THE

STUDENT'S GUIDE

TO THE

PRINCIPLES OF EQUITY.

BY

JOHN INDERMAUR, SOLICITOR,

(*First Prizeman, Michaelmas*, 1872).

AUTHOR OF "PRINCIPLES OF COMMON LAW," "MANUAL OF EQUITY," "PRINCIPLES AND PRACTICE OF CONVEYANCING," "MANUAL OF PRACTICE," "THE STUDENT'S GUIDE TO THE PRINCIPLES OF COMMON LAW,"

JOINT AUTHOR WITH MR. THWAITES OF

"THE STUDENT'S GUIDE TO REAL AND PERSONAL PROPERTY,"

"THE STUDENT'S GUIDE TO PROCEDURE AND EVIDENCE," &c., &c.

AND

CHARLES THWAITES, SOLICITOR,

(*First in First Class Honours, June,* *Sheffield District Prizeman*, 1880;
Reardon (Yearly) Prizeman, *Scott Scholar*, 1880, *and*
Conveyancing Gold [illegible] 1880),

AUTHOR OF "A GUIDE [illegible] LAW,"

JOINT AUTHOR WITH MR [illegible] OF

"[illegible]'S GUIDE TO REAL AND PERSONAL PROPERTY," &c., &c.

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Conveyancing Gold Medallist, 1880),

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ADVERTISEMENT.

THIS little work forms one of a series of Guides to the Bar Final by the Authors. The others are—on Real and Personal Property, fourth edition, by Messrs. Indermaur and Thwaites; on Criminal Law, fourth edition, by Mr. Thwaites; on Common Law, fourth edition, by Mr. Indermaur; on Procedure and Evidence, second edition, by Messrs. Indermaur and Thwaites; and on Constitutional Law and Legal History, second edition, by Messrs. Indermaur and Thwaites.

It is hoped that this Guide will be found of use by the class for whom it is written. Though particularly intended for Bar Students, it may, perhaps, be found of service to Articled Clerks as well.

Messrs. Indermaur and Thwaites continue to prepare Students in class, privately, and by post, for the Bar Final Examination, Solicitors' Final (Pass and Honours) Examinations, and Solicitors' Intermediate Examination. Particulars may be had on application, personally or by letter, to Messrs. Indermaur and Thwaites, at their Chambers, 22, Chancery Lane, London, W.C.

22, CHANCERY LANE, LONDON,

February, 1899.

CONTENTS.

PAGE

INDEX TO CASES CITED vii

I.—THE COURSE OF READING.. 1

II.—TEST QUESTIONS ON INDERMAUR'S MANUAL OF EQUITY (4TH EDITION) 13

III.—DIGEST OF QUESTIONS AND ANSWERS:—

1. EQUITY GENERALLY, THE MAXIMS, AND THE JUDICATURE ACTS 35

2. TRUSTS AND TRUSTEES 42

3. ADMINISTRATION 60

4. PARTNERSHIP AND COMPANIES 71

5. MORTGAGES 88

6. FRAUD, ACCIDENT, AND MISTAKE 98

7. SPECIFIC PERFORMANCE 103

8. INFANTS, PARTITION, &c. 110

9 ELECTION, SATISFACTION, PERFORMANCE, CONVERSION, &c. 114

10. PENALTIES, FORFEITURES, INJUNCTIONS 119

11. MARRIED WOMEN 123

GENERAL INDEX 129

INDEX TO CASES REFERRED TO.

Ackroyd v. Smithson, 118.
Agar-Ellis, *re*, Agar-Ellis v. Lascelles, 113.
Agra Bank v. Barry, 92.
Alcock v. Sloper, 53.
Aldrich v. Cooper, 70.
Aleyn v. Belchier, 101.
Antrobus v. Smith, 45.

Bacon, *re*, 71.
Bassett v. Nosworthy, 38.
Biscoe v. Jackson, 43.
Blair v. Bromley, 78.
Blandy v. Widmore, 117.
Bloomenthal v. Ford, 87, 88.
Bolton v. Curre, 57.
Bown, *re*, 125,
Bridgewater Navigation Co., *re*, 86.
Briggs v. Jones, 93.
Brinsden v. Williams, 47.
Brown v. Gellatly, 54.
Brown v. Oakshott, 79.
Burrough v. Philcox, 48.
Burrow v. Scammell, 108.

Cadell v. Palmer, 44.
Camp v. Coe, 71.
Castell & Brown, *re*, 98.
Castle v. Wilkinson, 108.
Caton v. Rideout, 125.
Chesterfield (Earl of) v. Janssen, 100.
Churton v. Douglas, 75.
Clayton's Case, 76.
Curry, *re*, 125.

Davis v. Whitehead, 48.
Dearle v. Hall, 39, 93.
Derry v. Peek, 83, 99, 100.
Dowse v. Gorton, 64.
Drover v. Beyer, 123.
Dyer v. Dyer, 47, 47.

Edwards v. Carter, 113.
Elibank (Lady) v. Montolieu, 40.
Ellison v. Ellison, 45.
English and Scottish Mercantile Trust v. Brunton, 85, 98.
Ewing v. Orr-Ewing, 37.
Eyre v. Countess of Shaftesbury, 112.

Falcke v. Gray, 105.
Fearon, *re*, 125.
Fisher v. Shirley, 127.
Fitzgerald's Trustee v. Mellersh, 89.
Flamank, *re*, 125.
Fletcher v. Ashburner, 36, 39, 117.
Foster v. Foster, 118.

Garth v. Cotton, 39.
Gibson v. Way, 125.
Glenorchy (Lord) v. Bosville, 36, 39, 45.
Gorton, *re*, 64.
Gray v. Siggers, 53.

Hamilton v. Dallas, 62.
Hamilton's Windsor Iron Works, *re*, 98.
Hanson v. Graham, 66.
Harman v. Johnson, 78.
Head, *re*, 80.
Howard v. Harris, 88.
Howe v. Lord Dartmouth, 53.
Hooley v. Hatton, 117.
Hotchkin v. Meyer, 125.
Hughes v. Young, 127.
Huguenin v. Baseley, 98.
Huntingdon v. Huntingdon, 48.

Ind v. Emmerson, 38.

Jackson v. Jackson, 79.
Jefferys v. Jefferys, 45.
Joy v. Campbell, 57.

Keech v. Sandford, 47, 49.
Kingston Cotton Mills, *re*, 86.
Kirk v. Eddowes, 116.

Lambert v. Thwaites, 49.
Lansdowne v. Lansdowne, 103.
Leeds Estate Co. v. Sheppard, 86.
Le Neve v. Le Neve, 93.
Lester v. Foxcroft, 105, 105.
Lockhart v. Hardy, 90.
London and General Bank, *re*, 86.
Lumley v. Wagner, 108.

Mackreth v. Symons, 49.
Marsh v. Lee, 40, 94.
Mercantile Investment Co. v. River Plate Co., 37.
Moor v. Anglo-Italian Bank, 85.
Marlborough, *re*, 48.

Northern Counties Insurance Co. v. Whipp, 92.
Noys v. Mordaunt, 115.

O'Halloran v. King, 125.

Palliser v. Gurney, 126.
Peachey v. Duke of Somerset, 119, 120.
Penn v. Lord Baltimore, 37, 38.
Pusey v. Pusey, 110.
Pye, Ex parte, 116.

Redgrave v. Hurd, 99.
Reeve v. Berridge, 107.
Reid v. Reid, 124.
Rice v. Rice, 93.
Robinson v. Harkin, 56, 57.
Rolt v. Hopkinson, 93.
Rudge v. Rickens, 90.
Russell v. Russell, 91.

Salt, *re*, 68.
Salting, *ex parte*, 70.
Shelley's Case, 36.
Sloman v. Walter, 119.
Soar v. Ashwell, 47.
Somerset (Duke of) v. Cookson, 110.
Somerset v. Poulet. *Re* Somerset, 57.
Speight v. Gaunt. *Re* Speight, 57.
Stapleton v. Cheales, 66.
Strathmore (Countess of) v. Bowes, 124.

Taite's Case, 85.
Talbot v. Duke of Shrewsbury, 116.
Talbot v. Scott, 122.
Tasker v. Tasker, 127.
Toller v. Carteret, 37.
Tollet v. Tollet, 103.
Trego v. Hunt, 77.
Trevor v. Whitworth, 84.
Tulk v. Moxhay, 122.

Vint v. Padgett, 94.

Waring v. Ward, 91.
Wassell v. Leggatt, 125.
Weatherall v. Thornburgh, 44.
Wellesley v. Duke of Beaufort, 111.
Welton v. Saffery, 87.
Whitwood Chemical Co. v. Hardman, 105, 108.
Winn v. Bull, 104.
Wood v. Cock, 125.
Woollam v. Hearn, 106.

THE STUDENT'S GUIDE

TO THE

PRINCIPLES OF EQUITY.

I.—THE COURSE OF READING.

OUR special intention in this small work is to afford some assistance to Bar Students in studying the Principles of Equity. It is one of a series of Guides which we have issued for the special help of Bar Students. At the same time, it is hoped that the work will be found useful by Articled Clerks, as they equally are examined in the Principles of Equity.

The Examiners in Equity at the Bar Final do not profess to examine on Equity generally, but on the Elements of Equity and certain special topics, which vary. At the last two examinations the subjects were Trusts, Mortgages and other securities, Principles of Equity, and Specific Performance. The term "Principles of Equity" is a general one, and might include elementary questions on any subject properly coming under the denomination of Equity, but may be taken as more particularly applying to the Maxims of Equity and matters arising directly out of them. It is advisable for the student to first acquire a general knowledge of Equity as a whole; and then he should devote special attention to the particular topics which may be announced for his particular examination. Roughly each examination is on topics covered

in the course of Lectures for the two years preceding the examination. We therefore print below the topics that have been lectured on from Hilary, 1897, to Hilary, 1899, inclusive.

Principles of Equity.

1. Distinction of law and equity—Origin and growth of equitable jurisdiction—Development of equitable principles—Equity acts on the person—Penn v. Lord Baltimore—Equitable estates: (1) Estate of the cestui que trust, (2) the separate use, (3) the equity of redemption.

2. Equitable Relief in cases of—(*a*) Accident, (*b*) Penalties and Forfeiture, (*c*) Mistake, (*d*) Misrepresentation, (*e*) Fraud, (*f*) Undue Influence—Peek v. Derry; Redgrave v. Hurd; Huguenin v. Baseley; Chesterfield v. Janssen; Fox v. Mackreth.

3. Leading Maxims of Equity—(*a*) Equity follows the law, (*b*) He who comes into equity must come with clean hands, (*c*) He who comes into equity must do equity, (*d*) Equity regards that as done which ought to be done, (*e*) *Qui prior est tempore, potior est jure*, (*f*) Where the equities are equal the law prevails, (*g*) *Vigilantibus, non dormientibus, æquitas subvenit*, (*h*) Equality is equity.

4. Special Remedies of Equity — (*a*) Specific Performance, (*b*) Injunction, (*c*) Receiver.

5. Effect of the Judicature Act 1873—Transfer of jurisdiction—Assignment of business—Sec. 34—Change of procedure—Abolition of injunction against legal proceedings—Sec. 24—Examples of equitable rules to be recognized—Sec. 25—1875 Act, Sec. 10.

Administration of Assets on Death.

1 and 2. The legal personal representative: his appointment—Probate—Letters of administration—Limited administrations: Rights and powers: (*a*) As to property and its alienation; (*b*) As to actions. Protection of; Indemnity; Retainer; Judicial Advice. Liabilities—Generally—Trading—Admission of assets.

3. Real estate. Original state of the law—Stages by which made liable for debts, 3 & 4 Will. 4, c. 104—Powers of executors as regards real estate, 22 & 23 Vict. c. 35—Elliot v. Merriman. Part I. of Land Transfer Act, 1897.

4. Debts: Order in which payable—32 & 33 Vict. 4; secured and unsecured—Judicature Act, 1875, sect. 10; Order in which estate applicable for debts; Exoneration—Ancaster v. Mayer—Marshalling—Aldrich v. Cooper; Blended funds; Charges—Locke King's Act; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.

5 and 6. Legacies and annuities: Specific—Demonstrative—General—Ashburner v. Macguire; lapse; interest; funds out of which payable—When charged on realty; appropriation; ademption and satisfaction—*Ex parte* Pye; charities—Mortmain and Charitable Uses Act, 1891.

7. Conversion—Fletcher v. Ashburner—Ackroyd v. Smithson.

8. Distribution of intestates' estates. Administration of insolvent estates in the Chancery Division and in Bankruptcy—Proof—Rights of secured creditors.

9. Government duties—The Finance Acts, 1894 and 1896.

10 and 11. Administration actions: Parties; forms of judgment; proceedings under—Accounts (vouching, surcharging); certificates; further consideration—Costs: Wilful default; receivers.

12. Payment into court; proceedings under Order LV.

13. Refunding and recouping.

14. Conflict of laws—*Lex domicilii* and *Lex loci*, when to be applied.

Trusts, Part I.—The Trust.

1. The origin of trusts: Uses of land—The subpœna.

2. The nature of trusts; Privity of estate and of person—Notice of trust—The parties to and subject-matter of a trust.

3. The creation of trusts: (*a*) Inter vivos—Statute of Frauds, sects. 7 and 8; (*b*) Testamentary trusts—secret trusts, (i.) Objects undisclosed., (ii.) Intention undisclosed.

4. The validity of trusts: (A) Absence of consideration; (B) Illegality. (*a*) Voluntary trusts based (i.) On declaration of trust, (ii.) On transfer—The avoidance of voluntary trusts (i.) By statute, (ii.) By rules of equity. (*b*) Unlawful trusts—(i.) Superstition—Immorality—Fraud; (ii.) Perpetuity—Repugnancy—Sundry; (iii.) Statutory restrictions on trusts for accumulation.

5. Dispositions resembling trusts, but wanting some of the characteristics of a trust; Trusts—(i.) For payment of creditors; (ii.) For maintenance of children; (iii.) Mixtures of trust and power; (iv.) Honorary trusts.

6. The classification of trusts: (i.) Trusts declared or created (Statute of Frauds, sect. 7) (*a*) Express trusts, (*b*) Implied trusts—Dependent on actual intention directly or indirectly evidenced; (ii.) Trusts resulting or arising by construction of law (Statute of Frauds, sect. 8)—(*c*) Resulting trusts, absence of contrary intention, (*d*) Constructive trusts, independent of intention.

7. (*a*) Express or direct trusts: Certainty of intention, subject, and object—Executory trusts.

8. (*b*) Implied or indirect trusts: (i.) Inter vivos; (ii.) Testamentary—Precatory trusts.

9. (*c*) Resulting trusts; arising on (i.) Imperfect dispositions (ii.) Purchases, (iii.) Joint purchases.

10. (*d*) Constructive trusts: (i.) Fiduciary relation, (ii.) Intermeddling, (iii.) Miscellaneous.

Trusts, Part II.—The Trustee.

1. His estate and office distinguished—Acceptance and disclaimer—The state under: (1) The Statute of Uses, (2) The Wills Act, Secs. 30 and 31.

2. The Office.—The appointment of new trustees: (1) By consent, (2) By the terms of the Trust, (3) By the statutory power, (4) By the Court under (*a*) The Trustee Act, 1893, (*b*) The general jurisdiction. The retirement and removal of trustees (under corresponding heads)—General rules of equity respecting the office, and the conduct of trustees therein.

3. Duties of Trustees.—(1) To receive and get in the trust property, (2) To keep it safely, (3) To convert, (4) To invest, (5) To distribute, (6) Generally.

4. Liabilities of Trustees.—(1) Criminal, (2) Civil, joint and several liability, primary and secondary liability.

5. Powers of Trustees.—(1) General, (2) Statutory under (*a*) The Conveyancing Acts, (*b*) The Settled Land Acts, (*c*) The Trustee Act, 1893.

6. Rights of Trustees.—(1) Reimbursement, (2) Release and indemnity, (3) Lien, (4) Remuneration (under exceptional conditions).

7. Miscellaneous matters.—Litigation by and against trustees: (1) The representative capacity of trustees, (2) The effect of litigation on the powers of trustees, (3) Costs of trustees, (4) Sundry.

8. The Trustee Acts, 1888, 1893, 1894. The Judicial Trustees Act, 1896.

Trusts, Part III.—The Cestui que Trust.

1. Equitable Ownership: The status and right of possession of equitable owners.
2. „ „ The right to enforce the trust and secure the trust property.
3. „ „ The right to follow the trust property or its proceeds.
4. „ „ The right of alienation (equitable assignment).
5. „ „ The devolution on death (conversion and re-conversion).
6. „ „ The remedies of equitable owners—(1) Specific; (2) Pecuniary.

7. The powers of a tenant for life.

8. The determination of a trust—(1) By direction of the beneficiaries, (2) By estoppel or acquiescence, (3) By Statutes of Limitation, (4) By purchase for value without notice, (5) By merger of the legal and equitable interests.

Winding-up of Companies.

1 and 2. Constitution of companies under the Act of 1862; nature of shares; increase and reduction of capital; liability of shareholders; nature of debentures.

3 and 4. Modes of winding-up—Compulsory, voluntary, supervision; grounds for winding-up; procedure for obtaining winding-up order.

5 and 6. Appointment of liquidators; meetings of creditors and contributories; examination of officers; misfeasance.

7 and 8. Lists of contributories; rectification of register; Sec. 35 of Act of 1862; calls; Sec. 25 of Act of 1867; Act of 1898.

9 and 10. Lists of creditors; distribution of assets; preferential claims; 1897 Act; dissolution of the company.

Mortgages and other Securities.

I.

1. Different kinds of mortgages and securities, and their creation—Legal mortgages (*a*) on land, (*b*) on chattels, (*c*) on choses in action; pawns, pledges, and possessory liens; equitable mortgages, charges, and liens charges under orders of the Court; securities including fixtures; securities by corporations; debentures; registration of securities.

2. Priorities—Doctrine of notice; tacking.

3. Redemption—Terms of redemption; accounts; consolidation.

4. Marshalling.

5. Remedies of the mortgagee—Personal remedy against mortgagor; foreclosure; sale (*a*) under powers, (*b*) by the Court; possession; receivers; secured creditors in bankruptcy and in administration of deceased persons' estates.

6. Actions relating to mortgages—Parties; forms of judgments and orders; statutes of limitation affecting mortgages.

II.

1. Mortgages at common law; rise and nature of equitable jurisdiction over mortgages.

2. General nature and incidents of a mortgage security; legal and equitable mortgages.

3. Pawns and pledges; hypothecations.

4. The form of mortgage securities as affected by the subject-matter comprised therein; mortgages of lands and hereditaments, personal chattels, ships, and *choses in action*; mortgage debentures.

5. Who may be mortgagors and mortgagees; mortgages made under statutory and other powers.

6. Void and voidable securities.

7. Nature of an equity of redemption; rights, remedies, and liabilities of a mortgagor; liability of the mortgagor and the mortgaged property to payment of the debt.

8. The estate, rights, remedies, and liabilities of a mortgagee

9. Priority as between incumbrancers; legal estate and tacking; priority by time; priority by notice; how priority may be lost.

10. Discharge of mortgage securities.

Procedure and Practice in the Chancery Division, with special reference to proceedings for Foreclosure and Redemption.

1. Commencement of proceedings by originating summons or writ of summons.

2. Who are necessary and proper parties.
3. Pleadings.
4. Notice and entry of trial. Proceedings at trial.
5. Evidence, discovery and inspection, admissions.
6. Decree *nisi* for foreclosure; period for redemption; just allowances, wilful defaults, successive redemptions.
7. Decree for redemption.
8. Accounts; surcharge and falsification.
9. Foreclosure absolute; dismissal of action for redemption; opening foreclosure.
10. Sale in foreclosure and redemption actions.
11. Foreclosure or sale against infants, and in other special cases.

Specific Performance.

1. The jurisdiction distinguished and defined—Fundamental conditions of relief—The relief must be (1) Necessary, (2) Possible, (3) Just, (4) Effectual—Affirmative and negative contracts—Incidents of the right to specific performance; conversion.

2. Parties to the action—Rights and liabilities of third persons—(Assignment—Sub-sale—Bankruptcy—Death—Agency).

3. Defences to the action, relating to (*a*) The person (incapacity of either party), (*b*) The substance of the agreement (*e.g.*, non-conclusion incompleteness, uncertainty, unfairness, hardship, inadequacy of consideration, illegality, invalidity), (*c*) The form of the agreement (Want of Seal—Statute of Frauds, &c.—Exception—Part Performance), (*d*) The subject matter of the contract (Defects of Property—Defects of Title), (*e*) The defendant's misapprehension of the effects of the contract (Misrepresentation—Fraud—Mistake), (*f*) Matter subsequent to the contract (Default—Delay—Rescission), (*g*) The Jurisdiction. Possible injustice to defendant (Want of Mutuality—Complete Performance not enforceable), (*h*) Contract providing for liquidated damages.

4. Waiver of objections by defendant.
5. Injunction and ancillary relief.
6. Compensation and damages.
7. Miscellaneous matters (Interest—Rent—Deterioration—Deposit, &c).

Having stated the matters lectured on for the last two years, we now purpose, first of all, to give some advice to the Bar Student in the course of reading the Principles of Equity; and, next, to give him such additional material as will assist him in attaining a successful result at his examination. This additional material consists of—(1) A Set of Test Questions on the Principles of Equity; and (2) A Digest of Questions and Answers. A good many of these questions

have actually been set at past Bar Examinations, and have been carefully revised up to date, and others have been added by ourselves as we deemed advisable. The Test Questions are set in the order of the book upon which they are founded, and the Digest of Questions and Answers is also, as far as possible, systematically arranged.

Dealing, first, with the student who desires to obtain a very sound knowledge, and not merely to read with a view to satisfying the scope of the examination, we suggest that he may well read the following works :—

1. Indermaur's Manual of the Principles of Equity (4th edition, published in 1897).

2. Snell's Principles of Equity (12th edition, published in 1898).

3. White and Tudor's Leading Equity Cases (7th edition, published in 1897).

4. Underhill's Law of Trusts (4th edition, published in 1894).

5. Go through the entire set of Test Questions in this book, writing out answers to some of them, at all events, by way of practice.

6. Finally conclude with a study of the Questions and Answers in this book.

This certainly forms a very fairly complete course of reading. It is doubtful how far a study of the Law of Companies can be considered as coming in under the head of Equity, and we do not think the perusal of a separate work on the subject necessary, unless the subject happen to be one of those specially selected. If it is, then the student should certainly read Eustace Smith's Summary of the Law of Companies (6th edition, published in 1897). This is only a small work, and will not take long; but for a more thorough knowledge, Palmer's Company Law is advised, a 2nd edition of which was published in 1898. Again, it would be very advisable to peruse Pollock's Law of

Partnership (6th edition, published in 1895), should that be one of the subjects set. *Of course, generally, special attention should always be given to any subject named by the examiner.*

All this will take some time, but the only very formidable book we have recommended is "White and Tudor." To thoroughly go through this work and grasp its contents will be to acquire a very large amount of knowledge, and more than is strictly necessary for the examination. Still, we hope many students desire to soar above mere examination necessities. To any who read "White and Tudor" we would recommend also Indermaur's Epitome of Conveyancing and Equity Cases (8th edition, published in 1897). In this they will find short notes of the cases in "White and Tudor," and they can have the book interleaved if they like, and materially add to the notes. As regards those students who have not at present such ambitious desires, we think they can safely leave out "White and Tudor," and rely on Indermaur's Epitome, except that on any particular special subject set, it would be very advisable to read the cases and notes bearing upon them in "White and Tudor." The best way to deal with these cases is to first look them up, and consider them from time to time whilst reading the text-book, and then afterwards to go straight through them.

Even leaving out "White and Tudor," the student has a fair amount of reading in our list. If time is scarce, Underhill's Trusts may, we think, be omitted. It has grown too big now for ordinary students, unless they are very much in earnest. Still, if Trusts is set as a subject (as is usually the case), if "Underhill" is not read, the cases on Trusts in "White and Tudor" should receive even more special attention. Then, finally, it will be observed that we have given two text-books. It is, perhaps, best to read them both, but if the student is aiming for the present only at the examination he can omit one of them—whichever he

likes. Snell's Equity contains 714 pages; Indermaur's Equity contains 428 pages. The Trustee Act, 1893, should be also perused, and it is set out in the Appendix to Indermaur's Principles of Equity.

We have advised in sufficient width, and given the student a choice. Let us now indicate the smallest possible amount of reading a student can with safety do for the purposes of the Examination.

1. Indermaur's Manual of the Principles of Equity, referring from time to time to some of the most important cases in "White and Tudor," according to the subjects set, which can be generally sufficiently looked up in Indermaur's Epitome of Conveyancing and Equity Cases.

2. Work thoroughly through the set of Test Questions hereafter given.

3. Finally study the Digest of Questions and Answers in this book.

We shall presently indicate the most important of the cases in "White and Tudor," and give a list of important Statutes. Some of them relate more particularly to the Law of Real and Personal Property and the Practice of Conveyancing, and the student very likely will already be acquainted with them from his study of that subject.

As the Bar Examination is, for the present at least, confined to the topics on the particular subjects which have been treated in the Lectures and Classes, held under the auspices of the Council of Legal Education, for a period of two years prior to the particular examination, the Bar Student is recommended, if he can, to get the prospectuses of the Lectures and Classes for the eight terms immediately prior to his examination, and more or less to shape his reading with a special view to the topics therein set forth. Still this is not necessary; the best and only safe course is to make a study of Equity generally, in the way we have

indicated. But in all cases, special attention to particular topics lectured on would be well.

We will now give a list of the most important Statutes which we consider every student should look up in connection with the Principles of Equity. Most of these Statutes are touched upon sufficiently in the works we have already indicated, but as regards some it would be advisable for the student to read them from the Statutes of the Realm, or, if they are recent Acts, to study the Epitomes published from time to time in the *Law Students' Journal*, usually in the numbers for September or October in each year.

27 Henry 8, c. 10 . .	Statute of Uses.
12 Car. 2, c. 24 . . .	Guardianship.
29 Car. 2, c. 3, (secs. 7, 8, and 9)	Statute of Frauds.
13 Eliz., c. 5 . . .	Frauds on Creditors.
39 & 40 Geo. 3, c. 98, and 55 & 56 Vict , c. 58 . .	Accumulations Act, 1800 (Thellusson Act) and Accumulations Act, 1892.
1 Will. 4, c. 40 . . .	Executors Act, 1830.
1 Will. 4, c. 46 . . .	Illusory Appointments Act, 1830.
3 & 4 Will. 4, c. 104, and 32 & 33 Vict., c. 46 . .	Administration of Estates Acts, 1833 and 1869.
1 Vict., c. 26 . . .	Wills Act, 1837.
17 & 18 Vict., c. 113 .	
30 & 31 Vict., c. 69	Real Estates Charges Acts.
40 & 41 Vict., c. 34 .	
18 & 19 Vict., c. 43 . .	Infants Settlement Act, 1855.
20 & 21 Vict., c. 57 . .	Malins' Act.
30 & 31 Vict., c. 48 . .	Auction Sales of Land.
31 Vict., c. 4 . . .	Sale of Reversions Act.
31 & 32 Vict., c. 40 . . 39 & 40 Vict., c. 17 . .	Partition Acts.

