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Enclosed

# THE

# LAWS OF ENGLAND.

## VOLUME XXI.

# THE

# LAWS OF ENGLAND

## A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

## VOLUME XXI.

*MISTAKE.*
*MONEY AND MONEY-LENDING.*
*MORTGAGE.*
*NAME AND ARMS, CHANGE OF.*
*NEGLIGENCE.*
*NOTARIES.*
*NUISANCE.*
*OPEN SPACES AND RECREATION GROUNDS.*
*PARLIAMENT.*
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*See* ECCLESIASTICAL LAW.

OUTLAW.

*See* CRIMINAL LAW AND PROCEDURE.

OVERDRAFT.

*See* BANKERS AND BANKING.

OVERSEERS.

*See* ECCLESIASTICAL LAW; ELECTIONS; POOR LAW; RATES AND RATING.

OXFORD UNIVERSITY.

*See* EDUCATION.

OYSTERS.

*See* FISHERIES.

PAINTINGS.

*See* COPYRIGHT AND LITERARY PROPERTY.

PALATINE COURTS.

*See* COURTS.

PARAPHERNALIA.

*See* HUSBAND AND WIFE.

PARDON.

*See* CONSTITUTIONAL LAW: CRIMINAL LAW AND PROCEDURE.

## PARENT AND CHILD.

*See* EDUCATION; INFANTS AND CHILDREN.

## PARISH.

*See* ECCLESIASTICAL LAW; LOCAL GOVERNMENT.

## PARISH CLERK.

*See* ECCLESIASTICAL LAW.

## PARISH COUNCIL.

*See* LOCAL GOVERNMENT.

## PARISHIONER.

*See* ECCLESIASTICAL LAW.

## PARKS.

*See* CONSTITUTIONAL LAW; OPEN SPACES AND RECREATION GROUNDS.


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| *For Accession of Sovereign* - | *See title* | CONSTITUTIONAL LAW. |
| *Audit of Public Accounts* - | ,, | REVENUE. |
| *Cabinet* - - - - - | ,, | CONSTITUTIONAL LAW. |
| *Contempt of Court* - - - | ,, | CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL. |
| *Coronation* - - - - | | CONSTITUTIONAL LAW. |
| *Corrupt Practices* - - - | | ELECTIONS. |
| *Crown and Executive* - - | | CONSTITUTIONAL LAW. |
| *Crown and Subject* - - - | | CONSTITUTIONAL LAW. |
| *Customs* - - - - - | | REVENUE. |
| *Departments of State* - - | | CONSTITUTIONAL LAW. |
| *Elections* - - - - | | ELECTIONS. |
| *Evidence* - - - - | | EVIDENCE. |
| *Excise* - - - - - | | REVENUE. |
| *Executive and Crown* - - | | CONSTITUTIONAL LAW. |
| *Habeas Corpus* - - - | | CROWN PRACTICE. |
| *Heralds' College* - - - | | PEERAGES AND DIGNITIES. |
| *Judgments of Judicial Authorities* | | JUDGMENTS AND ORDERS. |
| *Juries* - - - - - | | JURIES. |
| *Officers of State* - - - | | CONSTITUTIONAL LAW; PUBLIC AUTHORITIES AND PUBLIC OFFICERS. |
| *Peerage* - - | | PEERAGES AND DIGNITIES. |
| *Petition of Right* | | CROWN PRACTICE. |
| *Precedence* - | ,, | CONSTITUTIONAL LAW; ECCLESIASTICAL LAW; PEERAGES AND DIGNITIES. |
| *Privilege, Defence of* | | LIBEL AND SLANDER. |
| *Revenues of the Crown* | | CONSTITUTIONAL LAW. |
| *Revenue, Public* - | | ESTATE AND OTHER DEATH DUTIES; INCOME TAX; INHABITED HOUSE DUTY; REVENUE. |
| *Royal Family* - | | CONSTITUTIONAL LAW. |
| *Royal Prerogative* - | | CONSTITUTIONAL LAW. |
| *Statutes Construction of* | | STATUTES. |


## PARLIAMENTARY AGENTS.

*See* PARLIAMENT.

## PARLIAMENTARY ELECTIONS.

*See* ELECTIONS.

## PAROCHIAL CHAPEL.

*See* ECCLESIASTICAL LAW.

## PAROCHIAL CHARITIES.

*See* ALLOTMENTS; CHARITIES.

## PAROL EVIDENCE.

*See* CONTRACT; EVIDENCE.

## PARSONS AND PARSONAGES.

*See* ECCLESIASTICAL LAW.

## PART PERFORMANCE.

*See* CONTRACT; EQUITY; SPECIFIC PERFORMANCE.

## PARTICULAR ESTATE.

*See* REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

## PARTICULARS.

*See* COUNTY COURTS; PLEADING; PRACTICE AND PROCEDURE; SET-OFF AND COUNTERCLAIM.

## PARTICULARS OF SALE.

*See* AUCTION AND AUCTIONEERS; SALE OF GOODS; SALE OF LAND.

## PARTIES.

*See* BILLS OF SALE; CONTRACT; FAMILY ARRANGEMENTS; LANDLORD AND TENANT; MORTGAGE; PRACTICE AND PROCEDURE; SALE OF LAND; SETTLEMENTS.

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*For Board of Agriculture and Fisheries* - - - *See title* AGRICULTURE; CONSTITUTIONAL LAW.
*Boundaries* - - - ,, BOUNDARIES, FENCES, AND PARTY WALLS.
*Commons* - - - ,, COMMONS AND RIGHTS OF COMMON.
*Copyholds* - - - ,, COPYHOLDS.
*Easements* - - - ,, EASEMENTS AND PROFITS À PRENDRE.
*Foreshore* - - - ,, CONSTITUTIONAL LAW; FISHERIES; WATERS AND WATERCOURSES.
*Open Spaces* - - - ,, OPEN SPACES AND RECREATION GROUNDS.
*Parliamentary Procedure* - ,, PARLIAMENT.
*Real Estate* - - - ,, REAL PROPERTY AND CHATTELS REAL.
*Sale of Land* - - - ,, SALE OF LAND.
*Settled Estates* - - - ,, SETTLEMENTS.
*Tithes* - - - - ,, ECCLESIASTICAL LAW.

# ABBREVIATIONS

## USED IN THIS WORK.

| | |
|---|---|
| A. C. (preceded by date) . . | Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.) |
| A.-G. . . . . | Attorney-General |
| Act. . . . . | Acton's Reports, Prize Causes, 2 vols., 1809—1841 |
| Ad. & El. . . . | Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842 |
| Adam . . . . | Adam's Justiciary Reports (Scotland), 1893—(current) |
| Add. . . . . | Addams' Ecclesiastical Reports, 3 vols., 1822—1826 |
| Adv.-Gen. . . . | Advocate-General |
| Alc. & N. . . . | Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833 |
| Alc. Reg. Cas. . . | Alcock's Registry Cases (Ireland), 1 vol., 1832—1841 |
| Aleyn . . . . | Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 |
| Amb. . . . . | Ambler's Reports, Chancery, 2 vols., 1725—1783 |
| And. . . . . | Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605 |
| Andr. . . . . | Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 |
| Anon. . . . . | Anonymous |
| Anst. . . . . | Anstruther's Reports, Exchequer, 3 vols., 1792—1797 |
| App. Cas. . . . | Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890 |
| Arkley . . . . | Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 |
| Arm. M. & O. . . | Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842 |
| Arn. . . . . | Arnold's Reports, Common Pleas, 2 vols., 1838—1839 |
| Arn. & H. . . . | Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841 |
| Asp. M. L. C. . . | Aspinall's Maritime Law Cases, 1870—(current) |
| Ashb. . . . . | Ashburner's Principles of Equity, 1902 |
| Atk. . . . . | Atkyns' Reports, Chancery, 3 vols., 1736—1754 |
| Ayl. Pan. . . . | Ayliffe's New Pandect of Roman Civil Law |
| Ayl. Par. . . . | Ayliffe's Parergon Juris Canonici Anglicani |
| B. & Ad. . . . . | Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834 |
| B. & Ald. . . . | Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822 |
| B. & C. . . . . | Barnewall and Cresswell's Reports, King's Bench 10 vols., 1822—1830 |
| B. & S. . . . . | Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870 |
| Bac. Abr. . . . | Bacon's Abridgment |
| Bail Ct. Cas. . . | Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 |
| Baild. . . . . | Baildon's Select Cases in Chancery (Selden Society, Vol. X.) |
| Ball & B. . . . | Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 |
| Bankr. & Ins. R. . . | Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 |

| | |
|---|---|
| Bar. & Arn. .. .. | Barron & Arnold's Election Cases, 1 vol., 1843—1846 |
| Bar. & Aust. .. .. | Barron & Austin's Election Cases, 1 vol., 1842 |
| Barn. (CH.) .. .. | Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 |
| Barn. (K. B.) .. .. | Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 |
| Barnes .. .. .. | Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 |
| Batt. .. .. .. | Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 |
| Beat. .. .. .. | Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 |
| Beav. .. .. .. | Beavan's Reports, Rolls Court, 36 vols., 1838—1866 |
| Beav. & Wal. .. .. | Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 |
| Beaw. .. .. .. | Beawes's Lex Mercatoria |
| Bellewe .. .. .. | Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. |
| Bell, C. C. .. | T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 |
| Bell, Ct. of Sess. | R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 |
| Bell, Ct. of Sess. fol. | R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 |
| Bell, Dict. Dec. | S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 |
| Bell, Sc. App. .. | S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 |
| Belt's Sup. .. | Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756 |
| Benl. .. .. | Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 |
| Ben. & D. .. | Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 |
| Bing. .. .. | Bingham's Reports, Common Pleas, 10 vols., 1822—1834 |
| Bing. (N. C.) .. | Bingham's New Cases Common Pleas, 6 vols., 1834—1840 |
| Bitt. Prac. Cas. .. | Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 |
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# MISTAKE.


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*For Avoidance of Instruments* - *See title* CONTRACT; DEEDS AND OTHER INSTRUMENTS.
*Crime, Mistake in relation to* ,, CRIMINAL LAW AND PROCEDURE.
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*Fraud, Equitable Extensions of* ,, EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES.
*Judgments, Mistake in relation to* - - - - - ,, JUDGMENTS AND ORDERS.

SECT. 2. Classification.

Class (2) may be divided into (i.) cases where the mistake is mutual, that is, made equally by both or all parties (*w*), and (ii.) cases where the mistake is unilateral, that is, made by one party only (*x*).

Class (ii.) may be divided into (a) cases where the mistake was not conduced to or known of by the other party; (b) cases where the other party did not conduce to the mistake but knew of it and may or may not have been under a duty to disclose the true facts (*a*); and (c) cases where the other party conduced to the mistake by innocent misrepresentation (*b*).

# Part II.—Mistake of Law.

Relief not available.

**6.** Relief will not be granted on the ground of mistake if the mistake is one of law as distinguished from one of fact (*c*). The distinction between mistakes of law and mistakes of fact has never been clearly defined by the courts (*d*), but it may be taken that to exclude the right to relief the mistake must be one of general law (*e*), , for example, as the legal interpretation of a contract (*f*).

Mistake must be one of general law.

Circumstances of the rule.

**7.** Thus the above rule does not apply to ignorance of a private right, although the private right is the result of a matter of law (*g*), or depends upon rules of law applied to the construction of legal instruments (*h*); nor does it apply to ignorance of a right which depends upon questions of mixed law and fact, and a statement of fact which involves a conclusion of law is still a statement of fact and not a statement of law (*i*), while mistake as to the law of a foreign country which is clearly, in one sense, a mistake of law, is held in this country to be a mistake of fact (*k*).

Even where the mistake is held to be in a matter of law, however,

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(*w*) The remedy in such case may be either rescission (see p. 17, *post*), or rectification (see p. 20, *post*) or refusal of specific performance (see p. 24, *post*).

(*x*) The remedy in this case may be rescission (see p. 17, *post*), but is usually refusal of specific performance (see pp. 7, 10, 24, *post*).

(*a*) See pp. 9, 10, 11, 17, 18, 23, 33, 34, *post*.

(*b*) See title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 692, 721, 737 *et seq*

(*c*) *Midland Great Western Railway of Ireland (Directors etc.)* v. *Johnson* (1858), 6 H. L. Cas. 798, 810; *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23, 30; *Cockerell* v. *Cholmeley* (1830), 1 Russ. & M. 418; *Marshall* v. *Collett* (1835), 1 Y. & C. (EX.) 232. As to instruments drawn in wrong form under mistake of law, see pp. 12, 14, *post*. As to payment of money under mistake of law, see p. 32, *post*. As to contracts induced by misstatements of law, see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 668.

(*d*) *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, 191, P. C.; see *Clifton* v. *Cockburn* (1834), 3 My. & K. 76, 99.

(*e*) *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, *per* Lord WESTBURY, at p. 170.

(*f*) *Midland Great Western Railway of Ireland (Directors etc.)* v. *Johnson*, *supra*, *per* Lord CHELMSFORD, L.C., at p. 811; *Powell* v. *Smith* (1872), L. R. 14 Eq. 85; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108; *Hart* v. *Hart* (1881), 18 Ch. D. 670; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.

(*g*) *Cooper* v. *Phibbs*, *supra*, *per* Lord WESTBURY, at p. 170; *Beauchamp (Earl)* v. *Winn* (1873), L. R. 6 H. L. 223; *Clifton* v. *Cockburn*, *supra*; *Denys* v. *Shuckburgh* (1840), 4 Y. & C. (EX.) 42.

(*h*) *Beauchamp (Earl)* v. *Winn*, *supra*; *Daniell* v. *Sinclair*, *supra*, at p. 191.

(*i*) *Eaglesfield* v. *Londonderry (Marquis)* (1876), 4 Ch. D. 693, C. A., *per* JESSEL, M.R., at p. 702.

(*k*) *Leslie* v. *Baillie* (1813), 2 Y. & C. Ch. Cas.

the court may grant relief (*l*), if there are circumstances which make it inequitable upon the facts of the particular case that the act should stand. But relief will not be granted where a party, having been made aware of the question of law on which his title depends, under circumstances which might have given him equitable right to relief, determines to waive it (*m*).

PART II. Mistake of Law.

# Part III.—Mistake of Fact.

## SECT. 1.—*Mistake as to the Nature of the Transaction.*

**8.** In the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken is not sufficient to give him the right to rescind, unless such belief has been induced by representation, fraudulent or otherwise, of the other party to the contract (*n*).

Mistake as to nature of contractual obligations.

## SECT. 2.—*Mistake as to the Identity of the Other Party.*

**9.** Where a mistake is made as to the identity of one of the parties to a transaction, in cases where the identity of the person with whom the agreement was intended to be made was an inducement to the other to enter into the agreement, there is no real agreement formed; but, where the identity of the person is immaterial, the mistake as to identity does not, in the absence of fraud, affect the transaction (*o*).

Mistake as to identity of party.

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(*l*) *Clifton* v. *Cockburn* (1834), 3 My. & K. 76, *per* Lord BROUGHAM, L.C., at p. 99, *Watson* v. *Marston* (1853), 4 De G. M. & G. 230, C. A., *per* KNIGHT BRUCE, L.J., at p. 236; see *Allcard* v. *Walker*, [1896] 2 Ch. 369, *per* STIRLING, J., at p. 381. See also *Kilvington* v. *Parker* (1872), 21 W. R. 121, *per* BACON, V.-C., to the effect that relief may be given without reference to the manner in which the above maxim was construed in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149; and see title EQUITY, Vol. XIII., pp. 22, 170.

(*m*) See *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76, C. A., *per* TURNER, L.J., at p. 90; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, C. A.

(*n*) See *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108, 121, 122; and see title CONTRACT, Vol. VII., p. 355; and generally title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 404 *et seq.* (plea of *non est factum*). As to mistake in the nature of the contract or engagement induced by the other party, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 657 *et seq.*

(*o*) See title CONTRACT, Vol. VII., pp. 354, 355; and in addition to the cases cited *ibid.*, p. 355, notes (*r*), (*s*), see *Boulton* v. *Jones* (1857), 2 H. & N. 564 (where a man executed an order intended for his predecessor in business without intimating that he had succeeded to the business, and it was held that he could not maintain an action for the price of the goods); *Archer* v. *Stone* (1898), 78 L. T. 34 (where the purchaser's agent made a false representation as to the true name of his principal, knowing that the other party would not enter into the contract if he disclosed the true name, and specific performance was refused); *Nash* v. *Dix* (1898), 78 L. T. 445, 448, 449 (where specific performance was granted on the ground that the identity of the purchaser was immaterial); *Baillie's Case*, [1898] 1 Ch. 110 (where the plaintiff, believing that a new society was an old-established society of which he wished to become a member, which belief was fostered by an officer of the new society, applied for membership in the new society, and it was held that there was no contract at all, and that the plaintiff was entitled to have his name removed from the list of contributories in the winding-up of the new society). With regard to the cases cited in title CONTRACT, Vol. VII., p. 355, note (*r*), it was held :—

SECT. 2. Mistake as to the Identity of the Other Party.

The misdescription of the purchaser does not render a conveyance inoperative or prevent the legal estate from passing where it can be ascertained who was meant by the person misdescribed (*p*).

## SECT. 3.—*Mistake as to the Identity of the Subject-matter of the Transaction.*

### SUB-SECT. 1.—*When the Contract is Ambiguous.*

Admissibility of evidence.

**10.** Where the words used in a contract, though clear in themselves, are equally applicable to two different things or subject-matters, evidence is admissible to show which of them was the thing or subject-matter intended (*q*), but unless the evidence is sufficiently clear to establish satisfactorily that both parties had the same thing or subject-matter in view (*r*), there is no contract (*s*).

*Falsa demonstratio non nocet.*

**11.** Where the subject-matter of a contract is identified with sufficient legal certainty, but there is some inaccuracy in the description or some addition to the description which is inaccurate, the inaccuracy may be rejected according to the maxim *Falsa demonstratio non nocet* (*t*). Thus, where a plaintiff at the request of the defendant accepts a bill of exchange, and the defendant agrees

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*Hardman* v. *Booth* (1863), 1 H. & C. 803; *Re Reed, Ex parte Barnett* (1876), 3 Ch. D. 123; and *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, that there was no contract. In *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223, the defence that personal consideration entered into the contract failed; see *ibid.*, at p. 230.

(*p*) *Wray* v. *Wray*, [1905] 2 Ch. 349, following *Maugham* v. *Sharpe* (1864), 17 C. B. (N. S.) 443; compare the cases under the Statute of Frauds (29 Car. 2, c. 3), s. 4, referred to in *Catling* v. *King* (1877), 5 Ch. D. 660, C. A.; and see title CONTRACT, Vol. VII., pp. 361, 372.

(*q*) *Smith* v. *Jeffryes* (1846), 15 M. & W. 561, *per* ALDERSON, B., at p. 562; *Hitchin* v. *Groom* (1848), 5 C. B. 515, *per* WILDE, C.J., at p. 520; and see, generally, as to the admissibility of parol evidence to explain a written contract, p. 25, *post*, and title CONTRACT, Vol. VII., p. 523. An ambiguity of this kind is called a latent ambiguity (*Smith* v. *Jeffryes*, *supra*).

(*r*) And as to the necessity of *consensus ad idem* to the formation of a contract, see, generally, title CONTRACT, Vol. VII., p. 354.

(*s*) *Hodges* v. *Horsfall* (1829), 1 Russ. & M. 116 (where specific performance of an agreement, referring to a plan as an existing document, forming a term of the contract, was refused, on the ground that the evidence adduced for the purpose of identifying the plan did not show that the parties had agreed upon any particular plan); *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 (where in an action for breach of contract in not accepting Surat cotton, which the defendant bought of the plaintiff to arrive "ex *Peerless* from Bombay," the defence that the defendant meant a ship called the *Peerless* which sailed from Bombay in October, and that the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the *Peerless* which sailed from Bombay in December, was held to be a good defence); *Smidt* v. *Tiden* (1874), L. R. 9 Q. B. 446 (where a bill of lading, being ambiguous and equally capable of being applied to one charterparty as to another charterparty, and each party being ignorant of what was in the mind of the other, was held not to be a contract or evidence of a contract between the parties); and see *Falck* v. *Williams*, [1900] A. C. 176, P. C. (ambiguous telegram); *Swaisland* v. *Dearsley* (1861), 29 Beav. 430.

(*t*) See *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, 311, 312, C. A.; and titles CONTRACT, Vol. VII., p. 518; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465 *et seq.*; INSURANCE, Vol. XVII., p. 362. Many cases of false demonstration have reference to the construction of wills, as to which see title WILLS. This doctrine is not confined to cases where the first part of the description is true and the latter untrue, but it is immaterial in what part of the description the *falsa demonstratio* occurs (*Cowen* v. *Truefitt, Ltd.*, *supra*.

to indemnify him as to half of the amount, it is immaterial that by mistake the bill of exchange is misdescribed as being of the same date as the indemnity, whereas in fact it is dated the next day, if the surrounding circumstances are sufficient to identify the subject-matter of the contract (*a*).

SECT. 3. Mistake as to the Identity of the Subject matter of the Transaction.

**12.** The above maxim only applies, however, to cases where the false demonstration is added to that which was sufficiently certain before (*b*), and therefore, if the words in question form an essential part of the description of the subject-matter, they cannot be rejected as *falsa demonstratio* (*c*). So, too, it seems, the doctrine is not applicable when the court can see from evidence outside the instrument what it was that the parties really did mean by the particular document in question (*d*).

Cases to which doctrine does not apply.

### SUB-SECT. 2.—*When the Contract is Clear.*

**13.** When the contract is clear the mistake of one party only will not, as a general rule, prevent the formation of a contract and consequent liability in damages being incurred for non-performance, for if a man will not take reasonable care to ascertain what he is contracting about, he must take the consequences (*e*). Even if the mistake is such as a reasonably diligent man might fall into, a party cannot successfully resist an action for damages, nor, as a rule, specific performance, by a simple statement that he has made a mistake where there has been no misrepresentation and where there is no ambiguity in the terms of the contract (*f*).

Mistake of one party when contract is clear.

## SECT. 4.—*Mistake of Fact Materially Connected with the Subject-matter of the Transaction.*

### SUB-SECT. 1.—*As to its Existence.*

**14.** Where an agreement has been entered into in contemplation of a supposed actual state of things and it turns out that the parties were mutually mistaken and that such supposed state of things did not exist, the agreement is void (*g*).

Mutual mistake as avoiding contract.

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(*a*) *Way* v. *Hearn* (1862), 13 C. B. (N. S.) 292.

(*b*) See title CONTRACT, Vol. VII., p. 518.

(*c*) *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107 (where, in an agreement for transfer by the plaintiff of a public-house, the subject-matter of the contract was described as "the house and premises he now occupies, known by the sign of the White Hart," but a coach-house which belonged to the White Hart was not, in fact, in the plaintiff's occupation, being in the occupation of a tenant, and it was held that the words "he now occupies" formed an essential part of the description of the subject-matter, and could not be rejected as *falsa demonstratio*).

(*d*) *Couven* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, C. A., *per* LINDLEY, M.R., at p. 311.

(*e*) *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A., *per* JAMES, L.J., at p. 221.

(*f*) *Tamplin* v. *James*, *supra*, *per* BAGGALLAY, L.J., at p. 217; see *May* v. *Platt*, [1900] 1 Ch. 616, 623; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; [1903] 1 Ch. 434, 436, C. A.; and see *Malins* v. *Freeman* (1837), 2 Keen, 25 (where specific performance was refused). As to cases where there has been misrepresentation, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 657 *et seq.* As to specific performance, see title SPECIFIC PERFORMANCE.

(*g*) *Stapylton* v. *Scott* (1807), 13 Ves. 425, 427; *Robinson* v. *Dickenson* (1828), 3 Russ. 399, 413, 414; see *Pritchard* v. *Merchant's Life-Assurance Society* (1858), 3 C. B. (N. S.) 622; *Cochrane* v. *Willis* (1865), 1 Ch. App. 58; and see title SALE OF GOODS. As to cases in which the purchaser thinks that he is purchasing something different from what was intended to be sold by the vendor, see p. 10,

SECT. 4. Mistake of Fact etc.

Examples of rule.

Thus, in the case of a contract for the sale of a cargo supposed to exist and to be capable of transfer, but which has in fact been sold and delivered to others before the contract is made, the vendor cannot recover the price of the cargo (*h*). So also when an annuity is sold after and in ignorance of the fact that it has ceased to exist, the purchase-money may be recovered back as having been paid without consideration (*i*); and where a fund is held in trust for two persons equally, if living, with benefit of survivorship between them, and one of them sells his reversionary interest, the other being dead at the time, and that fact is not known to the vendor or the purchaser, the sale cannot stand (*k*). Similarly, if a premium is paid and accepted for the renewal of a policy after the death of the insured, though both parties are ignorant of the fact of his death, the payment does not in such circumstances revive the policy (*l*); and where a contract for the sale of a policy on the life of a man who is dead is entered into by both parties, in the belief that the assured is alive, and is completed by assignment, the transaction will be set aside (*m*).

Examples of non-application of rule.

**15.** When, however, the contract is for the sale of the subject thereof absolutely and not with reference to any collateral circumstances the agreement is binding, notwithstanding that the subject-matter is not in the condition supposed (*n*); and where a bargain is entered into, which depends upon a contingent event, of which chance both the parties are aware (*o*), or is for the sale of an uncertain speculative property (*p*), neither party will be discharged from his contract merely because the event turns out against him or the reality is different from what was expected.

(*h*) *Hastie* v. *Couturier* (1853), 9 Exch. 102, Ex. Ch.; affirmed (1856), 5 H. L. Cas. 673; and see title SALE OF GOODS.

(*i*) *Strickland* v. *Turner* (1852), 7 Exch. 208; see *Hitchcock* v. *Giddings* (1817), 4 Price, 135 (where the purchaser bought an interest of the vendors in a remainder in fee expectant on an estate tail and at the time of the contract the tenant in tail had actually suffered a recovery of which both were ignorant until after the conveyance, and an absolute bond was given for the payment of the purchase-money, the court rescinded the contract on the ground of mistake, and not only ordered the bond to be delivered up and cancelled, but that all interest paid on it should be refunded); compare *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334, where *Hitchcock* v. *Giddings*, *supra*, is discussed and distinguished); see also *Emmerson's Case* (1866), 1 Ch. App. 433 (sale of shares after petition had been presented unknown to the parties); *Rudge* v. *Bowman* (1868), L. R. 3 Q. B. 689 (similar case where purchaser only was ignorant).

(*k*) *Colyer* v. *Clay* (1843), 7 Beav. 188.

(*l*) *Pritchard* v. *Merchant's Life-Assurance Society* (1858), 3 C. B. (N. S.) 622; see title INSURANCE, Vol. XVII., pp. 527, 554, 555.

(*m*) *Scott* v. *Coulson*, [1903] 2 Ch. 249, C. A.

(*n*) *Barr* v. *Gibson* (1838), 3 M. & W. 390, 400 (sale of a ship which was at the time a wreck); see *Barker* v. *Janson* (1868), L. R. 3 C. P. 303.

