, in cases where the amount of debt is capable of being ascertained and followed against the estate of a deceased wrongdoer. No such debt is implied in respect of a claim to unliquidated damages, which can be assessed and recovered only in an action for the wrong (f).— And generally in cases of implied contract or of obligation or duty arising from the relation of the parties, though the breach may be treated as a substantive wrong to the person or property, the rule that the action dies with the person does not apply to the breach of contract, and the executor may sue or be sued in respect of the personal estate of the deceased; as in cases of carriers, bailees, innkeepers, and the like, in which the action may be framed either in contract or in tort (g). Where a passenger by a railway was injured by the negligence of the company's servants, and afterwards died in consequence, it was held that though

Debts implied from wrongs.

Implied contracts and duties.

(c) *Kirk v. Todd* (1882), 52 L. J. C. 221; 21 Ch. D. 484. See *Jones v. Smith* (1893), 9 L. J. C. 351; 43 Ch. D. 607.

(d) *Barker v. Evans* (1885), 54 L. J. Q. B. 411; 15 Q. B. D. 565.

(e) *Powell v. Rees* (1837), 8 L. J. Q. B. 47; 7 A. & E. 426. See *ante*, p. 55.

(f) *Phillips v. Homfray* (1883), 52 L. J. Q. B. 833; 24 Ch. D. 439. See

report of further proceedings (1892), 61 L. J. C. 210; (1892) 1 Ch. 465.

(g) *Kirch's v. Quarles* (1820), 2 Br. & B. 102; *Leggott v. G. N. Ry.* (1876), 45 L. J. Q. B. 557; 1 Q. B. D. 599. See *Bathany v. Walford* (1887), 56 L. J. C. 881; 36 Ch. D. 269; *Jackson v. Watson and Son* (1909), 78 L. J. K. B. 587; (1909) 2 K. B. 193.

PART VI. damages for the personal injury were not recoverable, the executor was entitled to recover the pecuniary loss to the estate arising from medical expenses and inability to attend to business (*h*).—And by the Fatal Accidents Act, 1846, an action is given to the executor or administrator upon the death of a person caused by a wrongful act or neglect, for the benefit of certain relations of the deceased to the amount of damages resulting to them from the death (*i*).

Bills and notes.

Executors and administrators take all the rights and liabilities on bills and notes, to which the deceased was a party at the time of his death; and they may sue or be sued in their representative character. "The right of action is transferred to them, but no promise is implied by law to pay them; otherwise the Statute of Limitations would run from the death of the payee, not from the time of the note becoming due" (*k*). If a bill is indorsed to executors or an administrator as such, the proceeds of the bill will be assets of the testator; and the executors or administrator may sue in their representative capacity (*l*). Where a bill was specially indorsed to a deceased person in payment of a debt, in ignorance of his death, it was held that the executor had an election to take it in payment, and might sue upon it as executor (*m*). Where the holder of a bill dies intestate before the bill is due, the cause of action accrues from the appointment of an administrator, and not from the maturity of the bill, because there is no right of action unless the bill is due and a party is capable of suing (*n*). But the Statute of Limitations runs against an executor from the time the bill falls due, because his title dates from the death of the testator (*o*).—The executor or administrator may indorse bills and notes of which the deceased was holder; and "it is immaterial whether they indorse as executors or not. If they indorse at all they are liable personally, and not as executors; for their indorsement would not give an action against the effects of the

Indorsement by executor.

(*h*) *Bradshaw v. Lancs. & Yorks. Ry.* (1875), 41 L. J. C. P. 148; L. R. 10 C. P. 149.

(*i*) *Blake v. Midland Ry.* (1852), 42 L. J. Q. B. 233; 18 Q. B. 93; *Rowley v. L. & N. W. Ry.* (1873), 42 L. J. Ex. 154; L. R. 8 Ex. 221; *Hetherington v. N. E. Ry.* (1882), 51 L. J. Q. B. 495; 9 Q. B. D. 160.

(*k*) *Parke, B., Timmia v. Platt* (1837), 2 M. & W. 721.

(*l*) *King v. Thom* (1786), 1 T. R. 487; *Court v. Partridge* (1819), 7 Pri. 591. See *Cokerwood v. Chabaut* (1823), 1 L. J. O. S. K. B. 66; 1 B. & C. 150.

(*m*) *Murray v. E. India Co.* (1821), 5 B. & Ald. 201.

(*n*) *Murray v. E. India Co.* (1821), 5 B. & Ald. 204.

(*o*) *Woolley v. Clark* (1822), 5 B. & Ald. 745. See *ante*, p. 921.

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testator" (p). So a promissory note in which the makers promised jointly and severally to pay on demand "as excoutors" was held to bind them personally to the holder (q). Where the holder of a note payable to order wrote an indorsement, but did not deliver the note, and after his death his executor delivered the note without further indorsement, it was held that there was no complete indorsement, and the transferee had no legal title (r). But where the holder assigned and delivered the note in his lifetime without indorsement, the assignee was held entitled to have the indorsement of the administrator to invest his equitable right with the legal title (s). And where a testator has bequeathed an unindorsed note by will, the executor must indorse it for the benefit of the legatee (t).—A banker's cheque, being an order upon the banker to pay which is revoked by the death of the drawer, is not chargeable against the executor unless it was presented and dishonoured in the lifetime of the drawer; but upon the death of the drawer it ceases to operate as payment of the debt or consideration for which it was given, and with which therefore the executor becomes chargeable (u).

Banker's
cheque.

A guarantee is construed presumptively to be commensurate with the matter guaranteed; as the guarantee of a certain debt or of a person in the performance of an office or duty; and therefore such guarantee is not revocable by the surety in his lifetime, nor is it determined by his death (x). But in the event of insolvency of the principal debtor or default of the party guaranteed, the surety may give notice to the creditor with the effect of precluding him in equity from further dealings at the risk of the surety, or charging the surety with subsequent credits or defaults (y). A continuing guarantee of a current account at a bank, or of a current account of goods sold in a business, may be withdrawn at any time by notice, except as to past transactions; unless a certain time of notice is expressly stipulated (z). But

Continuing
guarantee.

(p) *Buller, J., King v. Thom* (1780), 1 T. R. 489.

(q) *Childs v. Monins* (1821), 2 Br. & B. 460. See Bills of Exchange Act, 1882, s. 26.

(r) *Bromage v. Lloyd* (1917), 16 L. J. Ex. 237; 1 Ex. 32.

(s) *Watkins v. Maule* (1820), 2 Jac. & W. 237. See Bills of Exchange Act, 1882, s. 31 (4).

(t) *Re Robson* (1891), 60 L. J. C. 351; (1891) 2 Ch. 552.

(u) *Re Beaumont* (1902), 71 L. J. C. 478; (1902) 1 Ch. 889. See Bills of Exchange Act, 1882, s. 75.

(x) *Lloyds v. Harper* (1880), 50 L. J. C. 140; 10 Ch. D. 290; *Re Grace* (1902), 71 L. J. C. 358; (1902) 1 Ch. 734.

(y) *Per cur. Burgess v. Ecc* (1872), 41 L. J. C. 515; L. R. 13 Eq. 458.

(z) *Offord v. Davies* (1862), 31 L. J. C. P. 319; 12 C. B. N. S. 748; *Coul Hart v. Clementson* (1880), 49 L. J. Q. B. 204; 5 Q. B. D. 42.

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such a guarantee is not determined by the mere fact of the death of the surety (a); but may be determined by the death of one of several partners being creditors (b). It becomes the duty of the executor to give notice of withdrawal, and he is responsible to the estate for neglecting to do so; and the creditor cannot charge the executor with advances made to the principal after having notice of the death, however obtained, because it would be a breach of trust in the executor to charge the estate (c). In a continuing guarantee a stipulation for a certain time of notice to determine the guarantee does not apply to notice given of the death of the surety (d). The death of one of co-sureties does not affect the liability of the others, who continue chargeable with advances made after notice of the death (e).

Executory contracts of deceased.

An executor is entitled to the benefit of the executory contracts of the deceased for the supply of goods or performance of work which do not involve the personal skill and ability of the deceased, and he may as executor complete the contracts and recover the price for the benefit of the estate; as in the case of an ordinary building contract undertaken by the deceased; "if a party contract for himself and his executors to build a house, and die, the executors must go on, or they would be liable for damages for not completing the work; if they go on they may recover as executors, and the money when recovered will be assets in their hands" (f).

Where a coat was ordered of a tailor who began to make it, but died before completion, his administrator, having completed and delivered it, may claim the price in his representative character (g). On the other hand, where a person has contracted to accept the delivery of goods at a certain time, and dies before delivery, his executor will be liable for not accepting delivery in pursuance of the contract (h).

Contracts of sale of land.

Under a contract of sale of land the executor of a deceased party was entitled to sue at law for a breach of the contract in respect

(a) *Bradbury v. Morgan* (1862), 31 L. J. Ex. 462; 1 H. & C. 219. See *Re Cave* (1902), 71 L. J. C. 358; (1902) 1 Ch. 733.

(b) *Holland v. Teed* (1848), 7 Hare, 50.

(c) *Harris v. Fawcett* (1873), 42 L. J. C. 502; L. R. 8 Ch. 866. See *Re Sherry* (1884), 53 L. J. C. 401; 25 Ch. D. 692.

(d) See *Coulthart v. Clementson* (1880), 49 L. J. Q. B. 204; 5 Q. B. D. 42.

(e) *Beckett v. Adlyman* (1882), 51 L. J. Q. B. 547; 9 Q. B. D. 783; *Ashby v. Day* (1885), 51 L. J. C. 935.