36 Vict., c. 12 . . .	Custody and Guardianship of Infants.
49 & 50 Vict., c. 27 . .	
54 Vict., c. 3 . . .	
45 & 46 Vict., c. 75 . .	Married Women's Property Acts.
56 & 57 Vict., c. 63 . .	
51 & 52 Vict., c. 42 . .	Mortmain Acts.
54 & 55 Vict., c. 73 . .	
51 & 52 Vict., c. 59 (sec. 8)	Trustee Acts, 1888 and 1893.
56 & 57 Vict., c. 53 . .	
53 & 54 Vict., c. 39 . .	Partnership Act, 1890.
56 & 57 Vict., c. 21 . .	Voluntary Conveyances Act, 1893.
59 & 60 Vict., c. 35 . .	Judicial Trustees Act, 1896.
60 & 61 Vict., c. 65 (Part I.)	Land Transfer Act, 1897.

The following is a list of some of the most important cases on the Principles of Equity which should be looked up from "White and Tudor," or from Indermaur's Epitome of Conveyancing and Equity Cases, and considered with care. Of course they may, however, be selected from, according to the subjects set, and anyhow, particular attention should be given to those bearing on the given topics at each particular examination.

Ackroyd v. Smithson.
Agra Bank v. Barry.
Aleyn v. Belchier.
Ancaster (Duke of) v. Mayer.
Aylesford (Earl of) v. Morris.
Basset v. Nosworthy.
Blandy v. Widmore.
Brice v. Stokes
Chancey's Case.
Chesterfield (Earl of) v. Janssen.
Cuddee v. Rutter.
Dering v. Earl of Winchelsea.
Dyer v. Dyer.

Elibank (Lady) v. Montolieu.
Ellison v. Ellison.
Eyre v. Countess of Shaftesbury.
Fletcher v. Ashburner.
Fox v. Mackreth.
Glenorchy (Lord) v. Bosville.
Hooley v. Hatton.
Howe v. Earl of Dartmouth.
Huguenin v. Baseley.
Hulme v. Tenant.
Huntingdon v. Huntingdon.
Keech v. Sandford.
Lake v. Craddock.
Lake v. Gibson.
Lansdowne v. Lansdowne.
Lechmere v. Lechmere.
Lester v. Foxcroft.
Mackreth v. Symons.
Marsh v. Lee.
Peachey v. Duke of Somerset.
Penn v. Lord Baltimore.
Pusey v. Pusey.
Pye, Ex parte.
Robinson v. Pett.
Russel v. Russel.
Somerset (Duke of) v. Cookson.
Talbot v. Duke of Shrewsbury.
Tollet v. Tollet.
Woollam v. Hearn.

To Articled Clerks using this book, we would say, study carefully all the cases given and generally go most thoroughly through the Digest of Questions and Answers. It must also be of great service to go through the set of Test Questions on Indermaur's Equity, whilst reading that work.

We now proceed to give Test Questions on Equity (being a Set of Questions founded on Indermaur's Manual of Equity); and a Digest of Questions and Answers.

II.—TEST QUESTIONS ON INDERMAUR'S MANUAL OF EQUITY. (4TH EDITION.)

(The figures in brackets after each Question indicate the pages on which the Answer may be found).

PART I.

CHAPTER I.

1. Give a short account of the origin of Equity, and explain how it was that it became a fixed system. (1-5.)

CHAPTER II.

2. In what way does Equity follow the law—(*a*) as regards legal estates and interests; (*b*) as regards equitable estates and interests? (8.)

3. Explain the maxim, Where the equities are equal the law shall prevail. Illustrate your answer by reference to the case of Thorndike v. Hunt. (9-11.)

4. Under what circumstances does the maxim *Qui prior est tempore potior est jure* govern the priorities of different claimants to property? (11-13.)

5. With regard to the assignment of a *chose in action*, what was the rule laid down in the case of Dearle v. Hall? (14.)

6. A sues B in ejectment, and B pleads that he is in possession, and also that he is a purchaser for value without notice. Can A under these circumstances obtain discovery against B? (15.)

7. Point out any circumstances under which Equity will depart from the strict rule of law that where two or more persons take an estate without any words of severance they are joint tenants. What maxim of Equity does this illustrate? (18, 19.)

8. Explain the maxim, Equity acts *in personam*, by reference to the case of Penn v. Baltimore. (19.)

9. Explain when the maxim, *Vigilantibus non dormientibus æquitas subvenit* prevents a person seeking the assistance of Equity. Why was it that in the case of *Re* Maddever it was held that the plaintiff's laches did not bar his right to relief? (20-22.)

10. The liquidator of a company seeks to recover from the directors assets improperly applied by them. Can the directors plead the Statute of Limitations? (22.)

PART II.

CHAPTER I.

11. Define an express trust. What are the three essentials that must be existing to constitute a binding trust? (31.)

12. When will the Court enforce, and when will it refuse to enforce, a voluntary trust? Explain the principle on which the Court acts. (33, 34.)

13. A assigns his property to trustees upon trust for realisation, and to divide amongst his creditors in rateable proportion according to the amount of their respective debts. B assigns his property to trustees upon trust to thereout pay his debts. In each case after paying the creditors there is a surplus. Who is entitled to it in each case? (37.)

14. Discuss the rights of creditors, irrespective of any bankruptcy, against property comprised in a voluntary

settlement. Refer hereon to the cases of Spirett v. Willows, Freeman v. Pope, and *Ex parte* Russell, *re* Butterworth. (39, 40.)

15. A widow makes a settlement on a second marriage in which she (*inter alia*) provides for the children by her first marriage. Is their position in any way different from that of any children of the second marriage? (42.)

16. Distinguish between an executed and an executory trust. What difference is there as regards the construction to be placed upon them respectively, and does it make any difference according to whether the trust is raised by will or by settlement? (43, 44.)

17. A bequeaths the residue of his property to B on a private arrangement with B that he shall hold the property for the benefit of such persons as A shall name in a letter he says he will write to B. A dies without ever having written any such letter. What becomes of the property? (46.)

18. Discuss the question of the presumptions of Equity where a person pays the purchase-money of property, but has the property conveyed to another. (47-53.)

19. Define a constructive trust, and give an example. (53, 54.)

20. Are the following trusts, or any of them, good:—(*a*) a gift of £1,000 to be held upon trust to pay the income for ever for the benefit of the Great Northern Hospital; (*b*) a gift of £1,000, the income to be applied in paying for masses for the soul of the testator; (*c*) a gift of £1,000, the income to be applied in keeping in repair the testator's tomb? (57.)

21. Explain the *cy-pres* doctrine as regards charities. Illustrate your answer by reference to the case of *Re* Campden Charities. (60.)

CHAPTER II.

22. Are there any restrictions as regards persons who may

be trustees? What is meant by a "Judicial Trustee"? (63.)

23. When is it the duty of trustees to realize property vested in them, although there is no direction in their testator's will to do so? What is the position if they neglect this duty? Refer in your answer to Howe v. Lord Dartmouth, and Brown v. Gellatly. (67-70.)

24. May trustees to whom no special powers are given invest in the following securities:—(*a*) Debentures of an English Railway Company; (*b*) stock issued by the corporation of a municipal borough? As regards the latter, would it make any difference if such stock was standing at a premium, but the corporation had a right to redeem at par? (74, 75.)

25. What rules are laid down by the Trustee Act 1893, as regards trustees investing money on mortgage? (78-82.)

26. Under what circumstances are trustees liable (*a*) for the breaches and defaults of their co-trustees, (*b*) the defaults or misconduct of agents they employ? (83, 84.)

27. Trustees honestly make two investments, neither of which are proper trust investments. On one they make a loss of £100, and on the other a profit of £120. What are the rights of the *cestuis que trustent?* (87.)

28. A, B and C are trustees. A and B leave the management of the trust substantially to C, who commits a breach of trust. Are they all liable? If so, have A and B a right to call on C to indemnify them? (88.)

29. Are trustees entitled to plead the Statute of Limitations as an answer to a claim for breach of trust?

30. What is the position of a trustee who commits a breach of trust at the request of his *cestui que trust?* Refer in your answer to the recent case of Bolton v. Curre. (93, 94.)

31. Under what circumstances can a person, who is a stranger to a trust, be made liable as a trustee? If a solicitor acting for a trustee knows that, in the matter in which he is

acting, the trustee is committing a breach of trust, is he liable to make good the loss? (96, 97.)

32. When may property wrongfully disposed of by a trustee be followed and claimed by a *cestui que trust?* What would be a *cestui que trust's* rights, if he can show that his trustee has wrongfully used the trust fund to make up part of the purchase-money of a house he bought for himself? (97, 98.)

33. What information is a trustee bound, if required, to give to a *cestui que trust?* Is he bound to answer inquiries as to what notices of incumbrances created by a *cestui que trust* he has received? (99-100.)

34. What is the effect of the ordinary clause for the indemnity and reimbursement of trustees? What is the widest kind of indemnity clause that can be framed? (100, 101.)

35. One of several trustees is a solicitor. Can he be appointed by his co-trustees to act as solicitor in the trust so that he may make his ordinary professional charges? (102.)

36. State briefly the effect of the institution of proceedings in Chancery for the carrying out of the trusts of a settlement on the powers of trustees vested in them by the settlement. (102, 103.)

37. How does Order LV., rule 3, afford protection to trustees? If trustees commit a breach of trust has the Court any power afterwards to absolve them from personal liability as regards it? (106, 107.)

CHAPTER III.

38. What, if any, power has an executor as regards selling the real estate of his deceased testator? Does it make any difference as to when the testator died? (108, 109.)

39. An executor, in pursuance of a direction contained in the testator's will, carries on the testator's business, and in doing so incurs certain liabilities. What, if any, right has he to be indemnified out of his testator's estate? (109, 110.)

40. Can one only of several executors do any of the following acts:—(*a*) Give a valid receipt for money owing to the testator; (*b*) sell the testator's furniture; (*c*) sell the testator's freehold property? (111, 112.)

41. Has an executor power to (*a*) prefer one creditor to another; (*b*) pay a debt barred by the Statute of Limitations; (*c*) pay a debt claimed under an oral contract which should have been in writing under the provisions of the Statute of Frauds; (*d*) retain a debt owing to himself, to the detriment of other creditors? (113, 114.)

42. What is the difference between a vested and a contingent legacy? Give an example of each. (116, 117.)

43. What are the rules of the Court as to the payment of interest on legacies? (118, 119.)

44. Point out in what respects a *Donatio mortis causâ* respectively resembles and differs from a legacy. A lends a watch to B, and then on his death bed says he gives B the watch. Is this a valid *donatio mortis causâ?* (119.)

45. When does a general direction for payment of debts constitute a charge of the debts on the testator's real estate, and when is this not the case? (121.)

46. What is the difference between legal and equitable assets? What is the order in which debts are paid out of a deceased's assets? (122, 123.)

47. When an estate is being administered in Chancery and proves to be insolvent, to what extent do the rules of bankruptcy apply, and by what authority? (124, 125.)

48. What possible advantage may be gained by a creditor by having an insolvent estate administered in Bankruptcy instead of in Chancery? (126, 127.)

49. What is the primary fund out of which a deceased person's debts are to be paid, and what exceptions are there to the rule? (128, 132.)

50. A testator possessed of Whiteacre, Blackacre and Greenacre, devises Whiteacre specifically to X, and devises the residue of his realty to Z. The estate proving insufficient to pay all the debts without having recourse to one of those properties, what is the rule observed by the Court? (131.)

51. Define, explain and illustrate the doctrine of the Court known as Marshalling of Assets. (134, 135.)

52. What was formerly meant by the statement that the Court would not marshall assets in favour of a charity? Why is this point now of no importance? (136-138.)

53. Has the Land Transfer Act, 1897, in any way altered the rule of the Court as to the order in which assets of a deceased person are to be administered for payment of his debts? (141.)

CHAPTER IV.

54. Enumerate four of the grounds on which the Court can decree dissolution of a partnership. (144, 145.)

55. A, B and C are partners, the capital of each being £5,000. A dies, and a year elapses before his capital is paid out to his executors. Have they any right to a share of the profits made by the surviving partners during this period? (147.)

56. What is the position of surviving partners and the representatives of a deceased partner as regards the goodwill of the partnership property, the partnership deed containing no provisions with regard to it? (149.)

57. Are partnership debts joint only, or joint and several? Is there any exception to the rule, and if so, what limitation is it subject to? (151.)

58. Where accounts have been settled between partners,

under what circumstances will the Court nevertheless interfere; and when it does so interfere, what is the nature of the relief given? (154.)

59. A trustee pays £500 trust money into his own banking account, and some time afterwards becomes bankrupt, having in the meantime drawn out from his account more than £500, but having paid in other sums of his own money to about the same amount, so that there is still £500 standing to his credit. Has the *cestui que trust* any right to £500 against the trustee in bankruptcy? (156.)

Chapter V.

60. Explain and illustrate the rule that the Court will not allow of any attempt to clog or fetter a mortgagor's equity of redemption. (158, 159.)

61. What was the doctrine laid down in the case of Toulmin v. Steere? Does the doctrine prevail now? (161, 162.)

62. Where it is doubtful whether a transaction is really by way of mortgage, or by way of out and out sale with an agreement for re-purchase, what circumstances will weigh with the Court, and induce it to hold that it was really a mortgage transaction? What importance is there in this distinction? (163.)

63. Point out in what respects the position of a mortgagor has been ameliorated and improved by modern legislation. (167.)

64. Explain the expression "You foreclose down and redeem up." (169.)

65. Have the following or any of them a right to redeem (*a*) a tenant by the curtesy, (*b*) a judgment creditor of the mortgagor, (*c*) a tenant holding under a lease from the mortgagor which is void against the mortgagee? (169.)

66. A mortgagee loses one of the title deeds of the mortgage property. What are the rights of the mortgagor? (169.)

67. A mortgagor pays off a mortgage and requires the mortgagee to transfer the estate and the mortgage debt to his wife. Can the mortgagee be compelled to do this? (178.)

68. What are the liabilities of a mortgagee who goes into possession? If the annual rents received exceed the interest, how is the mortgagee to deal with the surplus? (175-177.)

69. A mortgagee goes into possession and expends £100 in necessary repairs, and £300 in improving the property. The mortgagor now applies to redeem. Can the mortgagee compel him to pay both the above amounts? (177, 178.)

70. Can a mortgagee make a valid sale of the mortgaged property to his mortgagor, or one of his mortgagors? (179.)

71. Explain what is meant by foreclosure. Under what circumstances will the Court re-open a foreclosure? (181, 182.)

72. What is the proper remedy of an equitable mortgagee against the property? (182, 183.)

73. A mortgagee having foreclosed desires to sue his mortgagor on the covenant for payment contained in the mortgage deed. Can he do so? (184-185.)

74. Define and illustrate Tacking. (187, 188.)

75. Under what circumstances may a first legal mortgagee lose his priority? Discuss and explain the decision in Northern Counties of England Fire Insurance Company v. Whipp. (189, 190.)

76. Define the doctrine of Consolidation of mortgages, and point out how the doctrine has been affected by legislation and by modern decisions. (191-193.)

77. A by three separate mortgages in 1879 mortgaged three distinct properties, and in 1880 sold the equities in the three properties to B, who has since kept down the interest.

B now desires to redeem one only of the properties, but the mortgagee objects and claims to consolidate. Can this claim be sustained? (193, 194.)

78. A mortgages property to B and dies, having shortly before his death cancelled the mortgage deed. What is the effect of this cancellation? (195.)

CHAPTER VI.

79. Define and illustrate "accident" as remediable in Equity. (197.)

80. Distinguish between a bare power, and a power coupled with a trust. Will the Court ever give relief against the non-execution of a power? (199, 200.)

81. What is the general rule as to when the Court will give relief on the ground of mistake of fact? (202, 203).

82. Under what circumstances will the Court rectify a marriage settlement so as to make it accord to the terms of marriage articles previously executed? (204.)

83. Under what circumstances will the Court grant relief on the ground of mistake of law? (206, 207.)

84. When will the Court give effect to, and when will it set aside, a family compromise entered into for the purpose of determining disputes? (208).

85. Define actual and constructive fraud respectively, and give two examples of the latter. (210.)

86. A sells and conveys a house to B, not informing him of a serious defect in it. Is this fraud on his part? Would it be fraud on B's part not to inform A of facts he is aware of making the property much more valuable than A thought it? (212.)

87. A executes a mortgage to B, his solicitor not knowing it to be a mortgage, but believing it to be merely a formal

document to enable B to raise money for him on the property. B then deposits the deeds with a bank to secure money which he obtains and appropriates. Discuss the respective rights of A and the bank. (216.)

88. A testator gave property to his unmarried daughter for life and afterwards to her children. He then by codicil expressed a desire that his daughter should not marry, and he directed that on her marriage or death the gifts to her and her children should go over to X. The daughter married, had children, and died. What are the positions and rights of the daughter, the children, and X? (217.)

89. Enumerate some of the positions existing between persons which will in themselves be sufficient to primarily stamp a gift or settlement by one to the other as being constructively fraudulent. (220.)

90. Mention the chief restrictions as regards contract, and generally, caused by the existence of the relationship of solicitor and client. If a solicitor personally advances money on mortgage to a client, is he entitled to charge his professional costs in connection with the matter? (222-226.)

91. What relief does the Court give to expectant heirs? To what extent was this doctrine affected by 31 Vict., c. 4? (228-230.)

92. Explain briefly what is meant by a fraud on a power, and give an illustration of an appointment that would be held bad as a fraud. (233, 234.)

93. What powers can and what cannot be released by the donee? (235-236.)

94. Property is put up for auction in several lots. A and B respectively agree that A shall not bid for lot 1 and B shall not bid for lot 2. Lot 1 is purchased by B and lot 2 by A. The agreement between A and B coming to the vendor's knowledge, he takes proceedings to have their respective purchases set aside, alleging that the agreement between them was a fraud upon him. Can he succeed? (238.)

CHAPTER VII.

95. What are the three cases in which the Court will decree specific performance of an oral contract for the sale and purchase of land? (244.)

96. A enters into an oral agreement to sell a house to B What will be the effect of the followings acts done by B:—(*a*) He pays a deposit on account of the purchase: (*b*) he has the house inspected and reported on by a surveyor; (*c*) he prepares and sends the draft conveyance to A; (*d*) he takes possession of the house with the consent of A? (245, 246.)

97. Does the doctrine of part performance only apply to contracts for the sale and purchase of land and houses, or does it also apply to other contracts in respect of which writing is required, and there is no contract in writing? (248, 249.)

98. Where a contract for the sale of land is in writing, will the Court ever, and if so when, receive evidence of a subsequent oral variation of such written contract? Distinguish in your answer between a defendant setting up the oral variation as a defence to specific performance of the written contract, and a plaintiff seeking specific performance of the written contract as thus subsequently varied. (250, 251).

99. In what case will the Court decree specific performance of a contract for the sale and purchase of chattels? (252, 253.)

100. Will the Court decree specific performance of (*a*) a contract entered into with an infant, (*b*) a contract relating to land reduced into writing, but signed only by one of the parties? (254, 255.)

101. Has the Court any power, either directly or indirectly, of enforcing contracts for the doing or not doing of personal acts—*e.g.*, a contract by an actor to act exclusively at one theatre? (255-257.)

102. A agrees to sell an estate to B for £24,000, and various things on the estate at a price to be arrived at by valuers to be mutually agreed on. A now absolutely refuses to appoint a valuer, and repudiates the whole transaction. What is B's position? (259, 260.)

103. Explain and illustrate the statement that specific performance is a discretionary remedy. (262.)

104. What power, and by virtue of what authority, has the Court in a specific performance suit to award damages? (264.)

105. In what way does the Vendor and Purchaser Act 1874 often obviate the necessity for a specific performance action? What limit is however, by the Act imposed on the Court's summary jurisdiction? (266.)

106. When will the Court grant specific delivery up of a chattel wrongly detained? In what way is the remedy of the Court here superior to the redress that can be obtained at law in an action of detinue? (268.)

CHAPTER VIII.

107. Explain briefly the origin of the Court's jurisdiction over the persons and property of infants. (270.)

108. In what way does the Custody of Children Act, 1891, modify a father's common law rights over his children? (270, 271.)

109. What powers of guardianship and of appointing a guardian are respectively vested in a father and a mother? (271, 272.)

110. To what extent if at all has a stranger a power of appointing a guardian to an infant child? (273.)

111. What powers does the Court possess of removing a child from its father's custody, and of appointing a guardian against the father's will? (274-276.)

112. What rule does the Court follow as regards the

religion in which a child is to be brought up? Can a father by *ante-nuptial* contract deprive himself of his natural right to have a child brought up in his own religion? (277, 278.)

113. When will the Court allow a father the income of his child's property for its maintenance? If one only of several children has a fortune, can the income of the property be obtained for the maintenance not only of himself but also of his brothers and sisters? (280, 281.)

114. What is meant by a "ward in Chancery"? How does the Court act when a person interferes with the ward's person or property without its consent? (283.)

115. Has the Court any power to compel a settlement to be executed of property of a ward of Court who has married without its consent? (285.)

116. In whom is the jurisdiction in respect of idiots and lunatics vested? (287.)

CHAPTER IX.

117. What remedy existed at law of effecting partition? What was the superiority of the remedy in Equity? (289, 290.)

118. Can the following maintain a partition suit:—(*a*) a mortgagee of a tenant in common, (*b*) a tenant in common who has mortgaged his share, (*c*) a tenant in common entitled in remainder? (291.)

119. What are the three important provisions of the Partition Act, 1868? (292.)

120. What amendments in the law as to partition were effected by the Partition Act, 1876? (293, 294.)

121. What do you understand by an action to settle boundaries? Give an example of a proper case for such an action. (296, 297.)

PART III.

CHAPTER I.

122. Define the doctrine of election, and instance it by reference to the case of Noys v. Mordaunt. (298-299.)

123. Explain the statement that as regards election the doctrine of compensation prevails and not forfeiture. (300, 301.)

124. A marries a woman who is under age. He settles property upon her, and she also executes the settlement and covenants in it to settle any property she may thereafter acquire. To what extent, if at all, is this covenant binding upon her? In your answer discuss and explain the decision in *Re* Vardon's Trusts. (302, 303.)

125. A, by his will, gives B £1,000, and he also gives him a leasehold house of no value and burthened with onerous covenants. Can B take the £1,000 and disclaim the house? (304.)

126. How may election be implied? In dealing with an alleged case of implied election what are the various points to be taken into consideration? (305, 306.)

127. Discuss and explain briefly the position where a person who is under an obligation to elect dies without making any election. (307.)

128. What is the practice of the Court with regard to election by (*a*) married women, (*b*) infants, (*c*) lunatics? (308, 309.)

CHAPTER II.

129. Define and distinguish between the doctrines of satisfaction and performance. (310.)

130. Explain what is meant by a person putting himself *in loco parentis*, illustrating your answer by reference to the case of Powys v. Mansfield. (311, 312.)

131. When is the doctrine of satisfaction usually styled "ademption"? Does the Court lean in favour of or against satisfaction in the case of portions for children? (315.)

132. A covenants to provide a portion of £5,000 for his son. He makes his will, giving half the residue of his estate to this son. Is this gift of residue a satisfaction, either entirely or *pro tanto*, of the obligation under the covenant? (316.)

133. Give examples in which the presumption of satisfaction in the case of portions to children may be rebutted by (*a*) circumstances, (*b*) extrinsic evidence. (319, 320.)

134. Under what circumstances is a legacy a satisfaction of a debt? (321-324.)

135. Where two or more legacies are given to the same person, what is the rule of the Court with regard to their being cumulative or substitutional? (326, 327.)

136. A covenants to leave his wife £625 by his will. He dies intestate. What are the wife's rights? What difference would it make if he covenanted to pay such a sum to his wife within two years, and then died intestate before payment, but after the two years? (332, 333.)

CHAPTER III.

137. Define and distinguish between the respective doctrines of Conversion and Re-conversion. (334.)

138. A devises Whiteacre to B. He then contracts to sell Whiteacre for £1,000, and dies shortly after signing the contract? What is B.'s position? (336.)

139. A dies intestate possessed of a freehold estate, as to

which shortly before his death the Great Northern Railway Company had served notice to treat under the Lands Clauses Act, 1845. Does the estate go to A's heir or to A's next-of-kin, and why? (337.)

140. Explain to what extent the doctrine of conversion applies to alter the rights of parties where a man dies possessed of a freehold estate which he has leased for 21 years, giving the lessee during the pendency of the lease an option to purchase the estate for a given price. (337-340.)

141. What difference is there as to the time from which conversion takes place, according to whether the conversion is directed by deed or will? (341, 342.)

142. State briefly what was decided in the case of Ackroyd v. Smithson, and explain the principle of such decision. (344.)

143. X devised his residuary freehold property to trustees upon trust to sell and pay the proceeds to B. B predeceased the testator, but the trustees, not knowing this, sold the freeholds. At the time of the death of X, C was his heir-at-law. Shortly after this C died, leaving D his heir-at-law, and D, E, and F his next-of-kin. Who is entitled to the money in the trustees' hands? (346, 347.)

144. Referring to the last question, what difference would there be in the answer had the direction in the will been to pay the proceeds equally between A and B, and though B had predeceased the testator, A was still living? (347.)

145. X bequeaths his residuary personalty to trustees in trust to buy a freehold estate for the benefit of A. A had predeceased the testator, but the trustees, not knowing this, buy a freehold property. At the time of the death of X, B was his next-of-kin, but B died very shortly after the estate had been purchased, leaving C his heir-at-law and C and D his next-of-kin. Who is entitled to the estate that the trustees have purchased? (348.)

146. Give an example of conversion effected by order of

the Court. In cases of conversion effected in this way, from what date does the conversion take place? (349.)

147. Where a conversion is directed in favour of two persons, when can one of them reconvert without the consent of the other? (352.)

148. Explain and illustrate re-conversion by operation of law. (353.)

Chapter IV.

149. Where an estate is sold by a tenant for life and a remainderman in fee simple without any agreement as to how the purchase money is to be divided, what are their respective rights? (355.)

150. What is the position where a limited owner, *e.g.*, a tenant for life or in tail, pays off an incumbrance on the estate? Where there is existing an incumbrance on a settled estate, what is the rule as to how it is to be apportioned between a tenant for life and a remainderman? (356, 357.)

151. Upon what principle does the doctrine of contribution between sureties rest? What difference formerly existed in the rules of law and equity respectively as to such contribution, and when did such difference cease? (358-360.)

Chapter V.

152. Give a short account of the origin and general principles of the doctrine of Equity with regard to giving relief against penalties. (361.)

153. Why was it that the Court refused formerly to give relief against forfeiture of a lease by reason of a breach of a covenant to repair? What power in this respect has now by statute been conferred on the Court? (364.)

154. Mention the chief points to be observed by the Court

in determining whether a sum of money agreed to be paid on breach of a contract, is a penalty or liquidated damages. (367.)

155. Where a person agrees not to do a certain act, and if he does, that he will pay £1,000 as liquidated damages, is it in his election to pay the £1,000, and do the act in question? (368.)

Chapter VI.

156. What at Common Law were a husband's rights in his wife's freehold, leasehold, and purely personal property? How does the matter now stand under the Married Women's Property Act 1882? (370, 371.)

157. What do you understand by a fraud on a husband's marital rights? Is this doctrine in your opinion now obsolete? Give reasons. (372-374.)

158. Has the Married Women's Property Act 1882 altered the rights of a husband on his wife's death (*a*) to her personalty, (*b*) to curtesy? (374.)

159. What words have been held sufficient to constitute a gift to a woman for her separate use? What is the meaning and effect of an "anticipation clause"? (375, 376.)