(*o*) *Mortimer* v. *Capper* (1782), 1 Bro. C. C. 156 (sale of an annuity for life and the party died before any payment of the annuity); see *Hitchcock* v. *Giddings*, *supra*, at p. 140.

(*p*) *Ridgway* v. *Sneyd* (1854), Kay, 627 (lease of mining property which proved not to be worth the expense of working); *Barendale* v. *Seale* (1855), 19 Beav. 601, 609, 612 (sale of a manor, the boundaries of which were not definitely ascertained and defined, but in this case the evidence showed that neither party intended

### SUB-SECT. 2.—*As to its Qualities.*

Difference in quality which gives rise to relief.

**16.** A mistake, common to both parties, as to the material of which the subject-matter of an agreement is composed may make the agreement void, when the difference between the actual thing and the thing contracted for amounts to a difference in kind (*q*); so where by the mistake of a common agent of both parties a vendor and purchaser agree to sell and buy different qualities of the same material, there is no binding contract (*r*). But a sale of goods on the footing of their being of a certain quality will not be set aside at the instance of the party who caused the mistake (*s*).

Mutual mistake.

Unilateral mistake.

**17.** A mistake on the part of one party only, not caused or actively assisted by the act of the other party as to the quality of the subject-matter of an agreement, does not, as a rule, invalidate the agreement (*t*), even if the other party knows of the mistake and that, but for the mistake, the contract would not have been entered into (*a*). If, however, the other party contributed to the mistake (*b*), or if he knew that the party making the mistake believed that the agreement was entered into on the footing that the subject-matter had the particular quality (*c*), the agreement is not binding.

### SUB-SECT. 3.—*As to its Quantity or Extent.*

Mistake, if common, may give rise to relief.

**18.** A material error as to the quantity or extent of the thing contracted for may make an agreement void if the mistake is common to both parties (*d*). But after a conveyance on sale the vendor cannot obtain relief on the ground that the property sold turns out to be more valuable than both parties supposed (*e*). Nor,

to sell nor buy a mere doubtful matter the extent and value of which was understood to be unknown to both parties, and specific performance was refused).

(*q*) *Cox* v. *Prentice* (1815), 3 M. & S. 344 (contract for the sale of a bar of silver on the assumption that it contained more silver than it actually did); see *Megaw* v. *Molloy* (1878), 2 L. R. Ir. 530, C. A. (sale by sample taken from wrong bulk). As to sale by sample, see, further, title SALE OF GOODS.

(*r*) *Thornton* v. *Kempster* (1814), 5 Taunt. 786 (where a broker described goods in one note as "Riga Rhine Hemp," and in the other as "Petersburgh clean Hemp").

(*s*) *Scott* v. *Littledale* (1858), 8 E. & B. 815 (sale by sample not in fact a sample); see *Johnson* v. *Islington Union* (1909), 73 J. P. 172.

(*t*) *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597 (new oats bought in belief that they were old oats); *Morley* v. *Clavering* (1860), 29 Beav. 84 (restrictive covenants in a lease).

(*a*) *Smith* v. *Hughes*, *supra*, *per* BLACKBURN, J., at p. 607; see, however, Pollock, Principles of Contract, 8th ed., p. 512.

(*b*) *Baskcomb* v. *Beckwith* (1869), L. R. 8 Eq. 100 (where the purchaser thought that restrictive covenants applied to all the vendor's estate); *Caballero* v. *Henty* 1874), 9 Ch. App. 447; see *Re Hare and O'More's Contract*, [1901] 1 Ch. 93.

(*c*) *Smith* v. *Hughes*, *supra*, at pp. 603, 608, 610.

(*d*) *Stapylton* v. *Scott* (1807), 13 Ves. 425, 427; see *Baxendale* v. *Seale* (1855), 19 Beav. 601; *Leslie* v. *Tompson* (1851), 9 Hare, 268.

(*e*) *Okill* v. *Whittaker* (1847), 2 Ph. 338; see *Howkins* v. *Jackson* (1850), 2 Mac. & G. 372. But in the case of releases and documents of that kind it has always been a rule of the court to construe them with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time (*Turner* v. *Turner*, *Hall* v. *Turner* (1880), 14 Ch. D. 829, *per* MALINS, V.-C., at p. 836, distinguishing *Howkins* v. *Jackson*, *supra*; and see

SECT. 4. Mistake of Fact etc.

in the absence of express contract, can compensation be claimed after conveyance in respect of a defect in title as to which there was a mutual mistake, and which defect might have been discovered by the plaintiff if he had exercised due diligence (*f*). Where, however, by the mistake of the joint agent of the parties, too much land is comprised in a conveyance, compensation may be given (*g*). Where one party *bonâ fide* thinks that he has purchased what the other party thinks he has not sold, the court may set the agreement aside (*h*), or refuse a specific performance (*i*), or, where rectification is sought, put the defendant to election between rescission or rectification in accordance with the plaintiff's view (*k*).

SUB-SECT. 4.—*As to its Price or Consideration.*

No relief on mere ground of mistake as to price.

**19.** In the absence of evidence that one party to a contract is attempting to take advantage of a manifest mistake, the other party cannot avoid the contract on the mere ground of mistake as to the price stated therein (*l*); though in some cases specific performance may be refused, for example, where a defendant inserts a wrong figure in a letter written by him and containing an offer to sell, and on becoming aware of his error immediately gives notice of it (*m*).

SUB-SECT. 5.—*Compromises and Family Arrangements.*

General rule as to binding effect.

**20.** If a compromise or family arrangement, with a view to avoiding litigation or terminating disputes, has been fairly entered into without concealment or imposition upon either side, and with no suppression of what is true nor suggestion of what is false, then, although the parties may have greatly misunderstood the

p. 18, *post*. See also *Lindo* v. *Lindo* (1839), 1 Beav. 496; *London and South Western Rail. Co.* (*Directors etc.*) v. *Blackmore* (1870), L. R. 4 H. L. 610, *per* Lord WESTBURY, at p. 623).

(*f*) *Besley* v. *Besley* (1878), 9 Ch. D. 103 (where a lessee, believing a lease had a longer time to run than it in fact had, granted an underlease for a period longer than the remainder of the term). As to the effect of a contract for compensation, see *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, C. A.; and title SALE OF LAND.

(*g*) *Dacre* v. *Gorges* (1825), 2 Sim. & St. 454; compare *Teacher* v. *Calder*, [1899] A. C. 451 (where an account was taken on a wrong basis by mistake of the accountant and a new account was ordered).

(*h*) *Calverley* v. *Williams*, *Williams* v. *Calverley* (1790), 1 Ves. 210; *Price* v. *Ley* (1863), 4 Giff. 235; *Clowes* v. *Higginson* (1813), 1 Ves. & B. 524, 530, 535.

(*i*) See *Douglas* v. *Baynes*, [1908] A. C. 477, 485, P. C. (where *Calverley* v. *Williams*, *Williams* v. *Calverley*, *supra*, and *Clowes* v. *Higginson*, *supra*, are referred to); see also *Humphries* v. *Horne* (1844), 3 Hare, 276, 277; *Henkel* v. *Pape* (1870), L. R. 6 Exch. 7 (an action on a contract transmitted inaccurately by telegraph).

(*k*) *Garrard* v. *Frankel* (1862), 30 Beav. 445; *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427; see *Paget* v. *Marshall* (1884), 28 Ch. D. 255, and note (*k*), p. 20, *post*. As to the vendor contributing to the mistake, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 657 *et seq.*

(*l*) *Islington Union* v. *Brentnall and Cleland* (1907), 71 J. P. 407.

(*m*) *Webster* v. *Cecil* (1861), 30 Beav. 62; see *Wood* v. *Scarth* (1855), 2 K. & J. 33; and see title SPECIFIC PERFORMANCE. In the case of a sale by public auction, however, a mistake as to price is not a ground for relief, since biddings can only be opened on the ground of fraud (*Griffiths* v. *Jones* (1873), L. R. 15 Eq. 279).

situation and mistaken their rights, the court will not disturb the arrangement (*n*).

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To render a compromise or family arrangement binding, however, there must be honest disclosure by each party to the other of all such material facts known to him, relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise, and any advantage taken by either of the parties of the known ignorance of the other of such facts will render the agreement void in equity and liable to be set aside (*o*).

Honest disclosure essential.

Equity will also relieve a party who in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another under the name of a compromise (*p*). So, too, relief will be granted where parties, being ignorant of facts on which their rights depend or erroneously assuming that they know their rights, deal with the property accordingly and not upon the principle of compromising doubts (*q*); and a compromise based upon a mutual mistake of account inducing the compromise will also be set aside (*r*).

Cases where relief against mistake is available.

# Part IV.—Mistake in the Expression of Consent to a Transaction.

## SECT 1.—*Remedy by Rectification or Rescission.*

**21.** Where there exists a real common intention between the parties to a transaction, but mistake occurs in the expression of that intention, the court may correct the mistake in order to give

Mistake in expression.

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(*n*) See *Holsworthy Urban Council* v. *Holsworthy Rural Council*, [1907] 2 Ch. 62. As to compromise entered into by counsel, see title BARRISTERS, Vol. II., pp. 398 *et seq.* As to family arrangements generally, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 540 *et seq.*

(*o*) See titles EQUITY, Vol. XIII., p. 24; FAMILY ARRANGEMENTS, Vol. XIV., p. 550; *Groves* v. *Perkins* (1834), 6 Sim. 576; *Pickering* v. *Pickering* (1839), 2 Beav. 31, 56; *Reynell* v. *Sprye*, *Sprye* v. *Reynell* (1849), 8 Hare, 222, 257; see also *Scott* v. *Scott* (1847), 11 I. Eq. R. 74, 96. But mere silence as regards a material fact which one party is not bound to disclose to the other is not a ground for rescission nor a defence to specific performance (*Turner* v. *Green*, [1895] 2 Ch. 205). A compromise sanctioned by the court on behalf of an infant cannot be set aside by him on any ground which would be insufficient to set aside a compromise between persons *sui juris*. Whether it can always be set aside on grounds which as between parties *sui juris* would be sufficient, *quære*. In no case can a compromise be set aside unless there has been, on the part of the person claiming to uphold it, conduct which in the view of a court of equity amounts to fraud (*Brooke* v. *Mostyn* (*Lord*) (1864), 2 De G. J. & Sm. 373, 416, C. A.). As to consent orders, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 217.

(*p*) *Naylor* v. *Winch* (1824), 1 Sim. & St. 555, 564; cited with approval in *Lawton* v. *Campion* (1853), 18 Beav. 87, 93; see title EQUITY, Vol. XIII., p. 24.

(*q*) *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23, 31; *Harvey* v. *Cooke* (1827), 4 Russ. 34, 57, 58; *Reynell* v. *Sprye*, *Sprye* v. *Reynell*, *supra*, at p. 255; *Lawton* v. *Campion*, *supra*, at pp. 97, 98. The plaintiff's right to relief is not forfeited by the mere fact that throughout he had the means, equally with the defendant, of knowing what his rights were and obtaining competent advice thereon (*Reynell* v. *Sprye*, *Sprye* v. *Reynell*, *supra*), or by the fact that the defendant was in ignorance and under mistake also (*ibid.*).

(*r*) *Pritt* v. *Clay* (1843), 6 Beav. 503; see *Stainton* v. "*Carron Co.*" (1861), 30 L. J. (CH.) 713, C. A.

SECT. 1. Remedy by Rectification or Rescission.

effect to the real intention (*s*). To justify the court in so doing, it must appear that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both (*t*). The relief given may be either by way of rectification or rescission as the case may require, for in such cases the difference is only one of degree (*a*). A deed poll may also be rectified on proof that it is not in accordance with the intention of the person who executed it (*b*).

Instrument in terms contrary to intention.

Operation in law contrary to intention.

Equity will also interfere where by mutual mistake a document has been signed which operates in law contrary to the express intention and agreement of both parties (*c*). There is no distinction in principle between a mistake as to the legal effect of the words used and a mistake in the words themselves, and, therefore, if a solicitor in drawing a deed, through error, either inserts or omits terms contrary to the intention of the parties, or uses words capable of a meaning different from that which the parties intended, relief will be granted (*d*). So it appears that equity would also relieve if a solicitor innocently misled parties as to the legal effect of a document and they were induced to sign it under a misapprehension of its meaning (*e*).

Principle on which relief granted.

**22.** The principle upon which the court acts in correcting deeds or instruments is that the parties are to be placed in the same

(*s*) *Exeter* (*Marquis*) v. *Exeter* (*Marchioness*) (1838), 3 My. & Cr. 321; *Walsh* v. *Trevannion* (1848), 16 Sim. 178; *Ashurst* v. *Mill*, *Mill* v. *Ashurst* (1848), 7 Hare, 502; *Barrow* v. *Barrow* (1854), 18 Beav. 529, 532; *Murray* v. *Parker* (1854), 19 Beav. 305, 308; *Druiff* v. *Parker* (*Lord*) (1868), L. R. 5 Eq. 131, 139; *Mackenzie* v. *Coulson* (1869), L. R. 8 Eq. 368, 375; *Smith* v. *Iliffe* (1875), L. R. 20 Eq. 666; *Cogan* v. *Duffield* (1875), L. R. 20 Eq. 789; affirmed (1876), 2 Ch. D. 44, C. A.; *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Cook* v. *Fearn* (1878), 48 L. J. (CH.) 63; *Welman* v. *Welman* (1880), 15 Ch. D. 570, 579; *Gun* v. *M'Carthy* (1884), 13 L. R. Ir. 304, 309; *Tucker* v. *Bennett* (1887), 38 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 14; *Johnson* v. *Bragge*, [1901] 1 Ch. 28; and see *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475, 486, C. A.; see also title EQUITY, Vol. XIII., pp. 24, 25. As to the avoidance of instruments, see title DEEDS AND OTHER INSTRUMENTS, Vol. X. (plea of *non est factum*), pp. 404 *et seq.* The court will not rectify articles of association of a company on the ground of mistake (*Evans* v. *Chapman* (1902), 86 L. T. 381); see title COMPANIES, Vol. V., p. 208; as to rectification of the register, see *ibid.*, p. 153.

(*t*) *Murray* v. *Parker* (1854), 19 Beav. 305, 308, 309; and see, generally, notes (*q*)—(*o*), p. 13, *post*. As to voluntary deeds, see pp. 18, 19, *post*.

(*a*) *Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476, 481; see *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, 552, C. A.

(*b*) *Wright* v. *Goff* (1856), 22 Beav. 207, 214; *Killick* v. *Gray* (1882), 46 L. T. 583; *Hood of Avalon* (*Lady*) v. *Mackinnon*, *supra* (where, however, the appointment was rescinded and set aside); and see *Wilkinson* v. *Nelson* (1861), 9 W. R. 393 (but in this case all the parties interested in the trust funds admitted that the omission of a hotchpot clause from the appointment was due to a mistake). As to mistakes in wills, see title WILLS.

(*c*) Story, 13th ed., ss. 151, 152, 155; *Wake* v. *Harrop* (1862), 1 H. & C. 202, Ex. Ch., *per* CROMPTON, J., at p. 207.

(*d*) See *Wake* v. *Harrop*, *supra*, at p. 204; see also *Rob* v. *Butterwick* (1816), 2 Price, 190; *Walker* v. *Armstrong* (1856), 8 De G. M. & G. 531, C. A.; *Daniel* v. *Arkwright* (1864), 2 Hem. & M. 95. Sometimes the court has dealt with a deed's operation contrary to intention by making a declaration—as, for example, precluding the application of merger (*Gifford* (*Lord*) v. *Fitzhardinge* (*Lord*), [1899] 2 Ch. 32).

(*e*) *Wake* v. *Harrop*, *supra*, *per* WILLES, J., at p. 204. As to the liability of solicitors in respect of negligent or mistaken advice to their clients, see title SOLICITORS.

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position as that in which they would have stood if the error to be corrected had not been committed (*f*). Thus in a proper case the court will rectify a deed of settlement (*g*), an appointment (*h*), a lease (*i*), a bond (*k*), a bill of exchange (*l*), a schedule of quantities annexed to a contract to execute works for a gross sum, purporting to show how the gross sum is made up (*m*), a policy of insurance (*n*), and a declaration of shipment under a policy of marine insurance, even after a loss has become known (*o*).

Documents which may be rectified.

So, also, where a conveyance is executed purporting to convey a moiety only of real estate, the intention of the parties having been to pass the whole, the deed will be rectified so as to pass the whole (*p*), and where by common mistake the parcels in a conveyance include more land than was comprised in the written contract, in pursuance of which the conveyance was executed, the court will rectify the conveyance at the suit of the vendor (*q*). So, too, if a holder of shares has the same or a larger number of shares than those which he professes to transfer, and by mistake

Examples of mistake which may be rectified.

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(*f*) *Walker* v. *Armstrong* (1856), 8 De G. M. & G. 531, C. A., *per* TURNER, L.J., at p. 544; see *Barrow* v. *Barrow* (1854), 18 Beav. 529, 532.

(*g*) *Walsh* v. *Trevannion* (1848), 16 Sim. 178; *Ashurst* v. *Mill*, *Mill* v. *Ashurst* (1848), 7 Hare, 502; *Torre* v. *Torre* (1853), 1 Sm. & G. 518; *Smith* v. *Iliffe* (1875), L. R. 20 Eq. 666; *Cogan* v. *Duffield* (1875), L. R. 20 Eq. 789; affirmed (1876), 2 Ch. D. 44, C. A.; *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Welman* v. *Welman* (1880), 15 Ch. D. 570; *Fitzgerald* v. *Fitzgerald*, [1902] 1 I. R. 477; and see *Re Tringham's Trusts*, *Tringham* v. *Greenhill*, [1904] 2 Ch. 487, 495. In *Re De la Touche's Settlement* (1870), L. R. 10 Eq. 599, the court did not order the settlement to be rectified, but, prefacing the order with a declaration that it appeared that the words in queston were inserted by mistake, made an order for the distribution of the funds as if the words had not been inserted. As to settlements, generally, see title SETTLEMENTS.

(*h*) *Wilkinson* v. *Nelson* (1861), 9 W. R. 393 (by inserting a hotchpot clause).

(*i*) *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363; *Murray* v. *Parker* (1854), 19 Beav. 305; *Paget* v. *Marshall* (1884), 28 Ch. D. 255; *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, C. A.

(*k*) *Simpson* v. *Vaughan* (1740), 2 Atk. 31; see *Bishop* v. *Church* (1750), 2 Ves. Sen. 100; *Thomas* v. *Frazer* (1797), 3 Ves. 399; *Burn* v. *Burn* (1798), 3 Ves. 573; *Hodgkinson* v. *Wyatt* (1846), 9 Beav. 566.

(*l*) *Druiff* v. *Parker* (*Lord*) (1868), L. R. 5 Eq. 131.

(*m*) *Neill* v. *Midland Rail. Co.* (1869), 20 L. T. 864.

(*n*) See *Motteux* v. *London Assurance* (1739), 1 Atk. 545; *Collett* v. *Morrison* (1851), 9 Hare, 162; *Henkle* v. *Royal Exchange Assurance Co.* (1749), 1 Ves. Sen. 317; and see title INSURANCE, Vol. XVII., p. 403.

(*o*) *Stephens* v. *Australasian Insurance Co.* (1872), L. R. 8 C. P. 18; and see title INSURANCE, Vol. XVII., p. 362.

(*p*) *White* v. *White* (1872), L. R. 15 Eq. 247; and see *Leuty* v. *Hillas* (1858), 2 De G. & J. 110. Where, however, in a case between vendor and purchaser, the conveyance is in conformity with the written agreement, evidence is not, it seems, admissible to show that the agreement and the conveyance do not carry out the intention of the parties (*Thompson* v. *Hickman*, [1907] 1 Ch. 550; but see the remarks of NEVILLE, J., *ibid.*, at p. 561; *Ellis* v. *Hills etc.* (1892), 67 L. T. 287 pp. 21, 25, 26, *post*).

(*q*) *Beale* v. *Kyte*, [1907] 1 Ch. 564; see *Beaumont* v. *Bramley* (1822), Turn. & R. 41, 52; *Mortimer* v. *Shortall*, *supra* (a lease). A conveyance having been executed *primâ facie* governs the relations between the parties and evidences their contract, but if, for the purpose of showing a mistake in the conveyance, the prior written contract is to be looked at, then all the prior relevant transactions must be looked at and not the contract alone (*Ellis* v. *Hills etc.*, *supra*, where *Leuty* v. *Hillas*, *supra*, was distinguished, and where it was held that there was no mistake on the part of the purchaser, and, moreover, that none was satisfactorily proved even on the part of the vendor).

SECT. 1. Remedy by Rectification or Rescission.

the wrong distinguishing numbers are inserted in the transfer, that will not prevent the shares passing to the transferee. The figures may afterwards be rectified (*r*).

Cases where the rule does not apply.

**23.** The principles upon which the court acts in rectifying or rescinding instruments do not apply in cases in which the instrument is in accordance with the expressed intention of the parties, and has been prepared with full knowledge of their rights, but the parties have mistaken the way of giving effect to their own intentions correctly expressed in the deed (*s*).

The court will not rectify an instrument by inserting a term which the parties wished to be a term of the contract, but deliberately omitted in the erroneous belief that it was illegal (*t*), or that it was unnecessary to insert it (*u*); and the court will not make a settlement conformable with what is alleged would have been the contract between the parties if all the facts material to be known by them had been present to their minds (*a*).

Defence to claim for specific performance.

**24.** Mistake in the expression of a contract in writing may also be a ground for refusing specific performance (*b*).

## SECT. 2.—*Remedy by Construction.*

Relief by supplying or omitting words.

**25.** Mistakes in instruments are sometimes dealt with by rules of construction (*c*). Thus, if it is clear on the face of the instrument itself that words have been omitted or inserted by mistake or inadvertence, the words so omitted or inserted will be supplied or struck out by the court as a matter of construction for the purpose of giving effect to the whole of the document (*d*).

Documents treated as rectified.

Similarly, if there is a manifest clerical error in a document (*e*),

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(*r*) *Ind's Case* (1872), 7 Ch. App. 485; see title COMPANIES, Vol. V., p. 191.

(*s*) *Farr* v. *Sheriffe*, *Dykes* v. *Farr* (1845), 4 Hare, 512, *per* WIGRAM, V.-C., at p. 523.

(*t*) *Irnham* (*Lord*) v. *Child* (1781), 1 Bro. C. C. 92 (where upon settling the terms of the grant of an annuity it was agreed that the annuity should be redeemable, but both parties supposing that this appearing on the face of the transaction would make it usurious, it was agreed that the grant should not contain a clause of redemption, and it was accordingly drawn and executed without such a clause); see *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328, 332; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133, 142.

(*u*) *Worrall* v. *Jacob* (1817), 3 Mer. 256, 271 (where a power of revocation was omitted from a deed of appointment).

(*a*) *Barrow* v. *Barrow* (1854), 18 Beav. 529, 533.

(*b*) *Watson* v. *Marston* (1853), 4 De G. M. & G. 230, C. A.; see p. 24, *post*, and title SPECIFIC PERFORMANCE.

(*c*) Compare the cases where courts of equity have applied rules of construction to stipulations in written contracts as to penalties; see title EQUITY, Vol. XIII., p. 150; and as to time, see title CONTRACT, Vol. VII., p. 413.

(*d*) See title CONTRACT, Vol. VII., pp. 517 *et seq.*; see also *Read and Redman's Case* (1612), 10 Co. Rep. 134 a; *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40; *Kirk* v. *Unwin* (1851), 6 Exch. 908 (where the words "shall appoint," omitted by accident from an agreement to refer to arbitration, were supplied); *Re Daniel's Settlement Trusts* (1875), 1 Ch. D. 375, C. A. (where an omission was supplied in a deed of settlement); see also p. 20, *post*. The court will also eliminate a word or phrase in an Act of Parliament if no sensible meaning can be given to it (*Stone* v. *Yeovil Corporation* (1876), 1 C. P. D. 691, *per* BRETT, J., at p. 701, and *per* ARCHIBALD, J., at p. 705); and see titles STATUTES; WILLS.

(*e*) *Burchell* v. *Clark* (1876), 2 C. P. D. 88, C. A. (where, there being a manifest clerical error in a lease, it was held that the counterpart might be looked at

SECT. 2. Remedy by Construction.

or an obvious mistake as to date (*f*), or as to a name (*g*), the court will treat it as rectified; and, where property is settled subject to a mortgage, the amount of which is incorrectly stated in the settlement, the error being clearly proved as between the parties to the settlement, the court may treat the settlement as if the correct amount had been stated therein without putting the parties to the formality of a suit to rectify the error (*h*). Again, as regards covenants, however general the words may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words (*i*).

Operation of documents limited.

Rule as to mortgage securities.

**26.** In a mortgage not containing a recital of any intention to do more than make a mortgage, the court regards the instrument with an inclination to believe that nothing more was intended than that which was necessary to make the estate a security to the mortgagees for the money advanced (*k*). The mere form of the reservation of the equity of redemption is not itself sufficient to alter the previous title (*l*), or to induce the court to depart from this presumption (*m*). In such a case (where fraud is out of the question) the form is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage (*n*).

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and that on the true construction of the lease and counterpart taken together the words "ninety four" in the grant in the lease might be rejected, and the lease read as a grant for ninety-one and a quarter years only); *Matthews* v. *Smallwood*, [1910] 1 Ch. 777 (where, there being a patent ambiguity on the face of the lease, the word "covenant" was treated as a clerical error for the word "covenants," the counterpart being referred to for the purpose of explaining the ambiguity); *Elliott* v. *Freeman* (1863), 7 L. T. 715 (£1,000 in mistake for £100 in a bill of sale corrected); see also *Re De La Touche's Settlement* (1870), L. R. 10 Eq. 599 (note (*g*), p. 13, *ante*); *Re Ottley's Estate*, [1910] 1 I. R. 1 (where the words "in fee" were construed as "in fee simple"); *Re Alexander's Settlements*, *Jennings* v. *Alexander*, [1910] 2 Ch. 225; *Stedman* v. *Collett* (1854), 17 Beav. 608.

(*f*) *Fitch* v. *Jones* (1855), 5 E. & B. 238; *Hollingsworth* v. *White* (1862), 10 W. R. 619; *Lamb* v. *Bruce*, *Duggan* v. *Bruce*, *Cooper* v. *Bruce* (1876), 45 L. J. (Q. B.) 538.

(*g*) *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40; see *Breslauer* v. *Barwick* (1876), 36 L. T. 52.

(*h*) *Scholefield* v. *Lockwood* (No. 2) (1863), 32 Beav. 436.

(*i*) *Hesse* v. *Stevenson* (1803), 3 Bos. & P. 565, *per* Lord ALVANLEY, C.J., at p. 575.

(*k*) *Clark* v. *Burgh* (1845), 2 Coll. 221, 227.

(*l*) *Jackson* v. *Innes* (1819), 1 Bli. 104, 114, H. L.