(f) *Per cur. Marshall v. Broadhurst* (1836), 9 L. J. O. S. Ex. 105; 1 Cr. & J. 403.

(g) *Werner v. Humphreys* (1841), 2 Man. & G. 855.

(h) *Wentworth v. Cork* (1839), 8 L. J. Q. B. 230; 10 A. & E. 42.

of damage accrued to the personal estate; and to recover the expense in and about making or investigating the title and preparing to complete the sale, and the loss of interest upon the deposit or purchase-money, but no damages in respect of the value of the property sold or loss of profit (*i*). So an action against a solicitor for negligence in investigating the title to land under a contract of sale may be brought by the administrator of the deceased purchaser, in respect of loss to the personal estate (*k*).—In equity a valid contract for the sale of land operated as a conversion of the property, permitting the real representative of the purchaser and the personal representative of the vendor to obtain specific performance against the vendor or the purchaser or their respective representatives (*l*); provided there were a valid and binding contract between the parties (*m*). It was necessary formerly in an action for the specific performance of a contract relating to freehold land of inheritance of the vendor, to make his real as well as his personal representatives parties (*n*). It is now unnecessary to do so, for where there is a contract enforceable against the heir or devisee of the vendor his personal representative has power to convey the land in any manner proper for giving effect to the contract, by force of sect. 4 of the Conveyancing and Law of Property Act, 1881; but it is doubtful whether this power extends to customary lands, as the section applies to a sale of "the fee simple or other freehold interest, descendible to his heirs general, in any land," which seems to qualify the general definition of the word "land" in sect. 2 (*ii*) of the same statute. Freehold land of inheritance now vests in the personal representative of a deceased notwithstanding any testamentary disposition of the same by force of sect. 1, sub-s. 1, of the Land Transfer Act, 1897, but by sub-sect. 4 "land of copyhold tenure or customary freehold" is excluded from the operation of the statute. Where a person has contracted for the building of a house upon his freehold land and died before it is

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Effect of conversion of the property by sale.

(*i*) *Orme v. Broughton* (1831), 3 L. J. C. P. 208; 10 Bing. 533. See *ante*, p. 786.

(*k*) *Knight v. Quarles* (1820), 2 Br. & B. 102.

(*l*) *Hoddel v. Fulk* (1861), 33 Beav. 489; *Lynagh v. Edwards* (1876), 45 L. J. C. 551; 2 Ch. D. 499. See Leake, *Law of Land*, pp. 185, 220.

(*m*) *Collier v. Jenkins* (1831), Younger, 295; *Re Thomas* (1886), 16 L. J. C. 9; 34 Ch. D. 166. See *Hudson v. Cook* (1872), 41 L. J. C. 306; L. R. 13 Eq. 417.

(*n*) *Townsend v. Champenourne* (1821), 9 Pri. 130; *Roberts v. Marchant* (1813), 13 L. J. Ex. 56; 1 Ph. 370.

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Covenants
running with
land.

completed, his heir is entitled to have the house completed and paid for out of the personal estate (o).

The rights upon covenants running with land, as already explained, pass with the land to the heir or devisee of the deceased owner, if the estate is freehold; and to the executor, if the estate is a chattel interest. The rights and liabilities upon such covenants in leases pass with the demise premises to the executor or legatee, as assignee of the lease; and with the reversion to the heir or devisee, or, if the reversion be a chattel interest, to the executor or legatee of the reversioner, as assignee of the reversion. But though the assignee of the term or of the reversion is liable so long as he continues assignee, yet the liability of the original lessor or lessee as being the contracting party is not discharged by his death, and his executor, to the extent of assets, remains liable, concurrently with the assignee for the time being (p). Accordingly the covenants for title in a conveyance for fee pass to the heir or devisee; who, and not the executor of the covenantor, may sue for breaches committed after the death of the latter. For breaches committed in the lifetime of the deceased covenantor the executor may sue for the benefit of the personal estate; but unless damage accrued to the personal estate, the executor has no right of action (q). And if the breach continues after the death, as in the case of a continuing defect of title, the heir or devisee may sue for the damages accruing to him in his own right (r). Where a covenant by the vendor with the purchaser of land, to take further assurance upon request, was broken in the lifetime of the purchaser, in consequence of which after the death of the purchaser his heir was evicted: it was held that the heir might sue for the breach of covenant, because the damage accrued to him and not to the ancestor (s). On the other hand, where the ancestor was evicted in his lifetime so that the whole damage accrued to him, the executor was entitled to recover upon the covenants for title, and not the heir to whom nothing descended (t). Under a lease made by a tenant for life, which expired at his death leaving no reversion, it was held that his executor was entitled to sue upon the

(o) *Carp v. Jarman* (1858), 38 L. J. C. 85; L. R. 3 Eq. 98; *Re Dyer* (1838), 67 L. J. C. 619; (1838) 2 Ch. 510.

(p) See *ante*, p. 917.

(q) *Kingdon v. Nottle* (1813), 1 M. & S. 355.

(r) *Kingdon v. Nottle* (1813), 1 M. &

S. 355. See *Spur v. Green* 1873, 43 L. J. Ex. 57; L. R. 9 Ex. 99.

(s) *King v. Jones* (1814), 5 Taunt. 118; *affd. nom. Jones v. King* (1815), 4 M. & S. 188.

(t) *Lacy v. Livingston* (1672), 2 Lev. 26; 1 Vent. 175. And see *Hobbs v. Hele* (1670), 2 Wms. Saund. 537, n. c.

covenant to repair, and without alleging or proving special damage to the testator's estate (*u*). The executor of a lease is liable as such to the extent of assets for the rent reserved and upon the covenant to pay rent, both rent accrued due at the death and rent accruing subsequently. He may be also charged in his own right as assignee of the term for rent accrued due subsequently to the death because the profits of the land to the amount of the rent are reserved to the landlord; but he may discharge his personal liability by pleading that he is assignee as executor only, and that there are no profits or not sufficient profits to meet the rent, and that he has fully administered the other assets (*x*).

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Rent.

Contracts involving personal relations or qualities are for the most part determined by death; as a contract to build a lighthouse which is a matter of skill and science (*y*). Promises to marry are necessarily terminated by the death of either of the contracting parties; and though the promise was broken in the lifetime of the parties the right of action for the personal injury does not survive, and the executor can sue only for any damage that may have accrued to the personal estate (*z*). Contracts of agency and contracts of service are determined by the death of the principal, agent, master or servant, as the case may be, unless provision is made by the contract for a prolongation of the authority or of employment by the representatives of the master (*aa*). Upon this principle it is held that though a master has a right of action for the loss of services caused by an injury to his servant, yet if the injury causes death he can claim for no loss of service after the death (*b*). And a farm bailiff who contracted to serve at weekly wages with residence, subject to six months' notice or payment of six months' wages, upon the death of the employer was held to have no claim against the administrator for dismissal without notice or payment beyond the wages then due (*c*). Under a contract to complete certain work for a price to be paid in instalments, the determination of the contract by the death of the contractor before the completion of the work was held not to affect the

Contracts relating to the person.

Contract of marriage.

Contracts of agency or service.

(*u*) *Ricketts v. Weaver* (1844), 13 L. J. Ex. 15; 12 M. & W. 718.

(*x*) See *ante*, p. 902.

(*y*) *Patteson, J., Wentworth v. Cook* (1849), 8 L. J. Q. B. 230; 10 A. & E. 45. See *ante*, p. 928.

(*z*) *Chamberlain v. Williamson* (1814),

2 M. & S. 108; *Embry v. Chirney* (1883), 57 L. J. Q. B. 217; 20 Q. B. D. 491.

(*aa*) See *ante*, pp. 332, 503.

(*b*) *Osborn v. Gillett* (1872), 42 L. J. Ex. 54; L. R. 8 Ex. 88.

(*c*) *Farrar v. Wilson* (1865), 38 L. J. C. P. 326; L. R. 1 C. P. 741.

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Contracts of
partnership.Shares in
company.

right to instalments then due, which his executor was entitled to recover (*d*).

A partnership is dissolved by the death of a partner, whether entered into expressly for a fixed term or not; subject to agreement to the contrary (*e*). If the partnership is expressly extended to the executors, they may be authorised to carry it on with the assets; but in so doing they incur the personal responsibility of partners upon business transactions after the death (*f*). Therefore they cannot be compelled to continue the partnership, but are entitled to a dissolution and an account of the assets, subject to the liabilities incurred up to the time of dissolution (*g*). Upon the same principle a contract of service or agency made with a firm of partners is in general dissolved by the death of one of the partners: the contract presumptively applying to the existing partnership business only, and not to any other (*h*). But if several persons join in a specific contract, as for the execution of certain works, the interest of each is not determined by his death; and the executor of the deceased contractor is entitled to his share of the full profits, and is subject to the liabilities which ultimately result from the completion of the contract (*i*).—The liability of a shareholder in a company is not limited, by analogy with that of a partner, to the time of his death; it passes with the property in the shares to the executor, whether named in the original contract for the shares or not; and the executor is liable to the extent of the assets for all calls made both before and after the death. But he incurs no personal liability, nor is he entitled to the full rights of a shareholder, unless he is registered as such in his own name (*k*). As a registered shareholder the executor becomes personally liable, though he may be entitled to indemnity from the testator's estate (*l*); and the addition to the registered name "as executor" is immaterial to his personal rights and liabilities as shareholder (*m*).

(*d*) *Smith v. Holwell Ry.* (1867), 36 L. J. Ex. 166; L. R. 2 Ex. 311.

(*e*) Partnership Act, 1890, s. 33. See *Craushay v. Maule* (1818), 1 Swanst. 495; *Gillepie v. Hamilton* (1818), 3 Madd. 251; *Ex p. Edmunds* (1862), 4 D. G. F. & J. 488; *Re Bourne* (1906), 75 L. J. C. 779; 1906] 2 Ch. 427.