160. A testator gave £4,000 to trustees in trust for his niece, and after her decease for her child or children living at her death, and the issue of any who should have predeceased her, and he directed the shares of any female legatees should be for their separate use without power of anticipation. The niece at her death had two daughters both married. Is the anticipation clause effectual? (376, 377.)

161. Property is given to a married woman without power of anticipation, but there are no words stating that it is to be to the woman's separate use. Is the anticipation clause effectual? (378, 379.)

162. With regard to the power of a judgment creditor to

seize in execution under a judgment against a married woman, property held by her without power of anticipation, state what was respectively decided in the cases of Hood-Barrs v. Heriot, Whiteley v. Edwards, and Collyer v. Isaacs. (379.)

163. A sum of £10,000 is given absolutely to Mrs. X, a married woman, without power of anticipation. Is the anticipation clause effectual? (381.)

164. A sum of £10,000 is given to trustees on trust to invest and pay the income to A for life, and at his decease the whole fund to Mrs. X, a married woman, without power of anticipation. What in this case is the effect of the anticipation clause? (381, 382.)

165. How has the Conveyancing Act 1881 (Sec. 39) dealt with the anticipation clause? What was hereon decided in *re* Warren's Settlement? (382, 383.)

166. What was formerly the rule of the Court as to what debts of a married woman would bind her separate estate? Hereon what has been provided respectively by the Married Women's Property Acts 1882 and 1893? (384-387.)

167. What is the effect of a married woman permitting her husband to receive (*a*) the income, (*b*) the capital, of property she is entitled to for her separate use? (388-389.)

168. What is meant by pin money, and by paraphernalia, respectively? Can any arrears of pin money be recovered? Are gifts of jewellery to a married woman separate estate or paraphernalia? (390-392.)

169. What is meant by the doctrine of Equity to a settlement? Give an example of a case in which it may be necessary even at the present day for a wife to assert this right? (393-395.)

170. A married woman is entitled in reversion to a sum of £10,000, not to her separate use. Discuss the point of how, if at all, this reversionary interest can be validly sold and assigned. (398, 399.)

171. When is a separation deed valid? Has the Court any power to specifically enforce the provisions of such a deed? (400, 401.)

CHAPTER VII.

172. What was meant by a common injunction? Can the Court grant an injunction of this kind at the present day? (402, 403.)

173. What is the proper course to be taken where an administration suit or winding-up proceedings are pending, and actions are brought in the Queen's Bench Division to recover debts from the executor or the company? (405.)

174. Has the Court any jurisdiction to grant an injunction to restrain an application to Parliament? (406, 407.)

175. Give four instances of cases in which the Court will grant a special injunction. What is the principle that actuates the Court in granting this relief? (407.)

176. The Court has power under the Judicature Act, 1873, to grant an injunction whenever just and convenient so to do. Explain the interpretation put on the words "just and convenient" referring to the decision in Day v. Brownrigg. (408, 409.)

177. What difference is there in the mode of obtaining an injunction in cases of public and private nuisance respectively? (410.)

178. When will the Court interfere by injunction to restrain the publication of private letters? (413.)

179. Explain briefly the doctrine of the Court with regard to granting injunctions to restrain the fraudulent imitation of goods. (414, 415.)

180. The committee of a club, professing to act under its rules, expel a member, who contends they have acted in a way they had no right to do. Has the Court here any jurisdiction to interfere by granting an injunction? (415, 416.)

181. Has the Court any power to grant an injunction against the publication, or continued publication, of a libel? (416, 417.)

182. What do you understand by (*a*) an interlocutory injunction, (*b*) an *ex parte* injunction, (*c*) a perpetual injunction? (419.)

183. The Court in granting an interlocutory injunction expresses that it does so "on the usual terms." What is meant by this? (419, 420.)

184. What is a mandatory injunction? Give an example. (420.)

185. What is a writ of *Ne exeat regno*, and in what kind of cases is it granted? What must now be shown in support of an application for the writ? (421.)

Chapter VIII.

186. What is an action to perpetuate testimony? What is the course of procedure in such an action, and who bears the costs of it? (422, 423.)

187. What was a bill to take evidence *de bene esse*? Why is it not ever necessary now to institute separate proceedings for the taking of evidence in this way? (423, 424.)

188. What was a bill for discovery? Why is it that independent proceedings for discovery are now never taken? (424, 425.)

189. What do you understand by an action to establish a will? How does the Land Transfer Act 1897 affect this mode of procedure? (425, 426.)

190. Explain what is meant by an action in the nature of a bill of peace, giving two examples of cases in which such an action might be brought. (427, 428.)

III.—DIGEST OF QUESTIONS AND ANSWERS.

1. Equity Generally, The Maxims, and the Judicature Acts.

Q. What is the meaning of the term "Equity?"

A. By Equity is meant that portion of natural justice capable of being judicially enforced, but not originally recognised by Common Law, yet not existing in opposition to Common Law, but rather following it so far as consistent with justice, and administered where Courts of Common Law could not, or did not, give the necessary relief, or at least without circuity of action or multiplicity of suits. (Indermaur's Equity, 6.)

Q. Trace concisely the reasons which led to the establishment and growth of the Jurisdiction of the Court of Chancery.

A. The rules of the Common Law were developed into a positive and inflexible system at an early date; the Roman law was discouraged and deprived of all authority in Common Law Courts; the defects of the Common Law procedure, which required each action to be commenced by a special writ, and refused relief to a suitor who chose the wrong writ or could not find a suitable writ; the failure of the statute *in consimili casu* (1285) which empowered new writs to be devised, because the judges were jealous of such innovations and because new defences also arose; the disregard paid by the Common Law to uses; the practice of petitioning the king in council for relief, and the Ordinance of Edward III., in 1348, referring all cases of grace to the Chancellor. (Indermaur's Equity, 1-5.)

Q. What do you understand by the "Maxims of Equity?"

A. They are certain maxims or doctrines which have been laid down from time to time by eminent judges of the

Court of Chancery, chiefly by Lord Bacon, the Earl of Nottingham, and Lord Hardwicke. The Earl of Nottingham in particular has been styled the "Father of Equity." These maxims form the ground work or foundation of the whole system of Equity jurisprudence, and were finally settled by Hardwicke, Thurlow and Eldon. (Indermaur's Equity, 4, 5.)

Q. Explain and illustrate the maxim "Æquitas sequitur legem"). Can this maxim be reconciled with the enactment that "in matters where there is a variance between the rules of Equity and the rules of Common Law, the rules of Equity shall prevail?"

A. (1) A legal right, estate, or limitation, receives precisely the same construction in a Court of Equity as in a Court of Law; thus, words which in a Court of Law give a legal estate tail, under the rule in Shelley's case, receive the same construction in Equity. (2) An equitable right, estate or limitation is usually construed in the same way as a Court of Law would construe it if it were legal instead of equitable—*e.g.*, in executed trusts, the rule in Shelley's case applies; but, in dealing with executory trusts, Equity gives effect to the intention of the parties rather than the words used. (Lord Glenorchy v. Bosville, 2 Wh. & Tu., 763.) The maxim can be thus reconciled, for it has never been of absolute application in all cases, and it often happened that Equity, while following the law, went further and mitigated its harshness by allowing an equitable right where the legal right had ceased, *e.g.*, redemption of a mortgage. (Indermaur's Equity, 8.)

Q. Give an example of the maxim "Equity considers as done that which ought to be done."

A. An example is found in the doctrine of Conversion, under which when real property is directed to be sold, or personal property is directed to be invested in land, it is forthwith treated as of that nature into which it is so directed to be changed. (Fletcher v. Ashburner, 1 Wh. & Tu., 327.)

Q. Trace the importance in the history of the Court of Chancery of the rule that Equity acts in personam. Illustrate by references to cases.

A. This maxim is principally, if not exclusively, descriptive of the procedure in a Court of Equity, and is not otherwise a principle of Equity itself. In Penn v. Lord Baltimore (1 Wh. & Tu., 755), which was a suit for specific performance of a contract for marking out the boundaries of two provinces in America, Lord Chancellor Hardwicke stated :—"The strict primary decree in this Court, as a Court of Equity, is *in personam;* and although this Court cannot (in the case of lands situate without the jurisdiction of the Court) issue execution *in rem*, *e.g.*, by elegit, still the judgment of the Court, which is *in personam*, can be enforced by process *in personam*, *e.g.*, by attachment of the person when the defendant is within the jurisdiction, and also by sequestration so far as there are goods and lands of the defendant within the jurisdiction of the Court, until he do comply with the order or judgment of the Court, *which is against himself personally to do, or cause to be done, or abstain from doing, some act.*" In accordance with this the Court is in the habit of entertaining actions respecting immovables abroad if there is some contract or equity against a person in England—*e.g.*, actions for administration (Ewing v. Orr-Ewing (1886), 53 L. T., 826); and for accounts of rents and profits, waste, specific performance, injunctions (Mercantile Investment Co. v. River Plate Co., 61 L. J., Ch., 473), and for foreclosure or redemption of mortgages (Toller v. Carteret, 2 Vern., 494) regarding lands situate abroad provided that the title to the lands is not in question. This maxim was also the foundation of the jurisdiction of equity to restrain actions at law by a common injunction. (Indermaur's Equity, 19, 20.)

Q. Explain and illustrate the statement that Equity acts in personam. Does this principle apply to the foreclosure of a mortgage?

A. A Court of Equity may, where a person against whom relief is sought is within the jurisdiction, make decrees upon the ground of a contract or any equity subsisting between the parties respecting property situate out of the jurisdiction, and can enforce such decree by attachment of the person and sequestration of his property within the jurisdiction. Thus in Penn v. Lord Baltimore (1 Wh. & Tu., 755), equity decreed specific performance of a contract made in England as to the boundaries of two provinces in America. It does apply, because a decree for foreclosure is a decree *in personam*.

Q. What exactly is meant by saying that Equity will not interfere against a purchaser for value without notice? Have the Judicature Acts made any difference as to the right to discovery against such purchasers?

A. It means that equity pays respect to the defence of a *bonâ fide* purchaser for value to the extent that the Court will not give assistance against a person occupying that position beyond what could be obtained against him at Common Law. Thus, before the Judicature Acts, the Court of Chancery refused to give discovery, as against a *bonâ fide* purchaser for value, it being then a relief peculiar to Equity (Basset v. Nosworthy, 2 Wh. & Tu., 150); but discovery can now in all cases be obtained by an interlocutory application in the action. (Ind v. Emmerson, 12 App. Cas., 300; Indermaur's Equity, 14, 15.)

Q. When there are successive equitable charges to different persons on the same property, on what principles will Equity determine whether or not they shall rank merely in order of their respective dates?. Give instances.

A. They will rank in the order of their respective dates, the rule being *Qui prior est tempore potior est jure*, unless there are circumstances giving some superior equity, or right in point of conscience. (Indermaur's Equity, 12-14.)

Q. A holds £1,000 *railway stock in trust for B. Who is entitled to the stock in the following cases:*—(a) *B executes an assignment of his equitable interest to C, who does not give notice; B then executes an assignment of it to D, who gives notice to A. Value is given in both cases.* (b) *A transfers the stock to Z, who has no notice of the trust.* (c) *A deposits the certificates with his bankers to secure an overdraft?*

A. (*a*) D is entitled, assuming that he took without notice of C's rights; for D, by giving notice first to A, has by his greater diligence acquired a right *in rem* to the stock, as distinguished from rights *in personam* against B. This is known as the rule in Dearle v. Hall (3 Russ., 1). (*b*) If Z takes for value, he is entitled, on the principle that when the equities are equal the law will prevail; but if Z is a volunteer, he is in the same position as A. (*c*) B has priority, because *qui prior est tempore potior est jure.* (Indermaur's Equity, 10.)

Q. Explain the phrases:—Executory trust; equitable waste; conversion; equity to a settlement; tacking mortgages. Give illustrations.

A. *Executory trust* means a trust which is inchoate and incomplete, and not fully and finally declared (Lord Glenorchy v. Bosville, 2 Wh. & Tu., 763). *Equitable waste* means waste in respect of which there was before the Judicature Acts only a remedy in Equity, *e.g.*, a tenant for life whose estate is granted to him without impeachment for waste cutting down ornamental timber (Garth v. Cotton, 2 Wh. & Tu., 970). *Conversion* means that imaginary change in the nature of property whereby, for certain purposes and under certain circumstances, real estate is considered as personal, and personal as real, and transmissible and descendible as such (Fletcher v. Ashburner, 1 Wh. & Tu., 327). *Equity to a settlement* means the right of a married woman to go to the Court and get a settlement out of property which would otherwise be taken by her

husband (Lady Elibank v. Montolieu, 1 Wh. & Tu., 621). *Tacking* means the uniting of two incumbrances so as to postpone an intervening one prior in point of time to the security tacked (Marsh v. Lee, 2 Wh. & Tu., 107).

Q. How far is it correct to say that the distinction between Law and Equity was abolished by the Judicature Acts? State the general effect of what was done in this direction.

A. The Judicature Acts did not absolutely abolish the difference between Law and Equity, but merely provided that they should be administered concurrently by the High Court and the Court of Appeal, and that these Courts should recognise and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, in the same manner in which the Court of Chancery would formerly have done. It was also provided that in all cases of a conflict between the rules of Law and Equity, those of Equity should prevail. Certain matters also which formerly Equity alone had cognizance of were exclusively assigned to the Court of Chancery. (Judicature Act, 1873, secs. 24, 25, 34.)

Q. Summarize the provisions of the Judicature Acts for the "fusion of Law and Equity."

A. Under section 16 of the 1873 Act the previously existing Courts are moulded into one, called the Supreme Court of Judicature, consisting of two parts, viz.: The High Court of Justice and Her Majesty's Court of Appeal. The High Court is divided into (1) The Chancery Division, (2) The Queen's Bench Division, (3) The Probate Divorce and Admiralty Division. In the Chancery Division are specially meant to be considered and adjudicated upon all such matters as were formerly specially dealt with in the Court of Chancery (sec. 34.) It is enacted that the High Court and the Court of Appeal shall recognise all equitable estates, rights, and titles, in the same way in which the Court of Chancery would formerly have done, and that in cases in which there was

formerly a conflict between the rules of Law and Equity, the rules of Equity shall prevail (secs. 24, 25).

Q. Explain the provisions of the Judicature Acts on the following subjects:—Merger; waste; assignment of choses in action; the rights of secured and unsecured creditors of insolvent estates; injunctions to restrain actions.

A. No merger shall take place by operation of Law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in Equity (Judicature Act, 1873, sec. 25, sub-sec. 4.) An estate for life without impeachment of waste shall not confer on the tenant for life any legal right to commit equitable waste, unless it shall expressly so appear from the instrument creating such estate (*ibid*, sub-sec. 3). Any absolute assignment by writing signed by the assignor, of any legal chose in action, with express notice in writing to the debtor, shall pass the legal right and all legal remedies (*ibid*, sub-sec. 6). In the administration by the Chancery Division of the estate of a deceased insolvent, the same rules shall prevail as regards (1) the respective rights of secured and unsecured creditors, (2) the kind of debts and liabilities provable, and (3) the mode of valuing contingent liabilities, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (Judicature Act, 1875, sec. 10). No one division of the High Court can restrain proceedings in another division (Judicature Act, 1873, sec. 24 (5)).

Q. Explain the law of merger. What alteration was made by the Judicature Act?

A. By merger is meant that when a greater and a less estate come into the hands of one person, who takes both in the same right and without any vested estate between them, the less is swallowed up in the greater. Thus, if A has a life estate in Whiteacre, and B has the remainder in fee, and A buys up B's remainder, A has an estate in fee simple in

possession. The Judicature Act, 1873 (sec. 25 (4)), provides that no merger shall take place by operation of Law only, of any estate the beneficial interest of which would not be deemed to be merged or extinguished in Equity.

Q. What is equitable waste?

A. Such acts as at law did not constitute waste, but did in Equity. Where an estate was granted to A for life without impeachment for waste, with remainder over, at Law A was entitled to commit all acts of waste; but the Court of Chancery would not permit him to commit such gross acts of waste as cutting down ornamental timber, or pulling down the family mansion house. Thus there was a conflict between the rules of Law and Equity; and the equitable rule now prevails under the Judicature Act, 1873, which enacts that a grant for life without impeachment for waste, shall not be deemed to have conferred any right, even at Law, to commit waste, known as equitable waste. (See notes to Garth v. Cotton, in Indermaur's Conveyancing and Equity Cases, 7th edition, 6, 7.)

Q. *Name some matters which are especially assigned to the Chancery Division by the Judicature Acts.*

A. Generally it may be stated that all those matters which were formerly within the exclusive jurisdiction of the old Court of Chancery are now assigned to the Chancery Division. Particularly may be mentioned administration of estates of deceased persons, dissolution of partnership, redemption and foreclosure of mortgages, execution of trusts, specific performance, and partition. (Indermaur's Equity, 25.)

2. Trusts and Trustees.

Q. Define and classify trusts.

A. A trust may be defined as an obligation under which a person in whom property is vested, is bound to deal with (or supervise the dealing with) the beneficial interest in that property in a particular manner, and for a particular

purpose, either wholly in favour of another or others, or partly in favour of another or others conjointly with himself. Trusts may be classified as being (1) express trusts, (2) implied trusts, (3) constructive trusts. Also, simple or special, voluntary or for value, public or private. (Indermaur's Equity, 27.)

Q. What is necessary to constitute an express trust (a) *of real estate;* (b) *of personal estate? When is writing necessary, and when is it not necessary?*

A. To create an express trust, the subject matter (or property) and the object (or beneficiary) must be clearly pointed out, and the words used must be imperative and not discretionary. As regards real and leasehold property, the trust must be in writing and signed under section 7 of the Statute of Frauds; but as regards purely personal property, the trust may be created by word of mouth. Any assignment of an existing trust must however be in writing by sec. 9 of the Statute of Frauds. (Indermaur's Equity, 32, 33.)

Q. Having regard to the Statute of Frauds, what is sufficient evidence of a trust of real estate? It is said that "in cases of charitable trusts a greater latitude of construction is allowed than in ordinary trusts." Illustrate this.

A. To create a trust of real estate, writing is absolutely necessary (29 Car. II., c. 3, sec. 7). This enactment, however, does not apply to trusts of real estate arising merely by implication or construction of law. The latitude shown by the Court, as regards charitable trusts, is well illustrated by the *cy-près* doctrine, which is, that if a testator has created a charitable trust which fails, but has shown a general charitable intention, the idea of the trust will be carried out as nearly as possible, and will not be allowed to fail as would be the case were a private individual concerned, and not a charity (Biscoe v. Jackson, 35 Ch. D., 460); also a charitable trust may be a perpetuity, and in favour of fluctuating bodies, *e.g.*, the poor of a parish. (Indermaur's Equity, 59.)

Q. A bequeaths £1,000 to B by will, and tells B verbally that he is to hold the money in trust for a fever hospital, and B agrees to do so. C is appointed executor, but the will contains no other provisions. Who is entitled to the £1,000? and what must the party so entitled do to obtain payment?

A. This is a case of a Secret Trust. Assuming the facts stated in the question are all capable of proof, or are admitted by B, the hospital is entitled to sue for a declaration that B holds in trust for them, and that he must carry out the trust. If, however, the communication had not been made to B thus, but the testator had left behind him a letter not attested as a will, containing a direction to this effect, this would not have been binding on B who would have been entitled to retain the £1,000 for his own benefit. (Indermaur's Equity, 44, 47.)

Q. Distinguish a trust infringing the rule against perpetuities from one infringing the statutory limits of accumulation. What, in the latter case, becomes of income for the period for which the trust for accumulation exceeds those limits?

A. A trust infringing the law against perpetuities is one where the property, the subject of the trust, is itself tied up in such a way as to withdraw it from ordinary transferability for a period of time exceeding that allowed by the rule laid down in Cadell v. Palmer (Indermaur's Conveyancing and Equity Cases, 22.) A trust infringing the statutory limits of accumulation is where the income of property is directed to be accumulated for a period which merely exceeds that allowed by the Thellusson Act (39 & 40 Geo. III., c. 98.) The income for the period for which the trust for accumulations exceeds those limits goes to such person or persons as would have been entitled thereto if no accumulation had been directed (Weatherall v. Thornburgh, 8 Ch. D., 261.)

Q. Explain, and illustrate by cases, the law as to executory trusts. What difference exists between executory trusts arising out of ante-nuptial agreements and out of wills?

A. Executory trusts are always valid if created (1) by will or (2) by instrument *inter vivos* for value; but if created by an instrument *inter vivos* without value, they are not enforced. An executory trust is primarily construed in the same way as an executed trust, for Equity follows the Law; but the Court does not hesitate to depart from this strict construction to follow the party's intention when such intention can be perceived. The well-known case of Lord Glenorchy v. Bosville (2 Wh. & Tu., 763) furnishes a good illustration. There is often a material distinction in the case of executory trusts arising in marriage articles and wills respectively, for in the former you have the intention from the very nature and well-known design of the instrument, whilst in the latter you can only gain the intention from the actual words used. (Indermaur's Equity, 44.)

Q. What is the effect of incompleteness in the execution of a voluntary settlement or gift? Give instances of such incompleteness, distinguishing the cases where what was intended was a transfer by the donor, from cases where he meant to be a trustee for the beneficiary.

A. The effect of incompleteness in the execution of a voluntary settlement or gift is that the settlor or donor can draw back from it, and the Court will always refuse to decree specific performance. A voluntary trust, to be binding, must be a perfect trust (Ellison v. Ellison, 2 Wh. & Tu., 835). Instances of such incompleteness are to be found in Jefferys v. Jefferys (Cr. & Ph., 138) and in Antrobus v. Smith (12 Ves., 39). In the latter case a father desiring that his daughter should have his shares in a company indorsed upon the share certificate a memorandum as follows: "I hereby assign to my daughter all my right, title, and interest," &c., &c. It was held that this was only an imperfect gift, and could not be enforced by the daughter. But, if the father had simply declared himself a trustee for

his daughter, a perfect trust being created, the gift would have been good. (Indermaur's Equity, 33, 34.)

Q. A assigned certain funds by deed to B, on certain trusts for C, with no expressed powers of revocation. C was not informed of the transaction. A subsequently destroyed or lost the deed. Has C on hearing of the matter any remedy?

A. Assuming the assignment was complete, C acquired perfect rights under it, and may take proceedings to have the benefit of the assignment. A trust, though voluntary, is, if complete, irrevocable, if there is no power of revocation reserved by the instrument. (Indermaur's Equity, 34.)

Q. When may voluntary trusts be avoided or set aside (a) *under Statute;* (b) *by rules of equity?*

A. (*a*) Under 13 Eliz., c. 5, if they constitute frauds on creditors. Also under the Bankruptcy Act 1883, in case of bankruptcy within two years, and even within ten years, unless the parties claiming under the settlement can show the settlor was solvent when he made it. Formerly also, under 27 Eliz., c. 4, a voluntary trust of land could be defeated by a subsequent sale for value, but this is not so now since the Voluntary Conveyances Act 1893. (*b*) If obtained by fraud or undue influence, or made under mistake, or if the object of the trust has ceased to exist, or if in favour of creditors and not communicated to them, or if executory. (Indermaur's Equity, 35, 36.)

Q. Compare and contrast the Statutes 13 *Eliz., c.* 5, *and* 27 *Eliz., c.* 4, *for the avoidance of fraudulent dispositions of property, and explain the object of the Voluntary Conveyances Act* 1893.

A. 13 Eliz., c. 5, provides that all dispositions of both realty and personalty made for the purpose of defeating creditors shall be void unless made *bonâ fide* for value. 27 Eliz., c. 4, provided that all voluntary dispositions of land should be void against a subsequent *bonâ fide* purchaser

for value. This was altered by the Voluntary Conveyances Act 1893, which provides that no voluntary conveyance of land, if made *bonâ fide* and without any fraudulent intent, shall be void against a purchaser for value who takes since 29th June, 1893. (Indermaur's Equity, 37, 38.)

Q. Define and illustrate Express, Implied, and Constructive Trusts, respectively.

A. An express trust depends upon the declared intention of the settlor, *e.g.*, A bequeaths £10,000 to B in trust to pay the income to B for life and then divide between B's children. An implied trust is founded upon an unexpressed but presumable intention, *e.g.*, A pays the purchase-money of property and takes a conveyance in the name of B, here B will generally be held to be a trustee for A. (See Dyer v. Dyer, 2 Wh. & Tu., 803.) A constructive trust is one raised by construction of equity, to satisfy the demands of justice, without reference to any presumable intention, *e.g.*, where a trustee makes a profit out of his trust estate, he will be bound to account for such profit to his *cestui que trust.* (See Keech v. Sandford, 2 Wh. & Tu., 693.)

Q. Under what circumstances may a stranger to a trust become liable as a constructive trustee?

A. A stranger may be liable as a constructive trustee if he has interfered in the matter, or possessed himself of the trust money, for he may thus, though not being a trustee, yet have incurred the liabilities of a trustee. (Soar v. Ashwell (1893), 2 Q. B., 390; Brinsden v. Williams, 63 L. J., Ch., 713.)

Q. Land is conveyed by X to A and his heirs by the direction of B, who pays the purchase-money. B dies intestate, leaving a widow and one son. Who is entitled to the land?

A. Dyer v. Dyer (2 Wh. & Tu., 803) shows that if A is a stranger he only takes as a trustee for B, but if a wife or child, unprovided for, that then generally he or she will take beneficially, it being presumed to be an advancement.

Assuming that A was a stranger, B's son will take subject to the widow's dower. (Indermaur's Equity, 48.)

Q. When a wife joins her husband in mortgaging, what equitable presumptions arise, and what rights has she or her representatives against the husband or his representatives? What effect has the "Married Women's Property Act 1882*" on the doctrine?*

A. As decided in Huntingdon v. Huntingdon (1 Bro. P.C.), the Court presumes that the wife simply charged her estate as surety for her husband, and that she or her representatives are to have the estate back again free from the mortgage. In cases coming within the Married Women's Property Act 1882, there is now no need for the husband to join in a mortgage of the wife's property, so that there will now ordinarily be nothing on the face of the mortgage to raise the presumption of the wife's estate being merely a surety for her husband's debts; but parol evidence can be given to shew that this was so, and then no doubt the general rule of suretyship applies. (Indermaur's Equity, 52, 53; and see *Re* Marlborough, Davis v. Whitehead (1894), 2 Ch., 133; 63 L. J., Ch., 471.)

Q. (a) *What is meant by a power in the nature of a trust?* (b) *If residue be bequeathed to such of the testator's nearest relations as A shall appoint, to whom may he appoint?* (c) *Would the effect be different if the words were "to my nearest relations in such shares as A may appoint"?* (d) *To whom, and in what shares, will the property in each case go if A makes no appointment?*

A. (*a*) A power in the nature of a trust arises where there is a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by the donee of the power. Here, if the donee fails to make any selection, and there is no gift over in default of appointment the members of the class will take share and share alike (Burrough v. Philcox, 5 My. & C., 72). (*b*) A

may appoint to all or any one or more of those persons who literally are nearest of kin by blood to the testator, for the words "nearest relations" do not mean statutory next-of-kin. (*c*) Prior to the Powers Amendment Act 1874, A was bound to appoint something to all the nearest relations by blood of the testator, but now A can appoint to all or any one or more. (*d*) In default of appointment the property will go—in case (*b*) to the whole class of the nearest relations by blood to the testator at the time of his death *per capita* as joint tenants; and in case (*c*) the result will be exactly the same. In both cases, if A's power had been to appoint *by will*, there would be a difference, for then the representatives of any of the nearest blood relations who die after testator but before A will take the share their deceased would have taken had he survived A (Lambert v. Thwaites, 2 Eq., 151.) (2 Wh. & Tu., 354 to 363.)