(*m*) *Clark* v. *Burgh*, *supra*, at p. 227.

(*n*) *Jackson* v. *Innes*, *supra*, at p. 114; and see title MORTGAGE, p. 72, *post*. Therefore, in a case of this kind, where an estate belonging to a wife is mortgaged and the redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs (see *Jackson* v. *Innes*, *supra*, at p. 115; *Clark* v. *Burgh*, *supra*, at p. 227; *Re Betton's Trust Estates* (1871), L. R. 12 Eq. 553; *Re Marlborough (Duke)*, *Davis* v. *Whitehead*, [1894] 2 Ch. 133; title EQUITY, Vol. XIII., p. 75); so if a lease is made by a tenant for life under a power created by a settlement and the rent is reserved to the lessor and his heirs, these words are interpreted by the prior title and applied to such person as under the settlement may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happens to be such remainderman (*Jackson* v. *Innes*, *supra*, at p. 115); compare *Empson's Case* (1870), L. R. 9 Eq. 597 (where provisions in a mortgage, with regard to a mortgagor's membership of a mortgagee building society, were rejected).

# Part V.—Relief in Cases of Mistake.

## SECT. 1.—*When Relief will be Granted.*

SECT. 1.

**When Relief will be**

General rule as to proof.

**27.** In order that a mistake may be a ground for legal remedy the party who pleads it as a reason why the ordinary consequences of his act should not obtain must be able to show that his conduct has been determined by the mistake (*o*), and also that the mistake is of such a character as to affect the substance of the transaction (*a*).

Mistake due to ignorance.

Misconception.

Forgetfulness.

**28.** The court will grant relief when the mistake was due to ignorance (*b*), notwithstanding that the party alleging the mistake had the means of knowing the facts (*c*). The court will also grant relief when the mistake was due to misconception (*d*), and in some cases when it was due to forgetfulness (*e*).

Wilful ignorance.

But the court will not interfere in favour of a man who is wilfully ignorant of what he ought to know, or, in other words, who commits a mistake without exercising the due diligence which the law would expect of a reasonable and careful person (*f*), nor will relief be granted when the ignorance was due to the negligence of the party's legal adviser (*g*).

Effect of acquiescence

When a common mistake has been acted upon for a long period, one of the parties may be deprived of any right to relief by his acquiescence (*h*).

(*o*) *Carpmael* v. *Powis* (1846), 10 Beav. 36, 43 (mistake of fact); *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76, C. A. (mistake of law); see *Trigge* v. *Lavallée* (1862), 15 Moo. P. C. C. 270, 298 (where errors both as to matters of law and fact were alleged); as to equitable relief, see also title EQUITY, Vol. XIII., pp. 22 *et seq.*, and as to relief against specific performance of contracts, see p. 24, *post*, and title SPECIFIC PERFORMANCE.

(*a*) *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108, 118, 122; see *Kennedy* v. *Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587 *et seq.*; *McKenzie* v. *Hesketh* (1877), 7 Ch. D. 675, 682.

(*b*) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; *East India Co.* v. *Donald* (1804), 9 Ves. 275; *Hore* v. *Becker* (1842), 12 Sim. 465; *Bell* v. *Gardiner* (1842), 4 Man. & G. 11.

(*c*) *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Bell* v. *Gardiner*, *supra*; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 952; *Willmott* v. *Barber* (1880), 15 Ch. D. 96; compare *New Brunswick and Canada Railway and Land Co.* v. *Conybeare* (1862), 9 H. L. Cas. 711, *per* Lord CHELMSFORD, at p. 742, and see p. 16, *ante*. Non-compliance with statutory requirements with respect to a company prospectus by ignorance may be excused; see title COMPANIES, Vol. V., p. 125.

(*d*) *Strickland* v. *Turner* (1852), 7 Exch. 208; *Colyer* v. *Clay* (1843), 7 Beav. 188; *Cochrane* v. *Willis* (1865), 1 Ch. App. 58; *Scott* v. *Coulson*, [1903] 2 Ch. 249, C. A.; *Harryman* v. *Collins* (1854), 18 Jur. 501.

(*e*) *Kelly* v. *Solari*, *supra*; *Lucas* v. *Worswick* (1833), 1 Mood. & R. 293; *Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476; see *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56, 65; compare *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417, C. A.; *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Q. B. 835, C. A. (where relief was refused); and see p. 30, *post*.

(*f*) *Beaufort* (*Duke*) v. *Neeld* (1845), 12 Cl. & Fin. 248, 280, H. L.; *Campbell* v. *Ingilby* (1857), 1 De G. & J. 393, 403, 404, C. A.; *Leuty* v. *Hillas* (1858), 2 De G. & J. 110.

(*g*) *Urmston* v. *Pate* (1794), cited 3 Ves. 235; *Thomas* v. *Powell* (1794), 2 Cox, Eq. Cas. 394; *Barrow* v. *Isaacs & Son*, *supra*.

(*h*) *Re Hulkes*, *Powell* v. *Hulkes* (1886), 33 Ch. D. 552, 561; see *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, 357, C. A.; and see title ESTOPPEL, Vol. XIII., p. 168.

SECT. 1. When Relief will be Granted.

**29.** The court may refuse to rescind or rectify an instrument where the result would be to affect prejudicially the interest which third parties have acquired on the assumption that the instrument as it stood was good. The court may, therefore, refuse to interfere where interference would prejudice a purchaser for full value (*i*) or an incumbrancer (*k*), or where it is impossible to restore the parties to substantially their original position (*l*), though relief would not be denied in a proper case where it is merely difficult to restore the parties to their original condition (*m*).

No relief when third parties affected and original position cannot be restored.

## SECT. 2.—*Different Kinds of Relief.*

### SUB-SECT. 1.—*In General.*

Classification of kinds of relief.

**30.** The relief to be granted in case of mistake may be:—(1) rescission (*n*), (2) rectification (*o*), (3) application of the rules of construction of documents (*p*), (4) refusal of specific performance or of damages for breach of contract (*q*), (5) recovery of money paid under mistake (*r*), or (6) opening of settled accounts

### SUB-SECT. 2.—*Rescission.*

Contract made under mutual mistake or understood in different terms.

**31.** Where two parties contract (*t*) under a mutual mistake of fact, the agreement is liable to be set aside at the suit of either party as having proceeded upon a common mistake (*u*), but in determining whether relief should be given, the nature of the mistake and the cause of it must be considered (*x*). So, also, where the parties understand the contract in different senses, it may be set aside (*a*).

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(*i*) *Malden* v. *Menill* (1737), 2 Atk. 8.

(*k*) *Blackie* v. *Clark*, *Cock* v. *Clark* (1852), 15 Beav. 595; *Ellis* v. *Hills etc.* (1892), 67 L. T. 287, 290.

(*l*) *Re Saxon Life Assurance Society* (1862), 2 John. & H. 408; and see *Bateman* v. *Boynton* (1866), 1 Ch. App. 359, 367.

(*m*) *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223, *per* Lord CHELMSFORD, at p. 232; and compare pp. 30, 31, *ante*.

(*n*) See the text, *infra*.

(*o*) See pp. 20 *et seq.*, *post*.

(*p*) See p. 14, *ante*.

(*q*) See p. 14, *ante*, p. 24, *post*, and title SPECIFIC PERFORMANCE.

(*r*) See pp. 29 *et seq.*, *post*.

(*s*) See pp. 29 *et seq.*, *post*.

(*t*) As to compromises, see p. 10, *ante*.

(*u*) *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149 (where an owner of property agreed with another to take it from the latter at a rent, both parties being under a misapprehension that the property belonged to the latter whereas in fact it belonged to the former); *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223 (where, however, the plaintiff's action to rescind an agreement to exchange properties was dismissed on other grounds); *Lansdowne* v. *Lansdowne* (1730), cited 2 Jac. & W. 205 (where a bond and indenture obtained by mistake and misrepresentation of the law common to both parties were cancelled); *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126 (where the plaintiff bought from the defendant lands which in fact belonged to himself); see also *Jones* v. *Clifford* (1876), 3 Ch. D. 779; *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, 109, where *Bingham* v. *Bingham*, *supra*, is referred to; *Re Saxon Life Assurance Society* (1862), 2 John. & H. 408, 412; affirmed 1 De G. J. & Sm. 29, C. A. (where a creditor, who had given up a security in a selling company in exchange for a substituted security in the purchasing company was granted relief). See also pp. 7, 9, *ante*.

(*x*) *Beauchamp* (*Earl*) v. *Winn*, *supra*.

(*a*) *Calverley* v. *Williams*, *Williams* v. *Calverley* (1790), 1 Ves 210, referred

SECT. 2. Different Kinds of

Where mistake is unilateral only.

**32.** Where the mistake is unilateral only, rescission may be granted if the mistake is of a fundamental character (*b*), but not when it is as to a collateral term only (*c*). The mistake must also be as to a fact, for, as a general rule, the mistake of one party only as to the meaning of the words used in a contract does not afford a ground for relief (*d*) unless it can be shown that the mistake has been induced, however innocently (*e*), by some act on the part of the other party (*f*).

Unilateral mistake where parties in unequal position.

**33.** The court will sometimes intervene and grant relief in cases in which one party to a transaction is mistaken as to his rights and such mistake is perceived by the other party thereto and taken advantage of by him (*g*), especially when the transaction is between a parent and a child who has just come of age (*h*), or when the person labouring under the mistake is in pecuniary difficulties (*i*). Liability under an instrument which has been delivered up to be cancelled may be enforced, when it can be shown that the instrument was delivered up under the ignorance of one party and with the knowledge of the other party that the liability was enforceable (*k*).

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to in *Douglas* v. *Baynes*, [1908] A. C. 477, 485, P. C.; compare *Fowler* v. *Scottish Equitable Life Insurance Society* (1858), 4 Jur. (N. S.) 1169; *Haymen* v. *Gover* (1872), 25 L. T. 903; see also p. 10, *ante*.

(*b*) *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363, 372; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250, 265; *Paget* v. *Marshall* (1884), 28 Ch. D. 255, 263; *Gun* v. *M'Carthy* (1884), 13 L. R. Ir. 304; and see *Ellis* v. *Hills &c.* (1892), 67 L. T. 287, 289; *Goddard* v. *Jeffreys* (1881), 51 L. J. (CH.) 57. See also pp. 9, 10, *ante*.

(*c*) *Scott* v. *Littledale* (1858), 8 E. & B. 815; see also *North* v. *Percival*, [1898] 2 Ch. 128.

(*d*) See pp. 5, 7, *ante*.

(*e*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, C. A.

(*f*) See *Wilding* v. *Sanderson*, *supra*; *Jennings* v. *Jennings*, [1898] 1 Ch. 378, *per* STIRLING, J., at p. 390; compare *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597; see also title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.* The court will also sometimes give the defendant the option to accept rectification in accordance with the plaintiff's understanding of the contract (*Paget* v. *Marshall* (1884), 28 Ch. D. 255); see p. 20, *post*.

(*g*) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400 (where an agreement as to the distribution of the personal estate of an intestate made under a misconception of right was set aside); *M'Carthy* v. *Decaix* (1831), 2 Russ. & M. 614 (which Lord BROUGHAM, L.C., at p. 622, held to be directly within the principle laid down in *Cocking* v. *Pratt*, *supra*); *Sturge* v. *Sturge* (1849), 12 Beav. 229 (where a conveyance by an eldest son to his brothers of his interest in an estate for an inadequate consideration was set aside on the ground of (*inter alia*) his ignorance of his rights and of the absence of a full and free disclosure of all material facts known to the defendants); *Coward* v. *Hughes* (1855), 1 K. & J. 443, 449 (where a widow, shortly after her husband's death, believing she was liable on a promissory note signed by her late husband and herself, signed a new promissory note, and it was held that such note was invalid); *Broughton* v. *Hutt* (1858), 3 De G. & J. 501, C. A. (where the execution of a deed of indemnity executed under a mistake of fact and law was cancelled); see *Pusey* v. *Desbouvrie* (1734), 3 P. Wms. 315; *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 304 (cases of releases by women in ignorance of their rights); see also *Beauchamp* (*Earl*) v. *Winn* (1873), L. R. 6 H. L. 223, 233.

(*h*) *Cocking* v. *Pratt*, *supra*; see *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76, 90, C. A.; *Re Garnett*, *Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, 10, 17, C. A.

(*i*) *Sturge* v. *Sturge*, *supra*; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.*

(*k*) *East India Co.* v. *Donald* (1804), 9 Ves. 275.

SECT. 2. Different Kinds of Relief.

Releases.

**34.** Where a party executes a release in ignorance of his right, especially if his right is concealed from him by the person to whom the release is made, the release may be set aside (*l*). So a release to a trustee may be set aside after the lapse of twenty years and after the death of the trustee on evidence that it was executed in error, and in such case it is unnecessary to prove fraud (*m*).

Rescission after conveyance.

**35.** After conveyance, rescission cannot, in the absence of fraud, be obtained on the ground of unilateral mistake (*n*). But when a mutual mistake of a fundamental character is proved, the court may, in a proper case, grant rescission even after conveyance (*o*). The general rule, however, is that in the absence of such a mutual error (*p*), after the conveyance has been executed, a purchaser has no remedy by way of rescission or compensation in respect of any defects, either in the title to or quantity or quality of the estate, which are not covered by the vendor's covenant (*q*), or by collateral warranty as to the quality of the subject-matter of the transaction (*r*). Thus, where a tenant for life sells property, and after conveyance it is found that the property is subject to a reversionary lease granted by a predecessor in title, of which all parties were ignorant, that fact will not afford a ground for rescission (*s*).

Voluntary instruments.

**36.** The court will, in a proper case, set aside a voluntary deed executed for the purpose of carrying out trusts declared by parol, but which is wholly inconsistent with those trusts (*a*), or a deed which does not carry out the full arrangement, even after the

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(*l*) *Cann* v. *Cann* (1721), 1 P. Wms. 723, 727; *Pusey* v. *Desbouvrie* (1734), 3 P. Wms. 315. As to releases, see titles CONTRACT, Vol. VII., p. 454; TRUSTS AND TRUSTEES.

(*m*) *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, 10, 17, C. A.; see also *Millar* v. *Craig* (1843), 6 Beav. 433; *Skilbeck* v. *Hilton* (1866), L. R. 2 Eq. 587.

(*n*) *May* v. *Platt*, [1900] 1 Ch. 616, 623.

(*o*) *Debenham* v. *Sawbridge*, [1901] 2 Ch. 98, *per* BYRNE, J., at p. 109; *Scott* v. *Coulson*, [1903] 2 Ch. 249, C. A.; see *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126, approved of in *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, by Lord CRANWORTH, at p. 164, and in *Jones* v. *Clifford* (1876), 3 Ch. D. 779, by HALL, V.-C., at p. 791; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, *per* Lord SELBORNE, L.C., at p. 937. As to the case of fraud, see *ibid.*; and see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 741.

(*p*) Or fraud; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 741.

(*q*) See *M'Culloch* v. *Gregory* (1855), 1 K. & J. 286, *per* PAGE WOOD, V.-C., at p. 291; *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334; *Besley* v. *Besley* (1878), 9 Ch. D. 103; *Allen* v. *Richardson* (1879), 13 Ch. D. 524; *Brett* v. *Clowser* (1880), 5 C. P. D. 376; *Brownlie* v. *Campbell*, *supra*, at pp. 925, 937, 949; *Clayton* v. *Leech* (1889), 41 Ch. D. 103, C. A.; *Re Tyrell*, *Tyrell* v. *Woodhouse* (1900), 82 L. T. 675; *Debenham* v. *Sawbridge*, *supra*; *Angel* v. *Jay*, [1911] 1 K. B. 666. *Re Turner and Skelton* (1879), 13 Ch. D. 130, dissented from by MALINS, V.-C., in *Allen* v. *Richardson*, *supra*, was an entirely different case. As to compensation under express conditions of sale, see title SALE OF LAND.

(*r*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.; see *Brownlie* v. *Campbell*, *supra*.

(*s*) *Re Tyrell*, *Tyrell* v. *Woodhouse*, *supra*; see *Debenham* v. *Sawbridge*, *supra* (where a purchaser discovered after completion that a portion of the property sold belonged to a third party, to acquire a title to which he had to pay £300, and it was held that, even assuming that there had been a common mistake and that there need not be a total failure of consideration to justify rescission after conveyance, the error made was not sufficient to justify rescission).

(*a*) *Lister* v. *Hodgson* (1867), L. R. 4 Eq. 30.

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death of the grantee (*b*) or of both the donor and donee (*c*). So, also, a voluntary gift made under a mistake of fact may be set aside in a proper case (*d*). The court, moreover, has power to rectify a deed by setting aside a part of it only and allowing the remainder to stand, if the grantor agrees that such part of the deed ought to stand (*e*). But mistakes which the court might rectify, if so desired by the donor, may not be sufficiently fundamental to enable the donor to set the whole deed aside as failing in substance to carry out his intention (*f*).

Burden of proof.

Where a voluntary deed is impeached, the burden of supporting it does not necessarily rest upon those who set it up (*g*).

SUB-SECT. 3.—*Rectification.*

Relief in cases of mutual mistake only.

**37.** Rectification can only be had if the mistake is mutual or common to all parties to the instrument (*h*). Where the mistake is unilateral only, the proper remedy, if any, is rescission, not rectification (*i*). But the court may, it seems, in special cases put the defendant to the option of either having the whole transaction set aside or of submitting to have the instrument rectified and altered according to the plaintiff's prayer (*k*).

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(*b*) *Hughes* v. *Seanor* (1870), 18 W. R. 1122.

(*c*) *Phillipson* v. *Kerry* (1863), 32 Beav. 628; see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 106.

(*d*) *Ellis* v. *Ellis* (1909), 26 T. L. R. 166 (gift by husband to wife in ignorance that it would be caught by wife's covenant in her marriage settlement to settle after-acquired property set aside); see title GIFTS, Vol. XV., p. 421.

(*e*) *Turner* v. *Collins* (1871), 7 Ch. App. 329, 342. As to rectifying voluntary instruments, see p. 23, *post*.

(*f*) *Ogilvie* v. *Littleboy*, [1897] W. N. 53, C. A.

(*g*) *Henry* v. *Armstrong* (1881), 18 Ch. D. 668; see *Tucker* v. *Bennett* (1887), 38 Ch. D. 1, 9, C. A.

(*h*) *Rooke* v. *Kensington* (*Lord*) (1856), 2 K. & J. 753; *Hills* v. *Rowland* (1853), 4 De G. M. & G. 430, 436, C. A.; *Thompson* v. *Whitmore* (1860), 1 John. & H. 268; *Sells* v. *Sells* (1860), 1 Drew. & Sm. 42; *Bradford* (*Earl*) v. *Romney* (*Earl*) (1862), 30 Beav. 431, 438; *Eaton* v. *Bennett* (1865), 34 Beav. 196; *Re Walsh's Estate* (1867), 15 W. R. 1115, 1117; *Paget* v. *Marshall* (1884), 28 Ch. D. 255; *May* v. *Platt*, [1900] 1 Ch. 616, 623; see the exception in the case of a marriage settlement, p. 23, *post*.

(*i*) See p. 17, *ante*.

(*k*) *Garrard* v. *Frankel* (1862), 30 Beav. 445, 451, 458; *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1; *Paget* v. *Marshall*, *supra*; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427, which last case is stated, in *Beale* v. *Kyte*, [1907] 1 Ch. 564, to be unintelligible; see also title MISREPRESENTATION AND FRAUD, Vol. XX., p. 741. According to *May* v. *Platt*, *supra*, *per* FARWELL, J., at p. 623, *Garrard* v. *Frankel*, *supra*, *Harris* v. *Pepperell*, *supra*, and *Paget* v. *Marshall*, *supra*, can only be supported on the ground of fraud, being cases of rescission after conveyance; and it seems from *May* v. *Platt*, *supra*, that vendors and purchasers of land cannot, after conveyance, be put to their election to rescind or accept rectification on the ground of unilateral mistake in the absence of fraud. *Garrard* v. *Frankel*, *supra*, *Harris* v. *Pepperell*, *supra*, and *Paget* v. *Marshall*, *supra*, are treated as anomalous by Sir FREDERICK POLLOCK (see Pollock, Principles of Contract, 8th ed., pp. 506, 552), who thus states their principle: "The court will not hold the plaintiff bound by the defendant's acceptance of an offer which did not express the plaintiff's real intention, and which the defendant could not in the circumstances have reasonably supposed to express it; nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not have consented to accept: but will put the parties in the same position as if the original offer were still open." These decisions are also criticised unfavourably by Mr. Cyprian

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**38**. It seems that the court is less willing to rectify an instrument where the party seeking relief is the person who prepared and perfected it (*l*), but in a proper case the court will not, on this account, refuse to grant relief (*m*), though it may refuse to give him his costs (*n*).

Relief to party who prepared the instrument.

**39**. It is always necessary to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument (*o*). Thus an instrument as to which no contract has been entered into will not be rectified so as to prevent it having a legal effect which was not contemplated by the parties (*p*).

Necessity for contract leading to instrument to be rectified.

So, also, there cannot be rectification where one of the contracting parties to the instrument never heard of what is said to be the real agreement (*q*), or where the parties were mutually mistaken as to a matter which formed the basis of the deed and the agreement on which it was founded (*r*).

Although where a written contract is followed by a conveyance the conveyance may, on the ground of common mistake, be rectified so as to correspond with the contract (*s*), yet when the two documents as executed correspond, common mistake will not, it seems, be sufficient ground for rectifying both (*a*).

Contract and conveyance cannot both be rectified.

**40**. To justify the court in correcting a mistake in an instrument the evidence must be clear and unambiguous, not only that

Necessity for continuity of intention.

Williams (see Williams, Law of Vendor and Purchaser, 2nd ed., pp. 794 *et seq.* See also *Gun* v. *M'Carthy* (1884), 13 L. R. Ir. 304, 311.

(*l*) *Collett* v. *Morrison* (1851), 9 Hare, 162, 176, 177; see *Ex parte Wright* (1812), 19 Ves. 255.

(*m*) *Ball* v. *Storie* (1823), 1 Sim. & St. 210; see *Fowler* v. *Scottish Equitable Life Insurance Society* (1858), 4 Jur. (N. S.) 1169.

(*n*) *Murray* v. *Parker* (1854), 19 Beav. 305.

(*o*) *Mackenzie* v. *Coulson* (1869), L. R. 8 Eq. 368, 375 (the actual decision in this case seems no longer good law; see title INSURANCE, Vol. XVII., p. 404); and see p. 12, *ante*.

(*p*) *Elwes* v. *Elwes* (1861), 3 De G. F. & J. 667, 682, C. A. (where a charge was inadvertently excluded on a resettlement).

(*q*) *Fowler* v. *Scottish Equitable Life Insurance Society*, *supra*. In this case the original agreement for a policy was made by the plaintiffs with an agent, but different terms were sent to the principals, and the court declared that the policy in question was not binding on either the plaintiffs or defendants (the principals), and ordered the defendants to repay the premiums and the plaintiffs thereupon to deliver up the policy. Compare *Mackenzie* v. *Coulson*, *supra*, at p. 375; *Haymen* v. *Gover* (1872), 25 L. T. 903.

(*r*) *Carpmael* v. *Powis* (1846), 10 Beav. 36 (but the agreement and deed will be set aside).

(*s*) *Beale* v. *Kyte*, [1907] 1 Ch. 564.

(*a*) *Davies* v. *Fitton* (1842), 2 Dr. & War. 225; *May* v. *Platt*, [1900] 1 Ch. 616; *Thompson* v. *Hickman*, [1907] 1 Ch. 550, where NEVILLE, J., at p. 561, said that the law was as stated in the text, but that he had great difficulty in following the reasoning on which the cases appear to be based. The above decisions were founded on the old equitable rule that the court would not grant specific performance of a written contract with parol variation; but *quære* whether that rule should still prevail since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); see *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Shrewsbury and Talbot Cab and Noiseless Tyre Co.* v. *Shaw* (1890), 89 L. T. Jo. 274; title SPECIFIC PERFORMANCE; and note (*l*), p. 26, *post*.

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a mistake has been made (*b*), but that the alleged intention, to which it is desired that the instrument should be made conformable, continued concurrently in the minds of all the parties down to the time of the execution of the instrument (*c*). Thus the court will not add to a settlement a power which the plaintiff states that he intended to be added, but to his knowledge was not contained therein when he executed it (*d*); nor will the court supply a provision which the evidence shows was intentionally omitted (*e*).

Necessity to prove correct form.

**41.** The party seeking to rectify must also be able to show precisely the form to which the deed ought to be altered (*f*).

Joint contracts.

**42.** There is no settled rule in equity that every contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several so as to be binding on the estate of a deceased covenantor (*g*). In such case, therefore, in the absence of any evidence that a deed (*h*) or cheque (*i*) was drawn in a form different from that which was the intention of the parties, or that there was any agreement for a covenant of a different sort, there is no ground for imputing a mistake and rectifying the instrument, so as to make it joint and several (*k*). If, however, there is a reasonable presumption that the instrument was made joint instead of joint and several either through fraud or for want of skill (*l*), or, although intended to be joint and several,

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(*b*) *Beaumont* v. *Bramley* (1822), Turn. & R. 41, 50; *Rooke* v. *Kensington* (*Lord*) (1856), 2 K. & J. 753; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250; *Rake* v. *Hooper* (1900), 83 L. T. 669; see *Mackenzie* v. *Coulson* (1869), L. R. 8 Eq. 368, 369; *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363, 373; *Parsons* v. *Bignold* (1843), 13 Sim. 518 (alleged mistake in declaration, upon the footing of which a policy of insurance was granted).

(*c*) *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328, 333, 334; *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (1784), 1 Bro. C. C. 338, 341; *Breadalbane* (*Marquis*) v. *Chandos* (*Marquis*) (1837), 2 My. & Cr. 711, 739, 740; *Exeter* (*Marquis*) v. *Exeter* (*Marchioness*) (1838), 3 My. & Cr. 321; *Hills* v. *Rowland* (1853), 4 De G. M. & G. 430, C. A.; *Rooke* v. *Kensington* (*Lord*), *supra*, at pp. 763, 764; *Wright* v. *Goff* (1856), 22 Beav. 207, 214; *Fowler* v. *Fowler*, *supra*, at pp. 264, 273; *Sells* v. *Sells* (1860), 1 Drew. & Sm. 42; *Bentley* v. *Mackay* (1862), 4 De G. F. & J. 279, C. A.; *Bradford* (*Earl*) v. *Romney* (*Earl*) (1862), 30 Beav. 431; *Re Walsh's Estate* (1867), 15 W. R. 1115, 1117; *Rake* v. *Hooper*, *supra*; and see *Beaumont* v. *Bramley*, *supra*, at p. 53. *Quære*, however, whether this rule applies or ought to be applied where the purpose of the ratification is to set aside the deed *pro tanto* as against the party alleging the mistake (*Bentley* v. *Mackay*, *supra*, *per* TURNER, L.J., at p. 287).