(*f*) *Wightman v. Townroe* (1813), 1 M. & S. 475; *Holme v. Hammond* (1872), 41 L. J. Ex. 157; L. R. 7 Ex. 218.

(*g*) *Kershaw v. Matthews* (1826), 2

Russ. 62; *Downs v. Collins* (1818), 6 Hare, 418.

(*h*) *Tasker v. Shepherd* (1861), 30 L. J. Ex. 207; 6 H. & N. 575.

(*i*) *Mel'ban v. Kennard* (1871), 43 L. J. C. 323; L. R. 9 Ch. 336.

(*k*) *Burd's case* (1870), L. R. 5 Ch. 725.

(*l*) *Duff's Executors' case* (1880), 32 Ch. D. 309.

(*m*) *Barton v. L. & N. W. Ry.* (1886), 59 L. J. Q. B. 33; 21 Q. B. D. 77.

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If an executor in the course of administration makes a contract for the benefit of the estate, the proceeds of which would be assets, as by selling goods or carrying on a business belonging to the estate, he may sue either in his own right, as being the actual party to the contract, or in the character of executor on behalf of the estate (*n*). So also with bills of exchange or promissory notes, if drawn or indorsed to executors expressly in their representative character (*o*). If one of joint executors make such a contract, he may sue alone as being in fact the party to the contract without joining the other executors (*p*); and if he professed to contract upon his own account and not on behalf of the estate, the other executors could not be joined as co-plaintiffs; as was held in the case of an agent employed to receive rents, who is accountable to those only of the executors who in fact employed him (*q*).

Contracts made by executors.

The executor is personally liable on all contracts made after the death of his testator, as being in fact the contracting party unless he expressly restricts them to payment out of the estate; nor can the creditor under such contract charge him upon it as executor, or acquire any claim against the estate of the deceased: as in the case of an advance by a banker to an executor, upon which he can be charged personally only and not as executor, though the advance was made upon an executorship account and for the purpose of the estate (*r*). So if an executor or administrator draws or indorses a bill or note, purporting to do so in his representative capacity, he is personally liable, unless it is expressly restricted to payment out of the estate: and such an instrument gives no claim against the estate of the testator (*s*). But if the executor is authorised by the will to raise money upon the security of the estate or any part of it, he may effectually charge it to that extent (*t*).

Liability on contracts of executor.

Where an executor is directed or authorised by the will of his testator to carry on a business, and contracts debts or liabilities in the course of the business, he is personally liable to the creditor; who has no claim in his own right against the estate of the testa-

Executor carrying on business of testator.

n. *Moseley v. Rendell* (1871), 10 L. J. Q. B. 111; L. R. 6 Q. B. 338; *Abbott v. Fagitt* (1871), 10 L. J. Q. B. 115; L. R. 6 Q. B. 346.

o. *King v. Thom* (1786), 1 T. R. 487.

p. *Brassington v. Ault* (1821), 3 L. J. O. S. C. P. 243; 2 Bing. 177.

q. *Heath v. Chilton* (1844), 13 L. J. Ex. 225; 12 M. & W. 632. See *Keighley v. Durant* (1901), 70 L. J. K. B. 662; (1901) A. C. 240.

r. *Ashby v. Ashby* (1827), 6 L. J. O. S. K. B. 41; 7 B. & C. 444; *Fachall v. Fachall* (1871), 41 L. J. C. 116; L. R. 7 Ch. 123.

s. Buller, J., *King v. Thom* (1786), 1 T. R. 487; *Childs v. Monius* (1821), 2 Br. & B. 460. See Bills of Exchange Act, 1882, s. 26.

t. *Fachall v. Fachall* (1871), 41 L. J. C. 116; L. R. 7 Ch. 123.

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tor (*u*). The executor, however, is entitled to claim indemnity from the estate for liabilities properly incurred in the business; and the creditor upon default of payment by the executor, becomes entitled to the benefit of that indemnity: this right to an indemnity is the presumptive right of the executor, but will be lost wholly or in part if it can be shown that the executor is in default to the estate, and the claim of the creditor, being merely an equitable right of subrogation to the executor, is subject to the state of an account taken between the executor and the estate (*x*). Where a specific fund is appropriated by the testator for conducting the business the claim for indemnity for the liabilities of the business is restricted to that fund (*y*). An executor has no authority to carry on a business of the testator unless given by the will; and therefore has no claim to indemnity from the estate except so far as he acts under the direction or authority of the testator (*z*). By Order XVIII. r. 5, "claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate" (*a*). This order does not apply to a counterclaim (*b*).

Preference by
executor in
payment of
debts.

An executor in paying the debts of the testator may pay one creditor in full before paying another of equal degree: and though the latter has commenced an action against him (*c*). But after judgment recovered, which creates a debt of higher degree, the judgment creditor must be first satisfied; and an executor may confess judgment to a creditor for the purpose of giving him a preference (*d*). The priority of specialty debts in the administration of assets was abolished by the Administration of Estates Act, 1869. Foreign creditors are in the same position as English, as to priority of payment in administration: which is regulated by the

(*u*) *Owen v. Dulmeier* (1872), 42 L. J. C. 232; L. R. 15 Eq. 134; *Re Morgan* (1881), 50 L. J. C. 654; 18 Ch. D. 93; *Re Evans* (1887), 31 Ch. D. 597.

(*x*) *Re Johnson* (1880), 49 L. J. C. 745; 15 Ch. D. 548; *Douce v. Gorton* (1891), 60 L. J. C. 715; (1891) A. C. 190; *Re Brooke* (1891), 61 L. J. C. 21; (1894) 2 Ch. 609. See *Jennings v. Mather* (1901), 70 L. J. K. B. 1032; 1902, 1 K. B. 1.

(*y*) *Ex p. Garland* (1803), 10 Ves. 110.

(*z*) *Kirkman v. Booth* (1818), 18 L. J. C. 25; 11 Beav. 273; *Land v. Land*

(1874), 43 L. J. C. 311; *Strickland v. Symonds* (1851), 53 L. J. C. 582; 25 Ch. D. 245.

(*a*) See *Johnson v. Burges* 1878, 47 L. J. C. 552.

(*b*) *Mardhauld v. Carington* 1878, 48 L. J. C. P. 179; 4 C. P. D. 28.

(*c*) *Libart v. Cohen* (1890), 59 L. J. Q. B. 157; 21 Q. B. D. 361; *Re 187th* (1890), 59 L. J. C. 810; 15 Ch. D. 569.

(*d*) *Prince v. Nicholson* (1814), 5 Trinit. 665; *Lyttham v. Cross* 1821, 3 L. J. O. S. K. B. 2; 3 B. & C. 317.

procedure of the court (e).—By the Trustee Act, 1893, s. 21 (1), “an executor may pay or allow any debt or claim on any evidence that he thinks sufficient.” And (2) an executor may accept any composition or security for any debt, or may compromise, abandon, submit to arbitration, or otherwise settle any debt or claim relating to the testator’s estate.—Where an executor, who has given the statutory notice for creditors to come in and prove their claims, has fully administered the estate and paid over the residue to the residuary legatee, a creditor remaining unpaid may follow the assets and sue the residuary legatee without joining the executor (f). And if he charges the executor, who has paid over the residue without notice of the outstanding debt, the executor having been compelled to pay the debt may recover back the amount from the legatee; and notice of a contingent liability, as that of calls upon shares, which afterwards becomes a debt, does not deprive him of the right (g).

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Discretion of
executor.

Creditor
following
the assets.

The appointment of a debtor of the testator as executor operates as a release of the debt in law, because the executor cannot bring an action against himself (h); but the executor is forthwith chargeable with the amount of the debt as assets collected, unless the testator in making the appointment shows an intention of forgiving the debt (i). And the debt is released in law, though the executor has not proved the will (k). The appointment of a debtor to be a joint executor with others, and the appointment of a joint debtor to be an executor, have the same operation (l). The grant of administration to a debtor of the intestate, being the act of the court and not of the creditor, does not discharge the debt, but only suspends the remedy during the administration (m).

Appointment
of debtor as
executor.

The appointment of a creditor as executor if he proves the will, or the grant of administration to a creditor, entitles him to retain the amount of his debt out of the assets in preference to other

Retainer by
executor of
his own debt.

(e) *Re Klæbe* (1884), 54 L. J. C. 297; 28 Ch. D. 175.

(f) *Clegg v. Rowland* (1867), 36 L. J. C. 137; L. R. 3 Ex. 398; *Hunter v. Young* (1879), 48 L. J. Ex. 689; 4 Ex. D. 256. See Law of Property Amendment Act, 1859, ss. 27, 29.

(g) *Jorris v. Wolfreston* (1874), 43 L. J. C. 809; L. R. 18 Eq. 18; *Whitaker v. Kershaw* (1890), 60 L. J. C. 9; 45 Ch. D. 324.

(h) *Nidham's case* (1610), 8 Co. 135 a; *Wankford v. Wankford* (1699), 1 Salk. 299.

(i) *Strong v. Bird* (1874), 43 L. J. C. 814; L. R. 18 Eq. 315; *Re Appleby* (1891), 60 L. J. C. 793; (1891) 3 Ch. 422.

(k) *Re Appleby* (1891), 60 L. J. C. 793; (1891) 3 Ch. 422.

(l) *Cherham v. Ward* (1797), 1 B. & P. 630; *Evakley v. Fox* (1829), 7 L. J. O. S. K. B. 118; 9 B. & C. 130.