Q. Define and give an instance of a resulting trust.

A. A resulting trust is in the nature of an implied trust, and arises where (1) the objects of a trust fail or (2) a legal estate is given to another, but the equitable estate is not disposed of, or only partly disposed of, or disposed of on trusts that are not effectual, or (3) the trusts declared are illegal, or (4) a purchase is made in the name of another. The property comes home again to the creator. Thus, A settles property on B in trust for C, who it turns out was dead at the time, and the consequence is that B holds for A. (Indermaur's Equity, 50.)

Q. Give instances of different kinds of constructive trusts. C's will bequeathed renewable leaseholds to A for life, remainder to B. A bought the freehold reversion. How does the freehold devolve on A's death?

A. Instances would be (*a*) a trustee making directly or indirectly a profit out of his trust estate (Keech v. Sandford, 2 Wh. & Tu., 693); (*b*) a vendor's lien for unpaid purchase-money (Mackreth v. Symons, 2 Wh. & Tu., 926). As the

testator has shown an intention that the leaseholds should be renewed, the freehold on A's death will devolve on his heir or devisee, subject to the right of B to have the leaseholds renewed for the term for which they are capable of being renewed. The heir or devisee will thus be a constructive trustee to this extent for B. (Indermaur's Equity, 53, 54; Lewin on Trusts, 404.)

Q. How can new trustees be appointed?

A. (1) Under any power in the settlement. (2) Under Section 10 of the Trustee Act, 1893. (3) By the Court, under Section 25 of the Trustee Act, 1893, or under the Judicial Trustee Act, 1896.

Q. How may a new trustee be appointed if the existing trustee dies? And how would you vest the property in copyholds, mortgages, consols, and freeholds?

A. A new trustee may be appointed by the person nominated for that purpose by the trust instrument, and if no such person, by the last surviving or continuing trustee, or the executors or administrators of the last surviving or continuing trustee. (Trustee Act, 1893, Section 10.) The freeholds would be vested by means of a declaration inserted in the deed of appointment; but the copyholds, the mortgages, and the consols would have to be transferred in the ordinary manner. (*Ibid.*, sec. 12.)

Q. A is the surviving trustee of a will which contains no power to appoint new trustees. What must be done on A's death to appoint new trustees and vest the trust property in them? The trust estate consists of £1,000 *lent on mortgage of freeholds,* £1,000 *Consols,* £1,000 *Brighton Railway Stock, a copyhold farm,* £1,000 *due on a promissory note, and a leasehold house and some furniture.*

A. By the Trustee Act 1893 (sec. 10) the personal representative of A can appoint new trustees by signed writing. A deed should be employed, and should contain a declaration that the trust property is to vest in the new

trustees, as this will operate under section 12 as a conveyance to them of the money due on the promissory note, the leasehold house, and the furniture. But the mortgage must be conveyed by separate deed of transfer; the consols by signature of the books at the Bank of England; the railway stock by deed of transfer registered with the company; and the copyholds by surrender and admittance.

Q. B, the sole trustee for A's children under a settlement comprising leasehold, freehold and copyhold lands held on trust for sale, £1,000 *Consols, and a sum of money due on a promissory note, goes abroad and cannot be found. What must the beneficiaries do to obtain a sale and division of the property? A has three children, one of whom was a daughter married in* 1883.

A. Assuming that the trustee has been abroad for more than a year, a new trustee may be appointed under the Trustee Act 1893 (sec. 10), provided that there is a person named in the deed to appoint new trustees. The leaseholds and freeholds and the money can be made to vest in the new trustee by declaration under section 12 of this Act, but for the copyholds a vesting order must be obtained. If the provisions of section 10 do not, however, apply, a summons must be taken out under the Trustee Act 1893 (secs. 25, 26), for the appointment of a new trustee and for a vesting order. A new trustee being appointed, and the property duly vested in him, the sale can take place. If all the children are *sui juris*, they could make a good title without the appointment of a new trustee. As the daughter married since 1882, her husband would not have to join. A vesting order would, however, have to be obtained.

Q. How can a trustee retire without appointing a new trustee in his place? The trust property consists of freeholds, copyholds, leaseholds, mortgage debts, furniture and consols. What must be done to vest these respectively in the continuing trustees?

A. He may under the Trustee Act 1893 (sec. 11), retire with the consent of his co-trustees, and such other person, if any, as is empowered to appoint new trustees, provided there will still be left two trustees. The matter must be carried out by deed. Under Section 12 a declaration in the deed will be all that is necessary as regards the freeholds, leaseholds and furniture; but copyholds, mortgages, and stocks are excepted, and must be transferred in the ordinary way.

Q. In what respect did the Wills Act alter the general rules of Equity under which the trustees' estate commonly determined when their intervention was no longer necessary?

A. Formerly, when it was not specified in the will what estate the trustees were to take, they would have taken merely such an estate as was necessary for the purposes of the trust; but now, under sections 30 and 31 of the Wills Act 1837 (1 Vict., c. 26), when there is a devise to trustees without words of limitation, they take either an estate determinable on the life of a person taking a beneficial life interest in the property, or if the trust may endure beyond such life, then they take the fee simple.

Q. Are there any, and if so what, circumstances under which a trustee may claim remuneration for services performed in relation to the trust?

A. Yes, he may do so:—(1) Where he is expressly authorised by the trust instrument to make charges for his services. (2) Where at the time of accepting the trust he expressly stipulated with beneficiaries who were *sui juris* for a remuneration, and there was no unfair pressure on his part. (3) Where the Court has expressly allowed remuneration, and by the Judicial Trustee Act 1896 it has now been provided that in any proper case the Court may appoint an official trustee who may be remunerated. (4) Where the trust property is abroad, and it is the custom of the local Courts to allow remuneration. (Indermaur's Equity, 89, 90.)

Q. State and illustrate the rules of law as to the reimbursement and remuneration of trustees.

A. A trustee is entitled to be reimbursed all expenses which he has properly incurred in the execution of the trust, and as between the beneficiaries these are generally out of the capital, but until payment the trustee has a lien on both capital and income. If the trustee has committed a breach of trust he must make that good before he is reimbursed. A trustee is not entitled to remuneration for his services except in the cases specified in the last answer. (Indermaur's Equity, 89, 90.)

Q. State and discuss, referring to modern cases, the rule in Howe v. *Lord Dartmouth. How may the rule be excluded?*

A. Where personal property, being either of a wasting nature, or of a kind not yielding a present income, is bequeathed in trust as a whole (and not specifically) for one for life with remainders over, it is to be converted and properly invested, so that thus, for instance, short leaseholds may be preserved for the remainderman, and the tenant for life may gain a benefit from reversionary property. The rule does not apply if the property is given specifically, nor where there is an express direction for sale at a particular period, *e.g.*, an express trust to convert at the death of the tenant for life, for this will entitle him to specific enjoyment (Alcock v. Sloper, 2 M. & K., 699), nor where the trustees have special power to retain existing investments if they should think fit (Gray v. Siggers, 49 L. J., Ch., 819). (Indermaur's Equity, 67, 68.)

Q. A testator leaves property, comprising (a) *real estate,* (b) *leaseholds,* (c) *ships,* (d) *shares in an unlimited company,* (e) *ordinary railway stocks, to trustees in trust to convert and invest the proceeds and pay the income to A for life, and on A's death in trust for B, and he authorises the trustees to postpone the conversion of any shares not involving liability, and to employ the ships until they can be sold. The property is*

not converted for five years. What is the tenant for life entitled to claim as income?

A. The tenant for life is entitled to the income of such part of the property as consists of securities authorized by the law or by the will, *i.e.*, of the ordinary railway stocks. But as to the rest of the property (except ships) the tenant for life is only entitled, from the death of the testator, to the dividends on so much $2\frac{3}{4}$ per cent. New Consols as could have been purchased with the proceeds of such property if it had been converted at the end of a year after the death. As regards the ships, however, a value must be set on them at the date of testator's death, and the tenant for life must have 4 per cent. on that assessed value as income, and the rest of the profits made from the ships during the five years must be added to capital. (Brown v. Gellatly, 2 Ch., 751.) (Indermaur's Equity, 68—70.)

Q. Two landed estates, A and B, were devised to trustees upon trust for immediate sale and for investment of sale moneys, and for payment of income of investments to a tenant for life, and for transfer (on his death) of the investments absolutely to a remainderman. The trustees neglected to sell, but paid to the tenant for life the income of the estate A, which was more than the interest on investment of its sale moneys would have been. Estate B was vacant land, producing no income during the life of the tenant for life. On the death of the tenant for life, the capital value of each estate was not less than at the testator's death. What are the rights of the remainderman or the liability of the trustees in respect of excessive payments from Estate A to the tenant for life?

A. The trustees are guilty of a breach of trust by disobeying the trust for immediate sale and investment, and the remainderman can hold them liable for this. The remainderman is entitled to demand from the trustees the amount of consols that could have been bought had the two estates been sold at the end of a year from the death (which

may be a very different sum to that which the same money would purchase now), and they can call upon the trustees to pay them the excess of the income derived from the two estates during the life of the tenant for life beyond the dividends upon those consols; the trustees are then entitled to be recouped by the tenant for life, or as he is dead, by his estate, so far as such excess income is concerned. (Indermaur's Equity, 68-70.)

Q. State what conditions should be observed by a trustee in lending money on mortgage.

A. (1) The property must be such as they can lawfully lend upon under the settlement or the Trustee Act 1893; (2) they must employ a surveyor or valuer, who must be selected by themselves, and employed independently of the mortgagor, and told he is valuing for a trustee loan; (3) the report must state the value, and advise the loan: (4) the loan must not exceed two-thirds of the valuation; (5) the security must not be unfinished or unoccupied houses, and must be actually producing enough income to pay the interest, and must not be a contributory mortgage, or a mortgage for a fixed term, or a second mortgage; (6) they must see the mortgagor has a good title and get a first legal mortgage. (Indermaur's Equity, 75-83.)

Q. A is a trustee of a will, and invests trust moneys on mortgage of land and buildings, and on railway debentures. The securities turn out insufficient. In what circumstances would A be liable to make good the loss?

A. He will be liable if he was prohibited from investing in such securities, or if he has not exercised all proper precautions. Assuming he is not prohibited, still he will be liable as regards the debentures unless the railway company had during each of the 10 years last before the date of investment paid a dividend of not less than £3 per cent. per annum on its ordinary stock. (Trustee Act, 1893, sec. 1.) As regards the mortgages he will be liable unless he has had

a report of a surveyor as indicated by the Trustee Act, 1893, and has not advanced more than two-thirds of the reported value. (Sec. 8.) If he has advanced more than two-thirds, he will be liable for any excess he has advanced beyond that amount, Section 9. (Indermaur's Equity, 82.)

Q. A trustee is held liable for loss caused by a breach of trust. Under what circumstances has he any remedy over (a) *against a co-trustee;* (b) *against a cestui que trust?*

A. (*a*) If the breach of trust does not amount to actual fraud, a trustee who has had to refund a loss is entitled to contribution from his co-trustee (Robinson v. Harkin (1896), 2 Ch., 415; 65 L. J., Ch., 773.) (Indermaur's Equity, 88.) (*b*) The Trustee Act, 1893 (sec. 45), provides that where a trustee commits a breach of trust, at the instigation, or request, or with the consent in writing of a beneficiary, the Court may, even if the beneficiary is a married woman without power to anticipate, impound all or any part of the beneficiary's interest to indemnify the trustee. (*Ib.*, 93.)

Q. A and B are trustees of a settlement under which C is tenant for life. In 1880, *A and B were induced by C to sell* £1,000 *Consols belonging to the trust, and to lend the proceeds on mortgage at* 6 *per cent. of a leasehold property valued at* £1,000, *but which they had to sell for* £500 *in* 1890. *To what extent, if any, are A and B respectively liable for this loss, in an action brought by the remaindermen in* 1897 *?*

A. The advance on mortgage of leaseholds was a breach of trust, unless (1) the trust instrument expressly authorised it, or (2) the lease had 200 years unexpired at a rent of not more than a shilling a year. If the advance was a breach of trust, A and B are liable to the remaindermen for the entire loss of capital, which would be the sum lost on the investment plus any additional value that the Consols would have borne at the date of action brought. If the advance were not a breach of trust, then (*a*) if A and B had obtained a proper valuation, they would only be liable for any money

advanced beyond two-thirds of the valuation ; (*b*) if a proper valuation was not obtained, A and B would be liable apparently to the same amount only, according to *Re* Somerset, Somerset v. Poulet (68 L. T., 613). The Statute of Limitations does not begin to run against a remainderman until his remainder falls into possession, see Section 8 of Trustee Act, 1888. The breach of trust not being fraudulent, A and B have a right of contribution against each other. By section 45 of the Trustee Act, 1893, if the Court is satisfied that C knew (Bolton v. Curre, 1895) he was instigating a breach of trust, the Court can sequestrate his life interest to indemnify A and B.

Q. To what extent is a trustee liable for a breach of trust committed (a) *by a co-trustee,* (b) *by an agent ?*

A. (*a*) He is not liable if he has not in any way conduced to the breach of trust, *e.g.*, if the co-trustee has received money apart from him. But he will be liable if he lets it then remain in the co-trustee's hands. If he pays money to a co-trustee who misapplies it, he will be liable unless his action was reasonable, *e.g.*, for the co-trustee to pay away in the place in which he resided. (Joy v. Campbell, 1 Sch. & L., 341.) (*b*) He is liable unless it was necessary, or in the usual course of business, to employ an agent. In these cases he is not liable if he has been guilty of no negligence, but has acted strictly in the ordinary routine of business. (*Re* Speight, Speight v. Gaunt, 9 App. Cases, 1 ; Robinson v. Harkin (1896), 2 Ch., 415 ; 65 L. J., Ch., 773 ; Indermaur's Equity, 83, 84.)

Q. In what cases can a trustee without incurring liability delegate the execution of matters incidental to the trust to strangers, and leave the funds in their custody ?

A. (1) If the settlement authorises it ; (2) if morally obliged from necessity, acting in conformity to common usage ; (3) ministerial acts ; (4) allowing his solicitor to receive trust property, or his solicitor or banker to receive

insurance moneys—under section 17 of Trustee Act, 1893. He is never justified in leaving trust funds in the custody of another for longer than circumstances render necessary.

Q. When, and under what conditions, may trust property be followed into the hands of third persons?

A. It can be followed as long as it is capable of identification, into the hands of every one except (1) a *bonâ fide* purchaser who has got the legal estate without notice of the trust, or (2) in the case of a negotiable instrument in the hands of a holder in due course. (Indermaur's Equity, 97, 98.)

Q. Under what circumstances, if any, may a trustee purchase the trust property, or any interest therein?

A. The general rule is that a trustee cannot purchase of his *cestui que trust*, but such a purchase may stand if a full price is paid, and every possible fact that might affect the matter is disclosed, and no advantage taken by the trustee of his position. The onus of proving this would rest on the trustee. The trustee can, however, always purchase by leave of the Court, and an originating summons to obtain such leave can be issued under Order LV., rule 3. (Indermaur's Equity, 90.)

Q. What alternative rights has a cestui que trust against a trustee—(a) *where the trustee has improperly sold the trust estate;* (b) *where a trustee for sale has sold the property to one who secretly bought on behalf of the trustee? Are any, and which, of these rights liable to be barred by any Statute of Limitation?*

A. (*a*) He may compel the trustee to purchase other lands of equal value to be settled upon the like trusts, *or* may claim the actual proceeds of the sale with interest, *or* may claim the present estimated value of the land sold after deducting any increase in value due to improvements made since the sale. (Lewin, 1,031.) (*b*) The further alternative of suing to have the specific land reconveyed to be held upon the trusts, on returning the actual price paid with interest at

4 per cent., and for the income of the land without interest; *or* to have the property put up by auction at the price paid, and to take any increase on such price. (Lewin, Ch. 18, s. 3.) In (*a*) the Statute bars the right at the end of six years unless there is actual fraud; in (*b*) the Statute does not run under the language of Section 8 of the Trustee Act 1888.

Q. When, and at what rate, are trustees chargeable with interest on moneys received by them?

A. Where they neglect to invest money or improperly invest it, the general rule is that they are liable for the fund with interest at 4 per cent. per annum; but in certain cases they may be liable for more, *e.g.*, where they have improperly called in a security carrying a higher rate, or have dealt with the money in such a way that they have made more out of it, when they will be accountable for all profits, or where they have traded with the money, or have been guilty of gross misconduct. (Indermaur's Equity, 87.)

Q. Can a Court relieve a trustee from any liabilities he has incurred by reason of a breach of trust? If so, in what circumstances?

A. Yes, under Section 3 of the Judicial Trustee Act, 1896, if the Court is of opinion that the trustee acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach. The giving or withholding of such relief is a matter entirely in the Court's discretion, and must depend on the circumstances of each particular case. (Indermaur's Equity, 107.)

Q. To what extent, if at all, does lapse of time bar a claim by a cestui que trust against his trustee on an express trust?

A. Formerly the Statutes of Limitation did not apply in such a case, and lapse of time was never any bar unless the *cestui que trust* had been guilty of laches. If there had been laches, the *cestui que trust* was prevented from suing because of the maxim, *Vigilantibus non dormientibus æquitas*

subvenit. The Trustee Act, 1888 (sec. 8), however, provides that as regards actions commenced after 1st January, 1890, trustees may plead any Statute of Limitation, except where the claim is founded on fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by him and converted to his own use. In these excepted cases, therefore, lapse of time does not bar, unless there has been laches. When the Statute applies, the tenant for life has six years from the date of the breach of trust, and the remainderman six years from his remainder falling into possession. (Indermaur's Equity, 91, 92.)

3. Administration.

Q. In what different ways may proceedings be commenced in the Chancery Division for the administration of the estate of a deceased person? Has any other tribunal any jurisdiction of this nature?

A. Such proceedings are commenced by issuing a writ of summons in an action, or by originating summons under Order LV., rule 4. They should be commenced in the latter way if the matter is simple in its nature, and no special relief is sought, *e.g.*, to charge the executors with wilful default. Under the Bankruptcy Act, 1883 (sec. 125), as amended by the Bankruptcy Act, 1890 (sec. 21), an insolvent estate of a deceased *may* be administered in bankruptcy, or if being administered in equity it *may* be transferred to bankruptcy.

Q. A dies on 1st February, 1897, leaving personal estate insufficient for the payment of his debts, and devising his real estate to B for life, with remainder to C for life, with remainder to D in tail, with remainder to his own right heirs. E is his heir. A creditor desires to obtain payment out of the real estate. Give the form of claim and the necessary parties to the action. Will it make any difference (a) *if*

the action is not commenced till 1st *February*, 1898; (b) *if the testator does not die till* 1st *February*, 1898?

A. The form of claim is as follows: The plaintiff is a creditor of A, deceased, of whom the defendant X is executor (or administrator), and the defendants B, C, D and E are devisees, E being also heir-at-law. Particulars of the claim—principal due on a bond of the testator, dated 1st December, 1896, £2,000. The plaintiff claims to be paid the amount due to him, or to have the real and personal estate of A administered. The plaintiff will be the creditor suing on behalf of himself and all other creditors. The necessary defendants will be the executor as representing the personal estate, and B, C, D and E as representing the realty. (*a*) This will make no difference. (*b*) Yes; the only defendant will be the executor, under Part I. of the Land Transfer Act, 1897.

Q. Give the common form of order in an action by a creditor of a deceased person for administration of his real and personal estate, and state the steps which must be taken to obtain such an order, and to work out the proceedings to a final distribution of the estate.

A. The order directs (1) an account of the personalty not specifically bequeathed; (2) an account of debts; (3) an account of funeral expenses; (4) account of legacies and annuities; (5) inquiry what personalty is outstanding and undisposed of; (6) that the personalty be applied to pay debts and funeral expenses and legacies and annuities, in due course; (7) inquiry what realty testator left; (8) account of the rents since the death; (9) inquiry what incumbrances exist on such realty; (10) what is due to the incumbrancers who consent to a sale, and what are their priorities; (11) that the real estate be sold; and (12) that the further consideration be adjourned. Writ issued and served; appearance; summons for directions; pleadings; hearing when decree made; proceedings in chambers under the decree; Master's certificate; hearing on further consideration.

Q. How may persons who are interested in a deceased person's estate, and who are not named as plaintiffs or defendants in an administration action, be bound by the proceedings therein?

A. By serving them with notice of the judgment with a memorandum indorsed thereon in the prescribed form. They are then, after 28 days, bound as if they had been made parties, but within that time may apply to vary or add to the judgment.

Q. A British subject resident in Germany dies. He is entitled to real and personal estate in England, in Scotland, and realty in Germany. His estate is being administered in England. By what law must the validity of his will, its construction, and the mode of distributing his estate respectively be determined?

A. As to the real estate, the validity of the will and its construction depends on the law of the place where the land is situate. As to the personalty, the will will be valid if made according to (1) the law of his domicile of origin, or (2) the law of his domicile when the will was made or (3) the law of place where it was made (24 & 25 Vict., c. 114); the construction will be governed by the law of his domicile at the time of his death. As to procedure in distributing the estate, the Court follows its own practice. (Hamilton v. Dallas, 38 L. T., 215; Theobald on Wills, 1-4.)

Q. State fully what powers an executor has of dealing with the real and personal estate of a testator whose will contains no other directions, except to divide his estate equally between his children, X, Y and Z.

A. The fact that the realty and personalty are both given to the same persons does not exonerate the personalty from its primary liability for payment of debts, and does not vest the realty in the executors. The executors must, therefore, exhaust all the personal estate first in payment of debts, and then, if it is necessary to resort to the realty, must bring an administration action by writ, or (preferably)

by originating summons, to administer the realty. They have no other power over the realty. But if testator died after 1897, the realty (except copyholds) as well as personalty vests in the executors under Part I. of the Land Transfer Act, 1897, and they must get probate as to realty, and can sell or mortgage it when necessary, and the devisees get no title without the executor's assent.

Q. What do you understand by assets? Distinguish between legal and equitable assets respectively.

A. Assets means property of a deceased person available for payment of his debts. All property which devolves upon the executor *ex virtute officii*, constitutes legal assets, in respect of which the executor can be sued at law for payment of debts; but property which comes to the executor under an express devise or trust constitutes equitable assets, for the executor can only be sued in respect of it in equity—the distinction, therefore, refers to the remedy of the creditor against the executor, and not to the nature of the property. (Indermaur's Equity, 122.) On a death after 1897, all real property (except copyholds) appears to be made legal assets by Part I. of the Land Transfer Act, 1897.

Q. Explain the nature of, and reasons for, an executor's right of retainer. In what circumstances does it, and does it not, arise?

A. It is his right to retain a debt owing by the testator to himself out of legal assets in priority to other debts of the same degree, because he cannot, of course, sue himself, and it is a common rule that he has a right to prefer one creditor of the same degree to another. He cannot retain out of equitable assets, nor can he retain after a receiver has been appointed in administration proceedings. (Indermaur's Equity, 114, 115.)

Q. Have any, and if so what, classes of creditors any priority against the estate of deceased persons? When, and how, has the law on this subject been altered during the present reign?

A. Yes; debts rank thus:—(1) Debts to which priority is given by the Preferential Payments in Bankruptcy Act, 1888 (*Re* Heywood, 67 L. J., Ch., 25); (2) debts due to the Crown by record or specialty; (2) debts preferred by particular statutes other than those included in (1); (4) registered judgments against the deceased, and unregistered judgments against the personal representative; (5) recognizances and statutes; (6) specialty debts, arrears of rent, simple contract debts, and unregistered judgments against the deceased; and (7) voluntary bonds. By Hinde Palmer's Act (32 & 33 Vict., c 69), the priority of specialty debts (which existed over simple contracts under 3 & 4 Wm. IV., c. 104) was taken away, and both of these debts rank *pari passu*. If, however, the estate of the deceased is insolvent, and is being administered in bankruptcy, these priorities are not observed, but all debts rank equally, subject to the provisions of the Preferential Payments in Bankruptcy Act, 1888. (Indermaur's Equity, 123-126.)

Q. Explain shortly the position of an executor and of creditors, when the deceased's business is being carried on by the executor under a direction contained in the testator's will.

A. The executor is personally liable for debts incurred by him, unless the creditors agree to look only to the estate; but he is entitled to indemnity out of the estate, though if the testator has only authorised a certain portion of his estate to be devoted to the business, then the right of indemnity only extends to that portion. It was also decided in *Re* Gorton, Dowse v. Gorton (1891, A. C., 190), that the executor's right of indemnity ranks next after those persons who were creditors of the testator at his death unless those persons assented to the business being carried on, in which case the executor is entitled to indemnity even against them. (Indermaur's Equity, 109, 110.)

Q. £1,000 is owing to A by B deceased, and B's estate is being administered in Chancery and is insolvent. A holds

security worth £600. *Can A prove for his entire debt, or how should he proceed?*

A. Formerly, he could have realized his security and also proved for the whole £1,000. But now, by the Judicature Act, 1875 (sec. 10), the bankruptcy rules apply on this point —so that A must (1) realise his security and prove for the deficiency, or (2) estimate his security and prove for the deficiency, or (3) relinquish his security and prove for the entire debt, or (4) simply retain his security and not prove at all. (Indermaur's Equity, 123, 124.)

Q. Distinguish "specific," "general," and "demonstrative" legacies. How is the doctrine of ademption affected by the distinction? If a testator makes a will, leaving to A a sum described as now "owing to me on mortgage from B," and afterwards the mortgage is paid off, and the money received by the testator and invested on another mortgage, is A's legacy gone?

A. *A specific legacy* is a bequest of a particular thing, or sum of money, or debt belonging to the testator, as distinguished from all others of the same kind, *e.g.*, my diamond ring, or the £1,000 owing to me by C. *A general legacy* is a bequest to be satisfied out of the general personal estate, *e.g.*, a diamond ring, or £1,000. *A demonstrative legacy* is a bequest which in its nature is a general legacy, but there is a particular fund pointed out to satisfy it, *e.g.*, £1,000 out of my consols. A specific legacy alone is liable to ademption, *i.e.*, the legatee loses the particular thing if testator does not own it at his death; but general legacies and demonstrative legacies are not liable to ademption—except when given to a child and a subsequent portion is given by the parent during his life, which will be a satisfaction or ademption *pro tanto* (see *post*, pp. 115, 116, Indermaur's Equity, 115, 116). The legacy to A is specific and is adeemed, for there exists nothing at the death on which the will can operate.

Q. What are the rules as to legacies carrying interest?

A. The general rule is that they carry interest at 4 per

cent. per annum after the lapse of one year from the testator's death, but in the following cases they carry interest from the date of the testator's death, viz. :—(1) A legacy charged upon land; (2) a legacy to a child when there is no other provision for such child's maintenance; (3) a legacy given in satisfaction of a debt which itself carried interest; and (4) a specific legacy, and also a demonstrative legacy so long as it remains specific, carry with them their interest or profits from the date of the death. (Indermaur's Equity, 118, 119.)

Q. Distinguish between vested and contingent legacies, and give an illustration of each. If a legacy is charged on land and directed to be paid at a future day, what becomes of it if the legatee dies before that day?