(*d*) *Harbidge* v. *Wogan* (1846), 5 Hare, 258.

(*e*) *Rake* v. *Hooper*, *supra*.

(*f*) *Fowler* v. *Fowler*, *supra*; *Bradford* (*Earl*) v. *Romney* (*Earl*), *supra*, at p. 439; see *Sutherland* (*Duke*) v. *Heathcote*, [1892] 1 Ch. 475, 486, C. A. For if the parties took different views of what was intended there would be no contract between them which could be carried into effect by rectifying the instrument (*Bentley* v. *Mackay*, *supra*, *per* TURNER, L.J., at pp. 286, 287).

(*g*) *Sumner* v. *Powell* (1816), 2 Mer. 30, 36; affirmed on appeal (1823), Turn. & R. 423; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; compare, *contra*, *Thorpe* v. *Jackson* (1837), 2 Y. & C. (EX.) 553, to the effect that every joint loan is in equity to be treated as joint and several; and see titles CONTRACT, Vol. VII., p. 522; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 484 *et seq.*

(*h*) *Sumner* v. *Powell*, *supra*.

(*i*) *Other* v. *Iveson* (1855), 3 Drew. 177, 181.

(*k*) See *Rawstone* v. *Parr* (1827), 3 Russ. 539.

(*l*) *Simpson* v. *Vaughan* (1740), 2 Atk. 31, 33 (a bond).

was by mistake drawn in the form of a joint liability (*m*), relief may be granted on equitable grounds, but the court will not rectify joint covenants in a lease by making them joint and several (*n*).

Marriage settlements.

**43.** In the case of a marriage settlement where a post-nuptial settlement differs from articles entered into before marriage, the court would apparently always set up the articles (*o*); and so also, when an ante-nuptial settlement purports to be in pursuance of articles entered into before marriage and there is any variance, no evidence beyond the articles is necessary in order to have the settlement rectified. And even when the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence showing that the discrepancy has arisen from mistake, the court will reform the settlement and make it conformable to the real intention of the parties (*p*). Moreover, the court looks at the intention rather than the actual words of the articles, and where a post-nuptial (*q*) or an ante-nuptial (*r*) settlement purports to be made in pursuance of ante-nuptial articles, then though the limitations of the settlement may agree with the words of the articles, still if it does not carry out the intent, the court will reform it.

Where the husband undertakes the duty of having the marriage settlement prepared, but does not carry out the intention of the wife, the settlement may in some cases be rectified so as to accord with that intention (*s*).

Voluntary settlements.

**44.** A voluntary settlement as well as a settlement for value may be reformed or rectified in a proper case (*t*), but a voluntary deed which fails to carry out the intention of the parties can only be modified to suit former intentions if the donor consents to make a new and distinct instrument (*a*). A grantor may make a fresh deed and, with the consent of the grantee, cancel the old one, but he cannot be compelled to alter the grant, and if the grantor contests it, the deed must stand or fall in its actual condition without

(*m*) *Other* v. *Iveson* (1855), 3 Drew. 177, 181. As to partnership debts, see *Sumner* v. *Powell* (1816), 2 Mer. 30, 37; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 517; and see, generally, title PARTNERSHIP.

(*n*) *Clarke* v. *Bickers* (1845), 14 Sim. 639.

(*o*) *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558, 567.

(*p*) *Ibid.*, at p. 568; *King* v. *King-Harman* (1873), 7 I. R. Eq. 446. This was not so formerly. The doctrine of the court to be collected from the earlier cases was that when the articles and settlement were both before marriage the court would not interfere unless the settlement was expressed to be made in pursuance of the articles, for without such a recital the court supposed that the parties had altered their intention (*Bold* v. *Hutchinson*, *supra*, *per* Lord CRANWORTH, L.C., at pp. 566, 567, 568), but the later authorities have put the matter on the true footing, *i.e.*, that if it is perfectly palpable that there has been a mistake on which the settlement has been made, the court will admit evidence to correct it (*ibid.*, at p. 569).

(*q*) *Cogan* v. *Duffield* (1875), L. R. 20 Eq. 789; affirmed (1876), 2 Ch. D. 44, 49, C. A.; and see *Herring-Cooper* v. *Herring-Cooper*, [1905] 1 I. R. 465, 471.

(*r*) *Smith* v. *Iliffe* (1875), L. R. 20 Eq. 666.

(*s*) *Clark* v. *Girdwood* (1877), 7 Ch. D. 9, C. A.; *Lovesy* v. *Smith* (1880), 15 Ch. D. 655.

(*t*) *Bonhote* v. *Henderson*, [1895] 1 Ch. 742; affirmed, [1895] 2 Ch. 202, C. A.; as to the revocation and avoidance of gifts, see also title GIFTS, Vol. XV., p. 421.

(*a*) *Phillipson* v. *Kerry* (1863), 32 Beav. 628.

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alteration (*b*). No amount of evidence, however conclusive, proving that the grantor did intend otherwise than as expressed in the deed, will justify the court in compelling him to introduce a clause into the deed which he does not choose to introduce, although he might originally have wished to have done so (*c*).

Rectification at suit of settlor.

On the other hand, the court will hesitate to rectify a voluntary settlement at the instance of the settlor merely on his own evidence as to his intention, unsupported by other evidence such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognised precedents and what the settlor might reasonably have intended at the time (*d*).

Rectification at suit of volunteer.

A volunteer is, however, entitled to take proceedings to have an error in a settlement rectified (*e*), even though the effect would be to carry back the settled fund to the original settlor (*f*), but the court will only act upon the clearest and most certain demonstration of error and of actual intention (*g*).

Settlements under order of court or enrolled.

**45.** It is no objection to the exercise by the court of its jurisdiction that a settlement was made in pursuance of an order of the court (*h*), or that a resettlement has been enrolled (*i*) as a disentailing assurance (*k*).

Usual clauses may be struck out.

Nor is the fact that a provision, such as a clause restraining anticipation, is a most proper one, and one usually inserted in marriage settlements directed by the court, a ground for refusing to rectify the settlement by striking such provision out, when it is shown that its insertion defeats the intention (*l*).

SUB-SECT. 4.—*Defence to an Action for Specific Performance or Damages.*

Nature of mistake which may be a ground of defence to action for specific performance.

**46.** Mistake may be a ground for refusing specific performance of a contract, either where the mistake is in the expression of the contract in writing (*m*), or where the mistake is one of fact and made

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(*b*) *Broun* v. *Kennedy* (1863), 33 Beav. 133, *per* ROMILLY, M.R., at p. 147; see *Phillipson* v. *Kerry* (1863), 32 Beav. 628, 637, 638.

(*c*) *Lister* v. *Hodgson* (1867), L. R. 4 Eq. 30, 34; the reason being that specific performance of an intention to make a voluntary deed cannot be enforced (*ibid.*, pp. 34, 36). It seems, however, that if a man executes a voluntary deed declaring certain trusts, and dies, and it is afterwards proved from the instrument or otherwise that beyond all doubt the deed was not prepared in the exact manner which he intended, the deed may be reformed and those particular provisions, necessary to carry his intention into effect, introduced (*ibid.*, at p. 34).

(*d*) *Bonhote* v. *Henderson*, [1895] 1 Ch. 742; affirmed, [1895] 2 Ch. 202, C. A.; and see p. 19, *ante*. A voluntary settlement is not voidable by the settlor merely because it does not contain a power of revocation (*Henry* v. *Armstrong* (1881), 18 Ch. D. 668). See *James* v. *Couchman* (1885), 29 Ch. D. 212 (where a settlement was rectified).

(*e*) *Thompson* v. *Whitmore* (1860), 1 John. & H. 268, 273; *Weir* v. *Van Tromp* (1900), 16 T. L. R. 531.

(*f*) *Thompson* v. *Whitmore*, *supra*.

(*g*) *Weir* v. *Van Tromp*, *supra*, where BYRNE, J., stated that it was not immaterial to observe that he had not been referred to any case where judgment had been given in favour of reforming a voluntary settlement at the instance of a volunteer.

(*h*) *Smith* v. *Iliffe* (1875), L. R. 20 Eq. 666.

(*i*) Under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74); see title REAL PROPERTY AND CHATTELS REAL.

(*k*) *Hall-Dare* v. *Hall-Dare* (1885), 31 Ch. D. 251, C. A.

(*l*) *Torre* v. *Torre* (1853), 1 Sm. & G. 518.

(*m*) *Watson* v. *Marston* (1853), 4 De G. M. & G. 230 C. A.

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by the defendant only (*n*). In a case of the latter kind, however, there must have been reasonable excuse for the mistake (*o*), and the plaintiff may be given the option either of having a decree for specific performance in accordance with the view of the defendant or of having his action dismissed (*p*).

Alternative to dismissal of action.

**47.** Mistake may also be a good defence to an action for damages for breach of contract (*q*). But where the plaintiff has been deceived, by the reasonable reading of the contract, as to what was the defendant's meaning, it is no defence for the latter in an action for damages for breach of contract to set up that he meant something different to such reasonable reading (*r*). Even when specific performance is refused on the ground of mistake the court may give the same damages as would, under the old practice, have been given in a court of law (*s*).

Mistake as a defence to an action for damages.

## SECT. 3.—*Evidence upon which Relief will be Granted.*

**48.** As a general rule, parol evidence is not admissible to show that a written contract, interpreted according to the ordinary rules of construction, does not express the true and complete intention of the parties (*t*).

Parol evidence, as a rule, inadmissible.

Thus, at common law, if an agreement is unambiguous, parol evidence as to the intention of the parties with a view to showing that some term or word has been inserted or omitted by mistake is inadmissible (*a*), though parol evidence may be received for the purpose of explaining what the parties to an agreement meant when there is a latent ambiguity (*b*) in the agreement (*c*).

Common law rule.

**49.** In equity, however, parol evidence is admissible to make out a case for rectification or rescission of an instrument (*d*), or to show that what purports to be an agreement is not in fact an agreement at all, as, for example, where it has been signed by mistake (*e*). In

Equitable rule.

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(*n*) *Preston* v. *Luck* (1884), 27 Ch. D. 497, 506, C. A.; see *Manser* v. *Back* (1848), 6 Hare, 443; pp. 5, note (*o*), 7, 10, *ante*; the text, *infra*; and title SPECIFIC PERFORMANCE.

(*o*) *Swaisland* v. *Dearsley* (1861), 29 Beav. 430, 433; *Tamplin* v. *James* (1880), 15 Ch. D. 215, 217, 221, C. A.; see p. 7, *ante*.

(*p*) *Baskcomb* v. *Beckwith* (1869), L. R. 8 Eq. 100; *Preston* v. *Luck*, *supra*.

(*q*) *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906; and see p. 7, *ante*.

(*r*) *Haymen* v. *Gover* (1872), 25 L. T. 903.

(*s*) *Tamplin* v. *James*, *supra*, at pp. 217, 221.

(*t*) See titles CONTRACT, Vol. VII., pp. 523 *et seq.*; EVIDENCE, Vol. XIII., pp. 566—568.

(*a*) *Hitchin* v. *Groom* (1848), 5 C. B. 515; and see title CONTRACT, Vol. VII., pp. 510, 517, 523.

(*b*) That is to say, an ambiguity in the terms of the instrument, the existence of which is first shown by extrinsic evidence, whether written or verbal (see footnote to *Hitchin* v. *Groom*, *supra*, at p. 520), unless the error is so obvious on the face of the document that the court can remedy it as a mere matter of construction (see *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40, 66; and as to deeds, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 453). Where there is a patent ambiguity, that is to say, an ambiguity on the face of the instrument itself, the instrument is wholly void (see *ibid.*, pp. 453, 454).

(*c*) *Hitchin* v. *Groom*, *supra*, at p. 520; and see p. 6, *ante*, and p. 26, *post*.

(*d*) *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (1784), 1 Bro. C. C. 338, 341; *Baker* v. *Paine* (1750), 1 Ves. Sen. 456; and see p. 12, *ante*.

(*e*) *Pym* v. *Campbell* (1856), 6 E. & B. 370, *per* CROMPTON, J., at p. 374;

SECT. 3. Evidence upon which Relief will be Granted.

such cases the evidence is admissible, not to contradict what appears on the face of the agreement, a procedure the court will not allow, but to prove the existence of a mistake which could not otherwise be proved (*f*). So, also, where mistake cannot be established without evidence, equity will allow a defendant in an action for specific performance to support a defence founded on mistake by evidence *dehors* the agreement (*g*), the evidence being introduced, not to explain nor alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise which would make the specific performance of the contract as executed unjust (*h*).

Effect of Statute of Frauds.

**50.** Parol evidence is admissible to make out a case for the rectification of an instrument (*i*), notwithstanding the Statute of Frauds (*k*).

Effect of antecedent written agreement.

**51.** If there is a previous agreement in writing, which is unambiguous, the instrument will be reformed in accordance therewith, and if such agreement is ambiguous, parol evidence may be used to explain it according to the ordinary rules in cases of ambiguity (*l*). If, however, the previous agreement in writing is clear, and the instrument is in accordance therewith, parol evidence is not admissible to rectify the latter (*m*).

Claim for rectification on parol evidence only.

**52.** The court is, however, always unwilling to vary a settlement when the effect would be to defeat vested rights, or where it is sought to do so on mere parol evidence (*n*). If there is nothing but the recollection of the witnesses, and the defendant, by his answer, denies the case set up by the plaintiff, the plaintiff may be without remedy (*o*). There is no objection, however, to

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see *Gudgen* v. *Besset* (1856), 6 E. & B. 986; *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25, 30.

(*f*) *Baker* v. *Paine* (1750), 1 Ves. Sen. 456, *per* Lord HARDWICKE, L.C., at p. 457; see *Olley* v. *Fisher* (1886), 34 Ch. D. 367, at p. 369.

(*g*) *Joynes* v. *Statham* (1746), 3 Atk. 388; *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328; *Clarke* v. *Grant* (1807), 14 Ves. 519, 524, 525; *Ramsbottom* v. *Gosdon* (1812), 1 Ves. & B. 165, 168; *Clowes* v. *Higginson* (1813), 1 Ves. & B. 524, 527; *Manser* v. *Back* (1848), 6 Hare, 443, 448; *Wood* v. *Scarth* (1855), 2 K. & J. 33.

(*h*) *Clowes* v. *Higginson*, *supra*, at p. 527; and see title SPECIFIC PERFORMANCE.

(*i*) *Barrow* v. *Barrow* (1854), 18 Beav. 529; *Johnson* v. *Bragge*, [1901] 1 Ch. 28; or to show that the instrument is contrary to the real terms of the contract and that it ought to be set aside (*Price* v. *Ley* (1863), 4 Giff. 235); provided there are no written instructions in existence (*Lackersteen* v. *Lackersteen* (1860), 30 L. J. (CH.) 5).

(*k*) 29 Car. 2, c. 3; see *Thomas* v. *Davis* (1757), 1 Dick. 301, 303; *Rogers* v. *Earl* (1757), 1 Dick. 294; *Re Boulter*, *Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241; *Johnson* v. *Bragge*, *supra*.

(*l*) *Murray* v. *Parker* (1854), 19 Beav. 305, 308; see notes (*t*), (*b*), p. 25, *ante*. Where the original agreement is of doubtful construction and the conveyance is definite and unequivocal it is not easy to avoid the conclusion that the conveyance may be the best evidence of the actual agreement between the parties (*Humphries* v. *Horne* (1844), 3 Hare, 276, 278). But, though a defendant resisting specific performance may go into parol evidence to show that by mistake the written agreement does not express the real terms, it appears from the older authorities that the plaintiff could not do so for the purpose of obtaining specific performance with a variation; see note (*a*), p. 21, *ante*, and title SPECIFIC PERFORMANCE.

(*m*) *Davies* v. *Fitton* (1842), 2 Dr. & War. 225, 233; compare p. 21, *ante*.

(*n*) *Alexander* v. *Crosbie* (1835), L. & G. *temp.* Sugd. 145, 149; see *Barrow* v. *Barrow*, *supra*; *Kemp* v. *Rose* (1858), 1 Giff. 258, 266 (a question of penalty).

(*o*) *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363; and see *Irnham* (*Lord*) v.

SECT. 3. Evidence upon which Relief will be Granted.

correcting a deed by parol evidence when there is anything in writing beyond the parol evidence (*p*); and, although, in nearly all cases in which the court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance or a note by the attorney and the mistake has been properly accounted for (*q*), yet a mistake may be rectified where it is clearly proved by parol evidence, even though there is nothing in writing to which the parol evidence may attach (*r*). So, also, notwithstanding the absence of any evidence of intention, apart from the settlement itself and the fact that the instructions from which it was prepared are not forthcoming and that the solicitor who prepared it and the parties to it are dead, the deed itself may afford sufficient evidence of the intention to enable the court to rectify the mistake (*s*).

Effect of evidence from plaintiff only.

The court can order rectification (*t*) or rescission (*a*) on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained; but it requires very clear and distinct evidence in such a case that there was a different intention when the deed was executed (*b*).

## SECT. 4.—*Effect of Lapse of Time.*

When lapse of time effectual.

**53.** Lapse of time may be a bar to rectification (*c*) on account of the loss of evidence and the doubt thence arising (*d*), but the mere lapse of time of itself, even for a long period, will not be a

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*Child* (1781), 1 Bro. C. C. 92, 93; *Townshend* (*Marquis*) v. *Stangroom* (1801), 6 Ves. 328, 334; *Fowler* v. *Fowler* (1859), 4 De G. & J. 250, 274; *Bentley* v. *Mackay* (1862), 4 De G. F. & J. 279, 287, C. A.; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427, 431.

(*p*) *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363, 374.

(*q*) *Alexander* v. *Crosbie* (1835), L. & G. *temp.* Sugd. 145, 149; and see, for example, *Mortimer* v. *Shortall*, *supra*, at p. 374; *M'Cormack* v. *M'Cormack* (1877), 1 L. R. Ir. 119, C. A.; *Welman* v. *Welman* (1880), 15 Ch. D. 570, 576 (where the draft containing the clause (though struck out) which was alleged to have been omitted was in evidence); *Johnson* v. *Bragge*, [1901] 1 Ch. 28.

(*r*) *Alexander* v. *Crosbie*, *supra*, at p. 150; *Barrow* v. *Barrow* (1854), 38 Beav. 529, 533; *M'Cormack* v. *M'Cormack*, *supra*; *Cook* v. *Fearn* (1878), 48 L. J. (CH.) 63.

(*s*) *Fitzgerald* v. *Fitzgerald*, [1902] 1 I. R. 477, C. A., following *Re Bird's Trusts* (1876), 3 Ch. D. 214.

(*t*) *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Cook* v. *Fearn*, *supra*; and see *Smith* v. *Iliffe* (1875), L. R. 20 Eq. 666; but compare the comments, upon the evidence in that case, in *Hanley* v. *Pearson*, *supra*, at p. 548.

(*a*) *Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476.

(*b*) *Tucker* v. *Bennett* (1887), 38 Ch. D. 1, C. A., *per* COTTON, L.J., at p. 15, whose observations are referred to in *Bonhote* v. *Henderson*, [1895] 2 Ch. 202, C. A. In *Tucker* v. *Bennett*, *supra*, COTTON, L.J., at p. 15, said that with the exception of *Wollaston* v. *Tribe* (1869), L. R. 9 Eq. 44, there was hardly a single case in which, many years after a settlement was executed, on mere parol evidence uncontradicted because there was no one to contradict it, the court had altered a deed because one of the parties afterwards desired that it should not stand as executed; but see note (*d*), p. 12, *ante*.

(*c*) *Bloomer* v. *Spittle*, *supra* (the decision in which case was questioned in *Beale* v. *Kyte*, [1907] 1 Ch. 564); and see *Wolterbeek* v. *Barrow* (1857), 23 Beav. 423, 431; *Tull* v. *Owen* (1840), 4 Y. & C. (EX.) 192. As to the necessity for bringing an action for rescission promptly, see title EQUITY, Vol. XIII., p. 174.

(*d*) *Wolterbeek* v. *Barrow*, *supra*.

SECT. 4. Effect of Lapse of Time.

bar, if the mistake is clearly made out (*e*), and, moreover, the time to be considered is the date of the notice of the error and not the date when the error was committed (*f*).

Effect of payment under judgment.

After money has been paid under a judgment founded on the construction of an agreement it is too late to bring an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties (*g*).

SECT. 5.—*Practice.*

Petition.

**54.** The court will not rectify an instrument on petition (*h*), except, it seems, on a petition under the Trustee Acts (*i*), and so long as the instrument stands unaltered it cannot avoid acting on it (*j*).

Conveyance unnecessary.

Where a deed is ordered to be rectified the order of the court is sufficient without a conveyance (*k*). Sometimes the judge will authenticate the alteration by signing his initials against it (*l*),

Practice usually adopted.

but this is not necessary (*m*). The usual course is to direct the declaration made by the court to be indorsed on the instrument (*n*). Where an appointment under a settlement is set aside the court may direct a note of the appointment and a copy of the order rescinding it to be indorsed on the settlement (*o*).

Incidental relief.

When a conveyance is set aside on the ground of mistake, an account of rents and profits may be directed and interest charged on purchase-money (*p*). Occupation rent may also be charged, and sums expended on repairs and improvements may be ordered to be repaid (*q*).

Costs.

Costs will depend on the conduct of the parties. Where the

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(*e*) *Wolterbeek* v. *Barrow* (1857), 23 Beav. 423, 431 (a marriage settlement rectified after thirty-four years and the death of the husband); *M'Cormack* v. *M'Cormack* (1877), 1 L. R. Ir. 119, C. A. (a post-nuptial settlement rectified after thirty years, and after the death of the solicitor who prepared the deed); *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1, C. A. (a release to a trustee set aside after more than twenty years and after the death of the trustee); *Millar* v. *Craig* (1843), 6 Beav. 433 (a release set aside after more than nineteen years from the date of execution).

(*f*) *Beale* v. *Kyte*, [1907] 1 Ch. 564. As to the effect of lapse of time in the case of money paid under mistake, see pp. 31, 32, *post*.

(*g*) *Caird* v. *Moss* (1886), 33 Ch. D. 22, C. A.

(*h*) *Re Malet* (1862), 30 Beav. 407.

(*i*) See title TRUSTS AND TRUSTEES; and see *Lewis* v. *Hillman* (1852), 3 H. L. Cas. 607; *Re De La Touche's Settlement* (1870), L. R. 10 Eq. 599; *Re Bird's Trusts* (1876), 3 Ch. D. 214; and possibly also on a petition for payment out of a fund paid into court under a private Act of Parliament (*Re Hoffe's Estate Act*, 1855 (1900), 48 W. R. 507, in which the two former cases are discussed).

(*j*) *Re Malet, supra*, at p. 408.

(*k*) *White* v. *White* (1872), L. R. 15 Eq. 247; *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Beale* v. *Kyte, supra*, at p. 566; see *Stock* v. *Vining* (1858), 25 Beav. 235; see, however, the other cases where a conveyance was directed (*Exeter (Marquis)* v. *Exeter (Marchioness)* (1838), 3 My. & Cr. 321, 326; *Malmesbury (Earl)* v. *Malmesbury (Countess)*, *Phillipson* v. *Turner* (1862), 31 Beav. 407; *Clark* v. *Malpas* (1862), 4 De G. F. & J. 401).

(*l*) *Stock* v. *Vining, supra*.

(*m*) *White* v. *White, supra*.

(*n*) See *Hanley* v. *Pearson, supra*; *Johnson* v. *Bragge*, [1901] 1 Ch. 28, 37; *Gifford (Lord)* v. *Fitzhardinge*, [1899] 2 Ch. 32; 2 Seton, Judgments and Orders, 6th ed., pp. 1708 *et seq.*, 1714, 2306.

(*o*) *Hood of Avalon (Lady)* v. *Mackinnon*, [1909] 1 Ch. 476, 484.

(*p*) *Neesom* v. *Clarkson* (1812), 2 Hare, 163; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427.

(*q*)

plaintiff is entirely to blame he must pay all the costs (*a*). If both parties are to blame, the plaintiff in making the mistake and the defendant in refusing to correct it, no costs will be given (*b*). Where specific performance is refused on the ground of reasonable mistake on the part of the defendant, no costs will be given (*c*). When a settlement is rectified and no party is to blame, the costs may be paid out of the settled funds (*d*), but a party who is to blame must pay the costs (*e*). The solicitor whose mistake rendered an action to rectify necessary cannot, in the absence of fraud, be made to pay the costs (*f*). SECT. 5. Practice.

# Part VI.—Recovery of Money Paid under a Mistake.

## SECT. 1.—*Money Paid Voluntarily under a Mistake of Fact.*

**55.** Where money is paid voluntarily under a mistake (*g*), on the part of the payer, as to a material fact, it may, as a general rule, be recovered in an action for money had and received to the use of the plaintiff (*h*). This general rule is subject to certain restrictions General rule as to recovery.

(*a*) *Harris* v. *Pepperell* (1867), L. R. 5 Eq. 1, 5; *Bloomer* v. *Spittle* (1872), L. R. 13 Eq. 427, at p. 432.

(*b*) *Ibid.*; *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363; *Paget* v. *Marshall* (1884), 28 Ch. D. 255, 267.

(*c*) *Swaisland* v. *Dearsley* (1861), 29 Beav. 430, 436.

(*d*) *Stock* v. *Vining* (1858), 25 Beav. 235; see *Tomlinson* v. *Leigh* (1855), 14 W. R. 121.

(*e*) *Meadows* v. *Meadows* (1853), 16 Beav. 401; see *James* v. *Couchman* (1885), 29 Ch. D. 212, 218.

(*f*) *Clark* v. *Girdwood* (1877), 7 Ch. D. 9, C. A.

(*g*) For recovery of money paid for a consideration which fails, see title CONTRACT, Vol. VII., p. 481. For money paid by mistake by executors, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 278, 324. For recovery of money arising from mistake in sales of goods or of land, see, respectively, titles SALE OF GOODS; SALE OF LAND.

(*h*) See *Kelly* v. *Solari* (1841), 9 M. & W. 54, *per* PARKE, B, at p. 58; *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189, 197, 198; *Kendal* v. *Wood* (1871), L. R. 6 Exch. 243, Ex. Ch.; *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, P. C.; *Milnes* v. *Duncan* (1827), 6 B. & C. 671; *Hooper* v. *Exeter Corporation*, 56 L. J. (Q. B.) 457. See also *Lucas* v. *Worswick* (1833), 1 Mood. & R. 293 (where money paid in forgetfulness and in the hurry of business was recovered); *Clough* v. *Henry* (1894), 10 T. L. R. 603 (where money paid to the defendant under a mistaken belief that there was a contract between the plaintiff and defendant was recovered); *Meadows* v. *Grand Junction Waterworks Co.* (1905), 21 T. L. R. 538, better reported (1905), 3 L. G. R. 910 (where overpayments of water rates made under a mistake of fact were held to be recoverable); *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276 (fees paid to a director for services rendered during a period when his office was vacated under the articles of the company); *Barber* v. *Brown* (1856), 1 C. B. (N. S.) 121 (money paid for rent after the title of the defendants had expired); compare *Meadows* v. *Grand Junction Waterworks Co., supra*; *Slater* v. *Burnley Corporation* (1888), 59 L. T. 636 (where an overpayment of water rate made on a wrong basis of assessment was held not to have been a payment made under compulsion, but a voluntary payment and irrecoverable). In *Davison* v. *Fernandes* (1889), 6 T. L. R. 73, brokers quoted a price for stock to clients, but by mistake did not tell the clients that the quotation was *cum* dividend. The dividend before sale was paid by the company to the clients direct. The brokers subsequently paid to the clients the proceeds of sale, including, under protest, an amount attributable to dividend, to enable them to meet their obligations, and it was

SECT. 1. **Money Paid Voluntarily under a Mistake of Fact.**

or limitations hereafter referred to (*i*). Where money is paid voluntarily with full knowledge of the facts, and there is no *mala fides*, it cannot be recovered (*k*).