(m) *Nidham's case* (1610), 8 Co. 135 a; *Seagram v. Knight* (1867), 36 L. J. C. 918; L. R. 2 Ch. 628.

PART VI.

Retainer of
equitable
debts.

No retainer
against
equitable
assets.

creditors of equal degree (*n*); and he may retain the assets without realizing them, where his debt is equal to or exceeds them (*o*). One of joint executors, and one of joint creditors as executor, has the same right of retainer (*p*). And an executor who is surety for a debt of his testator, if compelled to pay the debt, may retain for the amount upon his implied indemnity, as a simple contract debt for money paid (*q*).—An executor may retain for a debt to which he is beneficially entitled (*r*); and for equitable debts generally, as for the balance of a partnership account (*s*); and for a fund of which he is trustee, for the benefit of the trust estate (*t*). He may retain for any pecuniary claims which are capable of being ascertained in amount, as the balance of a partnership account; but not for a claim to unliquidated damages for a wrong before assessment at a fixed sum (*u*). And an executor may retain for a debt barred by the Statute of Limitations, unless his right to do so has been successfully contested in court (*x*). An executor cannot retain for a debt which he could not recover by reason of the Statute of Frauds; nor can he charge payment of such debt in the administration of assets (*y*).

There is no right of retainer against equitable assets, which are administered in equity upon the principle of equality; nor against real estate made assets to be administered in equity by the Administration of Estates Act, 1833 (*z*). Nor has the heir or devisee any right of retainer against real assets, except where he is liable to be sued as such (*a*). The right of retainer is also limited to the assets which come into the possession or control of the executor

u *Ch. Lit.* 261 b; *Fisher v. Giles* (1890), 59 L. J. Q. B. 152; 24 Q. B. D. 361; *Re Huls* 1890, 59 L. J. C. 810; 45 Ch. D. 569. See *Smith v. North* (1851), 13 J. r. 998; *Re Bennett* (1905), 75 L. J. C. 122; (1905) 1 Ch. 216.

(o) *Ex p. Gilbert* (1897), 67 L. J. Q. B. 229; 1898 1 Q. B. 282.

(p) *Re Stewart* (1880), 50 L. J. C. 136; 16 Ch. D. 368.

(q) See *ante*, p. 16; *Hoyd v. Brooks* 1865, 34 L. J. C. 605; 31 Beav. 7; *Re Harrison* 1886, 55 L. J. C. 687; 32 Ch. D. 395.

(r) *Cockroft v. Black* 1725, 2 P. Wms. 298.

(s) *Re Morris' Estate* (1874), 44 L. J. C. 178; L. R. 10 Ch. 68.

(t) *Sander v. Heathfield* 1871, 44 L. J. C. 113; L. R. 19 Eq. 21; *Re Dunning* (1885), 54 L. J. C. 900; *Re Hayward*

(1900), 70 L. J. C. 155; (1901) 1 Ch. 221.

(u) *Re Compton* (1883), 54 L. J. C. 964; 30 Ch. D. 15. See *Re Morris' Estate* (1874), 44 L. J. C. 178; L. R. 10 Ch. 68.

(v) *Re May* (1890), 60 L. J. C. 51; 45 Ch. D. 49; *Re Winham* (1892), 61 L. J. C. 535; (1892) 3 Ch. 59. See *Mildgley v. Mildgley* 1893, 62 L. J. C. 905; (1893) 3 Ch. 282.

(w) *Re Rowson* (1885), 54 L. J. C. 950; 29 Ch. D. 353.

(z) *Lowe v. Piskitt* (1855), 21 L. J. C. P. 196; 16 C. B. 500; *Re Poole's Estate* (1877), 46 L. J. C. 803; 6 Ch. D. 739; *Walters v. Walters* (1881), 50 L. J. C. 819; 18 Ch. D. 182.

(a) *Re Illidge* (1884), 53 L. J. C. 901; 27 Ch. D. 478.

in his lifetime (*b*). It may be claimed against money paid into court on account of the estate, and if claimed against such fund by the executor in his lifetime, his representatives are entitled (*c*). An order of the court that a claim shall be paid by the executor "in due course of administration" has not the effect of a judgment in giving priority, nor does it deprive the executor of the right of retainer (*d*); and it is not lost by payment into court, even where it is made under an order made upon the application of the executor or administrator (*e*); but the appointment of a receiver in an administration action prevents any retainer against the assets collected by him (*f*).—The right of retainer is not affected by the insolvency of the estate, or by the application of the rules of bankruptcy as to secured creditors under the Judicature Act, 1875, s. 10 (*g*). Nor is it affected by the Administration of Estates Act, 1869, except that in the case of an insolvent estate, the specialty and simple contract debts being charged rateably, the fund apportioned to the latter, against which only an executor can retain for a simple contract debt, is thereby increased (*h*). In the case of an administration in bankruptcy under sect. 125 of the Bankruptcy Act, 1883, there is no right of retainer (*i*).

b, *Re Compton* (1885), 50 L. J. C. 961; 30 Ch. D. 15.

c, *Re Compton* (1885), 54 L. J. C. 961; 30 Ch. D. 15; *Richmond v. White* (1879), 18 L. J. C. 798; 12 Ch. D. 361.

d, *Re Hubback* (1885), 54 L. J. C. 923; 29 Ch. D. 531. See *Ex p. Campbell* (1880), 16 Ch. D. 198.

e, *Re Langley* (1899), 68 L. J. C. 361.

f, *Re Jones* (1886), 55 L. J. C. 370; 31 Ch. D. 440; *Re Harrison* (1886), 55 L. J. C. 687; 32 Ch. D. 395.

g, *Lee v. Nattall* (1879), 48 L. J. C. 616; 12 Ch. D. 61; *Re May* (1890), 60 L. J. C. 31; 45 Ch. D. 499; *Re Ambler* (1905), 74 L. J. C. 367; 1905) 1 Ch. 697.

h, *Wilson v. Churchill* (1883), 52 L. J. C. 975; 23 Ch. D. 764; *Re Jones* (1886), 55 L. J. C. 350; 31 Ch. D. 440.

i, See *Re York* (1887), 56 L. J. C. 552; 36 Ch. D. 233; *Re Williams* (1888), 57 L. J. C. 264; 36 Ch. D. 575.

CHAPTER VI.

ASSIGNMENT IN BANKRUPTCY.

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AN adjudication of bankruptcy operates as an assignment in law of all the property of a debtor for division amongst his creditors. The proceedings are now regulated by the Bankruptcy Act, 1883, and the amending statute of 1890. By the Bankruptcy Act, 1882, s. 5, upon a petition in bankruptcy the court may make a "receiving order" for the protection of the estate; and by sect. 9, on the making of such order an official receiver is thereby constituted receiver of the property of the debtor; with the ordinary powers of a receiver of the court (*a*). By sect. 20, in default of the creditors accepting a composition or arrangement with the debtor, the court shall adjudge the debtor bankrupt; "and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee." By sect. 54 (1), "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act"; and (2) "on the appointment of a trustee the property shall forthwith pass and vest in the trustee appointed" (*b*). (3) The property shall pass and shall vest in the

Assignment
in bank-
ruptcy.

a) See sect. 70.

b) See *Selkig v. Davis* (1844), 2 Dow. 230.

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Receiving
order.

trustee for the time being, without any conveyance, assignment or transfer whatever.—The receiving order has not the effect of an adjudication of bankruptcy in divesting the property of the debtor; who must sue in his own name to recover the assets, though he must hand over the proceeds recovered in the action to the receiver (e). But upon the adjudication the official receiver, unless another person is appointed a trustee, becomes invested with the full powers of trustee over the property, including the power to sell (d).

Property
vesting in
trustee.

By sect. 44, "The property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise: (1) property held by the bankrupt on trust for any other person (e); (2) the tools of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value not exceeding twenty pounds in the whole." But it shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge" (f). The commencement of the bankruptcy is defined by sect. 43, as having relation back to "the time of the act of bankruptcy being committed on which a receiving order is made; or if the bankrupt is proved to have committed more acts of bankruptcy than one, the time of the first of the acts of bankruptcy proved to have been committed within three months next preceeding the date of the presentation of the bankruptcy petition." The trustee in bankruptcy is also entitled to attack conveyances made by a bankrupt in fraud of creditors, and to obtain a transfer of the property to himself either under sect. 47 of the Bankruptcy Act, 1883 (g), or the statute 13 Eliz. c. 5 (h).

Protected
transactions.

Sect. 49 protects from the operation of the Act in vesting the property of the bankrupt, any payment, delivery, conveyance, assignment, contract, dealing or transaction, for valuable consideration, which takes place before the date of the receiving order,

(d) *Rhodes v. Dawson* (1885), 55 L. J. Q. B. 134; 16 Q. B. D. 518; *Ex p. Mason* 1893, 1 Q. B. 233. See *Re Berry* (1896), 65 L. J. C. 215; (1896) 1 Ch. 539.

(e) *Targum v. Bd. of Trade* (1886), 55 L. J. Q. B. 117; 11 Ap. Ca. 286.

(f) *Ex p. Solomon* (1910), 80 L. J. K. B. 71; (1910) 2 K. B. 1019.

(g) *Ex p. Official Rec., Re Beall* 1899, 68 L. J. Q. B. 462; (1899) 1 Q. B. 688;

Ex p. Jenks 1902, 71 L. J. K. B. 465; (1902) 1 K. B. 719.

(h) See *Ex p. Harey* (1885), 51 L. J. Q. B. 554; 15 Q. B. D. 682; *Ex p. Brown* (1892), 62 L. J. Q. B. 277; (1893) 1 Q. B. 181; *Ex p. Norton* (1893), 62 L. J. Q. B. 457; (1893) 2 Q. B. 381.