A. A vested legacy is one which the legatee is to get in all events, even though the time of payment may be postponed, *e.g.*, a legacy to A payable on his attaining 21. A contingent legacy is one that the legatee is not to get unless a certain event happens, *e.g.*, a legacy to A if he shall attain 21. As regards legacies which are charged on land and the payment postponed, if the postponement is for the convenience of the estate, the legacy will nevertheless be paid, but if the postponement is with regard to some event personal to the legatee, then it is otherwise. (See Stapleton v. Cheales, and Hanson v. Graham, and notes in Indermaur's Conveyancing and Equity Cases, 49-51.)

Q. A gives £1,000 *to B, and the residue of his real and personal estate to C, and appoints X his executor. The personal estate is worth* £500, *and the real* £5,000. *Will the legacy fail to any, and if so what, extent? If not, out of what fund must it be paid?*

A. The legacy will not fail. It is by implication and by force of the word "residue" charged ou the residuary realty and personalty. The whole of the personalty will be applied in paying debts, and next the realty must be used to pay the

legacy. If there are no debts, the legacy is payable rateably out of the realty and personalty.

Q. The testator in each of the following cases died possessed of personal estate worth £300 *and of a freehold house worth* £1,000:—(a) *He bequeaths* £500 *to B, and the residue of his real and personal estate to C.* (b) *He bequeaths* £500 *to B, and his freehold house to C.* (c) *He bequeaths* £500 *to B, and then gives his real and personal estate to trustees upon trust to sell the same and apply the proceeds in payment of his debts and legacies, but does not make any further disposition of his estate.* (d) *He bequeaths* £500 *to B, and directs that the same shall be a charge on his real estate. State out of what property and in what proportions the legacy is payable, if at all, in each of the above cases, and who is entitled to the residue.*

A. (*a*) There is an implied charge of the legacy on the land, and B's legacy will be paid in full and C will get the rest of the estate. (*b*) B will get paid as much of his legacy as there is personalty to pay it, and C will get the freehold house specifically devised to him. (*c*) The legacy is payable rateably out of the estate, and assuming that there is enough money left after satisfying the debts, B's legacy will be paid in full. If there is any balance after this it will go to the heir-at-law and next-of-kin of the testator respectively. (*d*) B gets his legacy in full, as the realty is charged in aid of the personalty, and after this the balance of the realty goes to the testator's heir-at-law.

Q. A by his will directed his debts to be paid, and then, after giving a legacy of £3,000 *to his son B, devised and bequeathed all his real, and the residue of his personal estate to trustees upon trust for his daughter C. The personal estate being of the value of* £2,000 *was insufficient to pay the legacy in full after satisfying the debts, which amounted to* £1,500. *Has the legatee any right to have the real estate (which is worth* £10,000) *applied in payment of the legacy, or any and what part thereof, and if so, on what ground?*

A. Yes, *Re* Salt, 64 L. J., Ch., 494. The general direction to pay debts, charges the real estate; and realty charged with debts is liable before general legacies; consequently B is entitled to marshal the assets as against C.

Q. What is a donatio mortis causâ? How does it (1) *resemble,* (2) *differ from, a legacy?*

A. It is a gift of personal property made by a person who apprehends that he is in peril of death at the time, and is evidenced by a delivery of the property, or the means of obtaining possession thereof, to the donee, and a condition accompanies the gift that it is revocable at pleasure, and it is necessarily revoked if the donor recovers. It resembles a legacy, in that it is liable to both estate duty and legacy duty, and it is liable for debts on deficiency of assets. It differs from a legacy, in that it vests in the donee from the delivery in the deceased's lifetime, and it requires no assent on the executor's part. (Indermaur's Equity, 119, 120.)

Q. In what order are the various assets of a deceased person to be applied in payment of debts?

A. The following is the order:—(1) The general personal estate. (2) Any estate particularly devised to pay debts. (3) Estates descended to the heir. (4) Real or personal property charged with the payment of debts, and devised, or suffered to descend, or specifically bequeathed, subject to that charge. (5) General pecuniary legacies *pro ratâ*, including annuities, and demonstrative legacies which have become general. (6) Specific devises, residuary devises, and specific bequests, not charged with debts. (7) Real and personal estate appointed by will under a general power of appointment. (8) Paraphernalia of the widow. (9) Property comprised in a *donatio mortis causâ*. (Indermaur's Equity, 128, 129.)

Q. With regard to the order for application of assets mentioned in the last answer, when is the general personal estate of a deceased person not the primary fund for payment of his debts?

A. In the following cases:—(1) When the general

personal estate is by express words exonerated, and postponed to some other asset. (2) Where it is exonerated and postponed by the testator's manifest intention. (3) Where the debt is one in its nature real, *e.g.*, a jointure. (4) When the debt was not contracted by the person whose estate is being administered, but by someone else from whom he took it. (5) Where the debt is a mortgage debt, or one for which a vendor's lien exists, or any other equitable charge, on land, under the Real Estate Charges Acts. (Indermaur's Equity, 132.)

Q. Where a person dies leaving realty and personalty, and there being either a mortgage or a vendor's lien existing in respect of his realty, what are the rights of the various parties interested ?

A. Under 17 & 18 Vict., c. 113, the mortgage debt is payable primarily out of the mortgaged property; and under 30 & 31 Vict., c. 69, and 40 & 41 Vict., c. 34, this is also the case as regards a vendor's lien. Subject to any mortgage or vendor's lien, the realty will, of course, go to any devisee, or if none to the heir. The legatees or next-of-kin will get the personalty, subject to payment of any deficiency as regards the mortgage or vendor's lien, and subject to any other debts. The above Acts are usually quoted as the Real Estate Charges Acts. (Indermaur's Equity, 133, 134.)

Q. State and illustrate the doctrine of marshalling in the two classes of cases—(1) *marshalling assets of a deceased person*; (2) *marshalling securities.*

A. (1) Marshalling assets indicates the right of each beneficiary in the dead man's estate, as against the other beneficiaries (when all the creditors have been paid), to have the assets arranged so that they shall be deemed exhausted by the debts in the proper order in which they are applicable for that purpose. Thus, if a creditor has seized and sold a specific legacy in satisfaction of his debt, the specific legatee is entitled to claim an indemnity from the residuary legatee

a devisee in trust to pay debts, the heir-at-law, general legatees and a devisee charged with debts, all of whose benefits are liable before his specific legacy. (2) Marshalling securities is the principle by which a creditor, who has a right to go against two funds, may be compelled by a second creditor, who can only go against one of those funds, to take his debt, in the first place, out of that fund which the second creditor cannot touch, but this right cannot be exercised to the prejudice of a third party. (Notes to Aldrich v. Cooper, 1 Wh. & Tu., 36; Indermaur's Equity, 134-141.)

Q. To secure a debt due from A's firm to their bankers, A, whose firm had, in the ordinary course of business, possession of some delivery warrants belonging to B, wrongfully pledged them with the bank without B's knowledge; and one of A's partners, who knew nothing of the fraud, also gave to the bank another security for the same debt. The firm having become bankrupt, the bank paid themselves by selling B's property. What remedy has B to recoup himself? What are the principles involved?

A. B is entitled to have the banker's securities marshalled; and, to the extent of the value of his property which the bank has sold, may have the benefit of the security given to the bank by the innocent partner, and may, therefore, prove against the innocent partner's estate to that extent. The principle is that a guarantee by one partner for the debt of the firm, which gives the creditor the right to prove against the estate of that partner in addition to his right of proof against the general estate of the partnership, is a security to which marshalling applies. (*Ex parte* Salting, 25 Ch. D., 148.)

Q. What becomes of the undisposed of residue of a testator's personal estate where the will appoints executors, but contains no residuary bequest?

A. Formerly the executor took it for his own benefit; but now, under 1 Wm. IV., c. 40, he is a trustee for

the next-of-kin. If no next-of-kin, the executor still takes for his own benefit. (*Re* Bacon, Camp v. Coe, 31 Ch. D., 460.)

Q. If testator gives his real and personal estate in trust to pay debts and legacies, would the date of testator's death have any effect on a legacy to a charity?

A. Yes. Formerly, as the Court would not marshal assets in favour of a charity, the legacies would be payable rateably out of the whole estate; and in so far as the estate consisted of realty, or leaseholds, or money savouring of realty, the charitable legacies would proportionately fail. This is not so now, by the Mortmain Act 1891, if the testator died after the 5th August 1891, and the charitable legacies would stand in the same position as other legacies. (Indermaur's Equity, 136-139.)

Q. What is meant respectively by (1) *open account;* (2) *stated account;* (3) *settled account;* (4) *surcharging and falsifying?*

A. (1) An open account is one where the balance is not struck or is not accepted by all the parties. (2) A stated account is one which has been expressly or impliedly acknowledged to be correct by all the parties. (3) A settled account is one not only acknowledged to be correct, but which has also been discharged by payment or otherwise, between the parties. (4) Surcharging signifies showing amounts received and not accounted for; and falsifying means showing items of disbursements wrongly inserted in an account. (Indermaur's Equity, 151-155.)

4. Partnership and Companies.

Q. Describe what is meant by partnership.

A. By the Partnership Act 1890 (sec. 1), partnership is defined as the relation which subsists between persons carrying on a business in common with a view to profit. This is the ordinary actual partnership, but a person is said to be a dormant partner when, though participating in profits, he

takes no active part in the concern. Further, if a person allows his name to appear in a firm, though he does not participate in the profits, or, in fact, have anything to do with the concern, he may be estopped from denying that he is a partner, and is styled a nominal partner.

Q. Point out the differences between co-partnership and co-ownership. Explain what is meant by a "partner's lien."

A. Co-ownership need not arise from agreement, partnership must; the former need not involve community of profit and loss, partnership must; each co-owner may transfer his share to a stranger, a partner cannot, so as to make the alienee a partner; each partner is the implied agent of the rest, but each co-owner is not; a partner has a lien for outlays, but a co-owner has not; a partner cannot compel partition, but a co-owner can; a co-owner's share of realty devolves on his devisee or heir, but a partner's share on his personal representative; partners have an action of account, but not so necessarily co-owners. (Lindley, 25, 26.) By a partner's lien is meant the right of each partner on dissolution to have all the property belonging to the partnership sold, and the proceeds of sale, after discharging all the partnership debts and liabilities, divided amongst the partners according to their respective shares in the capital. (Pollock's Partnership, 6th edition, 105, 106.)

Q. What are the rules by which the question whether a partnership does or does not exist is to be determined?

A. Joint tenancy or other co-ownership does not of itself create a partnership, nor does the sharing in gross returns. The receipt of a share of profits is *primâ facie* evidence of partnership, but does not necessarily create a partnership, and in particular none of the following positions necessarily create a partnership: (*a*) The receipt of a debt by instalments or otherwise out of accruing profits. (*b*) The remuneration of a servant or agent by a share of profits. (*c*) The payment of an annuity to a widow or child of a deceased partner out

of profits. (*d*) The lending of money to receive interest varying with the profits. (*e*) The receiving a portion of profits in consideration of the sale of a goodwill. (Partnership Act, 1890, sec. 2.) But (*d*) and (*e*) are deferred in bankruptcy to all other creditors.

Q. What are the principal rules contained in the Partnership Act, 1890, *with regard to rights and duties of partners inter se?*

A. The general rules (unless otherwise agreed) are laid down in Section 24, as follows: (1) Profits, capital, and losses are to be shared equally. (2) Partners to be indemnified for payments and liabilities made and incurred in the ordinary course of business. (3) Extra capital to bear interest at £5 per cent. (4) No partner entitled to interest on capital till profits ascertained. (5) Every partner entitled to take part in the management of the partnership business, but without remuneration. (6) No new partners to be introduced without consent of all. (7) In case of dispute majority to prevail, but no change in the nature of the business without consent of all. (8) Books to be kept at principal place of business, with liberty to each partner to inspect and copy.

Q. What events dissolve a partnership? Explain how the affairs of a partnership should be wound up in case there are no articles of partnership, and owing to losses the assets are insufficient to repay the capital embarked.

A. A partnership is dissolved—(1) If for a fixed term, by effluxion of time. (2) If for a single undertaking, by the termination thereof. (3) If for an undefined time, by reasonable notice. (4) By death. (5) By bankruptcy. (6) By the unlawfulness of the business. (7) By the decree of the Court. (Partnership Act, 1890, secs. 32-44.) Section 44 of the Partnership Act, 1890, provides that the assets shall be applied—(1) In paying the debts and liabilities of the firm to persons who are not partners. (2) In paying to each partner rateably what is due from the firm to him for

advances. (3) In paying to each partner rateably what is due from the firm to him in respect of capital. This would, under the circumstances stated in the question, exhaust the assets, and it is unnecessary, therefore, to proceed further. There being no partnership articles, the presumption would be that the capital had been brought in in equal shares.

Q. On what grounds will the Court dissolve a partnership?

A. The following are the chief grounds:—That a partner has been found lunatic by inquisition, or is permanently insane. Incapability of a partner to perform his part of the partnership contract. That a partner has been guilty of conduct calculated to prejudicially affect the carrying on of the business. That a partner has persistently committed breaches of the partnership articles. That the business can only be carried on at a loss. That the circumstances are such that it is just and equitable that the partnership should be dissolved. (Partnership Act, 1890, sec. 35.)

Q. A and B enter into partnership, sharing profits equally, but A bringing in £50,000 *capital and B* £10,000. *A then advances* £5,000 *to the firm.* (1) *Is interest payable on any, and if so which of these amounts*—(a) *during the continuance of the firm;* (b) *after its dissolution?* (2) *The firm is dissolved and all the partnership assets sold by auction for* £12,000. *How is this sum to be applied, and what must be done to adjust the accounts between the partners? The debts to persons not members of the firm amount to* £6,000.

A. (1) During the continuance of the firm and after dissolution, interest at 5 per cent. per annum is payable on advances (Partnership Act, 1890, sec. 24). During the continuance of the firm there is no interest on capital (sec. 24), but after dissolution, if the business goes on, any former partner is entitled to such share of the profits as are attributable to his capital, or at his option to interest at 5 per cent.

per annum (sec. 42). (2) It will be applied as follows (*a*) in paying the debts of the firm to persons who are not partners, (*b*) in repaying each partner what is due to him for advances, (*c*) in paying to each partner rateably, what is due from the firm to him in respect of capital, (*d*) The ultimate residue is divided amongst the partners in the proportion in which profits are divisible. In the case put the debts being paid leaves £6,000, out of this A must be paid £5,000 and any interest, and the balance then remaining must be proportionately divided between A and B, according to their amount of capital, that is to say, one-sixth to B and five-sixths to A. If the parties are not able to arrange matters between themselves, and there is no arbitration clause in the partnership deed, or they do not agree to arbitration, an action should be brought in the Chancery Division in which all necessary accounts and enquiries, and a complete adjustment, would be made.

Q. A and B carry on business as grocers in partnership, under the style "A & Co." The firm is dissolved and the business is put up for sale, B purchases it, and uses the old name, "A & Co." A takes X and Y into partnership, and starts a grocery business in the same street as B, under the style "A & Co." Has B any, and if so what, remedy? Has A any right of action against B?

A. B, having a right to use the old style of the firm as he has bought the business, has a remedy by issuing a writ and claiming an injunction to restrain A, X and Y from carrying on their business under the style of "A & Co." though he cannot restrain them from carrying on business under some other style (Churton v. Douglas, Johns, 174). A has no right of action. (Lindley's Partnership, 6th edition, 424-444.)

Q. When will Equity interfere between partners—(a) *by granting an injunction;* (b) *by appointing a receiver;* (c) *by appointing a manager?*

A. (*a*) It will be granted, irrespective of any claim for dissolution, to prevent a partner acting contrary to the partnership agreement, or contrary to the good faith which each partner is bound to observe towards the others, *e.g.*, to prevent omission of a partner's name, or his exclusion from the place of business. (*b*) A receiver will generally only be appointed with a view to a dissolution or final winding up of the partnership affairs. (*c*) A manager will be appointed for the purpose of carrying on the business under the control of the Court, when it is desired to sell it (upon dissolution) as a going concern. (Indermaur's Equity, 145, 146.)

Q. A is taken into partnership by B, who pays a premium. On dissolution of partnership, can B claim a return of his premium?

A. By Section 40 of the Partnership Act 1890, where the partnership was for a fixed term, and is dissolved before the expiration of that term otherwise than by death of a partner, the Court may order the return of the premium, or such part thereof as it thinks just, having regard to the terms of the articles and the length of time the partnership has endured, unless the dissolution is wholly or chiefly due to the misconduct of the partner who paid the premium, or the partnership has been dissolved under an agreement containing no provision for a return of any part of the premium. (Indermaur's Equity, 146.)

Q. State the rule in Clayton's Case. Show how it applies in favour of or against—(a) *deceased partners*; (b) *retired partners*; (c) *incoming partners—of a banking business in the accounts between the bank and its customers.*

A. The rule is as regards appropriation of payments, and is threefold: (1) The debtor has the first right to state in respect of what debt or contract the payment is made. (2) Failing this the creditor has the right. (3) Failing this, the law presumes that it was made in respect of the earliest

contract or debt, commencing with the liquidation of interest due. (*a*) As regards deceased partners, any amounts drawn out after the decease of a partner will be presumed to be on account of the balance owing at the time of the deceased partner's death, and if insolvency occurs the estate of the deceased partner will only be liable for the balance. (*b*) The same rule applies where a partner retires. (*c*) An incoming partner is not, as a rule, liable for debts contracted before he becomes a partner, but if such debts and others subsequently contracted are allowed to form one single account, and payments are made generally with respect to it, these payments (though made with moneys of the new firm) will be applied to the old debt, and a balance will be left for which the incoming partner will be liable. (Indermaur's Equity, 155, 156.)

Q. Will Equity decree specific performance of an agreement to form a partnership?

A. The Court will not generally do so, for "it is impossible to make persons who will not concur, carry on a business jointly for their own common advantage." But where such an agreement has been acted on, the execution of a formal deed recording its terms may be ordered by way of specific performance, if necessary, to do justice between the parties. (Pollock's Partnership, 6.)

Q. What are the respective rights of vendor and purchaser of a goodwill?

A. As between himself and the vendor, the purchaser acquires the sole right to carry on the business under the old name; whilst, in the absence of stipulation, the vendor may compete with him in the same line of business; but he may not solicit the customers of the old firm to transfer their custom to him (Trego v. Hunt, (1896), A. C., 7), nor must he in any way represent himself as still carrying on the old business. (Indermaur's Equity, 149.)

Q. What is the mode of proceeding against partnership property in respect of a partner's separate judgment debt?

A. Under the Partnership Act, 1890 (sec. 23), the Court may make an order charging the partner's interest in the partnership property with payment of the judgment debt, and may appoint a receiver of that partner's share, and may order all accounts and inquiries, and make all directions which might have been made if the charge had been made by the partner, or which circumstances require. The other partners are at liberty to redeem the interest charged, or if a sale is directed to purchase. Under section 33, on such an order being made, the partnership may, at the option of the other partners, be dissolved. (Indermaur's Equity, 143.)

Q. State shortly the provisions of the Partnership Act, 1890, *as to the misapplication of money received for a firm. A and B are solicitors in partnership. C, a client of the firm, hands a sum of money to A, to be invested in a specified security, and subsequently a further sum, with general directions to invest it for him. A never invests either sum, but applies both sums to his own use. B knows nothing of the transactions. Is he liable to make good either of the losses?*

A. In the following cases, viz.: (*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it: and (*b*) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm - the firm is liable to make good the loss (Section 11). As to the first sum of money handed by C to A, B also is liable since this is part of the ordinary business of solicitors (Blair v. Bromley, 2 Ph., 354); but as to the second sum it is otherwise (Harman v. Johnson, 22 L. J., Q. B., 297).

Q. Explain and illustrate the grounds on which persons who are not actually partners may be held liable for the debts of a firm, and state the limits of such liability.

A. The real ground is estoppel, viz., that the person has

(by speech, writing or conduct) represented, or has knowingly allowed others to represent, that he is a partner in a particular firm, and that credit has been given to the firm on the faith of that representation (see Partnership Act 1890, sec. 14). If A tells B he is a partner in C & Co., and B tells D, and D consequently sells goods to C & Co., A is liable to D. To avoid this liability, a retiring partner gives notice in the *London Gazette*, and also to all customers of the firm ; but a deceased partner is not liable on the doctrine of holding out.

Q. A, B and C carry on business in partnership (merchants) at a freehold warehouse which was conveyed to them as tenants in common. What difference would it make in case of C's death intestate, whether it belonged to them in Equity as co-owners or co-partners? How would you determine what was the true nature of their equitable interest therein?

A. If co-owners, C's share would go to his heir ; but if co-partners, to his personal representatives (Lindley's Partnership, 6th edition, 25). The Partnership Act 1890 (section 25) provides that unless a contrary intention appears, property bought with money of the firm is to be deemed to have been bought on account of the firm. The point must, subject to this, be determined on the individual facts ; generally if the property has been acquired outside the partnership business the parties are only co-owners, but if the property is treated as part of the common stock then it is otherwise. (See Brown v. Oakshott, 24 Beav., 254 ; Jackson v. Jackson, 9 Ves., 591 ; Lindley's Partnership, 340, 341.)

Q. What is meant by novation? A customer of a banking partnership consisting of A and B, after the death of A, removed £100 *which had, before A's death, been standing to the credit of the customer's current account to a deposit account, and received a deposit note from B. B failed. Is A's estate liable for the* £100*?*

A. Novation is the technical name for a contract of substituted liability, being in fact a tripartite agreement between a debtor and a creditor and a third party, whereby the debtor is released and the liability of the third party accepted instead. No; A's estate is not liable, for what has taken place is an acceptance of B's sole liability and a discharge of A's estate. (*Re* Head [No. 2], 1894, 2 Ch., 236.)

Q. On what ground will receivers of the property of partnerships be appointed? How is the appointment obtained, and what is its effect?

A. Only with a view to, or after, a dissolution. The appointment is usually made on motion supported by affidavit, but may sometimes be made on a summons. The appointment supersedes the rights of all parties (except prior incumbrancers) to get in the estate; he is an officer of the Court, must act strictly within the terms of his appointment, must pass his accounts, and must apply, by summons, for direction as to any special matter.

Q. Point out the principal differences between a share in a partnership and a share in a registered company.

A. An ordinary partnership is founded on personal confidence between the partners, and gives every partner equal rights in the conduct of the business unless there is an express agreement to the contrary. A commercial company on the other hand, is regularly composed of a minority of active members designated directors, and of a majority who need not, and most commonly do not, know anything of one another, and have no part in the ordinary conduct of the business. (Pollock's Partnership, 7, 8.)

Q. Define and distinguish—(a) *partnership*; (b) *unincorporated company*; (c) *joint adventure*; (d) *incorporated company.*

A. (*a*) It is the relation existing between persons who have agreed to share the profits of a business carried on by all, or by any of them on behalf of all. (*b*) It is a species of

partnership intermediate between a corporation at common law, and an ordinary partnership. (*c*) It is a limited partnership confined to one particular venture, in which the partners use no firm name, and incur no responsibility beyond the limits of the venture. (*d*) It is a corporation registered under the Companies Acts, with a common seal, and sues, and is sued, in its corporate name.

Q. What are the different functions of—(a) *partnership articles;* (b) *memorandum of association;* (c) *articles of association?*

A. (*a*) To define the scope of the partnership, and the shares, interests, duties, and general rights and positions of the partners. (*b*) To define the name of the company, its place of business, objects, liabilities of the members, and amount of capital. (*c*) To prescribe the regulations for the management and conduct of the business of the company.

Q. What are the various Courts which have jurisdiction to wind up joint stock companies, and under what circumstances does their jurisdiction exist?

A. (1) The High Court. (2) The Chancery Courts of the Counties Palatine of Lancaster and Durham. (3) The County Courts. Applications to wind up must be made—(*a*) To the High Court, where the paid-up capital exceeds £10,000; (*b*) to the Palatine Court or High Court, if the company is situate within the jurisdiction of either of the Palatine Courts, and its paid up capital exceeds £10,000; (*c*) to the County Court having bankruptcy jurisdiction where the registered office of the company is situate, if the paid up capital is less than £10,000; (*d*) formerly to the Stannaries Court if the company is formed to work mines within the Stannaries, but this Court is now abolished, and its jurisdiction transferred to the County Court of Cornwall. (Companies Winding-Up Act, 1890; Stannaries Court (Abolition) Act, 1896.)

Q. In what modes may a company be wound up, and how

do the various modes differ from each other? On what grounds may a compulsory winding-up order be made?

A. In three ways, viz.: (1) By the Court; (2) Voluntarily; (3) Subject to the supervision of the Court. The general scheme is the same in all these methods. The great distinction between winding-up by the Court and voluntary winding-up is, that in the first case the liquidators are officers of the Court and trustees for the creditors, whereas in the second case they are appointed by and are trustees for the company. In the case of a winding-up subject to the Court's supervision, the liquidators are appointed by the company, but are subject to the Court's control. The following are the grounds:—(1) Special resolution to wind up by the Court. (2) Not commencing business within a year, or suspending business for a year. (3) Members reduced to less than seven. (4) Inability to pay debts. (5) That it is just and equitable to wind up. (Eustace Smith's Companies, 72, 73.)

Q. What are the dates at which the winding-up of a company (a) *compulsorily*, (b) *voluntarily*, (c) *under the supervision of the Court, commence respectively?*

A. (*a*) From the date of the presentation of the petition. (*b*) From the date of the passing of the resolution to wind up. (*c*) From the date of the passing of the resolution to wind up, and not from the date of the presentation of the petition on which the order is made. (Lindley's Companies, 5th edition, 664.)

Q. State shortly the effect of the three Acts passed in 1890 *as regards the winding-up of companies, the liability of directors, and the alteration of the objects of companies under the Act of* 1862.

A. 53 & 54 Vict., c. 62, contains provisions enabling the objects of a company as stated in the memorandum of association to be, to a certain extent, altered by means of a special resolution confirmed by the Court. 53 & 54 Vict.,

c. 63, contains general provisions as to the winding-up of companies, defines the Courts having jurisdiction, provides for the appointment of a liquidator, and generally contains full provisions with regard to winding-up. 53 & 54 Vict., c. 64, alters the law as laid down in Derry v. Peek (12 App. Cas., 337) as regards misrepresentations made by directors, promoters, &c.; it is not now enough for them simply to prove that they believed the statements were true, but certain other facts have also to be shewn to exonerate them from liability. (See *Law Students' Journal*, Oct., 1890.)

Q. Shortly state the practice of the Court as to settling lists of contributories. What are the different classes of contributories in the winding-up of a company?

A. To answer the last part of the question first, there are two classes, viz., actual shareholders at the commencement of the winding-up, who are all placed in the A list, and past members who have, however, only ceased to be members within a year prior to the commencement of the winding-up, who are placed in the B list. The A list is settled as soon after the appointment of the liquidator as possible, but the B list not until it is shown that the present members of the company are unable to satisfy the debts. Notice is given of the date of settling the list of contributories, and the liquidator hears any persons who desire to urge objections why they should not be placed on the list, and he finally settles it. Every contributory placed on the list receives notice thereof, and may apply to strike his name off by summons to vary taken out within 21 days. (Eustace Smith's Companies, 111.)