Of what mistake may consist.

**56.** The mistake may consist in the payer never having known the real facts, or in his forgetfulness of facts of which he once had full knowledge (*l*). The possession of the means of knowledge of which the party does not avail himself necessarily does not prevent the application of the rule if the money was in fact paid under a real mistake (*m*), although such possession is strong evidence from which it may be inferred that the party had actual knowledge of the circumstances (*a*).

Possession of means of knowledge.

Effect of state of circumstances on payment.

**57.** If money is paid under the impression that a certain state of circumstances is true when in reality the facts are otherwise, it may, generally speaking, be recovered back, however careless the payer may have been in omitting to use due diligence in making inquiries. If, however, the money is intentionally paid without reference to the truth or falsehood of the matters, the payer meaning to waive all inquiry into them, and intending that the person receiving the money shall have it at all events, it cannot subsequently be recovered (*b*). But it is not enough that the means of acquiring accurate knowledge existed; the party must practically have waived all inquiry (*c*).

Mistake must be one of a material fact.

**58.** The mistake must be a mistake as to a material fact, that is, it must relate to a fact which, if true, would have rendered the party under the mistake liable to pay the money, and not merely as to a fact which, if true, would have rendered it desirable that he should pay it (*d*).

Mistake must be between payer and payee.

**59.** The mistake must not only be as to some fact affecting the liability to pay, but it must also be a mistake between the party paying and the party receiving the money. If the fact about which the mistake exists has nothing to do with the payee, the rule does not apply (*e*). Furthermore, the mistake must be that of the

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held that they were not entitled to recover the amount so attributable to dividend from their clients; the fact that the payment is made in connection with a bet seems to be immaterial (*Gasson* v. *Cole* (1910), 26 T. L. R. 468).

(*i*) See p. 33, *post*.

(*k*) *Higgs* v. *Scott* (1849), 7 C. B. 63; and see *Bromley* v. *Holland* (1802), 7 Ves. 3, 23.

(*l*) *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Lucas* v. *Worswick* (1833), 1 Mood. & R. 293; and see *Hood of Avalon* (*Lady*) v. *Mackinnon*, [1909] 1 Ch. 476, 483; compare *Wason* v. *Wareing* (1852), 15 Beav. 151, 155.

(*m*) *Kelly* v. *Solari*, *supra*, approved in *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, 56, P. C.; *Townsend* v. *Crowdy* (1860), 8 C. B. (N. S.) 477; *Dails* v. *Lloyd* (1848), 12 Q. B. 531.

(*a*) *Bell* v. *Gardiner* (1842), 4 Man. & G. 11, *per* TINDAL, C.J., at p. 24; *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 952; *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234.

(*b*) *Kelly* v. *Solari*, *supra*; *Wason* v. *Wareing*, *supra*, at p. 155.

(*c*) *Townsend* v. *Crowdy*, *supra*.

(*d*) *Bize* v. *Dickason* (1786), 1 Term Rep. 285, *per* Lord MANSFIELD, C.J., at p. 287; *Standish* v. *Ross* (1849), 3 Exch. 527; *Aiken* v. *Short* (1856), 1 H. & N. 210, *per* BRAMWELL, B., at p. 215; *Kelly* v. *Solari*, *supra*.

(*e*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; *Chambers* v. *Miller* (1862), 13 C. B. (N. S.) 125; see *Pollard* v. *Bank of England* (1871), L. R. 6 Q. B. 623; *Deutsche Bank* (*London Agency*) v. *Beriro & Co.* (1895), 73 L. T. 669, C. A.; and title BANKERS AND BANKING, Vol. I., p. 619.

person who paid the money, and not of another person on whose mistake he thought fit to act (*f*).

Time limit to claim for relief.

**60.** Where the defendant relies on the Statute of Limitation (*g*), the statute runs from the date of payment and not from the date of the discovery of the mistake, nor from the date when the plaintiff might have discovered it with the exercise of reasonable diligence (*h*).

*Restitutio in integrum.*

**61.** Where there has been neglect or misconduct on the plaintiff's part, he may be prevented from recovering by the fact that the defendant will be placed in a worse position than if the money had not been paid (*i*); but where there has been no neglect or misconduct, this fact affords no defence (*k*).

Effect of plaintiff's neglect, misconduct, or breach of duty.

Again, if some mutual relation exists between the parties which creates a duty on the part of the plaintiff towards the defendant, breach of such duty will disentitle him to recover (*l*); but if no such duty is cast upon the plaintiff, mere delay in discovering the mistake is not laches on his part, and he may nevertheless recover the money paid by him under a mistake of fact (*m*).

When demand before action is necessary.

**62.** Where money is paid by one party to another under a mistake of fact of which the payee alone was ignorant, a demand for payment must be made before action, because, until such demand, there can be no duty on the part of the payee to pay the money over (*n*); but where the mistake is common to both parties no such demand is necessary (*o*).

Actual payment not essential.

**63.** It is not necessary that money should have been actually paid. The same rules also apply where the money has only been allowed in account (*p*).

(*f*) *Moss* v. *Mersey Dock and Harbour Board* (1872), 20 W. R. 700; see *Kerrison* v. *Glyn, Mills, Currie & Co.* (1909), 101 L. T. 675; reversed (1909), 102 L. T. 674, C. A., but restored by the House of Lords (1911), 105 L. T. 721, H. L.; *Re An Arranging Debtor* (1909), 43 I. L. T. 21, C. A. As to payments made to an agent, see title AGENCY, Vol. I., p. 225.

(*g*) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*h*) *Baker* v. *Courage & Co.*, [1910] 1 K. B. 56; see *Re Croyden, Hincks* v. *Roberts* (1911), 55 Sol. Jo. 632; titles EQUITY, Vol. XIII., pp. 22 *et seq.*; LIMITATION OF ACTIONS, Vol. XIX., pp. 47, 173, and cases cited *ibid.*, p. 173, note (*a*).

(*i*) *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189, 195; *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (1904), 90 L. T. 474, C. A.; *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L. T. 263, H. L.; *Kerrison* v. *Glyn, Mills, Currie & Co.* (1909), 101 L. T. 675; reversed (1909), 102 L. T. 674, C. A., on the ground that the money was paid as intended and under no mistake of fact, but restored by the House of Lords (1911), 105 L. T. 721, H. L.

(*k*) *Standish* v. *Ross* (1849), 3 Exch. 527, 534; *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, P. C.

(*l*) See *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234, *per* POLLOCK, B., at p. 236; *Cocks* v. *Masterman* (1829), 9 B. & C. 902. See also *Mather* v. *Maidstone (Lord)* (1856), 18 C. B. 273; *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, 58, P. C.; title BANKERS AND BANKING, Vol. I., pp. 617, 618.

(*m*) *Durrant* v. *Ecclesiastical Commissioners, supra*; *Clifton* v. *Cockburn* (1834), 3 My. & K. 76.

(*n*) See *Kelly* v. *Solari* (1841), 9 M. & W. 54, *per* PARKE, B., at p. 58; *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189, per BRAMWELL, B., at p. 200; and see title CONTRACT, Vol. VII., p. 488.

(*o*) *Baker* v. *Courage & Co., supra*, distinguishing *Freeman* v. *Jeffries, supra*.

(*p*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; *Lucas* v. *Jones* (1844),

SECT. 1. Money Paid Voluntarily under a Mistake of Fact.

Circumstances sufficient to entitle party to reopen account.

Where accounts between two parties are shown to be erroneous to a considerable extent both in amount and in the number of items (*q*), or where there is a fiduciary relationship (*r*), and a less considerable number of errors are shown (*s*), or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the accounts are shown (*t*), the court will open the account (*a*), and not merely surcharge and falsify (*b*). But, where there has been a long lapse of time and loss of books and documents, the court may decline to open the accounts altogether and give liberty to surcharge and falsify only, notwithstanding that numerous and important errors in the account are proved (*c*).

### SECT. 2.—*Money Paid Voluntarily under a Mistake of Law.*

No right to recover as a general rule.

**64.** Money paid voluntarily (*d*) with a full knowledge of the facts is not, as a general rule, recoverable merely upon the ground that it was paid under a mistake as to the law or as to the legal

5 Q. B. 949; *Standish* v. *Ross* (1849), 3 Exch. 527, 534; *Gingell* v. (1850), 4 Exch. 720, 726; *Ehrensperger* v. *Anderson* (1848), 3 Exch. 148; *Ward & Co.* v. *Wallis*, [1900] 1 Q. B. 675. But the giving of a negotiable instrument is for this purpose equivalent to the payment of money (*Coward* v. *Hughes* (1853), 1 K. & J. 443).

(*q*) A single error may, however, be sufficient to justify the court in opening an account (*Taylor* v. *Haylin* (1788), 2 Bro. C. C. 310; *Johnson* v. *Curtis* (1791), 3 Bro. C. C. 266; *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309; *Pritt* v. *Clay* (1843), 6 Beav. 503; see *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, P. C.). As to accounts between mortgagor and mortgagee, see title MORTGAGE, pp. 215 *et seq.*, *post*. As to accounts between personal representatives and trustees and beneficiaries, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 320, 338 *et seq.*; TRUSTS AND TRUSTEES.

(*r*) See *Cheese* v. *Keen*, [1908] 1 Ch. 245, *per* NEVILLE, J., at p. 251; *Re Webb*, *Lambert* v. *Still*, [1894] 1 Ch. 73, 84, C. A. As to the time within which the party seeking to open or set aside the account must assert his right, and generally as to when a fiduciary relationship exists, see titles CONTRACT, Vol. VII., p. 358; EQUITY, Vol. XIII., pp. 16—18; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 107; LIMITATION OF ACTIONS, Vol. XIX., p. 170; SOLICITORS.

(*s*) See note (*q*), *supra*.

(*t*) Where the single error complained of is a fraudulent item the proper course is to open the accounts altogether (*Allfrey* v. *Allfrey* (1849), 1 Mac. & G. 87, followed in *Williamson* v. *Barbour* (1877), 9 Ch. D. 529, *per* JESSEL, M.R., at p. 533, and *Gething* v. *Keighley* (1878), 9 Ch. D. 547, *per* JESSEL, M.R., at p. 550), but, except in the case of fraud, where there is a single error the court will not order the whole accounts to be opened, but will decree that the plaintiff be at liberty to surcharge and falsify.

(*a*) How far the court will open accounts, upon the proof of error appearing in some, but not all of them, must depend upon the circumstances of the particular case, and if such circumstances lead to the inference that the errors proved in some cases may be expected to appear in all, relief will be given in respect of all (*Cheese* v. *Keen*, [1908] 1 Ch. 245, *per* NEVILLE, J., at p. 251); see also *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309, 334; and see as to opening accounts stated, title CONTRACT, Vol. VII., p. 490.

(*b*) *Williamson* v. *Barbour*, *supra*, *per* JESSEL, M.R., at p. 533.

(*c*) *Millar* v. *Craig* (1843), 6 Beav. 433.

(*d*) A payment of duty not exigible, *e.g.* for male servants, is a voluntary payment (*Whiteley, Ltd.* v. *R.* (1910), 101 L. T. Jo. 741). As to the payment of money under compulsion of legal process, see title CONTRACT, Vol. VII., p. 468; for money paid for an illegal consideration, see *ibid.*, p. 409; as to money paid under duress, see *ibid.*, p. 478; and as to money paid under an erroneous construction of a will, see title WILLS. As to the effect of a voluntary payment under a supposed legal liability as regards estoppel, see title ESTOPPEL, Vol. XIII., p. 405; *Butten Pooll* v. *Kennedy*, [1907] 1 Ch. 2

effect of the circumstances under which it was paid (*e*). Nor can sums allowed in account under a mistaken view as to the plaintiff's rights be recovered (*f*), and where a party accepts a sum as a composition for his debt of a larger sum under a mistake of law he cannot subsequently sue the defendant for the balance of the debt (*g*).

SECT. 2. **Money Paid Voluntarily under a Mistake of Law.**

**65.** Where money is paid at a time when the law is in favour of the payee, it cannot be recovered by reason of a subsequent judicial decision reversing the former understanding of the law (*h*).

Effect of change in understanding of law.

The general rule does not apply as against a principal where a payment has been made by an agent who, to the knowledge of the payer, had no authority to make it (*i*).

When rule does not apply.

**66.** Where money is ordered to be paid out of court to a person apparently but not really entitled, and the Paymaster-General obeys the order, then, except possibly in cases where the order was obtained by fraud or forgery, the person really entitled, though not before the court when the order was made, has no claim on the Consolidated Fund under the Court of Chancery (Funds) Act, 1872 (*k*).

Payment out of court under order.

**67.** The rule that money paid under a mistake of law cannot be recovered is not, however, absolute.

Rule not absolute.

Thus, where in the particular circumstances of the case there is any ground which makes it inequitable that the party who received the money should retain it, the court will sometimes give relief against mistakes in law as well as against mistakes of fact (*l*). So

Relief where retention by payee is inequitable.

*Nicholls* v. *Leeson* (1747), 3 Atk. 573; *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468; *Bilbie* v. *Lumley* (1802), 2 East, 469; *Stevens* v. *Lynch* (1810), 12 East, 38; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143; *Denby* v. *Moore* (1817), 1 B. & Ald. 123; *Goodman* v. *Sayers* (1820), 2 Jac. & W. 249, 263; *Stafford* v. *Stafford* (1857), 1 De G. & J. 193, 202, C. A.; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, C. A.; *Slater* v. *Burnley Corporation* (1888), 59 L. T. 636; *Henderson* v. *Folkestone Waterworks Co.* (1885), 1 T. L. R. 329; see also *Gomery* v. *Bond* (1815), 3 M. & S. 378; *Platt* v. *Bromage* (1854), 24 L. J. (EX.) 63; *Andrew* v. *Bridgman*, [1908] 1 K. B. 596, C. A.; see also *Evanson* v. *Crooks* (1911), 28 T. L. R. 123, *per* HAMILTON, J., at p. 124.

(*f*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281. But the mere non-demand of the full amount due by reason of a mistake in law does not amount to an allowance on account (*R.* v. *Blenkinsop*, [1892] 1 Q. B. 43); see also *Davis* v. *Morier* (1845), 2 Coll. 303, where a person who by mistake had received for some years a less income than he was entitled to under a settlement was held to be entitled under the circumstances of the case to have the difference made up to him out of the estate of the deceased settlor. As to opening accounts, see, however, p. 34, *post*.

(*g*) *Kitchin* v. *Hawkins* (1866), L. R. 2 C. P. 22.

(*h*) *Henderson* v. *Folkestone Waterworks Co.*, *supra*; so also, when an injunction is wrongly granted, an undertaking given by the plaintiff is equally enforceable whether the mistake was in point of law or of fact (*Hunt* v. *Hunt* (1884), 54 L. J. (CH.) 289).

(*i*) See *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, C. A., *per* COTTON, L.J., at p. 910.

(*k*) 35 & 36 Vict. c. 44; see *Re Williams' Settled Estates*, [1910] 2 Ch. 481, following *Re Dangar's Trusts* (1889), 41 Ch. D. 178, 186, explaining *Jones* v. *Jones* (1879), [1901] 1 Ch. 464, n., and *Bath* v. *Bath*, [1901] 1 Ch. 460, and distinguishing *Slater* v. *Slater* (1888), [1897] 1 Ch. 222, n.; *Marsh* v. *Joseph*, [1897] 1 Ch. 213, C. A. (where payment was obtained by the wrong person by fraud, and was repaid out of the fund).

(*l*) *Stone* v. *Godfrey* (1854), 5 De G. M. & G. 76, C. A., *per* TURNER, L.J., at p. 90; *Rogers* v. *Ingham*, *supra*, *per* MELLISH, L.J., at p. 357; *Allcard* v. *Walker*, [1896] 2 Ch. 369; see p. 4, *ante*.

SECT. 2. **Money Paid Voluntarily under a Mistake of Law.**

where the payee, knowing the law himself and knowing that the payer is ignorant of the law and would not pay if he were not so, is an accessory to the payment by the payer, for example, by getting some person to misinform the payer of the law, and obtains the payment from him by these means, he may not be allowed to benefit by his *mala fides* (*m*).

Relief where by payee's own

**68.** Although no action will lie for the recovery of money paid under a mistake of law to an officer of the court, the court will order it to be repaid (*n*), provided that no injury will be done to anyone or the rights of others interfered with (*o*). But payment of money into court in ignorance of the legal consequences does not amount to the kind of mistake for which equity will give relief (*p*).

Money paid to officer of the court.

e money demand.

**69.** Relief in respect of a payment under a mistake of law has never been given in the case of a simple money demand by one person against another, there being no fiduciary relation between them and no supervening equity by reason of the conduct of either of the parties (*q*).

Accounts settled under common mistake.

**70.** Where accounts are drawn up and assented to by parties under a common mistake as to their rights and obligations, the accounts may be directed to be opened (*r*).

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(*m*) *Dixon* v. *Monkland Canal Co.* (1831), 5 Wils. & S. 445, 451, H. L.; and see *Henderson* v. *Folkestone Waterworks Co.* (1885), 1 T. L. R. 329, *per* Lord COLERIDGE, C.J.

(*n*) *Re London, Ex parte James* (1874), 9 Ch. App. 609 (trustee in bankruptcy); *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308, C. A. (trustee in bankruptcy); *Re Brown, Dixon* v. *Brown* (1886), 32 Ch. D. 597 (trustee in liquidation); *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q. B. 347, C. A. (official receiver); *Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865, C. A. (official receiver). This rule does not, however, apply where the officer of the court has neither done nor omitted anything which could give rise to the suggestion that he has committed the court to a course which is in any way unworthy of its dignity (*Re Hall, Ex parte Official Receiver*, [1907] 1 K. B. 875, 879, C. A.; see *Tapster* v. *Ward* (1909), 101 L. T. 25). The principle established by *Re London, Ex parte James, supra*, that the court will not allow its officer, the trustee in bankruptcy, to retain money for distribution among the creditors when it would be contrary to fair dealing to do so, is not confined to the case of money paid under a mistake of law, but is of general applicaton (*Re Tyler, Ex parte Official Receiver, supra*).

(*o*) *Re Carnac, Ex parte Simmonds, supra*; *Re Opera, Ltd.*, [1891] 3 Ch. 260, C. A.; see *Hand* v. *Blow*, [1901] 2 Ch. 721, 729, 730, C. A. Where a trustee in bankruptcy has divided the money in question among his creditors, but the court sees that there are other moneys to come into his hands and it has not been shown that any injury will be done to anyone, he will be ordered to apply the money which is coming to him in replacing the money divided (*Re Carnac, Ex parte Simmonds, supra*).

(*p*) *Great Western Rail. Co.* v. *Cripps* (1845), 5 Hare, 91.

(*q*) *Rogers* v. *Ingham* (1876), 3 Ch. D. 351, C. A., *per* JAMES, L.J.; and see *Midland Great Western Railway of Ireland (Directors etc.)* v. *Johnson* (1858), 6 H. L. Cas. 798.

(*r*) *Thomas* v. *Hawkes* (1841), 8 M. & W. 140; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, 191, P. C.; and see *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648, *per* PARKER, J., at p. 666.

# MIXED ACTIONS.

## ACTION.

# MONEY AND MONEY-LENDING.


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# Part I.—Money and Interest on Money.

## SECT. 1.—*Money.*

Money in general.

**71.** The term "money" is applied to the means whereby the medium of exchange or the comparative values of different commodities is ascertained (*a*). Such medium may consist of tokens or coins, which, in a narrower sense, are called "money" (*b*).

(*a*) See Encyclopædia Britannica, 13th ed., Vol. XVIII., tit. Money, for the modern application of the term. For the meaning of the term in a will, see title WILLS.

(*b*) In Com. Dig., tit. Money (B. 1), six essential characteristics of money are stated, namely: a fixed weight, alloy, impression, and valuation, the King's authority, and proclamation; citing the Case of Mixt Moneys (1604), Dav. Ir. 18 a, 19 b; see also Vin. Abr., tit. Money, Vol. XV., p. 420. The standard of value in this country is the pound sterling, or sovereign, as to which and as to coinage and currency, see title CONSTITUTIONAL LAW, Vol. VI., pp. 461 *et seq.* As to paper currency, see *ibid.*, pp. 462, 464; see also title BANKERS AND BANKING, Vol. I., p. 570. As to payment in coin and legal tender, see titles BANKERS AND BANKING, Vol. I., p. 570; CONSTITUTIONAL LAW, Vol. VI., pp. 461, 462; CONTRACT, Vol. VII., pp. 418 *et seq.* As to coinage offences, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 514 *et seq.*

SECT. 1. Money.

The comparative values above mentioned (*c*), when reduced to terms of money, constitute, for example, the price of goods sold (*d*), or the respective values of property exchanged (*e*), or the compensation for loss or damage sustained (*f*).

Money as a defining term.

They may express the extent of contractual obligations (*g*), or may define liabilities the extent of which has been ascertained or determined either by agreement, or by a competent authority or tribunal resorted to, chosen or appointed for the purpose (*h*).

Money as denoting wealth or credit transferred by coins etc.

In the succeeding portions of this title the word "money" is used to denote that form of wealth or credit which is transferred from one person to another by means of coins, bank-notes, cheques and similar instruments.

## SECT. 2.—*Interest on Money.*

### SUB-SECT. 1.—*Definition.*

Interest.

**72.** Interest, when considered in relation to money, denotes the return or consideration, or compensation (*i*) for the use or retention by one party of a sum of money or other property belonging to another, and may arise from a loan (*k*), or investment of money, or as a result of money or property belonging to one party being retained or unrepaid by another (*l*).

### SUB-SECT. 2.—*When Payable.*

Common law rule.

**73.** At common law debts do not, as a general rule, bear interest unless there is an agreement to pay it (*m*).

Statutory right to interest.

**74.** Interest, however, is payable in the following cases:—

(1) Where a right to it, or an authority for its allowance or payment, is conferred by statute (*n*).

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(*c*) See p. 36, *ante*.

(*d*) See title SALE OF GOODS.

(*e*) See titles CONTRACT, Vol. VII., p. 444; PARTITION, pp. 809 *et seq.*, 815, *post*.

(*f*) See title DAMAGES, Vol. X., pp. 304, 305.

(*g*) For payment of money in discharge of contractual obligation, see title CONTRACT, Vol. VII., p. 444; as to appropriation of payments, see *ibid.*, p. 449; as to proof of payment in discharge of a debt, and receipts generally, see *ibid.*, pp. 446, 452 *et seq.*; as to payment by bill of exchange or cheque, see *ibid.*, p. 447.

(*h*) See titles ARBITRATION, Vol. I., pp. 468 *et seq.*; DAMAGES, Vol. X., pp. 304, 328; JUDGMENTS AND ORDERS, Vol. XVIII., pp. 209, 219.

(*i*) For a modern definition of interest, see Encyclopædia Britannica, 13th ed., Vol. XIV., tit. Interest. As to the effect of taking interest on arrears of rent upon the remedy of distress, see title DISTRESS, Vol. XI., p. 153. For the meaning of the term "profits," see *Re Spanish Prospecting Co., Ltd.*, [1911] 1 Ch. 92, 98, 99, C. A.

(*k*) As to money lent, see pp. 44 *et seq.*, *post*, and title MORTGAGE, pp. 87, 113 *et seq.*, *post*.

(*l*) For example, in the case of principal and agent, see title AGENCY, Vol. I., p. 188; or in the case of legatees, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273. As to cases where interest becomes payable by reason of the relation of parties, see p. 40, *post*.

(*m*) *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429; *Re Gosman* (1881), 17 Ch. D. 771; *Hill* v. *South Staffordshire Rail. Co.* (1874), L. R. 18 Eq. 154; *Rhodes* v. *Rhodes* (1860), John. 653; *Frühling* v. *Schroeder* (1835), 2 Bing. (N. C.) 77; *Foster* v. *Weston* (1830), 4 Moo. & P. 589; *Page* v. *Newman* (1829), 9 B. & C. 378; *Higgins* v. *Sargent* (1823), 3 Dow. & Ry. (K. B.) 613; *Shaw* v. *Picton* (1825), 7 Dow. & Ry. (K. B.) 201; *Calton* v. *Bragg* (1812), 15 East, 223; *De Bernales* v. *Fuller* (1810), 2 Camp. 426; *De Havilland* v. *Bowerbank* (1807), 1 Camp. 50; *Walker* v. *Constable* (1798), 1 Bos. & P. 306.

(*n*) See pp. 38 *et seq.*, *post*.

SECT. 2. **Interest on Money.**

If a debt or sum certain (*o*) is payable by virtue of a written instrument (*p*) at a certain time (*q*), interest may be allowed (*r*) thereon, to run from that time (*s*).

General rules.

Interest, to run from the time of demand, may also be allowed (*r*) upon all other debts or sums certain (*o*), if a written demand (*a*) of payment is made upon the debtor, giving him notice that interest will be claimed from the date of demand until payment (*b*).

In both cases the interest is payable by way of damages for the non-payment of the debt (*c*), and the rate allowed must not exceed the current rate of interest (*d*).

In particular cases.

In addition, a special right to interest is conferred by statute in

(*o*) A sum to be afterwards ascertained is not a "sum certain" (*Hill* v. *South Staffordshire Rail. Co.* (1874), L. R. 18 Eq. 154), nor is a sum claimed as the balance of an account, which proves to have been miscalculated (*Ward* v. *Eyre* (1880), 15 Ch. D. 130, C. A., disapproving on this point *Mackintosh* v. *Great Western Rail. Co.* (1865), 4 Giff. 683); but it is sufficient if the exact sum can be computed by arithmetic from materials contained in the contract (*London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, C. A., *per* LINDLEY, L.J., at p. 144). A claim may be for a "sum certain," notwithstanding the fact that there is a set-off which may cause a reduction in the amount finally found due (*Alexandra Docks and Rail. Co.* v. *Taff Vale Rail. Co.* (1911), 28 T. L. R. 163, C. A.).

(*p*) The written instrument must be one containing, on the face of it, the contract to pay the debt (*Taylor* v. *Holt* (1864), 3 H. & C. 452).