(i) See *Twyne's case* (1602), 3 Co. 80; 1 Sm. L. C. 1; *Re Holland* (1902), 71 L. J. C. 518; (1902) 2 Ch. 390.

and in which the party, other than the debtor, has not at the time of the transaction notice of any available act of bankruptcy (*i*). If the creditor has notice of an available act of bankruptcy, he cannot enter into any dealing with the bankrupt which may not be impeached within three months thereafter by reason of the relation back of the title of the trustee in bankruptcy under sect. 43 (*k*). Rights of property which are vested by contract before any act of bankruptcy, as a security upon goods or an irrevocable licence to seize goods, are protected independently of the above section; though not realised until after an act of bankruptcy (*l*). Notice of an intention to commit an act of bankruptcy, as the intention of presenting a liquidation petition, is not notice of an act of bankruptcy within the section; and a transaction effected without notice of the presentment of the petition is protected (*m*). Notice that a petition in bankruptcy has been filed is notice of the act of bankruptcy alleged in the petition (*n*). Transactions taking place after the date of the receiving order, though without notice of it, are in general not protected: as a payment to the bankrupt of the purchase-money of land sold by him before bankruptcy (*o*); or a payment to the bankrupt of money received by an agent of the bankrupt before the bankruptcy (*p*). Payment of a debt to the bankrupt by a post-dated cheque was held to be protected, though the drawer had notice of an act of bankruptcy before the cheque became due and did not stop it (*q*).

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Notice of
act of
bankruptcy.

By the joint effects of sects. 44 and 168 of the Bankruptcy Act, 1883, the property of the debtor vesting in the trustee comprises "goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising

Rights of
action of
bankrupt.

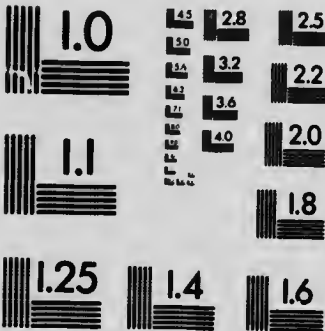
ⁱ See *Hood v. Newby* (1882), 52 L. J. C. 201; 21 Ch. D. 605; *Hance v. Harding* (1888), 57 L. J. Q. B. 403; 20 Q. B. D. 732; *Wild v. Southwood* (1896), 66 L. J. Q. B. 166; (1897) 1 Q. B. 317.
^k *Tonsford, Baker & Co. v. Union of London & Smiths Bk.* (1906), 75 L. J. C. 724; (1906) 2 Ch. 441.
^l *Krehl v. Central Gas Co.* (1870), 39 L. J. Ex. 197; L. R. 5 Ex. 289; *Ex p. Dickin* (1876), 46 L. J. Bk. 26; 4 Ch. D. 524. See *Ex p. Attwater* (1877), 46 L. J. Bk. 41; 5 Ch. D. 27; *Ex p.*

Payne (1879), 11 Ch. D. 539; *Ex p. Baxter* (1881), 53 L. J. C. 802; 26 Ch. D. 510.
^m *Ex p. Arnold* (1876), 15 L. J. Bk. 130; 3 Ch. D. 70.
ⁿ *Lucas v. Incker* (1881), 50 L. J. Q. B. 190; 6 Q. B. D. 81.
^o *Ex p. Robbidge* (1878), 18 L. J. Bk. 15; 8 Ch. D. 367.
^p *McEldon v. Pether* (1889), 22 Q. B. D. 438.
^q *Ex p. Richdale* (1882), 51 L. J. C. 462; 19 Ch. D. 409.



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PART VI.

out of or incident to property as above defined": as a right of action for wrongfully depriving the debtor of the use of a machine in his business (*x*); for not indemnifying the debtor as the assignor of a lease (*s*); for not indemnifying the debtor, as underlessee, against a distress upon his goods for the rent due to the superior landlord (*t*); for the negligence of a solicitor in allowing property to be taken in execution (*u*); for a wrongful dismissal of the debtor from his employment (*x*); but in the case of a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt, the bankrupt may maintain an action for a breach of contract occurring after the bankruptcy, unless the trustee intervenes (*y*). Rights of action of the above kind, by force of sect. 50, sub-sect. 5, of the Bankruptcy Act, 1883, are to be "deemed to have been duly assigned to the trustee." The trustee may sue in his own name on behalf of the creditors, and recover the same amount of damages as the debtor himself would have recovered (*z*); or he may compromise the action for an amount less than is claimed (*a*). And he may sell and assign the same right for the benefit of the creditors, without infringing the law against maintenance and champerty (*b*).

Personal injuries.

Rights of action for wrongs personal to the debtor do not pass to the trustee: as a right of action for the negligence of a solicitor in allowing his client to be detained in execution, and for the trouble and expense of obtaining his release; the cause of complaint being a personal wrong notwithstanding the pecuniary loss (*c*). It sometimes happens that the primary cause of complaint is a personal wrong although arising from a wrongful act to the debtor's property, and this right of action does not pass to the trustee in bankruptcy (*d*). But if the cause of action primarily affects the estate of the bankrupt it passes to the trustee, though special damage of a personal kind may also accrue which the

(*r*) *Stanton v. Colliver* (1854), 23 L. J. Q. B. 116; 3 E. & B. 274.

(*s*) *Re Perkins* (1898), 67 L. J. C. 454; (1898) 2 Ch. 182.

(*t*) *Hawcock v. Coffyn* (1832), 1 L. J. C. P. 104; 8 Bing. 358.

(*u*) *Wetherell v. Julius* (1850), 19 L. J. C. P. 367; 10 C. B. 267.

(*v*) *Beckham v. Drake* (1819), 2 H. L. C. 579.

(*y*) *Fenton v. Caste* (1881), 51 L. J. C. 41; 17 Ch. D. 768; *Bailey v. Thaxton* (1902), 72 L. J. K. B. 36; (1903) 1

K. B. 137.

(*z*) *Ashdown v. Ingamells* (1880), 50 L. J. Ex. 109; 5 Ex. D. 280.

(*a*) *Leeming v. Murray* (1879), 48 L. J. C. 737; 13 Ch. D. 123.

(*b*) *Seear v. Lawson* (1880), 50 L. J. C. 139; 15 Ch. D. 426; *Guy v. Churchill* (1889), 58 L. J. C. 345; 40 Ch. D. 481.

(*c*) *Wetherell v. Julius* (1850), 19 L. J. C. P. 367; 10 C. B. 267.

(*d*) *Reg v. Spruce* (1846), 12 Cl. & F. 700; *Rose v. Buckett* (1901), 70 L. J. K. B. 736; (1901) 2 K. B. 119.

trustee would not be entitled to claim; as a right of action against a solicitor for fraudulently selling the property of his client at an inadequate price, with the special consequence to the client of becoming bankrupt (e).

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An action commenced before bankruptcy does not become abated by reason of the bankruptcy, "if the cause of action continue." And if the continuing cause of action becomes vested in the trustee, an order may be obtained that the proceedings shall be carried on by the trustee as plaintiff; and if he refuses to take such proceedings the action may be stayed (f). The bankrupt during the bankruptcy cannot continue or maintain any action or proceeding in respect of any matter which has become vested in the trustee (g). In the case of the bankruptcy of a member of a partnership an action may be maintained by the solvent partners or the trustee in bankruptcy, using the name of the party not joining in the action, upon an indemnity as to the costs of action (h); and in the case of a joint contract, an action may be maintained by or against the solvent co-contractor without joining the trustee in bankruptcy (i). The trustee by refusing to continue the action commenced by the bankrupt is not barred from bringing an action in his own right as trustee for the same cause (k). But the trustee having refused to continue the action, which was thereupon stayed, the bankrupt after his discharge and having taken an assignment of the assets from the trustee, was held to be barred from removing the stay of proceedings and continuing the action (l).

Actions commenced before bankruptcy.

The effect of bankruptcy is "to vest in the assignees every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees: such, in short, as would

Executory contracts of bankrupt.

(e) *Stanton v. Collier* (1851), 21 L. J. Q. B. 116; 3 E. & B. 274; *Morgan v. Stoble* (1872), 41 L. J. Q. B. 260; L. R. 7 Q. B. 111.

(f) Ord. XVII. rr. 1, 4; *Jackson v. N. E. Ry.* (1877), 16 L. J. C. 723; 5 Ch. D. 844; *Elvedge v. Burgess* (1878), 47 L. J. C. 312; 7 Ch. D. 411.

(g) *Motson v. Mojen* (1872), 41 L. J. C. 596; L. R. 14 Eq. 202; *Ex p. Carter*

(1876), 45 L. J. C. 145; 2 Ch. D. 806. See *Fale v. Oppet* (1877), 5 Ch. D. 969.

(h) Bankruptcy Act, 1883, s. 113; *Whitehead v. Hughes* (1831), 2 Cr. & M. 318.

(i) Bankruptcy Act, 1883, s. 111.

(k) *Bennett v. Ganjee* (1876), 46 L. J. Ex. 204; 2 Ex. D. 11.

(l) *Setg v. Lion* (1891), 60 L. J. Q. B. 403; (1891), 1 Q. B. 513.