Q. (a) *A on the 30th of April*, 1894, *transferred fifty* £10 *shares in a limited company to a pauper.* £5 *was paid up on each share.* (b) *B sold fifty shares to the company on March 1st*, 1894, *in consideration of a payment by the company to him in cash.* £5 *had been paid on each share.* (c) *C received an allotment of thirty shares in the company as a*

return for certain services rendered by him. (d) *D was induced, by a fraudulent statement by the directors, to take up fifty* £10 *shares in the company, and paid* £5 *a share on them. An order to wind-up the limited company was made on May* 1*st*, 1895. *On what grounds (if any), and to what extent, may A, B, C and D respectively be liable to contribute to the assets of the company?*

A. (*a*) The commencement of the winding-up is the date of presentation of the petition, and as the order was made on the 1st May, 1895, it is evident A has not ceased to be a member for a year, and he will be placed in the B list of contributories, and is liable for the balance of £5 a share, to the extent of debts incurred before he ceased to be a member. (Eustace Smith's Company Law, 6th edition, p. 46, 47.) (*b*) A company cannot purchase its own shares. and B still remains liable for the £5 a share, and it would appear is also liable to refund what was paid him by the company. (*Ibid*, 63; Trevor v. Whitworth, 12 App. Cas., 409.) (*c*) Assuming they are fully paid up shares, and a proper contract was entered into and duly filed with the Registrar of Joint Stock Companies under section 25 of the Companies Act, 1867, C is not liable at all; but otherwise he is liable for the full amount of the shares, unless the court sees fit to give him relief under the Companies Act, 1898. (*d*) D will be liable to pay the remaining £5 a share, unless the misrepresentation was in the prospectus and, before the commencement of the winding-up, he has applied to have his name removed from the register; but he may have a right of action against the directors, either for deceit, or under the Directors Liability Act, 1890 (*Ibid*, 21.)

Q. A's name is on the register of shareholders of a limited company in respect of certain shares not fully paid up. Under what circumstances is he entitled to have it removed (a) *before* (b) *after, the commencement of a winding-up? What proceedings can he institute for the purpose?*

A. (*a*) Where he has been induced to take the shares by fraud, provided he proceeds promptly. (Taite's Case, 36 L. J., Ch., 475.) The application would be by motion or summons. (*b*) Only by the sanction of the Court, or perhaps, in the case of a voluntary winding-up, by the sanction of the liquidators. (Lindley's Companies, 5th edition, 832.)

Q. What is meant by a "floating security"? State and compare the rights of a preference shareholder, an ordinary shareholder, a debenture holder, an ordinary mortgagee of lands of a company, and an unsecured creditor in the winding-up of a company under the Act of 1862.

A. A debenture issued by a company charged on the property of the undertaking for the time being, or on the undertaking. The only rights of shareholders would be if there was a surplus. If, as a result, there has been a loss on the working of the company, the holders of shares entitled to a preference in respect of dividends payable out of profits are not entitled to any preference in respect of the assets. If there has been a profit, the question depends upon whether, according to the company's articles, the excess of assets over the capital paid up, though profit in one sense, constitutes a fund divisible as profits amongst the holders of the preference shares. (Lindley's Companies, 5th edition, 868.) A debenture holder as to specific property is in the same position as a mortgagee, but if his debenture is a floating charge, then he is subject to specific mortgages (Moor v. Anglo-Italian Bank, 10 Ch. D., 681), unless the debenture contains a clause against further mortgaging, and the mortgagee took with notice thereof (English and Scottish Mercantile Trust v. Brunton, 67 L. T., 406), and he is always subject to rates and taxes and wages under the Preferential Payments in Bankruptcy Act, 1897. An unsecured creditor has a right to be paid out of any assets left after payment of mortgagees and debenture holders, and the expenses of winding-up.

Q. What proceedings (if any) may be taken under the Statutes relating to Companies—(a) *By a creditor who finds great delay in a voluntary winding-up.* (b) *Against directors who have wrongfully been paying dividends out of capital.* (c) *Against auditors who have passed misleading balance-sheets.* (d) *By a person whose name has been entered on the register without his consent.* (e) *To determine the relative rights of preference and other shareholders in a case of doubt in a voluntary winding-up?*

A. (*a*) He may present a petition under Section 145 of the Companies Act 1862, for an order to wind-up on the ground that his rights are being prejudiced by the voluntary winding-up, and the Court may then make an order for compulsory winding-up, or for winding-up under supervision. (*b*) The directors can be held jointly and separately liable for all such dividends, and ordered to pay the same to the liquidator in the winding-up. (*c*) They may be held liable in a winding-up for all loss that has ensued from their misconduct (Leeds Estate Co. v. Sheppard, 57 L. T., 685; *Re* London and General Bank, 72 L. T., 611; *Re* Kingston Cotton Mills, 74 L. T., 768.) (*d*) He may apply by summons or motion for an order to rectify the register by taking his name off, and such order may be made by a judge in Chambers, or by any superior Court, under Section 35 of the Companies Act 1862. (*e*) Bring the matter before the Court on motion, as in *Re* Bridgewater Navigation Co., 39 Ch. D., 1. (See generally Eustace Smith's Company Law.)

Q. By what proceedings, and in what Courts, can the affairs of the following associations be wound up, and the rights of the members adjusted:—(a) *A tramway Company incorporated by Special Act.* (b) *A building society under the Act of William IV.* (c) *A company registered under the Act of* 1862, *with a capital of* £5,000. (d) *A building society registered under the Act of* 1874. (e) *A partnership of six members?*

A. (*a*) By petition under the Companies Acts—presented to the Bankruptcy County Court where the registered office or principal place of business is situate if the paid up capital is under £10,000, otherwise to the High Court. (*b*) Same as (*a*). (*c*) The Bankruptcy County Court where the registered office is situate, on petition of itself or a creditor or contributory. (*d*) The County Court, on petition of a judgment creditor for £50, or a member authorised by a majority of three-fourths present at a meeting. (*e*) The Chancery Division, or, if the assets are under £500 the County Court. (Buckley on Companies.)

Q. State the rights and liabilities of A, B and C in the following cases:—A company being in want of money issued (pursuant to a special resolution) 1,000 *shares of* £1 *each to A, on the terms that he should pay* 10*s. per share, and the shares should be deemed fully paid up. A sells* 300 *of the shares to B, and gives him the certificate for such shares. A then surrenders* 300 *of the shares to the company, and the company borrows* £300 *from C, and transfers the* 300 *shares to him as security. A retains the other* 400 *shares. An order is made for winding-up the company, and the list of creditors and contributories are being settled.*

A. The original issue of 1,000 shares to A is at a discount, and this is always forbidden by law (Welton v. Saffery, 76 L. T., 505), so that A holds all these shares with the obligation to pay up the other 10s. per share in cash. B is an innocent purchaser from A, but has not registered his transfer with the company and got new certificates; consequently the liquidator is not estopped from calling on B for the unpaid 10s. per share, but B has a right to be indemnified by A. The surrender of 300 shares by A to the company appears to have been without consideration and is a nullity so far as A's liability is concerned. C has a good security over the 300 shares, and the liquidator is estopped as against C from alleging the shares are not fully paid, Bloomenthal v. Ford

(76 L. T., 205). The liquidator will put A on the A list of contributories for 400 shares on which 10s. is still unpaid; and B on the A list for 300 shares on which 10s. is still unpaid, and A on the B list for the same shares; and A will be a contributory for the 10s. unpaid on C's 300 shares. C ranks as a creditor. If the original transaction with A had been a loan as in Bloomenthal v. Ford, the liquidator would have been estopped from alleging that any of the shares are not fully paid.

5. Mortgages.

Q. Explain, and illustrate, with reference to mortgages, the maxims, "Equity regards the spirit and not the letter," and "Once a mortgage always a mortgage."

A. At Common Law, if the mortgage was not paid off on the day named in the deed, the mortgagee became absolute owner, the mortgage being regarded as an estate granted to the mortgagee absolutely, subject to a condition to be performed by the mortgagor, and if not performed, the mortgagor's right was gone for ever. Equity acting on the first maxim mentioned in the question, regarded the transaction as a security for money only, and always allowed the mortgagor to come and redeem upon payment of principal, interest, and costs. This right was called the mortgagor's equity of redemption. The second maxim mentioned in the question means that if a transaction has once been clearly shown to be a mortgage, a mortgage it will always remain. Thus a clause in the deed, providing that the mortgagor's equity of redemption should be barred if the mortgage was not paid off within five years, would be perfectly useless. (Howard v. Harris, 2 Wh. & Tu., 11; Indermaur's Equity, 158.)

Q. A sells property to B for £1,000, *reserving a right of buying it back at the end of a year for* £1,100. *He does not exercise this right within the year, but shortly afterwards claims to do so. Can he maintain this claim?*

A. No, not if the transaction is really not a mortgage, but is an out-and-out sale with a right of re-purchase, for here the day named must be strictly observed. It may sometimes be difficult to tell which the transaction is really meant to be, and the following circumstances will all, with more or less force, point to its being a mortgage, in which case strict observance of the day is of no consequence :—(1) That the grantor remained in possession, merely accounting for rents as interest; (2) that the grantee, though in possession, accounted for rents and profits to grantor; (3) that the grantor paid the costs; (4) that the sum paid was totally inadequate, having reference to the value of the property. (Indermaur's Equity, 163.)

Q. What is meant by an Equity of Redemption? What notice must be given by a mortgagor who wants to pay off?

A. An Equity of Redemption is that equitable right existing in a mortgagor, after the day named for payment has gone by, under which he is entitled to redeem, and have the property re-conveyed to him on payment of principal, interest, and costs. The mortgagor desiring to pay off a mortgage after the day named in the deed, must give six months' notice, or pay six months' interest in lieu of notice, so that the mortgagee may have time to find another investment for his money. However, in the case of an equitable mortgage by deposit, reasonable notice only need be given, so as to enable the mortgagee to look up the deeds (Fitzgerald's Trustee v. Mellersh, 61 L. J., Ch., 231). (Indermaur's Equity, 158, 170.)

Q. How may a mortgagor lose or be deprived of his Equity of Redemption?

A. (1) By foreclosure, that is by the mortgagee taking proceedings in Chancery asking for an account to be taken, and for an order for payment by a certain date, usually six months from the date of the Master's certificate, and that if not then paid the mortgagor be deprived of any further

right. (2) By sale of the property by the mortgagee under his power; but, of course, the mortgagor is entitled to an account and payment of any balance. (3) By the Real Property Limitation Act 1874, under which, if the mortgagee goes into possession and holds for 12 years without giving any acknowledgment in writing of the mortgagor's right to redeem, such right is statute barred. (4) Under 4 & 5 Wm. & Mary, c. 16, a mortgagor loses his equity of redemption if he mortgages a second time without disclosing the prior mortgage. (Indermaur's Equity, 160.)

Q. Explain what is meant by re-opening a foreclosure.

A. The Court permitting a mortgagor to redeem, although a foreclosure decree has been made. Thus, if a mortgagee forecloses and then sues on his covenant, this re-opens the foreclosure. And the Court has a discretionary power to re-open a foreclosure on special grounds, *e g.*, ignorance of the state of the proceedings, or the day fixed for payment, irregularity in the proceedings, illness, or accidental inability to travel on the part of the person who should have paid the money, or even temporary poverty on the part of such person. (Indermaur's Equity, 163.)

Q. Can a mortgagee, after having foreclosed, or after having sold the mortgaged property, sue for any deficiency?

A. He can sue after foreclosure, but it re-opens the foreclosure, and gives the mortgagor the renewed right to redeem, and it therefore follows that if he has not merely foreclosed, but has then proceeded to sell the property, or any part of it, he cannot sue, because he no longer has the estate in his possession ready to restore to the mortgagor on payment (Lockhart v. Hardy, 9 Beav., 349). But if he has simply sold under his power of sale, he may sue for any deficiency (Rudge v. Rickens, L. R., 8 C. P., 358). (Indermaur's Equity, 184.)

Q. Explain shortly the position of a person who purchases an Equity of Redemption.

A. He is generally in the same position as the original mortgagor, but he is not liable to the mortgagee to pay him the mortgage debt, unless the mortgagee has joined in the transaction, and the purchaser has covenanted with him to pay the amount. But he will (in the absence of express stipulation) indirectly incur a liability, as there is an implied covenant to indemnify the mortgagor against further liability on the mortgage debt (Waring v. Ward, 7 Ves., 337.) (Indermaur's Equity, 161.)

Q. What are the remedies possessed by a legal mortgagee, and in what order must he resort to them?

A. His chief remedies are four in number—(1) to sue for his money; (2) to enter into possession and eject the mortgagor, and then he has certain other incidental powers, *e.g.*, a power of leasing; (3) to sell under express powers granted by the mortgage, or by statute; (4) to foreclose. He may exercise all his remedies concurrently, but if he first forecloses and then sues, this re-opens the foreclosure, and gives the mortgagor a renewed right to redeem; and if he has, after foreclosure, sold the property or any part of it, he cannot then sue, as he has not got the property to restore to the mortgagor on payment. (Indermaur's Equity, 173.)

Q. What is meant by an equitable mortgage? Explain why it is allowed. What are the remedies of an equitable mortgagee?

A. An equitable mortgage is one effected by a memorandum of charge on the property, or by a deposit of the title deeds, either alone, or with a memorandum. The ground on which it is allowed, is that if the depositor sued at Law to recover the title deeds, the lien of the depositee would be an answer, and if he sued in Equity for specific delivery, the maxim "He who seeks Equity must do Equity," would apply (Russell v. Russell, 2 Wh. & Tu., 76). If the mortgage is by deposit, the proper remedy is foreclosure; but if there is also an agreement to execute a legal mortgage, the mortgagee has the option of suing either for foreclosure or sale. In any

foreclosure suit, the Court has a discretion to direct a sale. (Indermaur's Equity, 182.)

Q. Who has priority in each of the following cases, and why:—(a) *Equitable mortgage to A, followed by a legal mortgage to B.* (b) *Legal mortgage to C, followed by equitable mortgage to D.* (c) *Equitable mortgage to E, followed by equitable mortgage to F?*

A. (*a*) The legal mortgagee B will have priority if he had no notice, actual or constructive, of the equitable mortgage to A, for "Where the Equities are equal the Law prevails." If B did not get the deeds, their absence would generally amount to constructive notice of the prior equitable mortgage; but this would not be so if he had enquired for the deeds, and a reasonable excuse was given for their non-production (Agra Bank v. Barry, Indermaur's Conveyancing and Equity Cases, 112). (*b*) C has both the legal estate and priority of time, and must have preference over D in the absence of any circumstances of fraud or conduct on C's part, which enabled the second advance to be obtained without notice of the prior one (Northern Counties Insurance Co. v. Whipp, 25 Ch. D., 482). (*c*) E will have priority, for neither has the legal estate, and the maxim is *Qui prior est tempore potior est jure.*

Q. State the order in which the incumbrances are payable in the following cases:—(a) *A gives a legal mortgage to B, a second mortgage to C, subject to B's mortgage, and then B makes further advances to A.* (b) *A gives a legal mortgage to B, who lends the title deeds to A. A deposits the deeds with C to secure a loan then made, C having no notice of B's mortgage.* (c) *A gives an equitable charge by deposit of deeds to B. B lends the deeds to A, who obtains a loan from C on deposit of the deeds. C has no notice of B's charge.* (d) *A mortgages land in Middlesex to B, who does not register his mortgage. A then mortgages the same land to C, who has notice of B's mortgage, and registers his own security.*

A. (*a*) If B knew of A's second mortgage when he made his further advances, the order will be B's mortgage, then C's, and then B's further advances; but if B did not know, B can tack his two advances together and postpone C (Rolt v. Hopkinson, 9 H. L. Cas., 514). (*b*) Here B is postponed to C on account of his own gross negligence (Briggs v. Jones L. R., 10; Eq., 92). (*c*) C has priority, because B has lost his priority through laches, and as the equities are not equal, C, though later in time, gets priority (Rice v. Rice, 2 Drew, 73). (*d*) B has priority because C took with notice, and so the object of the Middlesex Registry Act is accomplished (Le Neve v. Neve, 2 Wh. & Tu., 175.)

Q. In what cases and on what grounds does a mortgagee gain priority by giving notice? To whom should notice be given? In what cases is no priority gained by notice?

A. A legal or equitable mortgagee of a chose in action, or any equitable interest in pure personalty, who has lent his money without notice of a prior assignment, obtains priority over such prior assignee, if he gives notice first to the debtor or trustee. This is known as the rule in Dearle v. Hall (3 Russ, 1) and the reason for it is, that he has first done all that is necessary to perfect his title as between himself and all persons other than the assignor. But this rule does not apply where the security consists of a negociable instrument or an assignment of either legal or equitable interests in land, including leaseholds. The rule does apply to mortgages of an interest in the proceeds of sale of land, and to portions to be raised out of real estate. (Indermaur's Equity, 14.)

Q. Explain tacking fully, and give an illustration.

A. It is the uniting of securities given at different times on one property, so as to prevent any intermediate incumbrancer from claiming a title to redeem (or otherwise to discharge) one lien which is prior, without also redeeming or discharging the other liens which are subsequent, to his own title, *e.g.*, A, B and C, are first, second and third mortgagees,

but when C advanced his money he thought he was second mortgagee, and, therefore, if he can buy up A's mortgage, and thus get in the legal estate, he will be able to get payment of both mortgages before B (Marsh v. Lee, 2 Wh. & Tu., 107). The reason for the doctrine is found in the maxim, "Where the Equities are equal the Law shall prevail." (Indermaur's Equity, 187.)

Q. A, B and C have successive incumbrances on lands of D. Under what circumstances can C obtain priority for the last advance over B's incumbrance by obtaining a transfer of 's security, and when would he not obtain priority?

A. If C, when he advanced his money, was not aware of 's advance, he can, by buying up A's mortgage and obtaining the legal estate, get payment of both mortgages before B. But if C had notice of B's incumbrance when he advanced his money, he could not thus get priority. (Indermaur's Equity, 187.)

Q. What is meant by the doctrine of consolidation? How did the Conveyancing Act affect the topic?

A. Consolidation may be defined as the right of a mortgagee having two or more securities on different properties from the same mortgagor, to refuse to allow the mortgagor to redeem one of them without redeeming the other or others. It had its origin in the maxim, "He who seeks Equity must do Equity." (Vint v. Padgett, and Notes, in Indermaur's Conveyancing and Equity Cases, 106.) The Conveyancing Act 1881 (sec. 17) provides that when the mortgages, or one of them, be made after 1881, and so far as no contrary intention is expressed, a mortgagor seeking to redeem one property can do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Q. A sole mortgagee of freeholds, copyholds, and leaseholds dies, having devised his real estate to B, and bequeathed his

personal estate to C, and appointed D (who proves the will) his executor. Who can give a valid discharge for the mortgage money, and who can reconvey the various properties?

A. As regards the freeholds the money will be paid to, and the estate reconveyed by, the executor D (Conveyancing Act 1881, Sec. 30). As regards the copyholds, though the money will be paid to the executor D, the devisee B will reconvey (Copyhold Act 1894, Sec. 88). As regards the leaseholds, the money will be paid to, and the estate reconveyed by, the executor D. (Indermaur's Equity, 171, 172.)

Q. What powers were given to a mortgagor in possession by the Judicature Act 1873, *and the Conveyancing Act* 1881*?*

A. Under the Judicature Act 1873, if no notice of intention to enter has been given by the mortgagee, the mortgagor may sue for the recovery of the rents, or for damages in respect of trespass, or for ejectment, in his own name only. Under the Conveyancing Act 1881, he may make agricultural or occupation leases for 21 years, or building leases for 99 years, to take effect in possession within one year, at the best rent, without fine, with usual covenants and provisions for re-entry on non-payment of rent for not exceeding 30 days, and must deliver counterpart signed by lessee within one month to mortgagee, or first mortgagee if more than one. (Indermaur's Equity, 167.)

Q. What sums is a mortgagee in possession entitled to add to his mortgage debt?

A. He is entitled to add any proper costs incurred, any money he may properly have expended in maintaining his title, any sums properly paid for insurance, or for renewing renewable leaseholds, and any money expended in necessary repairs. But he may not add to his debt money expended in general improvements, for he has no right to make the estate more expensive for the mortgagor to redeem than is necessary. (Indermaur's Equity, 177, 178.)

Q. What is meant by decreeing an account against a mortgagee in possession with annual rests? When will an account be so decreed to be taken?

A. Striking an annual balance, and applying any net amount then in the mortgagee's hands in reduction of the principal from time to time. If the mortgagee entered when no interest was in arrear, and there was no other special reason for his entering, then, as he must have entered solely for the purpose of getting his principal, which could only thus be paid gradually, he has shewn his willingness to receive payment by driblets, and annual rests will be made, *i.e.*, a yearly balance will be struck, and any surplus, after payment of costs and interest, will, from time to time, be applied in reduction of the principal, which will produce a corresponding abatement of interest. (Indermaur's Equity, 176, 177.)

Q. Enumerate the disadvantages of a second mortgage.

A. They may be summarized as follows: (1) The second mortgagee does not get the legal estate, or the deeds, both of which are taken by the first mortgagee. (2) He is liable to be postponed in some cases by reason of tacking. (3) He is entirely subject to the first mortgagee, and can only exercise his powers subject to the first mortgagee's rights. (4) He is liable to be made a party to a foreclosure suit, or to the property being sold over his head, and he may be obliged, in order to avoid losing his whole security, to pay off the first mortgagee, and thus take the security into his own hands. (Indermaur's Equity, 196.)

Q. What is the nature and effect of a mortgage debenture charging the undertaking and property of a company by way of floating security? How may the charge on the property be effected? And what are the principal kinds of mortgage debentures now issued?

A. It creates an immediate and continuing charge on the property charged, subject only to the company's power to

deal with its property in the ordinary course of its business; unless otherwise agreed, it does not prevent the company creating specific mortgages which rank before the floating charge; notice of the floating charge does not postpone such specific mortgagee; the floating charge is valid against execution creditors, and the general creditors; it becomes a fixed charge when a receiver is appointed or a winding-up commenced. By any words in the mortgage debenture or in a trust deed for debenture holders, which indicate the intention to charge. Those payable to registered holder; to bearer; to registered holder with interest coupons payable to bearer; to bearer, but with power to have them placed on a register and afterwards to withdraw them from such register. (Palmer's Company Law, 194, 196, 213.)

Q. Draft a mortgage debenture of a joint-stock company to a registered holder creating a "floating security" in the common form (the endorsed conditions need not be set out). The X Company issues a series of debentures of this nature, purporting to be a first charge; it subsequently mortgages its business premises by way of legal mortgage to A, and then the same premises by way of second mortgage to B; ultimately the company is wound up. Assign to the debenture holders, to A, to B, and to the general creditors their respective priorities as regards the business premises and the rest of the assets of the company, and state your reasons.

A. The Company, Limited.

Issue of £100,000 of debentures of £100 each, carrying interest at 4 per cent. per annum.

No. Debenture £100.

(1) The Company, Limited (hereinafter called "the Company"), will on the day of , or on such earlier day as the principal moneys hereby secured, become payable in accordance with the conditions indorsed hereon, pay to A B of or other the registered holder for the time being hereof, the sum of £100. (2) The Company will,

during the continuance of this security, pay to such registered holder interest thereon at the rate of per cent. per annum by half-yearly payments on the day of and day of in each year, the first of such half-yearly payments to be made on the day of next. (3) The Company hereby charges with such payments its undertaking and all its property, present and future, including uncalled capital. (4) This debenture is issued subject to and with the benefit of the conditions endorsed hereon, which are to be deemed part of it. Given under the common seal of the Company this day of . (Palmer's Company Law, 194-197.) Assuming that the debenture contains the usual restrictive clause, that the Company is not to be at liberty to create any mortgage or charge having priority over the debentures, and also assuming that both A and B take without notice of such clause, the order of payment will be (1) A's legal mortgage (English Trust v. Brunton (1892), 2 Q. B., 700); (2) B's equitable mortgage (*Re* Castell & Brown (1898), 1 Ch., 315); (3) the debentures; (4) the general creditors. If there were no restrictive clause, A and B as specific mortgagees would still rank before the debentures (*Re* Hamilton's Windsor Iron Works, 12 Ch. D., 712). The floating charge under the debentures always has priority over general creditors, except rates and taxes and wages, which now come before the debentures under the Preferential Payments in Bankruptcy Act 1897. (Palmer, 199, 213.)

6. Fraud, Accident and Mistake.

Q. On what grounds can a deed executed by a person of full age, who understands its contents, be set aside?

A. (1) On the ground of some actual fraud which may have been perpetrated on him either by misrepresentation, or by concealment, where the other party was bound to disclose certain facts. (2) On the ground of some constructive fraud, *e.g.*, in Huguenin v. Baseley (1 Wh. & Tu., 247).

(3) On the ground of accident or mistake. (See Indermaur's Equity, Part II., Chap. VI.)

Q. Define actual and constructive fraud respectively, and explain the distinction between them.

A. Actual fraud may be defined as something said, done, or omitted by a person, with the design of perpetrating what he must have known to be a positive fraud; whilst constructive fraud is something said, done, or omitted, which is construed by the Court as a fraud, because, if generally permitted, it would be prejudicial to the public welfare. The great distinction between them is that in cases of actual fraud, there is always a design to do evil; whilst in cases of constructive fraud, there is not necessarily any such evil design, and there may, indeed, be nothing really harmful in the particular transaction, yet to allow it to stand would be to open the door to much possible evil in other cases. (Indermaur's Equity, 210.)

Q. A sells an estate to B at an undervalue. In which of the following cases can A bring an action for damages, or set aside the sale respectively: (a) *B makes a statement about the estate, which B believes to be true, and thereby induces A to sell at a lower price. The statement is in fact untrue;* (b) *B, having no knowledge or belief on the matter, makes a statement, which is in fact untrue, about the estate;* (c) *B, knowing of the existence of valuable mines under the estate, and that A is ignorant of the fact, refrains from telling A, and thereby gets the property below its true value?*

A. (*a*) A has no right of action for damages, for B believed his statement to be true, and it is not, therefore, fraud (Derry v. Peek, 14 App. Cases, 337), but if A relied on the statement then he might take proceedings to set the sale aside, or successfully resist specific performance (Redgrave v. Hurd, 20 Ch. D., 1); (*b*) A can set the sale aside, or successfully resist specific performance, and also can bring an action for damages, if he can show that B made the statement recklessly,

for this would constitute fraud (Derry v. Peek, *ante*, p. 99); (*c*) A has no right of action, nor can he set the sale aside, as a purchaser is not bound to inform his vendor of facts that he is aware of that render the property more valuable than the vendor thinks it is, unless, indeed, a fiduciary relationship exists. (Indermaur's Equity, 211-213.)

Q. What contracts will be set aside on the ground of constructive fraud, as being contrary to the policy of the law?

A. Instances of such contracts are: Marriage brokage contracts, contracts or conditions in restraint of marriage, frauds on marriages, and agreements to influence testators. (Indermaur's Equity, 217.)

Q. Give instances of fiduciary relationships which may vitiate contracts and other transactions entered into between the parties.

A. Those existing between trustees and *cestuis que trustent*, solicitor and client, principal and agent, guardian and ward, parent and child, &c. (Indermaur's Equity, 220, 227.)

Q. Define an expectant heir. On what principle does the Court construe dealings with them?

A. An expectant heir is one who has either some reversionary interest, or, at any rate, has an expectancy of some future benefit. The general rule of the Court is to set aside transactions with expectants on the principle of constructive fraud, if the expectant applies to the Court for this purpose, which he must do at any rate within a reasonable time after coming into possession (Earl of Chesterfield v. Janssen, 1 Wh. & Tu., 289.) But such a transaction will be maintained, if full consideration was paid and it was altogether fair; and if it was made known to, and approved by, the person to whose estate the expectant hoped to succeed, then also it may stand. With regard to reversions, it is now provided by 31 Vict., c. 4, that no purchase of any reversionary interest shall be set aside merely on the ground of undervalue. (Indermaur's Equity, 228, 229.)