(*q*) An agreement to pay at a stated period after the happening of a future event is an agreement to pay "at a certain time" if the event is one which must happen, for example, six months after the death of A. (*Re Horner, Fooks* v. *Horner*, [1896] 2 Ch. 188); but not if it is a mere contingency, *e.g.*, "one month after my arrival in England" (*Page* v. *Newman* (1829), 9 B. & C. 378), or two months after the arrival of a ship (*Merchant Shipping Co.* v. *Armitage* (1873), L. R. 9 Q. B. 99, Ex. Ch.; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, C. A.; affirmed, [1893] A. C. 429 (but see the judgment of Lord SHAND, *ibid.*, at p. 443), disapproving *Duncombe* v. *Brighton Club Co.* (1875), L. R. 10 Q. B. 371).

(*r*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28. The power to award interest is discretionary, and need not be exercised unless the court or jury think fit (*ibid.*).

(*s*) *Ibid.* The statutory provision is said to have been declaratory only of the law previously existing (*Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, 173, 178, C. A.). As to the date from which interest will be allowed when a judgment of a court of first instance has been reversed on appeal, see *Macbeth & Co.* v. *Maritime Insurance Co.* (1908), 24 T. L. R. 559; see also *Douglas* v. *Forrest* (1828), 4 Bing. 686.

(*a*) A demand made for the first time by the writ in the action is not sufficient (*Rhymney Rail. Co.* v. *Rhymney Iron Co.* (1890), 25 Q. B. D. 146, C. A.; see *Ryley* v. *Master, Sheba Gold Mining Co.* v. *Trubshawe*, [1892] 1 Q. B. 674, *per* Lord COLERIDGE, C.J., at p. 680); nor is a general intimation upon a tradesman's account that interest will be charged after a certain time (*Re Lloyd Edwards, Williams* v. *Trench* (1891), 61 L. J. (CH.) 22). For instances of demands held to be sufficient, see *Geake* v. *Ross* (1875), 44 L. J. (C. P.) 315; *Mowatt* v. *Londesborough* (*Lord*) (1854), 4 E. & B. 1, Ex. Ch.; *Berrington* v. *Phillips* (1836), 1 M. & W. 48; *Re Overend, Gurney & Co., Ex parte Lintott* (1867), L. R. 4 Eq. 184; *Edwards* v. *Great Western Rail. Co.* (1851), 11 C. B. 588; and for demands held insufficient, see *Ward* v. *Eyre, supra*; *Rishton* v. *Grissell* (1870), L. R. 10 Eq. 393.

(*b*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28.

(*c*) *Re State Fire Insurance Co., The "Times" Co. Claim* (1864), 34 L. J. (CH.) 58; see also *Upton* v. *Ferrers* (*Lord*) (1801), 5 Ves. 801. As to interest payable by way of damages, see, further, p. 40, *post*.

(*d*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28. As to rates of interest, see, further, p. 42, *post*.

many cases, as, for example, in the administration of bankrupt estates (*e*); on bills of exchange (*f*); in the liquidation of companies (*g*); on purchase-money under the Lands Clauses Acts (*h*); on death duties (*i*); on judgments (*k*); in actions for the value of goods converted or seized (*l*); on sums due on policies of assurance (*m*); on sums due between a solicitor and his client (*n*); on loans for public works (*o*); on sums due from owners of premises to a local authority for improvement expenses (*p*); and on sums charged upon land for improvements (*q*) or paid for redemption of land tax (*r*).

Express agreement.

(2) Where there is an express agreement to pay interest (*s*).

Implied agreement.

(3) Where an agreement to pay interest can be implied from the course of dealing between the parties (*t*).

Interest by custom.

(4) In mercantile transactions, by the general custom of merchants (*u*), or by the custom of a particular trade or business (*v*).

Interest at common by way of damages.

(5) Although, as a general rule, interest cannot be recovered for mere non-payment of a debt (*a*), yet in certain cases it is payable at

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 107, 112, 224, 227, 232, 233.

(*f*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 468, 524.

(*g*) See title COMPANIES, Vol. V., pp. 389, 511.

(*h*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 118, 119.

(*i*) See title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 182, 225, 259.

(*k*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 185, 206, 209.

(*l*) See titles DAMAGES, Vol. X., p. 345; TROVER AND DETINUE.

(*m*) See title INSURANCE, Vol. XVII., p. 504.

(*n*) See title SOLICITORS.

(*o*) See p. 60, *post*.

(*p*) See the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 223.

(*q*) See title LAND IMPROVEMENT, Vol. XVIII., pp. 296, 301.

(*r*) See title LAND TAX, Vol. XVIII., p. 324.

(*s*) *Page* v. *Newman* (1829), 9 B. & C. 378; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429.

(*t*) *Re Anglesey (Marquis), Willmot* v. *Gardner*, [1901] 2 Ch. 548, C. A.; *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307; see also *Bruce* v. *Hunter* (1813), 3 Camp. 467; *Calton* v. *Bragg* (1812), 15 East, 223; *Denton* v. *Rodie* (1813), 3 Camp. 493; *Re Wilcocks, Ex parte Williams* (1813), 1 Rose, 399; *Lawless* v. *Bryce* (1870), 5 I. R. C. L. 190; *Great Western Insurance Co.* v. *Cunliffe* (1874), 9 Ch. App. 525; *Nichol* v. *Thompson* (1807), 1 Camp. 52, n.; and compare *Re Lloyd Edwards, Williams* v. *Trench* (1891), 61 L. J. (CH.) 22. It is assumed that the law as stated in the text is not affected by the decision in *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, *supra*, as to which see note (*b*), p. 40, *post*.

(*u*) *Page* v. *Newman*, *supra*; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, *supra*; *Higgins* v. *Sargent* (1823), 2 B. & C. 348. For instance, before the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), interest was thus payable on negotiable instruments; see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 460, note (*k*). It should be noted that in this class of cases the interest is payable, not by agreement, but by way of damages for non-payment of the principal (*Cameron* v. *Smith* (1819), 2 B. & Ald. 305). For this subject see, further, p. 41, *post*.

(*v*) See, for example, *Blaney* v. *Hendricks* (1771), 2 Wm. Bl. 761; *Calton* v. *Bragg*, *supra*; *Eddowes* v. *Hopkins* (1880), 1 Doug. (K. B.) 376; *Ikin* v. *Bradley* (1818), 2 Moore (C. P.), 206, Ex. Ch.; *Bruce* v. *Hunter*, *supra*. As to interest payable by the custom of bankers, see title BANKERS AND BANKING, Vol. I., pp. 631, 642.

(*a*) *Calton* v. *Bragg*, *supra*; *Page* v. *Newman*, *supra*; *Foster* v.

SECT. 2. **Interest on Money.**

common law by way of damages for breach of contract (*b*), such as a contract to give a bill or other security which would itself have borne interest (*c*), or where the plaintiff's money has been used and interest made upon it (*d*).

Interest payable by the rules of equity.

(6) Interest, in certain cases, is payable by the rules of equity.

General rule.

Equity looks upon that as done which ought to be done (*e*). Therefore, if the defendant ought to have done something which in law would have entitled the plaintiff to interest, or has wrongfully prevented the plaintiff from doing something which would have so entitled him, the plaintiff may claim interest as though the thing had been done (*f*).

In cases of fraud.

Money obtained by fraud and retained by fraud can be recovered with interest (*g*).

In particular cases.

Interest may also be recovered in equity in some cases where a particular relationship exists between the creditor and debtor (*h*),

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(1830), 6 Bing. 709; *Rhodes* v. *Rhodes* (1860), John. 653; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429.

(*b*) In *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, *supra*, approving *Page* v. *Newman* (1829), 9 B. & C. 378, it was apparently held that interest is only payable in three cases, namely, (1) by statute, (2) by express agreement, or (3) by mercantile custom. But the rule as thus stated is not easy to reconcile with the earlier decision in *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27, or with the later case of *Re Anglesey* (*Marquis*), *Willmot* v. *Gardner*, [1901] 2 Ch. 548, C. A. It is submitted that the rule was not intended to apply to the instances stated in the text, or to cases where an agreement to pay interest can be inferred from the conduct of the parties (see p. 39, *ante*); and it is assumed that it does not affect the cases where interest is payable by the rules of equity (see the text, *infra*). But the old principle that interest is payable where there has been long delay, under vexatious and oppressive circumstances, in payment of money due under a contract (*Hilhouse* v. *Davis* (1813), 1 M. & S. 169; *Arnott* v. *Redfern* (1826), 3 Bing. 353; *Marsh* v. *Jones* (1889), 40 Ch. D. 563, C. A.), is apparently no longer law, unless the circumstances of the case bring it within the statute (see p. 38, *ante*) or one of the rules of equity (see the text, *infra*). As to interest as damages in admiralty cases, see title ADMIRALTY, Vol. I., p. 120.

(*c*) *Marshall* v. *Poole* (1810), 13 East, 98; *Harper* v. *Williams* (1843), 4 Q. B. 219; *Farr* v. *Ward* (1837), 3 M. & W. 25; *Sutton* v. *Morgan* (1814), 5 Taunt. 758, Ex. Ch.; *Lowndes* v. *Collens* (1810), 17 Ves. 27; *Davis* v. *Smyth* (1841), 8 M. & W. 399. This proposition, though supported by a number of common law cases, may also be referred to equitable principles, as to which see the text, *infra*.

(*d*) *Walker* v. *Constable* (1798), 1 Bos. & P. 306; *De Havilland* v. *Bowerbank* (1807), 1 Camp. 50; see also *Burdick* v. *Garrick* (1870), 5 Ch. App. 233. This proposition also may, perhaps, be referred to equitable principles, as to which see the text, *infra*.

(*e*) See title EQUITY, Vol. XIII., pp. 73 *et seq.*

(*f*) *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 2 Ch. 120, C. A.; affirmed, [1893] A. C. 429, *per* Lord WATSON, at p. 442, affirming, on this point, *Mackintosh* v. *Great Western Rail. Co.* (1864), 4 Giff. 683; see also *Hull and Selby Rail. Co.* v. *North Eastern Rail. Co.* (1854), 5 De G. M. & G. 872, C. A.; *Rhoades* v. *Selsey* (*Lord*) (1840), 2 Beav. 359.

(*g*) *Johnson* v. *R.*, [1904] A. C. 817, P. C., *per* Lord MACNAGHTEN, at p. 822; see also *Frühling* v. *Schroeder* (1835), 2 Bing. (N. C.) 77; *Sutton* v. *South Eastern Rail. Co.* (1865), L. R. 1 Exch. 32; but the fraud must be proved in the action in which the interest is sought to be recovered (*Johnson* v. *R.*, *supra*); and see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 745.

(*h*) In many of these cases interest was payable at common law befor

such as mortgagor and mortgagee (*i*); obligor and obligee on a bond (*k*); executor and beneficiary (*l*); principal and agent (*m*); principal and surety (*n*); trustee and *cestui que trust* (*o*); vendor and purchaser (*p*); or in the case of arrears of annuities (*q*).

Interest payable by officers of the court.

(7) Where a person who is an officer of the court, such as a sheriff (*r*), a solicitor (*s*), or a receiver (*t*), wrongfully withholds money which he has obtained in the course of legal proceedings, he may be ordered to pay it with interest.

SUB-SECT. 3.—*Recovery of Interest.*

Under contract.

**75.** Interest, where there is a contract to pay it (*a*), may be recovered in an action brought for interest only (*b*); but interest payable by way of damages (*c*) is not a debt, and can only be recovered in proceedings for payment of the principal (*d*).

As damages.

Discharge of interest by discharge of principal.

**76.** If the principal debt is merged in a judgment (*e*) or discharged by payment (*f*), or if the amount due is tendered (*g*), interest ceases to run from that date; but outstanding arrears may still be claimed if they could not have been recovered in the action (*h*). If the principal is barred by a Statute of Limitation (*i*), the interest is, as a general

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the Judicature Acts, as well as in equity, but, having regard to the decision in *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429 (as to which see note (*b*), p. 40, *ante*), they must now, it would seem, be referred to the rules of equity only.

(*i*) See title MORTGAGE, p. 145, *post*.

(*k*) See title BONDS, Vol. III., p. 95.

(*l*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 323—325, 342, 345, 346. As to interest on legacies payable abroad, see title CONFLICT OF LAWS, Vol. VI., p. 232.

(*m*) See title AGENCY, Vol. I., p. 188.

(*n*) See title GUARANTEE, Vol. XV., pp. 482, 523.

(*o*) See titles CHARITIES, Vol. IV., p. 278; EQUITY, Vol. XIII., p. 158; TRUSTS AND TRUSTEES.

(*p*) See title SALE OF LAND.

(*q*) See title RENTCHARGES AND ANNUITIES.

(*r*) *R.* v. *Villers, Ex parte Villers* (1823), 11 Price, 575.

(*s*) See title SOLICITORS.

(*t*) See title RECEIVERS.

(*a*) This applies to express contracts and, it is submitted, to contracts implied from the course of dealing between the parties (see p. 39, *ante*).

(*b*) *Hudson* v. *Fawcett* (1844), 7 Man. & G. 348; *Nordenstrom* v. *Pitt* (1845), 13 M. & W. 723; *Re King, Ex parte Furber* (1881), 17 Ch. D. 191.

(*c*) This applies to interest payable otherwise than by contract; see pp. 38—40, *ante*; see also *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, C. A.

(*d*) *Re Churcher* v. *Stringer* (1831), 2 B. & Ad. 777; *Cameron* v. *Smith* (1819), 2 B. & Ald. 305.

(*e*) *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454. As to the effect of such a discharge upon the liability of sureties, see title GUARANTEE, Vol. XV., p. 565, note (*h*). As to the effect of judgment and the right to and rate of interest, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209.

(*f*) *Gyles* v. *Hall* (1726), 2 P. Wms. 378; *Norton* v. *Ellam* (1837), 2 M. & W. 461.

(*g*) *Ibid.*

(*h*) *Florence* v. *Jenings, supra.*

(*i*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 37, note (*a*). As to payment of interest constituting an acknowledgment of a debt so as to prevent the statutory bar, see *ibid.*, pp. 67, 68, 79, 92, 104.

SECT. 2. Interest on Money.

rule (*k*), barred also (*l*), and if the debt so barred is paid, the interest thereon does not revive (*m*).

Effect of delay.

**77.** If the principal remains unpaid by reason of the delay of the creditor (*n*), or from any cause outside the debtor's control (*o*), interest cannot be claimed.

SUB-SECT. 4.—*Rate of Interest.*

No limit to agreed rate.

**78.** Since the repeal of the statutes against usury (*p*), and subject to the statutory power of the court to set aside or vary a transaction where the interest charged is excessive (*q*), there is no restriction on the terms which may be agreed upon between a borrower and a lender for the payment of interest, and the ordinary principles of the law of contract govern any such agreement. The same rule applies to interest upon other debts.

Amount usually allowed.

Where the rate of interest is not fixed by statute, agreement or fixed usage, there is no hard and fast rule as to the amount that will be allowed (*r*); and the rate may vary according to the practice of the particular court, the value of money for the time being, and the circumstances of the particular case (*s*). The usual practice, apart from special circumstances, is to allow 5 per cent. in cases where the interest is partly in the nature of a penalty (*t*), and in commercial and speculative transactions (*a*), and 3 or 4 per cent. in others (*b*).

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(*k*) See title GUARANTEE, Vol. XV., p. 482, note (*d*).

(*l*) *Hollis* v. *Palmer* (1836), 2 Bing. (N. C.) 713; *Clark* v. *Alexander* (1844), 8 Scott (N. R.), 147; *Parkes* v. *Smith* (1850), 15 Q. B. 297.

(*m*) *Collyer* v. *Willock* (1827), 4 Bing. 313.

(*n*) *Edwards* v. *Warden* (1876), 1 App. Cas. 281; *Webster* v. *British Empire Mutual Life Assurance Co.* (1880), 15 Ch. D. 169, C. A.; *Merry* v. *Ryves* (1757), 1 Eden, 1; *Marlborough* (*Duchess Dowager*) v. *Strong* (1724), 4 Bro. Parl. Cas. 539; *Laing* v. *Stone* (1828), Mood. & M. 229, n.; *Cameron* v. *Smith* (1819), 2 B. & Ald. 305; *Jones* v. *Gardiner*, [1902] 1 Ch. 191. See also *Bann* v. *Dalzel* (1828), Mood. & M. 228.

(*o*) *Sterling* v. *Wynne*, *Coles* v. *Wynne* (1834), 1 Jo. Ex. Ir. 51; *Scott* v. *Sandeman* (1852), 1 Macq. 293, H. L.; *Bushnan* v. *Morgan* (1833), 5 Sim. 635; *A.-G.* v. *Ludlow Corporation* (1849), 1 H. & Tw. 216; see also *Rishton* v. *Grissell* (1870), L. R. 10 Eq. 393; *Caledonian Rail. Co.* v. *Carmichael* (1870), L. R. 2 Sc. & Div. 56.

(*p*) Usury Laws Repeal Act, 1854 (17 & 18 Vict. c. 90).

(*q*) As to this statutory power, see p. 53, *post*.

(*r*) *Re Metropolitan Coal Consumers Association, Wainwright's Case* (1889), 62 L. T. 30, *per* KAY, J., at p. 33; *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27, *per* Lord CAIRNS, L.C., at pp. 32, 33; *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120, C. A., *per* LINDLEY, L.J., at p. 133.

(*s*) *Re Metropolitan Coal Consumers Association, Wainwright's Case*, *supra*; *Re Roberts, Goodchap* v. *Roberts* (1880), 14 Ch. D. 49, C. A.; *Capel & Co.* v. *Sim's Ships Composition Co.* (1888), 57 L. J. (CH.) 713, 718; *Re Unsworth's Trust* (1865), 2 Drew. & Sm. 337. For the rates allowed in particular cases, see the various titles *passim*.

(*t*) See, for instance, R. S. C., Ord. 50, r. 18; title RECEIVERS; *Gluckstein* v. *Barnes*, [1900] A. C. 240, 255.

(*a*) *Rokeby* (*Lord*) v. *Elliot* (1879), 13 Ch. D. 277, C. A.; *Re Beulah Park Estate, Sargood's Claim* (1872), L. R. 15 Eq. 43; *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66; *Harsant* v. *Blaine, Macdonald & Co.* (1887), 56 L. J. (Q. B.) 511, C. A.

(*b*) Three per cent. is allowed in certain cases of adjustments between tenant for life and remainderman etc.; see *Rowlls* v. *Bebb, Re Rowlls, Walters* v. *Treasury Solicitor*, [1900] 2 Ch. 107, C. A., following *Re*

If the circumstances are such that interest ought to be calculated at the commercial rate, and the debt is payable abroad, the rate current at the place of payment will be allowed (*c*).

Rate on debts payable abroad.

**79.** Where there is a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, and default is made in payment of the principal, the rate of interest mentioned in the contract is the rate usually allowed from the time of default; there is, however, no general rule of law to that effect (*d*).

Rate in case of default in payment.

SUB-SECT. 5.—*Compound Interest.*

**80.** Compound interest will not be allowed except where there is an agreement, express or implied (*e*), to pay it (*f*), or where the debtor has employed the money in trade and has presumably earned it (*g*), or unless its allowance is in accordance with a custom of a particular trade or business (*h*).

When allowed.

SUB-SECT. 6.—*Apportionment of Interest.*

**81.** Interest accrues *de die in diem*, and is, therefore, apportionable between persons entitled in succession to the principal (*i*).

Apportionment.

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*Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Lambert, Middleton* v. *Moore*, [1897] 2 Ch. 169; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284, notes (*g*), (*h*). But 4 per cent. is allowed in the majority of cases in the Chancery Division (*Re Goodenough, Marland* v. *Williams*, *supra*, *per* KEKEWICH, J., at p. 539; *Re Davy, Hollingsworth* v. *Davy*, [1908] 1 Ch. 61, C. A. (interest on advancements); *Re Owen, Slater* v. *Owen*, [1912] W. N. 49 (tenant for life and remainderman). As to the rate charged on adjustments in partition actions, see title PARTITION, p. 864, *post*.

(*c*) *Cooper* v. *Waldegrave* (*Earl*) (1840), 2 Beav. 282; *Connor* v. *Bellamont* (*Earl*) (1742), 2 Atk. 383; *Gibbs* v. *Fremont* (1853), 9 Exch. 25; see also *Finch* v. *Finch* (1876), 45 L. J. (CH.) 816; and see title CONFLICT OF LAWS, Vol. VI., pp. 212, 247.

(*d*) *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27; *Morgan* v. *Jones* (1853), 8 Exch. 620; *Keene* v. *Keene* (1857), 3 C. B. (N. S.) 144; *Orme* v. *Galloway* (1854), 23 L. J. (EX.) 118; and see *Kildare* (*Countess Dowager*) v. *Hopson* (1735), 4 Bro. Parl. Cas. 550; *Parker* v. *Hutchinson* (1796), 3 Ves. 133; *Re Lane, Ex parte Hodge* (1857), 26 L. J. (BCY.) 77, C. A.; *Re Roberts, Goodchap* v. *Roberts* (1880), 14 Ch. D. 49, C. A.; *Arbuthnot* v. *Bunsilall* (1890), 62 L. T. 234.

(*e*) *Morgan* v. *Mather* (1792), 2 Ves. 15; *Clancarty* (*Lord*) v. *Latouche* (1810), 1 Ball & B. 420; *Newell* v. *Jones* (1830), 4 C. & P. 124; compare *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, H. L., and *Crosskill* v. *Bower*, *Bower* v. *Turner* (1863), 32 Beav. 86. See also cases in note (*t*), p. 39, *ante*.

(*f*) *Fergusson* v. *Fyffe*, *supra*; *Boddam* v. *Riley* (1787), 4 Bro. Parl. Cas. 561; *Ex parte Bevan* (1903), 9 Ves. 223.

(*g*) *A.-G.* v. *Alford* (1855), 4 De G. M. & G. 843; *Burdick* v. *Garrick* (1870), 5 Ch. App. 233.

(*h*) *Bruce* v. *Hunter* (1813), 3 Camp. 467; *Eaton* v. *Bell* (1821), 5 B. & Ald. 34; *Fergusson* v. *Fyffe*, *supra*; *Williamson* v. *Williamson* (1869), L. R. 7 Eq. 542; see *Re Lloyd Edwards, Williams* v. *Trench* (1891), 61 L. J. (CH.) 22; *Silkstone and Haigh Moor Coal Co.* v. *Edey*, [1900] 1 Ch. 167; see title GUARANTEE, Vol. XV., p. 538.

(*i*) Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), s. 2; Apportionment Act, 1870 (33 & 34 Vict. c. 35); and see title EQUITY, Vol. XIII., p. 28. As to apportionment between various parties, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 227, 275; LANDLORD AND TENANT, Vol. XVIII., pp. 484 *et seq.*; REAL PROPERTY AND CHATTELS REAL; RENTCHARGES AND ANNUITIES; SETTLEMENTS; TRUSTS AND TRUSTEES; WILLS. Interest on money lent was apportionable at common law; see the preamble of the Apportionment Act, 1870 (33 & 34 Vict. c. 35); *Banner* v. *Lowe* (1806), 13 Ves. 135.

# Part II.—Loans of Money.

SECT. 1. **Registration of Money-lenders.**

## SECT. 1.—*Registration of Money-lenders.*

### SUB-SECT. 1.—*Who must Register.*

Who is a "money-lender."

**82.** Every person (*j*) (excepting those hereafter specified (*k*)) whose business is that of money-lending, or who advertises or announces himself or holds himself out as carrying on that business, is a "money-lender" within the meaning of the Money-lenders Acts (*l*), and must register himself as a "money-lender" in accordance with the statutory regulations made by the Commissioners of Inland Revenue (*m*).

The business of money-lending.

**83.** It is a question of fact in each case whether a person is carrying on the business of money-lending (*n*); and in order to establish that he is carrying on such a business it is not sufficient to prove that he has occasionally lent money at a remunerative rate of interest (*o*), but it is necessary to prove some degree of system and continuity in his money-lending transactions

(*j*) "Person" includes individuals, firms, societies, and companies (Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 3 (1), and Interpretation Act, 1889 (52 & 53 Vict. c. 63), ss. 1, 2). As to money-lending companies, see title COMPANIES, Vol. V., p. 765.

(*k*) See the text, *infra*, and p. 45, *post*.

(*l*) *I.e.*, the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), and the Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), which are to be construed as one (see *ibid.*, s. 3). Such persons are referred to in this title as "money-lenders."

(*m*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), ss. 2 (1) (a), 3 (1), 6. As to the statutory regulations, see pp. 46, 47, *post*. Persons so registered are referred to in this title as "registered money-lenders."

(*n*) *Kirkwood* v. *Gadd*, [1910] A. C. 422, 424, 428, 431.

(*o*) In *Newton* v. *Pyke* (1908), 25 T. L. R. 127 (where a man lent money to friends on several occasions at remunerative rates of interest); *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584 (where a curio-dealer discounted bills for friends in connection with his business); *Furber* v. *Fieldings, Ltd.* (1907), 23 T. L. R. 362 (where an auctioneer lent money on bills of sale in the hope of increasing his clientele); and *Newman* v. *Oughton*, [1911] 1 K. B. 792 (where a pawnbroker on an isolated occasion lent money on a bill of sale), it was held that the lenders were not carrying on the business of money-lending within the meaning of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51).

(*p*) *Kirkwood* v. *Gadd*, *supra*, *per* Lords LOREBURN, L.C., and ATKINSON, at pp. 423, 431; *Newton* v. *Pyke*, *supra*, *per* WALTON, J., at p. 128. The carrying on of a business implies a repetition of acts, and excludes an isolated transaction (*Smith* v. *Anderson* (1880), 15 Ch. D. 247, C. A., *per* BRETT, L.J., at p. 277; see also *Wigfield* v. *Potter* (1881), 45 L. T. 612; *Crowther* v. *Thorley* (1884), 32 W. R. 330; *Re Siddall* (*a Person of Unsound Mind*) (1885), 29 Ch. D. 1). Thus in *Bonnard* v. *Dott* (1905), 21 T. L. R. 491; affirmed, [1906] 1 Ch. 740, C. A. (where the sole business of the lender was the lending of money to company promoters), it was held that the lender ought to have registered himself as a money-lender under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51). In considering whether there is a sufficient "system and continuity" in the money-lending transactions, all the loans made by the lender must be taken into account, including loans made in the course of a business which has not for its primary object the lending of money, as to which see p. 45, *post* (*Fagot* v. *Fine*

SUB-SECT. 2.—*Exemptions from Registration.*

SECT. 1. Registration of Money-lenders.

Persons and bodies exempt from registration.