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pass as part of his personal estate to his executors if he had died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration." The trustee in bankruptcy, as assignee of the contract, by performing all the conditions of such contracts in the place of the bankrupt becomes entitled to payment or performance, or damages for non-performance, for the benefit of the creditors (*m*); as a contract for the sale and delivery of goods to the bankrupt, which the trustee may elect to perform by paying the price and accepting delivery, as being beneficial to the creditors (*n*). But if the sale is for delivery upon credit the bankruptcy or insolvency of the buyer has the effect, without rescinding the sale, of justifying the seller in refusing any delivery until payment of the price (*o*). So in the case of specific goods sold to the bankrupt on credit, though the right of property vests in the trustee before delivery, and the goods are at his risk, yet he cannot claim the possession without paying the price (*p*). And if the seller has delivered the goods to a carrier on behalf of the buyer, he retains the right to stop them *in transitu* and to recover the possession at any time before they have been finally delivered into the possession of the buyer or of his agent to hold them (*q*). In the case of the buyer mortgaging or re-selling the goods during the transit, the unpaid seller may still claim the right of stoppage as against any surplus value or unpaid price accruing to the insolvent (*r*).—Upon the same principle where the bankrupt has contracted to purchase land, the trustee may complete the contract for the benefit of the creditors; and where the bankrupt has contracted to sell land, the trustee takes the land under the bankruptcy subject to the equitable title of the purchaser to have a conveyance upon payment of the purchase-money to the

(*m*) *Parke, B., Gibson v. Carruthers* (1841), 11 L. J. Ex. 138; 8 M. & W. 333. See *Ex p. Tondour* (1867), 37 L. J. Eq. 121; L. R. 5 Eq. 160.

(*n*) *Gibson v. Carruthers* (1841), 11 L. J. Ex. 138; 8 M. & W. 321; *Ex p. Halliday* (1865), 2 De G. J. & S. 312. See *Lawrence v. Knowles* (1839), 8 L. J. C. P. 721; 5 Bing. N. C. 399.

(*o*) Sale of Goods Act, 1893, s. 39; *Ex p. Chalmers* (1872), 42 L. J. Bk. 37; L. R. 8 Ch. 289.

(*p*) Sale of Goods Act, 1893, s. 41; *per cur. Bloom v. Sanders* (1825), 4 B. & C. 918; *Miles v. Gorton* (1834), 3 L. J. C.

155; 2 Cr. & M. 504; *Grice v. Richards* (1877), 47 L. J. P. C. 48; 7 Ap. Ca. 319.

(*q*) Sale of Goods Act, 1893, s. 43; *Ex p. Rosecray Clay Co.* (1879), 48 L. J. Bk. 100; 11 Ch. D. 360; *Brindley v. Cilegum Co.* (1885), 55 L. J. Q. B. 67; *Bethell v. Clarke* (1888), 57 L. J. Q. P. 302; 20 Q. B. D. 615; *Lyons v. Hoffmann* (1890), 59 L. J. P. C. 79; 15 Ap. Ca. 391.

(*r*) *Bellamy v. Davey* (1891), 60 L. J. C. 778; (1891) 3 Ch. 540. See *ante*, p. 880.

trustee (s). So where the bankrupt has contracted for a lease the trustee may sell the lease for the benefit of the estate; and the purchaser is entitled to have the lease, though the lessor would not be compelled to grant it to the bankrupt or insolvent lessee (t). And a covenant or condition in the lease or agreement against assignment without licence does not apply to assignment by bankruptcy or by other operation of law (u).

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Contracts in which the personal skill or conduct of the bankrupt forms a material part of the consideration do not pass to the trustee: as a contract of partnership, which is dissolved by the bankruptcy of one of the partners; a contract between an author and a publisher for the publication of a literary work, involving on both sides a confidence in the personal qualities of the parties (x); but if the work is completed by the bankrupt on behalf of the estate, or if completed otherwise by the trustee and accepted by the employer, the trustee becomes entitled to recover the price (y). Under a contract for building a ship it was held that the trustee in bankruptcy of the builder had the option of completing the contract, notwithstanding a clause in the contract that upon bankruptcy the buyer might complete with the materials provided by the builder; because upon the bankruptcy the materials vested in the trustee (z).

Contracts relating to the person.

The contracts of a bankrupt vest in the trustee upon adjudication, without any assignment or act of acceptance (a). Nor is it required that the trustee should give notice to the other contracting party that he adopts the contract, otherwise than by offering performance of the conditions according to the terms (b). But by the Bankruptcy Act, 1883, s. 55 (1), "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of un-

Disclaimer of contracts by trustee.

(s) *Ex p. Rabidge* (1878), 48 L. J. Bk. 15; 8 Ch. D. 367. See *Whitbread & Co. v. Watt* (1902), 71 L. J. C. 42; (1902) 1 Ch. 235.

Shie v. Tooke (1833), 2 L. J. C. M. & K. 431; *Morgan v. Rhodes* (1834), 1 M. & K. 43; *Buckland v. Papillon* (1866), 36 L. J. C. 81; L. R. 2 Ch. 67.

(t) *Wenthall v. Greeng* (1806), 12 Ves. 504; *Doe v. Smith* (1814), 5 Fount. 795; *Re Rings* (1801), 70 L. J. K. B. 541; (1901) 2 K. B. 16. See *Doe v. Carter* (1798), 8 T. R. 57.

(x) *Leicester, Gibson v. Carnuthers* (1841), 11 L. J. Ex. 138; 8 M. & W. 33; 313.

(y) *Whitmore v. Gilmore* (1843), 13 L. J. Ex. 201; 12 M. & W. 810; *Kings v. Burgess* 1861, 33 L. J. C. 727.

(z) *Ex p. Barter* (1884), 53 L. J. C. 802; 26 Ch. D. 510.

(a) Bankruptcy Act, 1883, ss. 50 (5), 54. See *Wadhams v. Marlborough* (1785), 8 East, 314, n; *Trotter v. Cooper* (1882), 51 L. J. Q. B. 472; 9 Q. B. D. 473.

(b) *Gibson v. Carnuthers* (1841), 11 L. J. Ex. 138; 8 M. & W. 321.

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profitable contracts, or of any other property that is unsaleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may by writing signed by him, at any time within three months (altered to twelve months by the Bankruptcy Act, 1890, s. 13) after the first appointment of the trustee, disclaim the property" (c). (2.) "The disclaimer shall operate to determine, as from the date of the disclaimer, the rights and liabilities of the bankrupt in respect of the property disclaimed, and shall also discharge the trustee from all personal liability from the date when the property vested in him; but shall not except so far as is necessary for the purpose of releasing the bankrupt and the trustee from liability, affect the rights and liabilities of any other person" (d). (4.) The trustee shall not be entitled to disclaim when an application in writing has been made by any person interested requiring him to decide whether he will disclaim or not, and he has for twenty-eight days after the application or for such extended period as may be allowed by the court neglected to give notice whether he disclaims or not, "and in the case of a contract, if the trustee does not within such period disclaim the contract, he shall be deemed to have adopted it" (e). (5.) The court may, on the application of a person entitled or subject to a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance as to the court may seem equitable, and the damages payable to any such person may be proved as a debt in the bankruptcy. (7.) "A person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt in the bankruptcy."

Disclaimer
of lease.

By sect. 55 (3), "A trustee shall not be entitled to disclaim a lease without the leave of the court, and the court may before granting such leave impose such terms as a condition of granting such leave."

(c) See *Re Clayton and Barclay* (1895), 61 L. J. C. 615; (1895) 2 Ch. 212.

(d) See *Smith v. North* (1872), 41 L. J. Ex. 103; L. R. 7 Ex. 242; *Stacey v. Hill* 1901, 70 L. J. K. P. 135;

(1901) 1 K. B. 600; *Ex p. Trust Bastable* (1901), 70 L. J. K. B. (1901) 2 K. B. 518.

(e) See *Ex p. Davis* (1876), 15 Bk. 137; 3 Ch. D. 463.

ing leave, and make such orders with respect to fixtures, tenants' improvements, and other matters arising out of the tenancy as the court thinks just" (f). (6.) The court may make an order for vesting disclaimed property in any person entitled thereto on such terms as the court thinks just: provided that where the disclaimed property is of a leasehold nature a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or mortgagee by demise, must be made upon the terms of such person being subject to the same liabilities and obligations as the bankrupt was subject to under the lease (g). By sect. 13 of the Bankruptcy Act, 1890, the court is now empowered to modify these terms, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order (h). The trustee as statutory assignee of a lease, unless he disclaims, is personally liable for the rent accruing due after his appointment, and for the covenants, to the same extent as an assignee by conveyance; but the rent previously accrued due must be distrained for, or proved as a debt (i). The trustee as assignee of the lease may get rid of future liability without disclaimer by assigning it to another, and even to an insolvent assignee (k). Disclaimer of a lease does not render the trustee a trespasser during a previous occupation; nor can any contract be implied to pay for such occupation (l).—Upon disclaimer of an agreement for a lease the lessor is entitled to prove for the difference between the agreed rent and the rent obtainable at the time of the disclaimer (m). Upon the disclaimer of a lease for twenty-one years, which was determinable by the lessee at the end of seven years upon payment of the rent and performance of the covenants, the lessor was held entitled to

Proof by
lessor for loss
by disclaimer.

(f) See *Ex p. Arnal* (1884), 53 L. J. C. 131; 24 Ch. D. 26; *Re Moser* (1881), 13 Q. B. D. 738.

(g) See *Ex p. Hepburn* (1890), 59 L. J. Q. B. 554; 25 Q. B. D. 536; *Ex p. Lupton* (1901), 70 L. J. K. B. 856; (1901) 2 K. B. 628. See *Powell v. Hunsley* (1909), 78 L. J. C. 741; (1909) 2 Ch. 252.

(h) *Ex p. Swill* (1905), 74 L. J. K. B. 442; (1905) 1 K. B. 735. See *Ex p. Ashworth* (1908), 77 L. J. K. B. 1129; (1908) 2 K. B. 812.

(i) *Ex p. Dressler* (1878), 48 L. J. Bk.