Q. What is meant by a fraud on a power? Give an illustration.

A. It means such an execution of a special power of appointment as, though apparently good, is, nevertheless, not made *bonâ fide* for the direct end reserved, but operates virtually to defeat the objects of the donor of the power. Thus, in Aleyn v. Belchier (2 Wh. & Tu., 308), a husband, having a power of jointuring his wife, executed the power on an agreement with the wife that she should receive part only as an annuity for her benefit, and that the residue should be applied in payment of the husband's debts. It was held that this private agreement for the husband's benefit was a fraud on the power, and it was set aside.

Q. Define and illustrate an illusory appointment and an exclusive appointment respectively. Are such appointments valid?

A. An illusory appointment is where a person, having a power of appointment amongst a certain class, appoints to all the members of such class, but only gives a nominal share or shares to one or more members. Thus, A having a power of appointment over £1,000 in favour of B, C and D, appoints £500 to B, £499 19s. to C, and 1s. to D; the appointment to D is illusory. An exclusive appointment is where the donee of the special power appoints the whole fund to one member of the class to the exclusion of the others. Both illusory and exclusive appointments were void in Equity, as being considered frauds on the power, but an illusory appointment was allowed at Law, and by 1 Wm. IV., c. 46, it is also permitted in Equity. An exclusive appointment remained invalid until the year 1874, when was passed 37 & 38 Vict., c. 37, which made even an exclusive appointment valid. (Indermaur's Equity, 237, 238.)

Q. On what grounds may (a) *settlements and* (b) *sales be set aside at the instance of the settlor or vendor?*

A. (*a*) If voluntary and executory; if executed through

fraud, undue influence, or mistake, and the parties can be restored to their original position; if a voluntary settlement in favour of his creditors and not yet assented to by them; if the very object with which the trust was created has ceased to exist. (*b*) If the vendor was induced to sell by fraud, or if the sale is to a trustee, or person in a fiduciary position, who had not the leave of the Court, or who did not give full value and take no advantage. In both cases there must not be laches or acquiescence, and third parties must not have acquired rights innocently for value.

Q. What is meant by an accident remediable in Equity? Give an example.

A. Accident as relieved against in Equity may be defined as some unforeseen event, misfortune, loss, act, or omission, which is not the result either of negligence or misconduct of the party. Thus, an annuity is given by will, and the executors are directed to set aside a sufficient amount of certain stock to meet such annuity. This they do, but subsequently the stock is reduced by Act of Parliament so that the annuity falls short. The Court will decree the deficiency to be made up against the residuary legatee. (Indermaur's Equity, 197, 198.)

Q. Define mistake. When will the Court relieve in cases of mistake?

A. Mistake may be defined as some unintentional act, omission, or error arising from ignorance, surprise, imposition or misplaced confidence, and may be either mistake of fact or mistake of law. The Court will generally relieve in cases of mistake of fact if the mistake is of a material nature, for the rule is *Ignorantia facti excusat.* But the Court will not generally relieve in cases of mistakes of law, the rule being *Ignorantia legis neminem excusat.* To this rule, however, there is one exception, viz., where the mistake was one of title, arising from ignorance of a principle of law of such constant occurrence as to be supposed to be understood by

the community at large. The Court will also relieve in cases of mistake of foreign law. (Lansdowne v. Lansdowne, Indermaur's Conveyancing and Equity Cases, 157 and notes.)

Q. In what cases, and in whose favour, will the Court relieve against the defective execution of a power of appointment? Will it ever relieve against the non-execution af a power?

A. The Court will relieve, either on the ground of accident or mistake, where the defect is not of the essence of the power, and is in favour of a purchaser, a creditor, a wife, an intended husband, a legitimate child, or a charity (Tollet v. Tollet, 2 Wh. & Tu., 289). The Court will not relieve against the non-execution of a power, unless the power was coupled with a trust, or its execution has been prevented by fraud. (Indermaur's Equity, 199.)

7. Specific Performance.

Q. What is meant by "specific performance of contracts," and to what kind of contracts is the doctrine confined?

A. It is a remedy-peculiar to Equity, by which the Court will in some cases enforce, by attachment, strict performance of a contract, instead of leaving the person to his remedy by action for damages at law, the doctrine being based on the maxim, "Equity acts *in personam*." Specific performance will only be granted in cases in which damages will not completely compensate, *e.g.*, in contracts for the sale of land and houses. (Indermaur's Equity, 243, 244.)

Q. State shortly the essentials of a valid simple contract of which specific performance can be obtained, both as regards the ordinary requisites of such a contract and the nature of the property.

A. The requisites of the contract are: (1) Parties able to contract; (2) mutual assent; (3) valuable consideration; (4) something to be done or omitted which forms the object of the contract; and (5) usually signed writing under sec. 4 of

the Statute of Frauds. The contract must be of such a nature that damages will not compensate the parties for its breach, otherwise they will be left to their remedy by action for damages. (Indermaur's Equity, 241, 243.)

Q. When will the Court decree specific performance of a contract contained in letters?

A. Where from the letters there is found a direct offer on the one side, and an unconditional acceptance on the other, without the introduction of any fresh term or stipulation, and the Court can collect, from a fair interpretation of the letters, that they import a concluded agreement. Thus, if A writes to B offering to sell a house for £1,000 and B writes back simply accepting the offer, here there is a binding contract; but if B in accepting the offer were to insert as a condition that half the purchase-money should remain on mortgage, here there would be no binding contract. (Indermaur's Equity, 242, 243.)

Q. A offers by letter to buy a house from B for £1,000—(a) *B accepts the order verbally;* (b) *B writes:—"I accept your offer subject to my solicitor approving a formal contract." Can A sue B, or B sue A, in the above cases respectively, if the other party refuses to complete?*

A. (*a*) B can sue A for specific performance, as the Statute of Frauds only requires that the contract shall be signed by the party to be charged, but A could not sue B. (Indermaur's Equity, 243.) (*b*) Neither party could here sue for specific performance, because the acceptance is subject of a condition, and does not appear to be intended to amount to a concluded agreement. (Winn v. Bull, 7 Ch. D., 29; Indermaur's Equity, 243.)

Q. Will Equity decree specific performance of a contract—(1) *to sell a chattel;* (2) *to do some personal act;* (3) *not to do a certain thing?*

A. (1) Yes the Court will do so if the chattel is of some unique beauty, rarity, or special value, *e.g.*, an object of *vertu*,

a picture, or the like (Falcke v. Gray, 5 Jur., N. S., 645). There is also a general discretionary power in the Court irrespective of peculiar value under the Sale of Goods Act 1893, sec. 52, if the contract was to sell specific goods. (2) No, for it would be impossible to compel obedience to it. (3) Yes, where there is a direct agreement not to do a certain thing, the Court will practically give specific performance by granting an injunction (Whitwood Chemical Co. v. Hardman (1891), 2 Ch., 416.)

Q. What cases of specific performance stand outside the Statute of Frauds?

A. (1) Where there has been part performance of the oral contract. (Lester v. Foxcroft, 2 Wh. & Tu., 460.) (2) Where the contract was intended to be reduced into writing, but has been prevented from being so by the fraud of the defendant. (3) Where the contract, although oral, is set out in the statement of claim, and admitted in the statement of defence, and the defendant has not pleaded the Statute of Frauds. In each of these cases although the contract is one for which writing is required by the Statute of Frauds, yet the Court will decree specific performance of the oral contract. (Indermaur's Equity, 244, 245.)

Q. Explain the doctrine of Equity as to part performance of oral contracts.

A. Where there has been a contract by word of mouth only, but which ought, according to law, to have been in writing, the Court will decree specific performance if acts have been done by the parties towards the performance of such contract (Lester v. Foxcroft, 2 Wh. & Tu., 460). It is not, however, every act which will be sufficient part performance. The rule is that it must be some act exclusively referable to the contract, done with no other view than to perform it, and of such a nature that it would be a fraud not to carry out the contract. Part, or even entire payment of the purchase-money, or delivery of the abstract, will be

insufficient; but letting the purchaser into possession will be, for he cannot be placed *in statu quo*, as if the Court did not recognize and give effect to the contract he would be a trespasser. (Indermaur's Equity, 245, 246.)

Q. Where a contract has been reduced into writing, will the Court ever receive evidence of, and give effect to, a subsequent oral variation?

A. A distinction must here be observed between the position of a plaintiff seeking, and a defendant resisting, specific performance. In the latter case, the Court will always admit such evidence, for the Statute of Frauds does not say that the written contract shall bind, but that the unwritten contract shall not. In the former case, the Court will not generally admit such evidence, but it will do so in the following cases:—(1) After there have been acts of part performance, of the nature before described, as regards the oral variation. (2) Where the defendant in his defence sets up an oral variation as a reason for non-performance of the written contract, and the plaintiff then amends his claim, and seeks specific performance with the oral variation. (3) When the oral variation has not been introduced into writing by reason of the defendant's fraud. (Woollam v. Hearn and notes, 2 Wh. & Tu., 513.)

Q. Enumerate some of the chief defences to an action for specific performance.

A. That the contract itself is immoral, or contrary to public policy; that one party is an infant; that the contract does not comply with section 4 of the Statute of Frauds; that some fraud was practised on the defendant or there were circumstances of accident, mistake or surprise; that there has been a subsequent variation of the contract, even though such variation was by oral contract only; that it is practically impossible to compel the doing of the thing contracted to be done, *e.g.*, a contract to do some personal act; that the vendor cannot make a good title to the property; that the

contract is of such a nature that damages will compensate the plaintiff. (Indermaur's Equity, 255, 256.)

Q. A purchaser is resisting specific performance of a contract on the ground that he was induced to enter into the contract by misrepresentation. What must be alleged and proved in support of such defence?

A. That the vendor made an untrue or misleading statement of a material kind which induced the contract and misled the purchaser to his detriment. As when A contracts to sell a leasehold house to B, without offering B an inspection of the lease, and without disclosing that it contains unusual covenants. (Reeve v. Berridge, 57 L. J., Q. B., 265.)

Q. Will the Court decree specific performance of—(a) *a contract to build or repair;* (b) *a contract to sell the goodwill of a business?*

A. (*a*) The Court will not decree specific performance of a contract to repair premises, considering that damages will compensate. As to a contract to build, this is doubtful; but probably the Court will not grant specific performance. (*b*) No, not if the contract only relates to the goodwill, but a contract for the sale of a goodwill and of the premises, where the business is carried on, will be enforced. (Indermaur's Equity, 257, 258.)

Q. A agrees to sell a house and land to B. He can make a good title to the house and a portion of the land, but to a small part of it he cannot make a title. What are the rights of A and B respectively as regards specific performance?

A. A cannot enforce specific performance if (1) he knew he had no title to the part of the property when he put it up, or (2) the part is really material to the enjoyment of the whole. But if A had no such knowledge and the part is not material, he can enforce specific performance, allowing an abatement out of the purchase-money as compensation to the purchaser. B can in all cases enforce specific

performance, with an allowance as compensation for the portion to which a title cannot be made. (Indermaur's Equity, 260.)

Q. Where a vendor is unable to perform the whole of a contract for the sale of land, and the contract contains no condition as to compensation, in what cases can specific performance of the contract with compensation be enforced by (a) *the vendor, or* (b) *the purchaser? A contract for sale of land by A to B contains a condition for compensation "in the description of the premises, or for any error whatever in the particulars." The property is described in the particulars as freehold. It turns out that the greater part is copyhold. What are the rights of the purchaser?*

A. (*a*) The vendor can only so enforce it where the part which cannot be performed is not absolutely material. (*b*) The purchaser can always enforce specific performance with compensation if he chooses (Burrow v. Scammell, 19 Ch. D., 175), unless at the time of entering into the contract he knew of the vendor's inability (Castle v. Wilkinson, L. R., 5 Ch., App., 534). Difference in tenure is not a matter for compensation, and the purchaser can resist specific performance. (Indermaur's Equity, 260, 261.)

Q. Will the Court decree specific performance of (a) *a contract to enter into a partnership;* (b) *a contract to sing at a certain theatre and no other for three months;* (c) *a contract to build a house? Give reasons for your answers.*

A. (*a*) Yes, where the agreement is for a partnership for a fixed and definite period, and there have been acts of part performance. (*b*) Yes, there being an express negative covenant. (Lumley v. Wagner, 1 De G., M. & G., 604; Whitworth Chemical Co, v. Hardman (1891), 2 Ch., 416.) (*c*) This is doubtful, but the better opinion is that the parties must be left to their Common Law remedy of damages. (Indermaur's Equity, 257.)

Q. Discuss want of mutuality as a defence to an action

for specific performance. Is inadequacy of consideration ever, and if so, when, a defence to such an action?

A. In all cases in which specific performance is sought, the remedy, if it exists at all, must be a mutual one. Thus though damages would compensate a vendor of land, he can get specific performance, because his purchaser can get it against him. Again, the Court will not decree specific performance at the instance of an infant, because it cannot do so against him. (Indermaur's Equity, 254.) As a general rule, inadequacy of consideration was not, except in cases of reversionary interests, and is not now, except where fraud or imposition is presumed, a ground for refusing specific performance; still, if great hardship would be done the Court will, in some cases, refuse to interfere in this way.

Q. To what extent does lapse of time prevent a person enforcing specific performance of a contract?

A. (1) The rights on the contract may be statute barred. (2) Irrespective of this, as the granting of specific performance is a discretionary remedy, though the party's rights, looked at in a legal light, may not be statute barred, yet if he has been guilty of laches, and has let the matter rest for a considerable time, the Court will refuse to give this relief, acting on the maxim, *Vigilantibus non dormientibus æquitas subvenit.* (Indermaur's Equity, 263.)

Q. On a sale of freehold land, the vendor and purchaser both die before completion. Who are the parties by and against whom the contract may be specifically enforced?

A. (1) If the deaths were before 1898—The vendor's personal representatives should sue or be sued as the case may be, for they represent his estate, and, under the Conveyancing Act 1881, sec. 4, have full power to convey. The purchaser's executor or administrator together with the devisee or heir-at-law, as the case may be, should be sued, and the devisee or heir-at-law, as the case may be, can sue (2) On deaths after 1897, the vendor's personal representatives

should be sued as they can convey anything but copyholds under Part I. of Land Transfer Act 1897; and the purchaser's personal representatives only need be sued.

Q. Will Equity decree specific delivery of a chattel when there is no contract?

A. Yes, when a chattel is wrongfully detained and is an heirloom, or for some reason of peculiar value to the owner, so that damages for the detention would not sufficiently compensate. (Pusey v. Pusey, 2 Wh. & Tu., 454; Duke of Somerset v. Cookson, 2 Wh. & Tu., 455.)

Q. A and B enter into a binding agreement for the sale by A to B of Whiteacre in fee simple, free from incumbrances. A delivers the abstract of title; but B returns it and refuses to complete, giving no reasons. On these facts draw the plaintiff's statement of claim in an action for specific performance.

A. 1898.—A.—No. . In the High Court of Justice, Chancery Division. Mr. Justice X. Writ issued 12th May, 1898. Between A, plaintiff, and B, defendant. Statement of claim. By an agreement dated the 6th day of March, 1898, the plaintiff agreed to sell to the defendant an estate called Whiteacre in the County of N., for £3,000. The sale was to be completed on the 20th April, 1898. The defendant has absolutely refused to perform the said agreement though the plaintiff has always been ready to do so. The plaintiff claims specific performance of the above agreement. (Signed) C. D. Delivered 16th day of May, 1898.

8. Infants, Partition, &c.

Q. Who is the natural guardian of an infant? What powers of appointing guardians have the parents? and what are the powers of the Court as to custody of children?

A. The father is the natural guardian of his children, and has a right to their custody. By 12 Car. II., c. 24, he can, by deed or will, appoint a guardian until marriage or full

age; and now, by the Guardianship of Infants Act 1886, the mother is, after the father's death, the guardian, either alone or jointly with any guardian appointed by the father; and she may by deed or will appoint a guardian to act after the deaths of herself and the father; and if both parents appoint guardians, they act together. The Divorce Court has under this Statute, power after a decree, to pronounce the guilty parent unfit to have the custody of the children (sec. 7), and, by the Custody of Children Act 1891, the Court may refuse the custody of a child to a parent who has abandoned or deserted it. By the Acts above referred to, and by its general jurisdiction, the Court has full powers of making such arrangements as to the custody and education of a child as it thinks best for the child's welfare. (Indermaur's Equity, 270-279.)

Q. Under what circumstances will the Court in the exercise of its general jurisdiction remove an infant from the custody of the parent?

A. When the parent is living in immorality, or is guilty of constant drunkenness, or continually ill-treats the infant, and generally where the parent's conduct is such that it will probably be injurious to the morals and interests of the child. (Wellesley v. Duke of Beaufort, 2 Russ., 1; Indermaur's Equity, 274, 275.)

Q. What statutory provisions have been made extending the original jurisdiction of the Court with regard to the custody of infants?

A. Under the Infants Custody Act 1873 (36 Vict., c. 12), the Court has power irrespective of any misconduct on the part of a father to give the custody of a child to the mother up to the age of 16. By the Guardianship of Infants Act 1886 (49 & 50 Vict., c. 27), the Court may, on the application of the mother, make such order as it thinks fit, regarding the custody of an infant, and the right of access of either parent. It has been held under this provision that the Court has jurisdiction to order the delivery of an infant to

the custody of its mother, without fixing any limit as to age. (*Re* Witten, 57 L. T., 336; Indermaur's Equity, 278, 279.)

Q. A husband and wife separate, and it is mutually agreed that the wife shall have the custody of the children. Is this agreement binding?

A. Under the Infants Custody Act 1873, this is a matter entirely in the Court's discretion, it being, however, specially enacted that the Court shall not enforce any such agreement, if of opinion that it will not be for the benefit of the infant to do so. Before this statute such an agreement would never be enforced by the Court, unless the circumstances were such that had the Court been applied to, it would have removed the children from the father's custody. (Indermaur's Equity, 276, 277.)

Q. What is meant by a ward in Chancery? How does the Court act generally with regard to its wards?

A. Strictly speaking, a ward in Chancery is an infant who is under a guardian appointed by the Court, but whenever a suit is instituted in Chancery relating to the person or property of an infant, he or she is treated as a ward of Court, though no guardian may be actually appointed. The Court is studious to protect the person and property of its wards, and nothing can be done with regard to either without the Court's sanction, and any one interfering with the infant, or his or her property, without the Court's sanction, is guilty of a contempt of Court, *e.g.*, where a man marries a female ward without the Court's consent. (Eyre v. Countess of Shaftesbury, 1 Wh. & Tu., 473.)

Q. Under what circumstances will the Court allow the income of an infant's property, or part of it, to be applied towards his or her maintenance? What principles guide the Court as to the amount to be allowed for maintenance?

A. When the infant has no parent, or the parent is not in a position to adequately maintain the infant according to his or her station in life. When the Court allows

maintenance, it does not always act strictly on the view of the direct maintenance and education of the infant being the only object to be attained, but it has a liberal regard to the circumstances and state of the family to which the infant belongs. Thus, if there are several children and one only has a fortune, and they are all living with the parent, the Court will make such an allowance as will practically benefit all the children. (Indermaur's Equity, 280, 281.)

Q. What is the rule observed by the Court as to the religion in which a child is to be brought up?

A. The general rule is that the religion of the father is to be followed, unless the child is of some reasonable age of discretion, and has already received education in another religion to such an extent as to render it dangerous and improper to effect any change in it. And although a father may have agreed to his child being brought up in a religion other than his own, it has been held that such agreement cannot be enforced, as it is contrary to public policy to allow a father to abdicate a duty naturally imposed upon him. (*Re* Agar-Ellis, Agar-Ellis v. Lascelles, 10 Ch. D., 49.)

Q. Under what circumstances is a settlement made by an infant valid and binding?

A. A valid settlement can be made with the consent of the Court by males at 20, and females at 17, but with regard to powers of appointment and disentailing assurances executed by an infant tenant-in-tail, these are only valid if the infant subsequently attains full age (18 & 19 Vict., c. 43). Settlements not made under the Act are not absolutely void, but voidable within a reasonable time after the infant attains full age. (Edwards v. Carter, 69 L. T., 153; Indermaur's Equity, 286.)

Q. Of what property can partition be made, and who can claim partition?

A. Partition can be made of freeholds, copyholds, and leaseholds. At Common Law, only co-parceners could claim it; but by the Statutes of Partition, joint tenants and

tenants in common have equal right; and a mortgagee of a joint owner can also compel it. A person can only maintain an action for partition where he is entitled in possession, and where his title is manifest, and no litigation is required to determine whether he is interested or not. (Indermaur's Equity, 289, 290.)

Q. What are the provisions of the Partition Act 1868 *as regards the power of the Court to order a sale in the place of a partition?*

A. There are three distinct provisions: (1) If it appears to the Court that a sale would be desirable in the interests of the parties, the Court, on the application of any party interested, may order a sale; (2) If parties entitled to a moiety or more request a sale, the Court shall order one, unless it sees good reason to the contrary; (3) If any person interested requests a sale, the Court may order one, unless the other parties interested undertake to purchase his share, and may order a valuation for that purpose. (Indermaur's Equity, 292.)

Q. What is an action to settle boundaries, and when will such an action be entertained?

A. Where two proprietors dispute as to their boundaries, an action to settle them may be brought in the Chancery Division. It is not sufficient to found such an action that the boundaries are merely in dispute, but there must also be some equity superinduced by the act of one of the parties, *e.g.*, some particular instances of fraud, or some gross negligence, &c., on the part of a person whose special duty it is to preserve or perpetuate the boundaries. (Indermaur's Equity, 296, 297.)

9. Election, Satisfaction, Performance, Conversion, &c.

Q. Define and illustrate the doctrine of Election.

A. It may be defined as the obligation imposed upon a

party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. (Indermaur's Equity, 298.) Thus A, being entitled to Whiteacre in fee simple, and Blackacre in fee tail, devises Whiteacre to his eldest son and Blackacre to his second son. At Law the eldest son would get both estates—Whiteacre because it was devised to him, and Blackacre because of the Statute De Donis (13 Ed. I., c. 1). But in Equity the eldest son would be put to his election. (Noys v. Mordaunt, 1 Wh. & Tu., 414.)

Q. With regard to the doctrine of Election, what rule was established by the leading case of Streatfield v. Streatfield? (1 *Wh. & Tu.*, 416.)

A. That a person who elects against a will does not necessarily forfeit the whole benefit given to him by it, but only so much as is necessary to compensate the disappointed devisee—in other words, it establishes the principle that compensation and not forfeiture is the doctrine. (Indermaur's Equity, 301.)

Q. Define the doctrine of Satisfaction. What equitable maxim does it illustrate?

A. It may be defined as the making of a donation with the intention expressed or implied that it is to be an extinguishment of some existing right or claim of the donee. It may be divided into two wide classes, viz.: (1) Satisfaction arising in the case of a gift to a child, or one towards whom the donor stood *in loco parentis*, followed by some subsequent benefit; and (2) Satisfaction arising in the case of a legacy given to a creditor. The doctrine is founded upon and illustrates the maxim, "Equity imputes an intention to fulfil an obligation." (Indermaur's Equity, 310.)

Q. Does the Court lean in favour of or against the doctrine of satisfaction? Give illustrations.

A. It leans in favour of the doctrine in the first class of

cases referred to in the last answer, and against it in the second class. Thus, if a father covenants to provide a portion for his child of £5,000, and then on his marriage advances him £2,000, this will be deemed to be a satisfaction *pro tanto*, and he only remains liable for £3,000, in the absence of evidence to the contrary (see *Ex parte* Pye, 2 Wh. & Tu., 364). But if A, owing B £1,000, leaves him £500 by his will, this is not a satisfaction *pro tanto*, but B will get the £1,000 and the £500, for it is necessary for a legacy to satisfy a debt that it should be equal to or greater in amount, and in every possible respect equally beneficial. (See Talbot v. Duke of Shrewsbury, 2 Wh. & Tu., 375; Chancey's case, *Ib.*, 376.)

Q. What inquiries should an executor make before paying legacies to children of the testator who have married since the date of the will, and before their father's death?

A. He should inquire whether some advancement was not made to the children upon their respective marriages; because if there was this would operate as a satisfaction or ademption *pro tanto* of the legacy, and the children would only be entitled to so much of the legacy as exceeded the advancement.

Q. A testator made a will bequeathing £3,000 *in trust for his daughter for life, with remainder to her children, and afterwards gave to her in his lifetime a sum of* £500. *Would that be in satisfaction pro tanto of the legacy? Would evidence be admissible in connection with the point?*

A. Yes, the gift of £500 is *primâ facie* a satisfaction *pro tanto* of the legacy—a legacy to a daughter for life, with remainder to her children as a class, is a portion (Kirk v. Eddowes, 3 Hare, 509). It was decided in this case that parol evidence is admissible to rebut the presumption of satisfaction which equity draws from the bare facts, although it is inadmissible to alter, add to or vary a written instrument or to prove that a written instrument was intended to have

an effect not expressed in it. (Indermaur's Equity, 319, 320.)

Q, What is the rule of the Court where a legacy is given twice over in a will to a legatee, or where a legacy is given by a will, and then another legacy to the same legatee by a codicil?

A. If a general legacy of the same amount is given twice in the same will, for the same cause, and in the same words, or with only small differences, then the legatee will not get both, but the one is in substitution or satisfaction of the other. But if a general legacy is given by will, and to the same legatee there is a general legacy given by codicil, then (in the absence of internal evidence to the contrary) the legacies will be cumulative, and the legatee will get them both. (Hooley v. Hatton, 1 Wh. & Tu., 865.)

Q. A covenants to leave his wife £625 by will. He dies intestate, and the wife claims to have this amount first paid to her, and then to take her share in the balance of the personal estate under the Statute of Distributions. Is this claim maintainable?

A. It is not; she is only entitled to her distributive share, that is, of course, assuming it exceeds £625. The Court considers the covenant practically performed in this way, for "Equity imputes an intention to fulfil an obligation." (Blandy v. Widmore, 2 Wh. & Tu., 407.)

Q. Define the equitable doctrine of Conversion. What is the leading case on the subject ?

A. It is an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible and descendible according to its new character. Thus, A by his will directs his real estate to be sold, and the proceeds paid to B. On A's death, this is considered at once as money, so that were B then to die it would go to his personal representatives. The leading case is Fletcher v. Ashburner (1 Wh. & Tu., 327). (Indermaur's Equity, 334, 335.)

Q. Define and illustrate the doctrine of Reconversion.

A. It may be defined as that notional or imaginary process whereby a prior constructive conversion is annulled. Thus, in the case put in the last answer, suppose that on A's death B were to inform the trustees, under A's will, that he did not desire a sale, but intended to take the real estate as it stood, this would effect a reconversion, and the result would be that it B were then to die, the property would go to his heir. (Indermaur's Equity, 334, 351.)

Q. Explain the decision in Ackroyd v. Smithson. (1 *Wh. & Tu.*, 372.)

A. A conversion directed by will is only deemed to operate for the purposes specified in the will, and if those purposes do not exhaust the whole of the fund, the surplus will go to the person who would have taken it if the will had not directed a conversion. Thus, if testator devises Whiteacre to trustees in trust to sell for payment of his debts, and it realises £10,000 and the debts are only £7,000, the surplus £3,000 will go to testator's residuary devisee (or heir). As such residuary devisee (or heir) is the absolute owner of the surplus, it will (if he dies before it is paid to him) devolve in its actual condition of money to his legal personal representative. (Indermaur's Equity, 344.)