**84.** The following persons and bodies are not "money-lenders" within the meaning of the Money-lenders Acts (*a*).

(1) Pawnbrokers in respect of business carried on by them in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers (*b*);

(2) Persons (*c*) *bonâ fide* carrying on the business of banking (*d*);

(3) Persons (*c*) *bonâ fide* carrying on the business of insurance (*e*);

(4) Persons (*c*) *bonâ fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof they lend money (*f*);

(5) Registered societies within the meaning of the Friendly Societies Act, 1896 (*g*);

(6) Societies registered or having rules certified under the Friendly Societies Act, 1896 (*h*), ss. 2 or 4;

(7) Societies registered under the Benefit Building Societies Act, 1836 (*i*);

(8) Societies registered under the Loan Societies Act, 1840 (*j*);

(9) Societies registered under the Building Societies Acts, 1874 to 1894 (*k*);

(10) Bodies corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such Act;

(11) Bodies corporate for the time being exempted from registration under the Money-lenders Acts (*l*), by order of the Board of Trade published pursuant to regulations of the Board of Trade (*m*).

These persons and bodies are exempted from registration

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(1911), 105 L. T. 583). Interrogatories may be administered to a person lending money in order to prove "system and continuity" in his business, but not so as to disclose the names of his clients (*Nash* v. *Layton*, [1911] 2 Ch. 71, C. A.).

(*a*) As to these Acts, see note (*l*), p. 44, *ante*.

(*b*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93); *Newman* v. *Oughton*, [1911] 1 K. B. 792; and see title PAWNS AND PLEDGES.

(*c*) For the definition of the word "person," see note (*j*), p. 44, *ante*.

(*d*) See title BANKERS AND BANKING, Vol. I., p. 568. Money-lenders must not describe themselves as bankers; see pp. 47, 57, *post*.

(*e*) See title INSURANCE, Vol. XVII., p. 339.

(*f*) See *Furber* v. *Fieldings, Ltd.* (1907), 23 T. L. R. 362; *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584.

(*g*) 59 & 60 Vict. c. 25; see title FRIENDLY SOCIETIES, Vol. XV., pp. 123—126.

(*h*) 59 & 60 Vict. c. 25. *I.e.*, building societies, scientific, literary, or art societies, loan societies, and trade unions; see titles BUILDING SOCIETIES, Vol. III., p. 324; LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., p. 196; LOAN SOCIETIES, Vol. XIX., p. 217; TRADE AND TRADE UNIONS.

(*i*) 6 & 7 Will. 4, c. 32. See title BUILDING SOCIETIES, Vol. III., p. 324.

(*j*) 3 & 4 Vict. c. 110. See title LOAN SOCIETIES, Vol. XIX., p. 217.

(*k*) See title BUILDING SOCIETIES, Vol. III., p. 327.

(*l*) As to these Acts, see note (*l*), p. 44, *ante*.

(*m*) For these regulations, see Stat. R. & O. Rev., Vol. VIII., Money Lender, p. 2.

SECT. 1. **Registration of Money-lenders.**

under the Money-lenders Acts (*n*), and the restrictions imposed thereby with regard to the carrying on of the business of money-lending do not apply to them (*o*). Loans of money by persons so exempted are governed by the ordinary law (*p*).

SUB-SECT. 3.—*Regulations as to Registration.*

Place of registration.

**85.** Every "money-lender" (*q*) must register himself (*r*)—

(1) At an office provided by the Commissioners of Inland Revenue (*s*);

Particulars to be registered.

(2) Under his own name (*t*) or his usual trade name (*u*);

(3) With the address at which he carries on his business of a money-lender; or, if he carries on such business at more than one address, with all the addresses at which he carries on such business (*a*).

Removal from register.

**86.** The Commissioners of Inland Revenue have power, on giving proper notice to the "money-lender," to remove his name from the register, and if the registration is improper it is their duty to do so (*b*), but unless the name is removed from the register the registration is effective for the period of three years from the date thereof (*c*).

Renewal of registration.

The registration may from time to time be renewed, and, if renewed, is effective for a period of three years from the date of the renewal (*c*).

(*n*) As to these Acts, see note (*l*), p. 44, *ante*.

(*o*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 6.

(*p*) See p. 50, *post*.

(*q*) For the meaning of this term, see p. 44, *ante*.

(*r*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2. For the penalty for omission to register, see p. 47, *post*.

(*s*) The present Registration Office is at Room No. 12, Somerset House, Strand, London. Registration may be effected by post or personal attendance.

(*t*) A person's "own name" is not necessarily the surname of his father, with (in the case of a Christian) the names given to him at his baptism prefixed thereto; the name by which he is in fact known and described is, it is submitted, his "own name" within the statutory meaning; see title NAME AND ARMS, CHANGE OF, p. 349, *post*.

(*u*) "Usual trade name" means a trade name which the money-lender has been using before the date of his registration (*Whiteman* v. *Sadler*, [1910] A. C. 514, upholding on this point the decision of the Court of Appeal, *Sadler* v. *Whiteman*, [1910] 1 K. B. 868, C. A., and overruling *Stirling* v. *Silburn and Pyman*, [1910] 1 K. B. 67). A money-lender cannot adopt a trade name for the purpose of registration. "A disguise which a man assumes for the purpose of concealing his identity cannot be described as his usual attire at the time, even though he means to wear it in future as long as it serves his purpose" (*Whiteman* v. *Sadler*, *supra*, *per* Lord MACNAGHTEN, at p. 519). As to trade names generally, see title TRADE MARKS, TRADE NAMES, AND DESIGNS.

(*a*) See *Staffordshire Financial Co.* v. *Valentine* (1910), 26 T. L. R. 362, C. A. If the business is carried on in more than one part of the United Kingdom a separate registration must be made for each part; see the Regulations referred to in note (*f*), p. 47, *post*.

(*b*) *Whiteman* v. *Sadler*, *supra*, *per* Lord MACNAGHTEN, at pp. 521, 522.

(*c*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 3 (2). According to directions issued by the Board of Inland Revenue (November, 1911), a

SECT. 1. Registration of Money-lenders.

**87.** No person may be registered as a "money-lender" under any name including the word "bank," or under any name implying that he carries on banking business; and, if any "money-lender" is registered under any such name, the name must be removed from the register and a notification to that effect must be sent to him (*d*). Prohibition against registration as bankers.

**88.** The fees to be paid on registration and renewal of registration are fixed by the Commissioners of Inland Revenue, but must not exceed £1 for each registration or renewal (*e*). Fees on registration.

**89.** The register of "money-lenders" is kept by the Commissioners of Inland Revenue at Somerset House, and is open to inspection by any person on payment of a fee of 1*s.* for the inspection of each return on the register (*f*). The register.

SUB-SECT. 4.—*Penalties for Failure to Register.*

**90.** Any "money-lender" (*g*) who fails to register himself in accordance with the preceding provisions (*h*) is liable (*i*), on conviction under the Summary Jurisdiction Acts (*j*), to a fine not exceeding £100, and in the case of a second or subsequent conviction (*k*) to imprisonment with or without hard labour for a term not exceeding three months or to a fine not exceeding £100, or to both. If the offender is a body corporate, it is liable on a second or subsequent conviction to a fine not exceeding £500. Penalties for failure to register.

fresh registration is necessary whenever a change occurs either in the "money-lender's" name or in the place or any of the places of business (see p. 47, *post*); and in the case of a firm or unincorporated society or company, of a change of any kind therein. The carrying on of business at an additional place also entails a fresh registration.

(*d*) Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 2 (1). For the penalty imposed upon "money-lenders" who represent themselves as bankers, see p. 57, *post*.

(*e*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 3 (1).

(*f*) Regulations made by the Commissioners of Inland Revenue under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 3 (1) (Stat. R. & O., 1909, p. 601). For this fee a copy of the return will be supplied if it does not exceed one folio of seventy-two words or figures. If it exceeds this limit a fee of 4*d.* per folio is charged. The stamped forms for registration and for searching may be purchased at the Chief Registration Office or at the office of any collector of Customs and Excise, or may be ordered through any money order office; but applicants must state whether the registration is (a) of an individual, (b) of a firm or unincorporated society or company, or (c) of an incorporated society or company—seeing that different forms are to be used for each class (Directions issued by the Board of Inland Revenue, November, 1911).

(*g*) For the meaning of this term, see p. 44, *ante*.

(*h*) See pp. 44, 46, *ante*.

(*i*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2 (2). No prosecution for this offence can be instituted without the consent of the Attorney-General or Solicitor-General (*ibid.*, s. 2 (3)). As to the illegality of loans by unregistered "money-lenders," see p. 51, *post*.

(*j*) See title MAGISTRATES, Vol. XIX., pp. 589—607.

(*k*) As to the meaning of "second or subsequent conviction," see title INTOXICATING LIQUORS, Vol. XVIII., p. 107, note (*u*), and cases there cited.

SECT. 2. **Loans of Money by Registered Money-lenders.**

## SECT. 2.—*Loans of Money by Registered Money-lenders.*

### SUB-SECT. 1.—*Statutory Restrictions.*

**Restrictions on carrying on money-lending business.**

**91.** A "money-lender" (*l*) is subject to the following statutory restrictions with regard to the carrying on of his money-lending business (*m*) :—

(1) He must carry on such business in his registered name and in no other name and under no other description (*n*) ;

(2) He must not enter into an agreement in the course of his business as a money-lender with respect to the advance and repayment of money, nor take any security for money (*o*) in the course of his business as a money-lender, otherwise than in his registered name (*p*) ;

(3) He must carry on such business at his registered address or addresses and at no other address (*q*) ;

(4) He is bound, on reasonable request and on tender of a

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(*l*) For the meaning of this term, see p. 44, *ante*.

(*m*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2 (1) (b), (c), (d). As to the relief of borrowers, see p. 53, *post*.

(*n*) A "money-lender" who carries on two registered businesses under different names, one on his own account and the other in partnership with others, has committed a breach of this provision (*Whiteman* v. *Sadler*, [1910] A. C. 514 ; *Stirling* v. *Silburn and Pyman*, [1910] 1 K. B. 67 ; compare *Chapman* v. *Michaelson*, [1908] 2 Ch. 612 ; affirmed, [1909] 1 Ch. 238, C. A. ; *Staffordshire Financial Co.* v. *Valentine* (1910), 26 T. L. R. 362, C. A.). So, also, has one who carries on business through an intermediary, without disclosing his own identity until the transaction is complete (*Re a Debtor, Ex parte Carden* (1908), 52 Sol. Jo. 209, C. A.).

A trivial variation in the name, *e.g.*, "W Loan and Discount Co." and "W Loan and Discount Office," which is not calculated to deceive, is immaterial (*Wentworth Loan and Discount Co.* v. *Lefkowitz* (1911), 105 L. T. 585, affirmed (1912), 28 T. L. R. 334, C. A.). The distinction between this provision and the ensuing one (see the text, *infra*) is that the first is aimed at rendering the money-lender liable to penalties, and the second at setting aside the particular contract (S. C. (1911), 105 L. T. 585, *per* LUSH, J.). The question whether the variance amounts to a difference is a question of law (S. C. (1912), 28 T. L. R. 334, 335, C. A.).

(*o*) As to what is a "security for money," see *Re Robinson, Clarkson* v. *Robinson* (No. 2) (1911), 104 L. T. 712, C. A. Compare *West Ham Guardians* v. *Ovens* (1872), L. R. 8 Exch. 37, as to a judgment being a valuable security within the meaning of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 16.

(*p*) A "money-lender" who enters into an agreement or takes security under the circumstances mentioned in note (*n*), *supra*, has committed a breach of this provision also ; see cases cited in note (*n*), *supra*. As to the rights of assignees of contracts etc. rendered illegal by the Money-lenders Acts (see note (*l*), p. 44, *ante*), see p. 52, *post*.

(*q*) It is not necessary that every incident of the money-lending business should be transacted at the "money-lender's" registered office. If he really deals with a borrower at his registered address, whether by interview or correspondence, he may without infringing the Act transact negotiations or conclude the actual contract elsewhere (*per* Lord LOREBURN, L.C., in *Kirkwood* v. *Gadd*, [1910] A. C. 422). In each case it must be a question of fact whether he is really carrying on his business elsewhere than at his registered address ; see, on the one hand, *Staffordshire Financial Co.* v. *Hunt*, [1907] W. N. 258 (where it was held that the "money-lender" was carrying on business elsewhere than at his registered address) ; and, on the other hand, *Kirkwood* v. *Gadd*, *supra*, reversing S. C., *sub nom. Gadd* v. *Provincial Union Bank*, [1909] 2 K. B. 353, C. A. ; see also *King* v. *Turnbull* (1908), 24 T. L. R. 434 ; *King* v. *Massey* (1908), 24 T. L. R. 710 (completion of business at office of borrower) ; *Jackson* v. *Price*, [1910] 1 K. B. 143 (cheque sent to borrower by post) ; *Levene* v. *Gardner* (1909), 25 T. L. R. 711 (signature of promissory note at place

reasonable sum for expenses, to furnish the borrower with a copy of any document relating to the loan or any security therefor (*r*).

SECT. 2. Loans of Money by Registered Money-lenders.

SUB-SECT. 2.—*Penalties for Breach of Statutory Restrictions.*

Penalties.

**92.** A "money-lender" (*s*) who carries on business otherwise than in his registered name, or in more than one name (*t*), or elsewhere than at his registered address, or fails to comply with any other of the statutory obligations mentioned in the preceding paragraph, is liable (*u*), on conviction under the Summary Jurisdiction Acts (*v*), to a fine not exceeding £100, and, in the case of a second or subsequent conviction (*w*), to imprisonment with or without hard labour for a term not exceeding three months, or to a fine not exceeding £100, or to both. If the offender is a body corporate, it is liable on a second or subsequent conviction (*w*) to a fine not exceeding £500.

SUB-SECT. 3.—*Illegality of Loans made in Breach of Statutory Restrictions.*

Effect of loans in breach of statute.

**93.** If a "money-lender" (*a*), although duly registered, makes a loan either in some name other than his registered name (*b*), or under a description other than his registered description, or at an address other than his registered address (*c*), the transaction is

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other than registered address; money handed over at that address); *Re Seed, Ex parte King*, [1910] 1 K. B. 661; *Blaiberg* v. *Calvert* (1910), 26 T. L. R. 328 (substantial negotiations at registered address, but completion elsewhere); *Hopkins* v. *Hills*, [1910] 2 K. B. 29 (loans repaid at places other than registered address); *Rueter* v. *Bradford Advance Co.* (1910), 26 T. L. R. 533, where it was held that the "money-lender" had not committed any breach of the statutory provision requiring him to carry on his business at his registered address and not elsewhere; compare *Blair* v. *Buckworth* (1908), 24 T. L. R. 474, C. A. Having regard to the observations of the Lords of Appeal in *Kirkwood* v. *Gadd*, [1910] A. C. 422, it may be doubted whether *Lazarus* v. *Gardner* (1909), 25 T. L. R. 499, 719, C. A., was rightly decided.

(*r*) The obligation to furnish a copy implies, it is submitted, an obligation to permit reasonable inspection of the original for the purposes of comparing it with the copy.

(*s*) For the meaning of this term, see p. 44, *ante*.

(*t*) "A money-lender" who in fact carries on business in two or more names commits an offence against the Money-lenders Acts (see note (*l*), p. 44, *ante*), and is liable to conviction, although owing to a mistake on the part of the Commissioners of Inland Revenue each of the several names used by him has been placed on the register (*Whiteman* v. *Director of Public Prosecutions*, [1911] 1 K. B. 824).

(*u*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2 (2).

(*v*) See title MAGISTRATES, Vol. XIX., pp. 589—607.

(*w*) See note (*k*), p. 47, *ante*.

(*a*) For the meaning of this term, see p. 44, *ante*.

(*b*) *Whiteman* v. *Sadler*, [1910] A. C. 514, 521; see *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624 (where the money-lender was not registered, and consequently had no registered address); see also *Blair* v. *Holcombe* (1912), 28 T. L. R. 198, where it was held that an agreement made in consideration of the withdrawal of a bankruptcy petition, between a debtor and the creditor, a "money-lender," in the name in which he had originally been registered and had obtained judgment but which, between the date of the judgment and the date of the agreement, he had changed, was validly entered into. As to loans by unregistered money-lenders, see p. 51, *post*. As to the rights of assignees of contracts etc. rendered illegal by the Money-lenders Acts (see note (*l*), p. 44, *ante*), see p. 52, *post*.

(*c*) *Staffordshire Financial Co.* v. *Hunt*, [1907] W. N. 258.

SECT. 2. Loans of Money by Registered Money-lenders.

illegal, and he cannot maintain any action to recover the money lent or enforce any security obtained by him in respect thereof.

### SECT. 3.—*Loans of Money by Unregistered Persons.*

#### SUB-SECT. 1.—*By Persons who are not Money-lenders.*

Application of general law.

**94.** The loan of money by a person who is not a "money-lender" (*d*), and, therefore, not required to register himself nor subject to the restrictions imposed by the Money-lenders Acts (*e*), is, since the repeal of the usury statutes (*f*), governed by the general law relating to contracts. In such cases the loan of money creates a debt recoverable by action (*g*), and the debt which constitutes the cause of action arises instantly on the making of the loan (*h*). A request for payment of the debt before action brought is not necessary unless the parties stipulate for it (*i*).

Money lent.

Money lent on mortgage.

**95.** Where money is lent upon mortgage and the mortgage deed does not contain any covenant, either express or implied, to repay the loan (*j*), or where the borrower, having agreed to repay the loan on demand or to execute a mortgage, refuses to do so (*k*), the debt may be recovered in an action for money lent; but where there is a covenant by the borrower to repay, the action must be brought on the covenant (*l*).

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(*d*) For the meaning of this term, see p. 44, *ante*. As to loans by loan societies, see title LOAN SOCIETIES, Vol. XIX., pp. 222 *et seq.*

(*e*) As to these Acts, see note (*l*), p. 44, *ante*.

(*f*) Usury Laws Repeal Act, 1854 (17 & 18 Vict. c. 90).

(*g*) The mere payment of money by one person to another, or the production of an I.O.U., or of a cheque given in respect of money paid, is not evidence of a loan, the presumption being that the money was paid in respect of a debt already due (*Welch* v. *Seaborn* (1816), 1 Stark. 474). "An I.O.U. is no more proof of money lent by the party holding it to the party sought to be charged than of goods sold and delivered by one to the other" (*Fesenmayer* v. *Adcock* (1847), 16 M. & W. 449, *per* PARKE, B., at p. 450). See *Curtis* v. *Rickards* (1840), 1 Man. & G. 46 (the production of an I.O.U. by the plaintiff is *primâ facie* evidence of an account stated by the defendant with him); compare *Douglas* v. *Home* (1840), 12 Ad. & El. 641; *Pearce* v. *Davis* (1834), 1 Mood. & R. 365. See also *Morgan* v. *Jones* (1830), 1 Cr. & J. 162; *Howard* v. *Danbury* (1846), 2 C. B. 803; *Enthoven* v. *Hoyle* (1853), 13 C. B. 373; *Tyte* v. *Jones* (1788), 1 East, 58, n.; *Buck* v. *Hurst and Bailey* (1866), L. R. 1 C. P. 297; *Aubert* v. *Walsh* (1812), 4 Taunt. 293; *Breton* v. *Cope* (1791), 1 Peake, 43 [31]; *Pfiel* v. *Vanbatenberg* (1810), 2 Camp. 439.

(*h*) *Norton* v. *Ellam* (1837), 2 M. & W. 461, *per* PARKE, B., at p. 464; see title LIMITATION OF ACTIONS, Vol. XIX., p. 43. As to the damages for breach of contract to lend money, see title DAMAGES, Vol. X., p. 332.

(*i*) *Walton* v. *Mascall* (1844), 13 M. & W. 452, *per* PARKE, B., at p. 458; see *Birks* v. *Trippet* (1666), 1 Wms. Saund., 1845 ed., p. 32; *Kington* v. *Kington* (1843), 11 M. & W. 233; *Waters* v. *Thanet* (*Earl*) (1842), 2 Q. B. 757; and see title CONTRACT, Vol. VII., p. 434.

(*j*) *Yates* v. *Aston* (1843), 4 Q. B. 182; *Mathew* v. *Blackmore* (1857), 1 H. & N. 762; see *Cassidy* v. *Cassidy* (1889), 24 L. R. Ir. 577; and see title MORTGAGE, p. 115, *post*.

(*k*) *Bristowe* v. *Needham* (1842), 9 M. & W. 729; see *James* v. *Cotton* (1831), 7 Bing. 266; *Scott* v. *Parker* (1841), 1 Q. B. 809.

(*l*) *Mathew* v. *Blackmore*, *supra*; *Brown* v. *Price* (1858), 4 C. B. (N. S.) 598. A covenant to repay may sometimes be implied by an acknowledgment of the debt in the deed; see *Courtney* v. *Taylor* (1843), 6 Man. & G. 851, 870; *Marryat* v. *Marryat* (1860), 28 Beav. 224; *Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573; *Isaacson* v. *Harwood*, *Brook* v. *Hurwood* (1868), 3 Ch. App. 225; and see title MORTGAGE, p. 113, *post*.

SECT. 3. Loans of Money by Unregistered Persons.

Void security.

**96.** Where money is lent on a security which is void (*m*) or worthless (*n*), the lender may recover the amount of the loan in an action for money lent.

Illegal consideration.

**97.** Where money is lent for an illegal or immoral purpose, the lender cannot maintain an action for money lent (*o*), such transactions being governed by the same rule of law which applies to other illegal contracts (*p*).

Loan induced by fraud.

**98.** If a person fraudulently conceals his identity, and thereby induces another to borrow money from him, the borrower may repudiate the transaction (*q*).

SUB-SECT. 2.—*By Unregistered Money-lenders.*

Effect of loan

**99.** The loan of money in the course of his business (*r*), by a person who is a "money-lender" (*s*), but is not registered, is illegal and void, and he cannot maintain any action to recover the money lent or enforce any security obtained by him in respect thereof (*t*).

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(*m*) *Davis* v. *Rees* (1886), 17 Q. B. D. 408, C. A., where a bill of sale, containing a covenant for repayment, was held void under the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), on the ground that it was not in the form given in the schedule to that Act; but it was held that an action would lie for money lent, there being an implied agreement to repay apart from the bill of sale.

(*n*) *Bank of England* v. *Tomkins* (1842), 6 Jur. 347; see *Timmins* v. *Gibbins* (1852), 18 Q. B. 722.

(*o*) Thus money lent to play at "hazard," which is forbidden by the law of England (Gaming Acts, 1738 (12 Geo. 2, c. 28) and 1744 (18 Geo. 2, c. 34)), cannot be recovered (*M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434); but it would appear that money lent for the purpose of gambling in a country where the game is not illegal may be recovered in this country (*Quarrier* v. *Colston* (1842), 1 Ph. 147; *King* v. *Kemp* (1863), 8 L. T. 255; *Saxby* v. *Fulton*, [1909] 2 K. B. 208, C. A.); see, however, on this point, title GAMING AND WAGERING, Vol. XV., p. 283, note (*l*); and as to recovery of money lent for the purpose of enabling a debtor to pay gaming debts, see *Re O'Shea, Ex parte Lancaster*, [1911] 2 K. B. 981, C. A., following *Re Lister, Ex parte Pyke* (1878), 8 Ch. D. 754, C. A.; and distinguishing *Tatam* v. *Reeve*, [1893] 1 Q. B. 44, *and Saffery* v. *Mayer*, [1901] 1 K. B. 11, C. A. See also *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179; *Hill* v. *Fox* (1859), 4 H. & N. 359, Ex. Ch.; and title GAMING AND WAGERING, Vol. XV., p. 278.

(*p*) See title CONTRACT, Vol. VII., pp. 390 *et seq.*

(*q*) *Gordon* v. *Street*, [1899] 2 Q. B. 641, C. A.; *Levin* v. *O'Keeffe*, [1900] 2 I. R. 628, C. A.; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 754, note (*u*).

(*r*) As to what constitutes carrying on business, see p. 44, *ante*; and see *Re Robinson's Settlement, Gant* v. *Hobbs*, [1912] 28 T. L. R. 298, C. A.

(*s*) For the meaning of this term, see p. 44, *ante*.

(*t*) *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624; *Bonnard* v. *Dott*, [1906] 1 Ch. 740, C. A.; *Dott* v. *Brickwell* (1906), 23 T. L. R. 61; *Whiteman* v. *Sadler*, [1910] A. C. 514. For the rights of assignees of contracts or securities so obtained, see p. 52, *post*. The court will not necessarily assist a plaintiff by reason of a co-defendant's omission to plead the statute; see *Re Robinson's Settlement. Gant* v. *Hobbs*, *supra*; titles CONTRACT, Vol. VII., p. 390; PLEADING. The transaction will be set aside, at any rate at the instance of the trustee in bankruptcy of the borrower, even though judgment has been obtained for the loan and a subsequent agreement entered into for paying off the judgment debt by instalments (*Re Campbell, Ex parte Seal*, [1911] 2 K. B. 992, C. A.). As to loans by registered money-lenders, see p. 48, *ante*.

SECT. 3. **Loans of Money by Unregistered Persons.**

The borrower is entitled to a declaration that the transaction was illegal and void (*u*); but if he seeks to obtain any equitable relief, the court can impose as a condition on the grant of such equitable relief that he himself should do what is fair and equitable in the matter, and repay to the "money-lender" the money actually lent with reasonable interest thereon (*x*).

Condition upon which relief may be granted.

Remedy open to lender.

Although the "money-lender" cannot maintain an action to recover the money lent, he is not debarred from maintaining any action, other than that for money lent, which may be open to him; if, for instance, he was induced to lend the money by fraud, he may bring an action for damages for deceit (*a*).

## SECT. 4.—*Rights of Transferees of Securities taken by Money-lenders.*

Provision in favour of assignees or holders for value.

**100.** If an agreement made between a borrower and a "money-lender" (*b*), or a security given by the one to the other, is illegal and void as between the original parties thereto under the Money-lenders Act, 1900 (*c*), it is nevertheless valid in favour of a *bonâ fide* assignee or holder for value (who is not himself a "money-lender" (*b*)) without notice (*d*) of the defect, and of any person deriving title under him; and all payments and transfers of money or property made *bonâ fide* by any person (whether acting in a fiduciary character or otherwise) on the faith of the validity of such agreement or security and without notice (*d*) of the defect are, and are to be deemed always to have been, as valid in favour of that person as they would have been if the agreement or security had itself been valid (*e*). If the borrower or any other person is prejudiced by this provision, the "money-lender" is liable to indemnify him (*e*).

This provision does not render valid any agreement, security, or other transaction which is void or unenforceable for any other reason, or any agreement or security which was declared void by a court of competent jurisdiction before the 16th December, 1911 (*f*).

Notice of defect.

**101.** No person is to be deemed to have had notice of a defect in an agreement or security merely because a search in the register of money-lenders (*g*) would have disclosed the defect, or shown that the agreement or security was effected with a "money-lender" (*h*).

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(*u*) *Chapman* v. *Michaelson*, [1908] 2 Ch. 612; affirmed, [1909] 1 Ch. 238, C. A.

(*x*) *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; and see title CONTRACT, Vol. VII., pp. 408, 409.

(*a*) *Dott* v. *Brickwell* (1906), 23 T. L. R. 61.