20; 9 Ch. D. 252; *Tilston v. Cooper* (1882), 51 L. J. Q. B. 472; 9 Q. B. D. 473; *Ex p. Mantelberg* (1895), 64 L. J. Q. B. 454; (1895) 1 Q. B. 844.

(k) *Hopkinson v. Loring* (1883), 52 L. J. Q. B. 391; 11 Q. B. D. 92; ante, p. 947.

(l) *Lovrey v. Burl*, (1880), 49 L. J. Ex. 433; 5 Ex. 170; *Gabriel v. Blankenstein* (1884), 53 L. B. D. 484.

(m) *Ex p. Lymington Co.* (1871), 41 L. J. Bk. 5; L. R. 7 Ch. 28. See sub-s. (7).

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prove for the diminution of rent to the end of the seven years together with the value of the performance of the covenants (*n*). In the case of a lease to joint tenants with joint and several covenants to pay the rent, a disclaimer of the lease in the bankruptcy of the joint lessees entitles the lessor to prove against the separate estate of each lessee (*o*). Where a lease has been assigned, a disclaimer in the bankruptcy of the assignee does not affect the rights and liabilities of the original parties (*p*).

Goods in
reputed
ownership of
bankrupt.

By sect. 44, the property of the bankrupt divisible amongst his creditors comprises (amongst the property therein specified), "all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business, by the consent and permission (*q*) of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." If the debtor has an interest in the goods the reputed ownership clause does not apply, as in the case of the possession of goods by an ostensible partner, although with the consent of the dormant partner (*r*). So of goods obtained by fraud (*s*).—"Things in action" in the meaning of the proviso comprise a policy of life assurance, which had been mortgaged by the bankrupt (*t*); and shares in a company constituted under the Companies Clauses Act, of which the certificate had been pledged (*u*); but shares in a company after deposit of the certificate with an assignee or mortgagee cease to be in the order and disposition of the registered owner (*x*).—"Debts due or growing due to the bankrupt in his trade or business" are expressly excepted from the proviso (*y*); therefore if the bankrupt has assigned such debts and the assignee has given no notice of the assignment to the debtors before the bankruptcy.

Things in
action.

Trade debts.

(*n*) *Ex p. Blake* (1879), 11 Ch. D. 572.

(*o*) *Ex p. Corbett* (1880), 49 L. J. Bk. 74; 14 Ch. D. 121.

(*p*) *Smith v. North* (1872), 41 L. J. Ex. 103; L. R. 7 Ex. 212.

(*q*) *Re Mill* (1895), 61 L. J. C. 708; (1895) 2 Ch. 561.

(*r*) *Coldwell v. Gregory* (1811), 1 Price, 119; *Reynolds v. Royley* (1807), 36 L. J. Q. B. 247; L. R. 2 Q. B. 474. See *G. E. Royley v. Turner* (1872), 42 L. J. C. 83; L. R. 8 Ch. 149.

(*s*) *Lord v. Green* (1816), 15 L. J. Ex. 113; 15 M. & W. 216.

(*t*) *Ex p. Ibbetson* (1878), 8 Ch. D. 519.

(*u*) *Colonial Bk. v. Whinney* (1886), 56 L. J. C. 43; 11 Ap. Ca. 426. See *Ex p. Barry* (1873), 43 L. J. Bk. 18; L. R. 17 Eq. 113.

(*x*) *Ex p. Nottingham Bk.* (1885), 54 L. J. Q. B. 601; 15 Q. B. D. 411; *Colonial Bk. v. Whinney* (1886), 56 L. J. C. 43; 11 Ap. Ca. 426.

(*y*) See *Ex p. Kemp* (1874), 43 L. J. Bk. 59; L. R. 9 Ch. 383.

they remain in the order or disposition of the bankrupt at the time of the bankruptcy and vest in the trustee by force of the statute (7); but if such notice is given before the bankruptcy, they cease to be in the order or disposition of the bankrupt (a). "Things in action" within the proviso are exempted from the effect of reputed ownership; and the trustee in bankruptcy takes only such interest in them as the bankrupt has at the time of the bankruptcy, and therefore cannot gain priority over a prior assignee or incumbrancer by giving notice to the debtor (b). But it seems to be held necessary for the trustee to give notice of his claim in order to maintain priority over subsequent assignments of the bankrupt to persons not having notice of the bankruptcy (c).—The possession, order, or disposition of the bankrupt must be under circumstances which create a reputed ownership as a matter of fact (d). No such reputation arises as to goods in the possession of a recognised factor or agent for sale or purchase (e); or as to a ship in a shipbuilder's yard (f); or where there is a recognised custom of a trade negating the inference of property from possession (g).—The rule of bankruptcy affecting goods in possession of the bankrupt as reputed owner does not apply under the Judicature Act, 1875, s. 10, to the winding up of insolvent companies (h).

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Reputation of ownership.

"Property held by the bankrupt on trust for any other person" is not divisible amongst his creditors and does not vest in the trustee (i). Therefore debts which have been assigned to another before bankruptcy (except trade debts which remain in the order

Property held in trust

Beatt (1895), 61 L. J. C. 872; *Ex p. Trustee, Re & Co* (1898), 67 L. J. Q. 398; 1 Q. B. 787.

q. v. Moore (1869), 39 L. J. C. 98. See *Ex p. Beatt* (1878), 47 L. J. Bk. 38; 7 Ch. D. 419.

(b) *Ex p. Ishelson* (1878), 8 Ch. D. 519; *Goringe v. Jewell Rubber Wks.* (1886), 56 L. J. C. 85; 31 Ch. D. 128.

(c) *Pulver v. Locke* (1881), 51 L. J. C. 124; 14 Ch. D. 381. See *Re Russell's Policy* (1871), L. R. 15 Eq. 25; *Ex p. Rabbidge* (1878), 48 L. J. Bk. 15; 8 Ch. D. 367.

(d) *Ex p. Watkins* (1873), 42 L. J. Bk. 50; L. R. 8 Ch. 520; *Ex p. Lowrey* (1874), 43 L. J. Bk. 50; L. R. 9 Ch. 624; *Ex p. Brooks* (1884), 23 Ch. D. 261; *Ex p. Lowrey* (1883), 52 L. J. C. 951; 24 Ch. D. 31.

(e) *Ex p. Bright* (1879), 41 L. J. Bk. 81; 10 Ch. D. 565; *Harris v. Truman* (1882), 51 L. J. Bk. 338; 9 Q. B. D. 261.

(f) *Holburness v. Rankin* (1869), 29 L. J. C. 753; 2 De G. F. & J. 258; *McBain v. Waller* (1881), 6 Ap. Ca. 588.

(g) *Craven v. Salter* (1881), 51 L. J. C. 495; 18 Ch. D. 30; *Ex p. Brooks* (1884), 23 Ch. D. 261; *Ex p. Turquant* (1885), 54 L. J. Q. B. 212; 14 Q. B. D. 636; *Ex p. Trustee, Re Gutz, Jones & Co.* (1898), 67 L. J. Q. B. 577; (1898) 1 Q. B. 787.

(h) *Goringe v. Jewell Rubber Wks.* (1886), 56 L. J. C. 85; 31 Ch. D. 128.

(i) Bankruptcy Act, 1883, s. 41; *St. Thomas' Hosp. v. Richardson* (1909), 79 L. J. K. B. 488; (1910), 1 K. B. 271.

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or disposition of the bankrupt as reputed owner) do not pass to the trustee (*k*). Upon this principle the mortgagee of a ship which remains in the possession of a mortgagor is entitled to the freight accruing due as against the trustee in bankruptcy of the mortgagor; the mortgage operating as an assignment of the freight (*l*). And where the claims arising upon a contract are severable and assignable separately, the trustee takes those only of which the bankrupt retains the beneficial interest: as in the case of a policy of insurance on goods with a stipulation for return of premium in certain events, the bankrupt having assigned the goods with the benefit of the insurance, it was held that he could recover for the loss as a trustee for the buyer, but that the claim to a return of premium passed to the trustee (*m*). Where a fund or debt is assigned by way of mortgage to secure a sum of less amount, a trustee of the fund is in equity a trustee for the assignee in respect of any surplus, and probably ought to pay that surplus to the trustee in bankruptcy, but a debtor is not a trustee and is entitled to treat an assignee by way of mortgage as absolutely entitled, unless he concurs in a payment of the surplus to the trustee in bankruptcy (*n*).

Money held
by bankrupt
agent.

Property held by an agent for the purposes of his principal is in general in the position of trust property; but there is a distinction as to money arising from the kind of agency: a clerk or servant employed to receive money is bound to retain it *in specie* and deliver it to his employer, whose property it is during the possession of the agent; and there is no property in the agent which can vest in the trustee. But a solicitor, or a banker, or a commercial agent in general, who receives money in the ordinary course of business for a client or customer, is not bound to retain it and deliver it *in specie*, and is accountable for it only as a debt; which is provable in his bankruptcy, the money received becoming part of the assets which vest in the trustee (*o*). If a factor, having sold goods for his principal and received the price, becomes bankrupt, the principal can only prove for the money received as a debt, unless the money has been kept separate or can be followed and

(*k*) *Burn v. Carvalho* (1839), 9 L. J. C. 65; 4 M. & Cr. 690; *Ex p. Brett* (1878), 47 L. J. Bk. 38; 7 Ch. D. 411. See *ante*, pp. 861, 948.

(*l*) *Rusden v. Pope* (1868), 37 L. J. Ex. 137; 1 R. 3 Ex. 269.

(*m*) *Boddington v. Castell* (1853), 23

L. J. Q. B. 31; 1 F. & R. 879.

(*n*) *Re Foligno's Policy* (1863), 32 Beav. 131; *Re Bell* (1895), 65 L. J. C. 188; (1896) 1 Ch. 1.