Q. John Brown was entitled in fee to one-quarter of Blackacre. A partition action was instituted, and Blackacre was sold, by the order of the Court, for £5,000. *John Brown died, an infant, in* 1892, *leaving a widow, a son, and a daughter. What becomes of his share in the proceeds of Blackacre?*

A. There is an equity here preventing the effect of the conversion brought about by the sale under the Court's order (Foster v. Foster, 1 Ch. D., 588). Therefore, subject to the widow's dower (if any), the son takes the money. (Indermaur's Equity, 350.)

10. Penalties, Forfeitures, Injunctions.

Q. In what cases, and on what principles, did the Court of Chancery give relief against penalties and forfeitures?

A. The Court always gave relief in cases of provisions for payment of money when there was a stipulation for payment of a larger sum if not paid at the time mentioned, or for forfeiture of any property by reason of non-payment of money; but the Court will not (except as now provided by Statute) give relief in the case of forfeiture of estates (Peachey v. Duke of Somerset, 2. Wh. & Tu., 250). The Court acts upon the principle which is embodied in the maxim, "Equity regards the spirit and not the letter." (Indermaur's Equity, 361-363.)

Q. Explain the grounds upon which, and state the cases in which, Courts will relieve against penalties and forfeitures.

A. Upon the grounds that the penalty or forfeiture was inserted to secure the doing of some collateral act, and that the Court can give due compensation, for "Equity regards the spirit and not the letter," so that in all cases of provisions for payment of money any stipulation for payment of a larger sum, if not paid at the time named, or for forfeiture of any property by reason of non-payment, will always be relieved against (Sloman v. Walter, 2 Wh. & Tu., 25). So also, from a very early time, the Court of Chancery granted relief in cases of forfeiture by tenants of their leases by reason of non-payment of rent, upon the principle that the right of entry was intended merely as a security for the debt, and that, provided the rent, interest thereon, and all costs were paid, the landlord was put in the same position as if the rent had been paid to him originally. A similar power was conferred on the Courts of Common Law by the Common Law Procedure Act 1852. But if the performance of the thing itself is essential the Court will

not relieve. (Peachey v. Duke of Somerset, 2 Wh. & Tu., 250.) With regard to forfeitures under leases, and relief therefrom, special provision is now made by Section 14 of the Conveyancing Act 1881. (Indermaur's Equity, 363-365.)

Q. State the rights of the parties in the following cases :— (a) *A lease contains covenants to pay rent, to keep the property in repair, and not to assign without a licence, and also a power of re-entry for breach of covenant. The covenants are broken.* (b) *A mortgagor covenants to repay an advance of* £1,000 *on a certain day and interest at* 4 *per cent., and in default of punctual payment on the day named to pay* £1,200 *and interest at* 5 *per cent.* (c) *A builder agrees to finish a building in a month, and in default to pay his employer* £1,000. *The building is not completed until three days after the time named.* (d) *A agrees with B, to whom he is selling a business, not to carry on a similar business within five miles, and in case of breach of such agreement to pay* £100. *A starts a business in breach of the covenant, and offers B* £100.

A. (*a*) Relief can be had against a forfeiture for non-payment of rent, at any time within six months after execution in the action of ejectment. Re-entry for breach of the covenant to repair is governed by the Conveyancing Act 1881 (Section 14), and the lessor must serve a notice specifying the breach, and if capable of being remedied, requiring it to be remedied, and specifying the monetary compensation required (if any) ; and the Court has absolute discretion to relieve against the forfeiture at any time before actual entry by the lessor. The Court cannot relieve against re-entry for breach of the covenant not to assign, if the lessor wishes to re-enter. (*b*) Equity will relieve against the covenant to pay the £1,200 and 5 per cent., as it is looked upon in the nature of a penalty, on the mortgagor paying the £1,000 and 4 per cent. (*c*) The Court will not allow the employer to recover the whole £1,000 (being a

penalty), but only such reasonable portion thereof as a jury assess. (*d*) The Court will grant an injunction to restrain A from carrying on the business, as it is in B's choice which remedy he prefers. (Indermaur's Equity, 366-369.)

Q. What is meant by an injunction? Give instances of cases in which the Court would interfere by granting an injunction.

A. An injunction is a judicial process whereby a party is required to abstain from doing a particular act, or to do a particular act, in which latter case it is styled a mandatory injunction. (Indermaur's Equity, 402). The following are instances:—To prevent waste; to prevent infringement of patents, copyrights, or trademarks; to prevent a person acting contrary to his express covenant; to prevent the commission or continuance of a nuisance.

Q. Distinguish between a perpetual and an interlocutory injunction. What terms does the Court always impose on granting an interlocutory injunction?

A. A perpetual injunction is one granted at the hearing of a cause, and absolutely prohibits the act complained of. An interlocutory injunction is one granted at some intermediate stage and may be *ex parte*, and it only prohibits the act for a certain time, *e.g.*, until the next motion day or until the hearing of the cause. The Court will only grant an interlocutory injunction on the terms of the plaintiff undertaking to abide by such order as the Court may think fit to make thereafter, should it ultimately be of opinion that no injunction ought to have been granted, and that damage has been caused thereby to the defendant. (Indermaur's Equity, 418, 419.)

Q. Will the Court grant injunctions against waste in the following cases:—(a) *where plaintiff is claiming an estate against a defendant in possession claiming to be owner in fee;* (b) *where plaintiff is mortgagor and defendant is mortgagee in possession;* (c) *where defendant is owner in fee subject to an*

executory devise, which, if a certain event happens, will carry the estate over to the plaintiff?

A. (*a*) An injunction will be granted here, for the Court will keep the property intact until the title has been decided (Talbot v. Scott, 4 K. & J. 96). (*b*) The mortgagee in possession may cut and sell ripe timber under the Conveyancing Act 1881, but he will be restrained from committing other acts of voluntary waste, unless indeed, his security is a scanty one, when the Court will not interfere. (Indermaur's Equity, 178, 179.) (*c*) An injunction may be had to prevent equitable waste. (Ibid, 409.)

Q. If, before an injunction, timber has been wrongfully cut and sold, how does the Court regulate the rights to the proceeds of sale?

A. As a general rule, where the timber is severed by the act of a trespasser, or by the waste of the tenant, or by act of God, *e.g.*, tempest, while the tenant for life impeachable for waste is in possession, the proceeds become at once the property of the owner of the first vested estate of inheritance *in esse*, even although there is an intervening life estate. The result is the same if the wrongful severance is by a tenant for life impeachable for waste. (2 Wh. & Tu., 1024-1029.)

Q. A buys a plot of freehold land from B, and covenants that he will lay out £1,000 *in building on the land, and also that he will not use any building on the land for a manufactory. A sells the land to C. Can the covenants, or either of them, be enforced by B against C, and if so, how, and on what ground?*

A. By the rules of Common Law, the burden of a covenant relating to freehold land does not run with the land, and neither covenant could be enforced against C. But in Equity the burden of a restrictive covenant runs with the land to anyone who takes with actual or constructive notice of it, so that an injunction can be obtained by B against C as regards the manufactory (Tulk v. Moxhay,

2 Phil., 774). And since the Judicature Acts, the rule of Equity prevails.

Q. Will the Court interfere by injunction to restrain the publication of a libel?

A. Before the Judicature Acts it would not, but it has been held that since these Acts it will. This jurisdiction to the fullest extent has only been recently thoroughly established, for at first the Court would only interfere in this way in case of libels affecting a man's property, trade, or business, but in later cases it has been held that the Court can in its discretion interfere by injunction in any case. In very clear cases the Court will even go so far as to grant an interlocutory injunction. (Indermaur's Equity, 416, 417.)

Q. What is a writ Ne exeat regno, and when is it issued?

A. It is a writ issued to restrain a person from leaving the realm, and is now only issued in cases coming under the Debtors Act 1869, *i.e.*, to prevent the defendant leaving the country, where the plaintiff makes an affidavit that the defendant is indebted to the extent of £50 at least, and (except in the case of a penalty other than a penalty arising under a contract) that the defendant's absence will materially prejudice the plaintiff in the prosecution of his claim (Drover v. Beyer, 49 L. J., Ch., 37). (Indermaur's Equity, 421.)

11. Married Women.

Q. What was, and what is now since 1882, *the position of a married woman as regards her property?*

A. As regards freeholds, the husband was entitled during the coverture to the rents and profits, and if he had heritable issue by her born alive, he had an estate by the curtesy after her death. As regards leaseholds, they vested in the husband absolutely, and he could dispose of them in any way, except by will. As regards other property, *choses in possession*

vested absolutely in him, but if *choses in action*, he had to reduce them into possession. If he survived her, he took all her personalty, including leaseholds. Now, by the Married Women's Property Act 1882, as regards a woman married since the Act, all her property is to her separate use, and as regards a woman married before the Act, all property her title to which accrues since the Act (see Reid v. Reid, 31 Ch. D., 402), is her separate property. (Indermaur's Equity, 370, 372.)

Q. What is meant by a fraud on a husband's marital rights?

A. Where a woman was engaged to be married, and made a settlement or other disposition of her property secretly, without the knowledge and consent of the intended husband, it operated as a fraud on him, and would be set aside (Countess of Strathmore v. Bowes, 1 Wh. & Tu., 613.) This is of little importance now, as the Married Women's Property Act 1882, appears to render the doctrine obsolete. (Indermaur's Equity, 372-373.)

Q. Explain the nature and effect of the clause against anticipation that may be annexed to a gift to a married woman for her separate estate.

A. It is a clause providing that she shall not anticipate, but shall only receive the income of her property as and when it becomes due from time to time. The effect of the clause was fully considered in the leading case of Tullett v. Armstrong (Indermaur's Conveyancing and Equity Cases, 91), where it was laid down that it was only applicable during marriage; but that, if property was given to a then unmarried woman for her separate use without power of anticipation, the clause became effectual upon her subsequent marriage, and that the clause would cease to have effect on her becoming a widow, though capable of reviving on a subsequent marriage if apt words were used. Under the Conveyancing Act 1881 (sec. 39) the Court has power, if it

thinks fit, on a married woman's application, if for her benefit, to enable her to dispose of her property notwithstanding the anticipation clause. (Indermaur's Equity, 382, 383.)

Q. A testator left his residuary estate to his married daughter for her separate use absolutely, without power of anticipation. In her marriage settlement there was a covenant for settlement of after-acquired property. Would she be compelled to bring such residue into settlement? What is the effect of a restraint on anticipation as applied to the capital of a fund given absolutely to a married woman for her separate use?

A. No, the restraint on anticipation is a restraint on alienation, and the covenant in the settlement has no effect on this property (*Re* Curry, Gibson v. Way, 54 L. T., 665). It used to be thought that if it was an income-bearing fund, the restraint was operative, and that if it was a sum of cash, the restraint was inoperative; but the Court of Appeal, in *Re* Bown, O'Halloran v. King (27 Ch. D., 422), decided that this accident made no difference, and it depends on every occasion on what the Court gathers, from the words used in the will, that the testator really intended. (See also *Re* Fearon, Hotchkin v. Mayer, 45 W. R., 232.) The Court has power to remove the restraint under Section 39 of the Conveyancing Act 1881.

Q. A married woman allows her husband to receive the income of her separate property for several years. Can she afterwards demand an account from him and payment of the amount he has received?

A. No, she cannot, for the allowing him to receive it will usually amount to a gift of it to him, either for the benefit of the family or otherwise. (Caton v. Rideout, 1 Mac. and G., 599.) This principle does not, however, ordinarily apply to capital received by the husband. (*Re* Flamank, Wood v. Cock, 40 Ch. D., 461; Wassell v. Leggatt, (1896), 1 Ch., 554.)

Q. What debts or contracts of a married woman will bind her separate estate?

A. If settled without power of anticipation, no debts or contracts will affect her property, but if not, then under the Married Women's Property Act 1882 (Sec. 1 (4)) all her debts or contracts bind her separate estate which she was then possessed of or which she might subsequently acquire. Under this provision it was, however, decided that to render subsequently acquired separate estate liable she must be possessed of some free disposable separate estate at the time of contracting the debt (Palliser v. Gurney, 19 Q. B. D., 519). Now by the Married Women's Property Act 1893 (Sec. 1), all her debts or contracts entered into (otherwise than as agent) after 5th December, 1893, will bind her separate property which she either possessed at the time or acquired afterwards, and whether she was at the time possessed of any separate estate or not. It is, however, specially provided that nothing in this provision is to render any separate property which she is restrained from anticipating liable to satisfy any debt. (Indermaur's Equity, 384, 386, 387.)

Q. A spinster incurs debts and then marries, settling all her property upon herself for life without power of anticipation, and after her death upon her husband for life, and then to the children of the marriage. Can the ante-nuptial creditors enforce their claims against the property comprised in the settlement?

A. As regards the rights of the husband and the children they cannot, but as regards the woman's life interest they can, for it is provided by the Married Women's Property Act 1882 (secs. 13, 19) that a woman after her marriage shall continue liable in respect of, and to the extent of, her separate property for all ante-nuptial debts and torts, and that she cannot by settling the property on herself, without power of anticipation, deprive creditors of their rights under this provision. (Indermaur's Equity, 385.)

Q. A marriage settlement on a marriage in 1850 *contained a covenant by husband and wife to settle all after-acquired property of the wife. The wife predeceased her husband, and was at her death entitled to a reversionary fund, which subsequently fell into possession during her husband's life. Will it belong to him or be bound by the covenant, and therefore payable to the trustees of the settlement?*

A. The fund is bound by the general covenant, as it falls into possession during the husband's life (Hughes v. Young, 22 L. J., Ch., 137; Fisher v. Shirley, 61 L. T., 668), and the Married Women's Property Act 1882 has made no difference on this point.

Q. What is meant by (a) *pin money*, (b) *paraphernalia?*

A. (*a*) Pin-money is an allowance settled upon the wife before marriage for her expenditure upon her person, to meet her personal expenses, and clothe her according to her proper rank and station. One year's arrears of pin-money only can ordinarily be recovered by the wife. (*b*) Paraphernalia consists of apparel and ornaments of the wife, given to her by her husband, suitable to her rank and condition in life, and whether a gift by a husband to his wife is separate estate or paraphernalia depends on the circumstances of each particular case. (Tasker v. Tasker (1895), P. 1). The property she possesses in paraphernalia is of an anomalous character, for she has no power to dispose of it during her husband's life, whilst the husband can dispose of it (except her necessary wearing apparel) either by sale or gift *inter vivos*, though not by will, so that on his death she is absolutely entitled to it, but subject to payment of his debts. (Indermaur's Equity, 390-391.)

Q. Explain the grounds upon which the doctrine of a wife's equity to a settlement was introduced. Why is the doctrine of less practical importance than it was formerly?

A. It does not depend on a right of property in the wife, but is entirely the creation of Equity and has its origin in

the maxim, "He who seeks Equity must do Equity." It was a condition imposed by the Court in cases where the husband was obliged to seek its assistance to enforce his Common Law right to reduce his wife's *choses in action* into his possession. The doctrine is of less practical importance now than formerly, because if the marriage is since 1882, or if the wife's title to the property accrues since 1882, the *chose in action* is made separate property by the Married Women's Property Act 1882. (Indermaur's Equity, 392, 398.)

Q. What is the wife's right by survivorship, and how was it affected by Malins' Act?

A. It consists of her right to her outstanding property, not reduced into possession, if she survives her husband, and needs no active enforcement; and the result, therefore, was that a married woman could not, even with her husband, effectually assign her reversionary interests in personalty or other *choses in action*, for if she survived, notwithstanding her disposition, the property survived to her, and she could repudiate what she had previously done. Malins' Act (20 & 21 Vict., c. 57), provided that every married woman might, with the concurrence of her husband, by deed acknowledged, dispose of every reversionary interest (whether vested or contingent) in pure personalty acquired by her under any instrument (not being her marriage settlement) made since 31st December, 1857. (Indermaur's Equity, 398-399.)

Q. What testamentary power has a married woman since 1882?

A. If married before the Married Women's Property Act 1882, she can dispose of all property the title to which in possession, reversion, or remainder, accrues to her since the Act and during the coverture, as if she were a *feme sole*; and a woman married since the Act can dispose of all her property as if she were a *feme sole*. Such wills now need no longer be re-executed or re-published after the husband's death (Married Women's Property Act 1893, sec. 3).

INDEX.

A

Accident, 102
Accounts—
  Open, 71
  Settled, 71
  Stated, 71
Actual fraud, 99
Ademption, 65, 116
Administration—
  Generally as to, 60-71
  How proceedings begun, 60
  Parties and form of claim in creditor's action, 61
  Decree, 61
  Steps in action, 61
  Notice of judgment, 62
  Will of British subject made abroad, 62
  Executors' powers over realty, 62
  Retainer, 63
  Order of paying debts, 63, 64
  Liability of executor trading, 64
  Creditor of insolvent estate, 41, 64
  Order of using assets to pay debts, 68, 69
Advice on reading, 1-13
Agreement to form partnership, 77
Annual rests—
  Definition of, 96
  When decreed, 96
Anticipation clause, 124-126
Appointment—
  Of new trustees, 50, 51
  Exclusive, 101
  Illusory, 101
Assets—
  Legal or equitable, 63
  Order of application to payment of debts, 68
  Marshalling of, 69
Assignment of *choses in action*, 41, 93
Association—
  Articles of, 81
  Memorandum of, 81

B

Bargains with expectant heirs, 100
Boundaries, action to settle, 114
Breaches of trust, 54-59
British subject's will made abroad, 62

C

Cases, list of important, 11, 12
Chancery—
Court of, 35
Matters assigned to, 42
Ward in, 112
Charity, gift to, 71
Choses in action, assignment of, 41, 93
Clayton's case, rule in, 77
Co-ownership and partnership, differences, 72
Companies, 80, 88
Companies Act 1898, 84
Company—
How share in differs from partner's share, 80
Unincorporated, 80
Incorporated, 80
Court to wind-up, 81
Modes of winding-up, 81, 82
Grounds for compulsory winding-up, 82
Date of commencement of winding-up, 82
Altering memorandum of association, 82
Directors Liability Act 1890, 82, 83
Winding-up Act 1890, 82, 83
Contributories in winding-up, 83, 84
Removing name from list of shareholders, 84, 85
Floating security, 85, 97, 98
Priority of debts in winding-up, 85
Debentures, 85-97, 98
Issuing shares at discount, 87
Consolidation, 94
Constructive fraud, 99, 100
Constructive trusts, 47, 49, 50
Contributories—
A list, 83, 84
B list, 83, 84
Settling list of, 83
Contingent legacy, 66
Contract—
Specific performance of, 103-110
Part performance, 105, 106
By married woman, 126
Contributories, list of, 83, 84
Conversion, 39, 117, 118
Co-ownership, 72
Co-partnership, 72
Course of reading, 1-13
Creditors of deceased insolvent estates, 41, 64
Custody of infants, 110-112

D

Dearle v. Hall, rule in, 39, 93
Debentures—
Form of, 97
Floating security, 85, 97
Priority of, 85, 98

Debts—
Priority of, 63, 64
When general personal estate not primary fund, 68, 69
Defective execution of power, 103
Demonstrative legacy, 65
Digest of Questions and Answers, 35-128
Disadvantages of second mortgage, 96
Dissolution of partnership, 73, 74, 75, 76
Donatio mortis causâ, 68
Dormant partner, 71

E

Election, 114, 115
Equitable assets, 63
Equitable mortgage, 91, 92, 93
Equitable waste, 39, 41, 42
Equity—
Meaning of, 35
Acts *in personam*, 37, 38, 103
To a settlement, 39, 127
Of redemption, 88, 89, 90, 91
Estoppel, 78
Exclusive appointments, 101
Executor's powers over realty, 62
Executor's right of retainer, 63
Executors, liability of, 64
Executory trusts, 39, 44, 45
Exoneration of personal estate, 68, 69
Expectant heirs, 100

F

Falsifying accounts, 71
Following trust property, 58
Floating security, 85, 97
Foreclosure, 89, 90, 91
Forfeitures—
Generally, 119-121
When relieved against, 119
Fraud—
Generally, 98-103
Actual, 99
Constructive, 99, 100
On power, 101
On husband's marital rights, 124
Fusion of Law and Equity, 40

G

General legacy, 65
Goodwill—
Sale of, 77
Contract to sell, 107
Guardianship of infants, 110-113

H

Heirs, expectant, 101
Howe v. Lord Dartmouth, rule in, 53, 54
Husband's marital rights, fraud on, 124

Illusory appointments, 101
Implied trusts, 47, 48
Infants—
Generally, 110-113
Natural guardian of, 110, 111
Custody of, 110, 111, 112
Ward in Chancery, 112
Maintenance of, 112
Religion of, 113
Settlements by, 113
Injunctions—
Generally, 121-123
Between partners, 75
Mandatory, 121
Perpetual, 121
Interlocutory, 121
To restrain publication of libel, 123.
To restrain waste, 121, 122
To restrain actions, 41
Insolvent estate, rights of creditors, 41, 64

Joint adventure, 80
Judicature Acts, 40-42
Judicial Trustee Act 1896, 59

Laches, 59
Land Transfer Act 1897, Part I., 61, 63
Lapse of time, 59
Lectures, subjects of, 2-6.
Legacies—
Ademption, 65, 116
Specific, 65.
General, 65.
Demonstrative, 65.
Interest on, 65,
Vested, 66.
Contingent, 66.
Charged on land, 66, 67, 68.
Charitable, 71.
Satisfaction of, 115-117.
Legal assets, 63.
Libel, injunction to restrain publication of, 123
Lien of partner, 72.

M

Maintenance of infants, 112
Malins' Act, 128
Manager between partners, 75
Marital rights, fraud on husband's, 124
Married women—
Generally, 123–128
Property of, 123, 124
Restraint against anticipation, 124, 125
Contracts by, 126
Settlements by, 126, 127
Pin-money, 127
Paraphernalia, 127
Equity to settlement, 127, 128
Right by survivorship, 128
Wills by, 128
Marshalling—
Of assets, 69
Of securities, 69, 70
Maxims—
Æquitas sequitur legem, 36
Equity acts *in personam* and not *in rem*, 37, 38, 103
Equity considers that as done which ought to be done, 36
Equity does not interfere against a purchaser without notice, 38
Equity imputes an intention to fulfil an obligation, 115
Equity regards the spirit and not the letter, 88, 119
He who seeks Equity must do Equity, 128
Ignorantia facti excusat, 102
Ignorantia legis neminem excusat, 102
Once a mortgage always a mortgage, 88
Qui prior est tempore potior est jure, 38, 39, 92
Vigilantibus non dormientibus æquitas subvenit, 59, 109
Where the Equities are equal the Law shall prevail, 39, 92
Merger, 41
Mistake, 102, 103
Mortgage debenture, 96, 97, 98
Mortgagee—
Remedies of, 91, 92, 95
Mortgages—
Generally, 88–98
Payable primarily out of mortgaged property, 69
Equity of redemption, 88, 89
Foreclosure, 89, 90, 91
Priority of, 92, 93
Annual rests, 96
Notice to pay off, 89
Equitable, 91, 92, 93
Tacking, 39, 93
Consolidation, 94
Reconveyance of, 95
Second, disadvantages of, 96
Mortgagor—
In possession, powers of, 95

N

Ne exeat regno, writ of, 123
Nominal partner, 72
Notice to pay off mortgage, 89
Novation, 79, 80

Open account, 71
Oral variation of written contract, 106
Origin of Court of Chancery, 35

Paraphernalia, 127
Partition, 113, 114
Partners—
Dormant, 71
Nominal, 72
Lien of, 72
Duties of, 73
Rights and duties of, 73, 74, 75, 76, 77, 79
Liabilities of, 78, 79, 80
Injunction between, 75
Receiver, 75, 80
Manager, 75
Premium, return of, 76
Partnership—
Generally, 71-81
Definition of, 71, 72, 80
Dissolution of, 73, 74, 75, 76
Articles of, 81
Differences from co-ownership, 72
Whether receipt of profits constitutes, 72
Distribution of assets on dissolution, 73
Goodwill, 75, 77
Specific performance, 77
Partnership property, liability for partner's private debts, 77
Part performance, 105, 106
Penalties, 119-121
Pin-money, 127
Power—
In the nature of a trust, 48, 49
Fraud on, 101
Premium, return of, on dissolution of partnership, 76.
Profits, whether receipt of is partnership, 72
Purchaser—
For value without notice, 38
Of equity of redemption, 90, 91

Q

Questions on Indermaur's Equity, 13-34
Questions and Answers, digest of, 35-128

R

Reading, course of, 1-13
Real Estate Charges Acts, 69
Receiver of partnership, 75, 80
Reconversion, 118
Reconveyance of mortgage, 95
Redemption, equity of, 88-91
Reimbursement and remuneration of trustees, 52, 53
Residue undisposed of, 70
Restraint on anticipation, 124-126
Resulting trusts, 49
Retainer, executor's right of, 63
Retirement of trustee, 51
Rule in Clayton's case, 77
Rule in Dearle v. Hall, 39-93
Rule in Howe v. Lord Dartmouth, 53, 54

S

Sale with option to repurchase, 88, 89
Sale, when ordered in lieu of partition, 114
Satisfaction, 115-117
Second mortgage, disadvantages of, 96
Secured creditor of insolvent estate, 64
Securities, marshalling, 69, 70
Separate estate, 124
Settled accounts, 71
Settlement, Equity to, 39, 127
Settlements—
    Avoidance of, 101
    By infants, 113
Settlement of boundaries, 114
Specific legacy, 65
Specific performance—
    Generally, 103-110
    Of contracts, 103-110
    Part performance, 105, 106
    Oral variation, 106
    Defences to action for, 106, 107
    Lapse of time, 109
    Of partnership agreement, 76
    After death of vendor or purchaser, 109
    Irrespective of contract, 110
    Statement of Claim in, 110
Stated accounts, 71
Statute in *consimili casu*, 35
Statutes, list of important, 10, 11
Supreme Court, divisions of, 40
Surcharging and falsifying, 71
Survivorship, wife's right by, 128

T

Tacking, 39, 93
Test Questions on Indermaur's Equity, 13, 34
Thellusson Act, 44
Trustee Act 1888, sec. 8, 60

Trustees—
Generally, 42-60
Appointment of new, 50, 51
Retirement of, 51
Estate of, 52
Remuneration of, 52, 53
Lending on mortgage, 55
Liability of, 55, 56, 57, 58, 59
Remedies of, 56
Power to delegate, 57
Power of Court to relieve from breach of trust, 59
Purchase of trust property by, 58
Statutes of limitation, 59
Trusts—
Generally, 42, 60
Defined and classified, 42
Requisites of, 43
Express, 43, 47
Secret, 44
Executory, 44, 45
Incomplete, 45
Voluntary, 45, 46
Implied, 47, 48
Constructive, 47, 49, 50
Resulting, 49
Trust property, right to follow, 58

U

Undisposed of residue, 70
Unincorporated company, 80

Vendor's lien, 69
Vested legacy, 66
Voluntary trusts, 45, 46

W

Ward in Chancery, 112
Waste, 41, 42
Wasting property, conversion of, 53, 54
Wills of married women, 128
Will of British subject made abroad, 62
Winding-up of companies, 81-88
Winding-up of companies, date of commencement, 82
Writ *Ne exeat regno*, 123

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