(*o*) See *ante*, p. 709; Blackburn, J., *Bridges v. Garrett* (1870), 39 L. J. C. P. 251; L. R. 5 C. P. 456.

identified; if the factor having sold the goods becomes bankrupt before payment, and the price is paid to his trustee, the principal may recover the amount in full as money received to his use; and so if the price was paid to the factor in bills falling due after the bankruptcy on which the trustee receives payment (*p*).

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If goods, money, or other property intrusted to an agent for purposes of his principal remain *in specie* in his possession at the time of his bankruptcy, they are subject to the trust for the principal, and do not pass to his trustee; and if the agent has converted the property, as goods into money, or money into goods, or mixed it with his own property, the proceeds remaining in his possession are held on trust for the principal and do not pass to the trustee (*q*).

Goods in possession of agent.

The property of the bankrupt which vests in the trustee for division among creditors comprises "all such property as may be acquired by or devolve on him before his discharge" (*r*), including the benefit of contracts and debts accruing to him pending the bankruptcy: as a judgment recovered by the bankrupt (*s*); a debt for work done and goods supplied by him (*t*); a debt for money paid by him without consideration so as to be chargeable as money received for his use (*u*). But as to all such after-acquired rights of the bankrupt, except so far as they consist of land of freehold tenure (*x*), the trustee must intervene to claim the benefit by giving notice of his claim to the debtor or party liable; otherwise the bankrupt may confer a good title upon an assignee who knows of his assignor's bankruptcy and that the trustee is ignorant of the property or right (*y*); but this exception is itself subject to the qualification that the person claiming under the bankrupt has given value (*z*). A bankrupt may sue upon a bill of exchange indorsed to him (*a*); and a bankrupt may indorse a

After-acquired contracts of bankrupt.

Intervention of trustee.

(*p*) *Scot v. Surman* (1743), Willes, 400. See Jessel, M. R., *Re Hallett* (1880), 49 L. J. C. 415; 13 Ch. D. 746.

(*q*) *Ex p. Cooke* (1876), 46 L. J. Bk. 52; 4 Ch. D. 124; *Ex p. Bright* (1879), 48 L. J. Bk. 81; 10 Ch. D. 566; *Gibert v. Gosard* (1885), 51 L. J. C. 439. See *Ex p. Blane* (1891), 63 L. J. Q. B. 573; (1894) 2 Q. B. 237.

(*r*) Bankruptcy Act, 1883, s. 13.

(*s*) *Ex p. Carter* (1876), 45 L. J. Bk. 145; 2 Ch. D. 806.

(*t*) *Whitmore v. Gilmore* (1843), 13 L. J. Ex. 201; 12 M. & W. 808.

(*u*) *Ex p. Walsingham Bank* (1881), 11 Q. B. D. 32.

(*v*) *Re New Land Development Assn. and Gray* (1892), 61 L. J. C. 491. (1892) 2 Ch. 138; *Off. Rec. v. Cooke* (1906), 75 L. J. C. 757; (1906) 2 Ch. 661.

(*g*) *Cohen v. Mitchell* (1890), 59 L. J. Q. B. 491; 25 Q. B. D. 262; *Re Clayton and Barclay* (1895), 64 L. J. C. 615; (1895) 2 Ch. 212.

(*z*) *Ex p. Off. Rec., Re Bennett* (1906), 76 L. J. K. B. 134; (1907) 1 K. B. 119.

(*a*) *Dechert v. Sayer* (1814), 13 L. J. Q. B. 299; 5 Q. B. 965.

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bill or note, if the trustee does not claim it before the indorsement (*b*). And payments made by a bankrupt or rent, or for goods supplied, or for services rendered (*c*); or a deposit paid on a contract made by a bankrupt for the purchase of land, are valid (*d*). The rule applies in the case of the assignment of an equitable chose in action, thus forming an exception to the rule that rights in equity are regulated by priority of time (*e*). Notice given by the trustee to the party liable vests the property in the trustee; and if the bankrupt has commenced an action for its recovery, the trustee may intervene and he will be added as co-plaintiff to conduct the action (*f*).

Personal earnings of bankrupt.

Exception is made of the earnings of a bankrupt by his personal labour, so far as may be necessary for the maintenance of himself and family (*g*). But the profits of carrying on an ordinary trade, business, or profession are not considered as personal earnings within the exception: as in the case of a furniture broker (*h*); or of a painter (*i*); or of a general medical practitioner (*k*); or of an architect (*l*). And the damages awarded to a bankrupt for wrongful dismissal from his employment are not within the exception (*m*).—By the Bankruptcy Act, 1883, s. 53, a salary, income, or pension of a bankrupt may be made payable to the trustee by an order of the court; but no such order can be made as to the prospective and contingent income or earnings of a profession or business (*n*); or as to an income or allowance paid to him voluntarily (*o*).—By sect. 64, the trustee may appoint the bankrupt himself to manage his property or to carry on his trade for the benefit of his creditors; and he may make an allowance to

Income or pension.

Employment of bankrupt by trustee.

(*b*) *Draxton v. Dale* (1823), 2 L. J. O. S. K. B. 20; 2 B. & C. 293.

(*c*) *Ex p. Deakurst* (1871), 41 L. J. Bk. 18; L. R. 7 Ch. 185; *Re Sinclair* (1885), 15 Q. B. D. 616.

(*d*) *Collins v. Stinson* (1883), 52 L. J. C. 440; 11 Q. B. D. 142.

(*e*) *Hunt v. Fypp* (1898), 67 L. J. C. 377; (1898) 1 Ch. 675.

(*f*) *Ex p. Carter* (1886), 45 J. Bk. 145; 2 Ch. D. 806; *F v. Carter* (1881), 51 L. J. C. 1; 17 Ch. D. 768. See Ord. XVI. r. 2.

(*g*) *Re Roberts* (1899), 69 L. J. Q. B. 19; (1900) 1 Q. B. 122.

(*h*) *Crofton v. Poole* (1830), 9 L. J. O. S. K. B. 59; 1 B. & Ad. 568.

(*i*) *Ex p. Banks* (1877), 46 L. J. Bk. 74; 4 Ch. D. 689.

(*k*) *Ellot v. Clayton* (1851), 20 L. J. Q. B. 217; 16 Q. B. 581.

(*l*) *Emden v. Carter* (1881), 51 L. J. C. 41; 17 Ch. D. 78.

(*m*) *Wadding v. Oliphant* (1876), 45 L. J. Q. B. 173; 1 Q. B. D. 115; *Emden v. Carter* (1881), 51 L. J. C. 41; 17 Ch. D. 768.

(*n*) *Ex p. Bennett* (1881), 51 L. J. Q. B. 58; 1 Q. B. D. 301; *Ex p. Lloyd* (1891), 60 L. J. Q. B. 751; (1891) 2 Q. B. 231; *Ex p. Shine* (1892), 61 L. J. Q. B. 25; (1892) 1 Q. B. 522. See *Ex p. Official Rec., Re Mirams* (1891), 60 L. J. Q. B. 397; (1891) 1 Q. B. 591.

(*o*) *Ex p. Wicks* (1881), 50 L. J. C. 620; 17 Ch. D. 70; *Ex p. Webber* (1886), 56 L. J. Q. B. 209; 18 Q. B. D. 411; *Ex p. Ward* (1897), 66 L. J. Q. B. 310; (1897) 1 Q. B. 265.

the bankrupt out of his property for the support of himself and family or in consideration of his services (*p*). By so doing the trustee is estopped from claiming the property or the profits of the business as against creditors who afterwards deal with the bankrupt in his own right in respect of the property or business in ignorance of the circumstances (*q*). But if the bankrupt deals with assets of the bankruptcy without any authority from the trustee, and without his knowledge, the trustee is not estopped from asserting his claim against a purchaser or mortgagee from the bankrupt: as in the case of household furniture left in the use of the bankrupt (*r*).—In the case of a second bankruptcy of an undischarged bankrupt the then property of the bankrupt vests in the trustee in the second bankruptcy, as against all persons except the trustee in the first (*s*). And goods then in the possession, order, or disposition of the bankrupt by the consent of the trustee of the first bankruptcy vest absolutely in the trustee in the second bankruptcy by force of the reputed ownership (*t*).

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Second
bankruptcy.

(*p*) See *Coles v. Barrow* (1813), 1 Taunt. 754; *Whitmore v. Gilmore* (1811), 13 L. J. Ex. 201; 12 M. & W. 808.

(*q*) *Engelback v. Nixon* (1875), 41 L. J. C. P. 396; L. R. 10 C. P. 615; *Ex p. Holland* (1878), 47 L. J. Bk. 74; 9 Ch. D. 312.

(*r*) *Ex p. Ford* (1876), 45 L. J. Bk. 96; 1 Ch. D. 521; *Meggy v. Imperial Dye Co.* (1878), 48 L. J. Q. B. 51; 3 Q. B. D. 711.

(*s*) *Morgan v. Knight* (1863), 33 L. J. C. P. 168; 15 C. B. N. S. 669; *Ex p. Watson* (1879), 12 Ch. D. 380; *Ex p. Beaumont* (1891), 61 L. J. Q. B. 806; 1891 2 Q. B. 393. See *Bird v. Philpott* (1900), 69 L. J. C. 187; (1900) 1 Ch. 822.

(*t*) *Bulter v. Hobson* (1838), 7 L. J. C. P. 118; 4 Bing. N. C. 290; *Meggy v. Imperial Dye Co.* (1878), 48 L. J. Q. B. 51; 3 Q. B. D. 711.

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