(*b*) For the meaning of this term, see p. 44, *ante*.

(*c*) 63 & 64 Vict. c. 51.

(*d*) As to what amounts to notice of a defect, see the text, *infra*.

(*e*) Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1 (1), passed in consequence of the decision in *Re Robinson, Clarkson* v. *Robinson* [1911] 1 Ch. 230, C. A.

(*f*) Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1 (3).

(*g*) See pp. 46, 47, *ante*.

(*h*) Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1 (2). The provisions of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (for which see title EQUITY, Vol. XIII., p. 87), apply to this case as if the expression "purchaser" included a person making the payment or transfer referred to in the text, *supra* (Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1 (2)).

## SECT. 5.—*Loans of Money to Infants and Expectant Heirs.*



### SUB-SECT. 1.—*To Infants.*

To infants.

**102.** The loan of money to an infant (*i*) is absolutely void (*j*); and an agreement made by the borrower after he comes of age to pay money in respect of any such loan, and any negotiable or other instrument given in respect of such loan, are void so far as they relate to money which represents or is payable in respect of such loan (*k*).

### SUB-SECT. 2.—*To Expectant Heirs.*

To expectant heirs.

**103.** From the earliest times relief has been given in equity in the case of unconscionable bargains with expectant heirs (*l*). In such cases, on the borrower submitting to do equity by repaying what is justly due, the court will set aside transactions which it considers unrighteous, and will order that the securities given shall stand as security for the money actually advanced with interest (*m*).

Equitable relief.

## SECT. 6.—*Relief of Borrowers.*

### SUB-SECT. 1.—*Under the Money-lenders Acts.*

Statutory relief.

**104.** In any transaction, whatever its form may be, which is substantially one of money-lending by a "money-lender" (*n*), if the interest or charges (*o*) in respect of the sum actually lent are excessive (*p*) and the transaction is either harsh and

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(*i*) As to the consequences where an infant fraudulently misrepresents himself to be of full age, and by means of such fraudulent misrepresentation induces another to lend him money, see title INFANTS AND CHILDREN, Vol. XVII., p. 66.

(*j*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1.

(*k*) See Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5; titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 490, 491; INFANTS AND CHILDREN, Vol. XVII., pp. 63, 65.

(*l*) See titles EQUITY, Vol. XIII., pp. 20, 21; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111, 112.

(*m*) *Samuel* v. *Newbold*, [1906] A. C. 461, 468.

(*n*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (4). Where the contract is made abroad, and the parties intend that it should be performed abroad, the Money-lenders Acts (see note (*l*), p. 44, *ante*) do not apply, and no relief thereunder can be obtained (*Shrichand & Co.* v. *Lacon* (1906), 22 T. L. R. 245; *Velchand* v. *Manners* (1909), 25 T. L. R. 329); nor do they apply where the lender is not a "money-lender" (as to meaning of which term, see p. 44, *ante*) and required to register himself; see p. 44, *ante*. A money-lender who is required to register himself, but fails to do so, cannot maintain any action to recover the money he has lent (see p. 51, *ante*), and consequently in such a case the borrower has no need to apply to the court for relief. Nor has the borrower any need to apply for relief in a case where the lender, though duly registered, has committed some breach of the statutory provisions affecting his trade which renders the transaction unenforceable; see p. 48, *ante*.

(*o*) "Charges" include the amounts charged for expenses, inquiries, fines, bonus, premium, or renewals (Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1)).

(*p*) There is no standard rate of interest on personal loans (*Carringtons, Ltd.* v. *Smith*, [1906] 1 K. B. 79), and in judging whether the interest or charges are excessive the court regards the necessities of the borrower, his

SECT. 6. Relief of Borrowers.

unconscionable (*q*) or is otherwise such that a court of equity would give relief (*r*), the borrower, or any surety for the borrower, or

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financial position, the presence or absence of security, the relation in which the money-lender stood to the borrower, and the total remuneration derived by the money-lender from the whole transaction; see *Levene* v. *Greenwood* (1904), 20 T. L. R. 389; *Wells* v. *Joyce*, [1905] 2 I. R. 134. In *Samuel* v. *Pazolt* (1907), 23 T. L. R. 622, RIDLEY, J., and in *Burton* v. *Companies Registration Agency* (1907), 23 T. L. R. 151, BUCKNILL, J., left to the jury the question whether the interest charged was excessive and the transaction harsh and unconscionable; but the Court of Appeal did not decide as to the propriety of this course (S. C., 23 T. L. R. 337, C. A.). The fact that the borrower understood when he entered into the transaction what was the rate of interest or the amount of the charges payable by him to the money-lender does not preclude him from obtaining relief (*Blair* v. *Buckworth* (1908), 24 T. L. R. 474, C. A.).

(*q*) As to unconscionable bargains in general, see titles EQUITY, Vol. XIII., pp. 20, 71; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111 *et seq.* As to unconscionable salvage bargains, see title SHIPPING AND NAVIGATION. In the absence of any other circumstances tending to show that the transaction was harsh and unconscionable, the mere fact that the money-lender has exacted, by way of interest or charges, amounts which are found by the court to be excessive, may of itself be sufficient to prove that the transaction was "harsh and unconscionable" within the meaning of the Money-lenders Acts (as to which see note (*l*), p. 44, *ante*). "If no justification for the excessive interest or charges be established, the presumption that the transaction was harsh and unconscionable hardens into a certainty" (*Samuel* v. *Newbold*, [1906] A. C. 461, *per* Lord LOREBURN, L.C., at p. 467); see also *Michaelson* v. *Nichols* (1910), 26 T. L. R. 327; *Jackson* v. *Price* (1909), 26 T. L. R. 106; *Wolfe* v. *Batters* (1909), 25 T. L. R. 575; *Blair* v. *Buckworth*, *supra* (where the loan was well secured, and the high charges made by the money-lender were therefore unjustifiable); *King* v. *Barnett* (1908), 25 T. L. R. 52; *Levene* v. *Titchener* (1907), 23 T. L. R. 508; *Part* v. *Bond* (1906), 94 L. T. 390, C. A.; *Poncione* v. *Higgins* (1904), 21 T. L. R. 11, C. A.; *Bonnard* v. *Dott* (1905), 21 T. L. R. 491; *Samuel* v. *Bell* (1905), 22 T. L. R. 118; *Wells* v. *Allott*, [1904] 2 K. B. 842, C. A.; *Re a Debtor*, *Ex parte the Debtor*, [1903] 1 K. B. 705, C. A.; and compare *Oakes* v. *Green* (1907), 23 T. L. R. 560 (where relief was refused); *Pall Mall Bank* v. *Philp* (1904), 41 Sc. L. R. 621. A condition that the whole debt becomes due on failure to pay the first instalment is *primâ facie* harsh and unconscionable (*Harris* v. *Clarson* (1910), 27 T. L. R. 30; ee *Wells* v. *Joyce*, *supra*). Since relief cannot be given under the Acts (as to which see note (*l*), p. 44, *ante*) unless the interest or charges be excessive, and an unjustifiable excess of interest or charges establishes that the transaction was harsh and unconscionable, it follows that in every application for relief the question at issue is whether, having regard to all the circumstances of the case, the interest or charges are excessive; but the other circumstances of the case, such as whether the borrower understood the transaction, as in the case where there is a default clause (see *Wells* v. *Joyce*, *supra*; *Levene* v. *Greenwood*, *supra*), or whether the money-lender was guilty of oppression, or took improper advantage of the weakness, or folly, or ignorance, of the borrower, are material to that issue and must be considered; see *Samuel* v. *Newbold*, *supra*, *per* Lord LOREBURN, L.C., at p. 467; *King* (*J.*), *Ltd.* v. *Hay Currie* (1911), 28 T. L. R. 10.

(*r*) See p. 56, *post*. In such case the effect of the Money-lenders Acts (as to which see note (*l*), p. 44, *ante*) is to give to every court in which the money-lender may seek to enforce his bargain power to grant to the borrower the relief prescribed by the statute, which is more extensive than that given previously by courts of equity. But if the transaction is harsh and unconscionable, and the interest or charges excessive, relief may now be given, even though a court of equity would not have granted it before

any other person liable to the "money-lender" in respect of the loan, may obtain relief under the Money-lenders Acts (*s*).

SECT. 6. Relief of Borrowers.

By which court and when relief is granted.

**105.** Any court in which the "money-lender" has taken or might take proceedings for the recovery of the money lent can give relief (*t*), and the application for relief may be made before the time for repayment of the loan or any instalment thereof has arrived (*a*).

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the Acts; see *Samuel* v. *Newbold*, [1906] A. C. 461, and especially the judgment of Lord MACNAGHTEN, at pp. 468 *et seq.* The contrary decision in *Wilton & Co.* v. *Osborn*, [1901] 2 K. B. 110, is no longer law.

(*s*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1), (2). As to the Money-lenders Acts, see note (*l*), p. 44, *ante*.

(*t*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1), (2), (3). Where there is an application relating to the admission or amount of a proof by a "money-lender" in any bankruptcy proceedings, the court in bankruptcy may reopen the transaction and grant relief from payment of anything in excess of the sum which it ascertains to be fairly due (*Re a Debtor, Ex parte the Debtor*, [1903] 1 K. B. 705, C. A.; *Re Attree, Ex parte Ward*, [1907] 2 K. B. 868; *Re Seed, Ex parte King* (1908), 26 T. L. R. 348; *Re a Debtor, Ex parte Carden* (1908), 52 Sol. Jo. 209, C. A.). This power may be exercised by a registrar in bankruptcy, and relief may be granted, even though the borrower did not defend an action brought by the "money-lender" to enforce his claim (*Re a Debtor, Ex parte the Debtor, supra*); but if the "money-lender" withdraws his proof, the court in bankruptcy has no jurisdiction to grant relief (*Re Attree, Ex parte Ward, supra*). Where the "money-lender" is the petitioning creditor, and the petition is opposed on the ground that the debtor is entitled to relief (see p. 53, *ante*) under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), the court in bankruptcy must investigate the transaction, and if a case for relief is established, must deal with the petition accordingly (*Re Shaw, Ex parte Gill* (1901), 83 L. T. 754, C. A.; compare *Re Bebro*, [1900] 2 Q. B. 316, C. A.); see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 57, 211. Where the "money-lender" brings an action in the High Court to recover money lent, and the interest charged is apparently excessive, he may obtain summary judgment under R. S. C., Ord. 14, for the balance of his principal remaining unpaid, *i.e.*, the difference between the amount actually lent and the amount which the borrower has repaid, but he cannot obtain summary judgment for any interest whatsoever (*Lazarus* v. *Smith*, [1908] 2 K. B. 266, C. A.; *Wells* v. *Allott*, [1904] 2 K. B. 842, C. A.; *Dott* v. *Bonnard* (1904), 21 T. L. R. 166, C. A.). Where the "money-lender" brings an action in the county court the power of the court to give relief may be exercised at any stage of the proceedings, and whether notice has, or has not, been given by the defendant of his intention to apply to the court to exercise that power (County Court Rules, 1903 and 1904, Ord. 50, r. 33 (1)). For the limits of the jurisdiction of county courts, see title COUNTY COURTS, Vol. VIII., p. 428.

(*a*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (2). The borrower may bring an action either in the Chancery or the King's Bench Division of the High Court, or (if the amount is within the limit of the county court jurisdiction) in the county court, for a declaration of his right to relief (*ibid.*; and *Samuel* v. *Newbold, supra, per* Lord MACNAGHTEN, at p. 468). As to whether, when the "money-lender" has brought his action in one Division, the borrower may go to another Division to get the bargain set aside, or *vice versâ*, see *Rechnitzer* v. *Samuel* (1906), 95 L. T. 75; *Tumin* v. *Levi* (1911), 28 T. L. R. 125, C. A. In *Tumin* v. *Levi, supra*, the suitability of the short cause list for actions brought by money-lenders was discussed; see *ibid.*, *per* FARWELL, L.J., at p. 126, who thought that the proceedings under R. S. C., Ord. 14, should be stayed, and *per* KENNEDY, L.J., at p. 126, who differed; see also *Thomson* v. *South Eastern Rail. Co.* (1882), 9 Q. B. D. 320, C. A.

SECT. 6. **Relief of Borrowers.**

Nature of relief.

**106**. The relief so obtainable is of the most ample description (*b*). The court may reopen the transaction (*c*) and, taking an account between the parties, may ascertain what sum is fairly due for principal, interest and charges, having regard to the risk and all the circumstances of the case (*d*), and may grant relief from the payment of anything in excess of that sum; and if any such excess has been already paid or allowed in account, may direct the "money-lender" to repay it. The court may also set aside, either wholly or in part, any security given or agreement made in respect of the loan, without prejudice, however, to the rights of any *bonâ fide* assignee or holder for value without notice, which rights are not affected thereby (*e*). If the "money-lender" has parted with any security, the court may order him to give an indemnity in respect thereof (*f*). The relief may be given notwithstanding any statement or settlement of account or any agreement purporting to close the previous dealings and create a new obligation

*PT. 2.—Apart from the Money-lenders Acts.*

Equitable relief.

**107**. In cases where the lender is not a "money-lender," the borrower can only obtain relief if the circumstances are such that the court under its equitable jurisdiction has power—as in the case of transactions procured by misrepresentation or affected with

(*b*) The relief which the court may grant under the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), is wholly different from that which courts of equity grant in the case of expectant heirs (*Samuel* v. *Newbold*, [1906] A. C. 461, *per* Lords MACNAGHTEN and ATKINSON, at pp. 468, 476); and see p. 53, *ante*. "Equity mends no man's bargain" (*Maynard* v. *Moseley* (1676), 3 Swan. 651, *per* Lord NOTTINGHAM, L.C., at p. 653); but the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), authorises and empowers the court to create a fresh bargain between the parties in the place of the bargain which is impeached.

(*c*) The transaction may be reopened even though the whole amount claimed by the "money-lender" has been paid under pressure of a writ (*Samuel* v. *Bell* (1905), 22 T. L. R. 118, *per* CHANNELL, J.); but a closed transaction will not be reopened unless there has been deception or pressure by the "money-lender" (*Michaelson* v. *Nichols* (1910), 26 T. L. R. 327, *per* PICKFORD, J.).

(*d*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1); see *Michaelson* v. *Nichols*, *supra* (where interest at the rate of 60 per cent. per annum was allowed); *Carringtons, Ltd.* v. *Smith*, [1906] 1 K. B. 79 (30 per cent.); *Oakes* v. *Green* (1907), 23 T. L. R. 560 (40 per cent.); *Saunders* v. *Newbold*, [1905] 1 Ch. 260, C. A. (10 per cent.); *Wolfe* v. *Batters* (1909), 25 T. L. R. 575 (25 per cent.); *King* v. *Barnett* (1908), 25 T. L. R. 52 (60 per cent.); *Jackson* v. *Price* (1909), 26 T. L. R. 106 (50 per cent.); *Levene* v. *Gardner* (1909), 25 T. L. R. 711 (20 per cent.); *Fortescue (L.), Ltd.* v. *Bradshaw* (1911), 27 T. L. R. 251 (50 per cent.); *Wheatley* v. *Part* (1911), 27 T. L. R. 303 (30 per cent.).

(*e*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (5). This saving clause for the rights of assignees etc. is strictly limited to the cases mentioned in *ibid.*, s. 1 (*Re Robinson, Clarkson* v. *Robinson*, [1911] 1 Ch. 230, C. A.). For the rights of assignees etc. where the money-lender has committed a breach of the Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, see p. 52, *ante*.

(*f*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1 (1).

(*g*) *Ibid.*; and see note (*c*), *supra*; and *Re Campbell, Ex parte Seal*, [1911] 2 K. B. 992, C. A.

fraud (*h*) or loans to expectant heirs (*i*)—to set aside the transaction (*k*); but, where the equitable jurisdiction of the court is involved, relief will not be granted except upon the terms that the applicant for relief should himself do that which the court considers fair and equitable in the matter (*l*).

SECT. 6. Relief of Borrowers.

## SECT. 7.—*Offences by Money-lenders* (*m*).

### SUB-SECT. 1.—*Under the Money-lenders Acts.*

**108**. Any "money-lender" (*n*), whether he is registered or unregistered (*o*), or any manager, agent, or clerk of such a "money-lender," or any director, manager, or other officer of any corporation carrying on the business of a "money-lender (*n*)," whether such corporation is registered or not, who, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, is guilty of a misdemeanour, and is liable on indictment to imprisonment with or without hard labour for a term not exceeding two years or to a fine not exceeding £500, or to both (*p*).

Penalties for false statements etc.

**109**. A "money-lender" (*n*) who, in the course of carrying on the money-lending business, issues or publishes, or causes to be issued or published, any circular, notice, advertisement, letter, account, or statement of any kind containing expressions which might reasonably be held to imply that he carries on banking business, is liable to the same penalties as if he had carried on the money-lending business under a name other than his registered name (*q*).

Implied carrying on of banking business.

### SUB-SECT. 2.—*Under the Betting and Loans (Infants) Act*, 1892.

**110**. Any person who, for the purpose of profit, sends or causes to be sent to an infant a circular or other document inviting the infant to borrow money, or to enter into any transaction involving the borrowing of money, or inviting him to apply to any person or at

Circulars inviting infants to borrow.

(*h*) A transaction induced by misrepresentation, whether fraudulent or innocent, is voidable at the option of the representee (see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 737); and fraud vitiates every transaction (*ibid.*, p. 759). In either case the court can set it aside.

(*i*) As to relief granted by courts of equity in the case of expectant heirs, see title EQUITY, Vol. XIII., p. 20; and see p. 53, *ante*.

(*k*) The equitable jurisdiction of the court is also available in cases where the lender is a "money-lender"; see p. 54, *ante*.

(*l*) *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; *Samuel* v. *Newbold*, [1906] A. C. 461, *per* Lord MACNAGHTEN, at p. 468; compare *Chapman* v. *Michaelson*, [1909] 1 Ch. 238, C. A.; see also title EQUITY, Vol. XIII., p. 71.

(*m*) As to the offence of failing to register as a money-lender, see p. 47, *ante*. As to the offence of carrying on the business of a money-lender in breach of the statutory restrictions, see p. 49, *ante*.

(*n*) For the meaning of this term, see p. 44, *ante*.

(*o*) See p. 44, *ante*.

(*p*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 4; see also p. 51, *ante*.

(*q*) Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 2 (2). For these penalties, see p. 49, *ante*.

SECT. 7.

**Offences by Money-lenders.**

any place with a view to obtaining information or advice as to borrowing money, is guilty of a misdemeanour, and is liable on conviction to both fine and imprisonment (*r*), unless he proves that he had reasonable grounds for believing that the infant was of full age (*a*).

Persons deemed to send circulars.

If at any place from which such circular or document purports to issue, or which is indicated therein as the place at which applications are to be made, there is carried on any business connected with loans, then every person who takes part in or assists in carrying on that business, or who attends at that place for the purpose of taking part in that business, is deemed to have sent such circular or document, unless he proves that he was not in any way party to and was wholly ignorant of the sending of such document (*b*).

Affidavits or declarations by infants.

**111.** Any person who, except under the authority of a court of justice, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connection with any loan, is guilty of an offence punishable by fine and imprisonment (*c*).

# Part III.—Loans to Local Authorities.

## SECT. 1.—*By the Public Works Loans Commissioners.*

Power of local authorities to borrow.

**112.** Local authorities and other authorised bodies of persons may borrow money from the Public Works Loans Commissioners (hereinafter called "the Commissioners" (*d*)) on favourable terms for the purpose of works of permanent character and public usefulness (*e*).

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(*r*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 2 (1). The offence is punishable both on indictment and summarily. On a conviction upon indictment the maximum penalty is three months' imprisonment or a fine of £100, and on a summary conviction one month's imprisonment or a fine of £20; see, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 552; INFANTS AND CHILDREN, Vol. XVII., p. 172. As to enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*a*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 5.

(*b*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 2 (2); and see *Director of Public Prosecutions* v. *Witkowski* (1911), 27 T. L. R. 211.

(*c*) Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 4. The procedure and punishment are the same as those mentioned in the text and in note (*r*), *supra*, except that, if the conviction is upon indictment, the court cannot inflict both imprisonment and fine.

(*d*) The Commissioners are appointed by Parliament (Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 4, 5), with power to take or defend legal proceedings by their secretary (*ibid.*, s. 5 (1)), to examine on oath (*ibid.*, s. 5 (2)), to appoint officers (*ibid.*, s. 6), and to make regulations (*ibid.*, s. 41). They must keep accounts (*ibid.*, s. 43), and make an annual return of their transactions (*ibid.*, s. 5 (3); Public Works Loans Act, 1899 (62 & 63 Vict. c. 31), s. 6). As to the powers etc. of their secretary, see Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 7, 8, 20. As to service of notices under the Acts, see *ibid.*, ss. 47, 48. As to the receipts given by the Bank of England, see *ibid.*, ss. 26, 46.

(*e*) Public Works Loans Acts, 1875 (38 & 39 Vict. c. 89); 1876 (39 & 40 Vict. c. 31), s. 7; 1879 (42 & 43 Vict. c. 77), ss. 2, 4; 1881 (44 & 45 Vict. c. 38); and 1882 (45 & 46 Vict. c. 62), s. 8 (these Acts may be cited as the

SECT. 1. By the Public Works Loans Commissioners.

The Commissioners may lend money to county, borough, district, or parish councils for any works for which such councils are authorised to borrow money (*f*); and the councils must keep special accounts of money borrowed on the security of the rates (*g*).

Objects for which money may be lent.

The money for the loans is provided by the National Debt Commissioners (*h*) from a local loans fund composed of (1) money provided by Parliament for the purpose (*i*), and (2) all payments in discharge of principal or interest of such loans (*k*), except when the principal has been written off as irrecoverable (*l*).

Sources from which money provided.

Public Works Loans Acts, 1875—1882 (Public Works Loans Act, 1883 (46 & 47 Vict. c. 42), s. 2)); Public Works Loans Acts, 1892 (55 & 56 Vict. c. 61), s. 2; 1894 (57 & 58 Vict. c. 11), s. 3; 1897 (60 & 61 Vict. c. 51); 1898 (61 & 62 Vict. c. 54), ss. 1, 3; 1899 (62 & 63 Vict. c. 31), s. 1; 1905 (5 Edw. 7, c. 22), ss. 1, 3; 1908 (8 Edw. 7, c. 23), s. 6; and 1911 (1 & 2 Geo. 5, c. 17).

(*f*) Public Works Loans Act, 1896 (59 & 60 Vict. c. 42), s. 2. For these borrowing powers, see title LOCAL GOVERNMENT, Vol. XIX., pp. 244, 282, 317, 337, 361. A list of the purposes for which the Commissioners might originally grant loans is given in the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), Sched. I., but the Public Works Loans Act, 1896 (59 & 60 Vict. c. 42), has made this list obsolete as regards the councils mentioned in the text. Loans by the Public Works Loans Commissioners (see p. 58, *ante*) are also provided for by other statutes, namely, Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 20 (see title METROPOLIS, Vol. XX., p. 449); Prison Act, 1877 (40 & 41 Vict. c. 21), s. 47 (see title PRISONS); Public Works Loans Act, 1881 (44 & 45 Vict. c. 38), s. 11; Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 67, as modified by the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44) (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION); Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 42 (4) (see title ANIMALS, Vol. I., pp. 430, 431); Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), s. 9 (7) (see title SMALL HOLDINGS AND SMALL DWELLINGS); Public Works Loans Act, 1896 (61 & 62 Vict. c. 54), ss. 2, 3 (see title RAILWAYS AND CANALS); Public Works Loans Act, 1898 (61 & 62 Vict. c. 54), s. 3 (see title POOR LAW); Military Land Acts, 1892 (55 & 56 Vict. c. 43) and 1897 (60 & 61 Vict. c. 6), and Public Works Loans Act, 1908 (8 Edw. 7, c. 23), s. 6 (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 158 *et seq.*; see also Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), s. 11); Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 663 (see title SHIPPING AND NAVIGATION; Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), s. 11); and see titles MAGISTRATES, Vol. XIX., p. 567. Loans under special Acts are governed by the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), as varied by the special Act (*ibid.*, s. 50). For the meaning of the term "special Act," see Public Works Loans Act, 1876 (39 & 40 Vict. c. 31), s. 7.

(*g*) Public Works Loans Act, 1882 (45 & 46 Vict. c. 62), s. 8. See also title LOCAL GOVERNMENT, Vol. XIX., p. 283.

(*h*) National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), s. 6. As to the National Debt Commissioners, see title REVENUE. As to the authority to the Bank of England to pay, see Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 45.

(*i*) National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), s. 7 (1); see title REVENUE.

(*k*) National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), ss. 7 (2), 12, 14. There are certain exceptions; see *ibid.*, s. 7 (2), Sched. II. Accounts are to be kept distinguishing capital and income of the fund (*ibid.*, ss. 7 (3), 16).

(*l*) *Ibid.*, s. 15. In this case any payments recovered are paid to the Exchequer (*ibid.*). Further directions as to the manner of dealing with the fund are contained in *ibid.*, ss. 4, 13, 14; Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), s. 4; Public Works Loans Act, 1904 (4 Edw. 7, c. 36), s. 3.

SECT. 1. By the Public Works Loans Commissioners.

In addition money may be raised by borrowing by means of local loans stock (*m*).

Application of loans.

**113.** Loans must be applied to their authorised object (*n*), and if advanced on the security of the rates and not so applied, the Local Government Board may on inquiry (*o*) order it to be so applied or repaid, or, with the Commissioners' consent, to be applied to some other authorised object (*p*).

Repayment of loans.

**114.** The Commissioners in granting loans must consider the propriety of the loan, and the security for repayment (*q*), which must be effected by instalments in not more than fifty (*r*) years, subject to any special Act (*s*).

Interest.

Interest is payable at not less than 4 per cent. (*a*), unless otherwise provided by any special Act (*b*).

Powers of Commissioners in default of payment.

In default of payment of the loan, the Commissioners, where the property is mortgaged to them as security, have powers similar to an ordinary mortgagee (*c*) and may spend further sums on the property (*d*).

Where the loan is secured by mortgage of the rates (*e*), the

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(*m*) National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), ss. 8—10, 17; Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), s. 2. As to local loans stock, see title REVENUE.

(*n*) The Commissioners may take security for the carrying out of the work to which the loan is to be applied (Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 35, 39).

(*o*) *Ibid.*, s. 36. As to the expenses of an inquiry, see Public Works Loans Act, 1881 (44 & 45 Vict. c. 38), s. 8.

(*p*) Public Works Loans Act, 1878 (41 & 42 Vict. c. 18), s. 4; Public Works Loans Act, 1881 (44 & 45 Vict. c. 38), s. 9.

(*q*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 9. Securities authorised for acceptance by the Commissioners are dealt with in the Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 12, 20, 32, 38, 39; and see also note (*s*), p. 62, *post*. They are not bound to accept such securities (Public Works Loans Act, 1878 (41 & 42 Vict. c. 18), s. 6). Loans secured by a mortgage of property take priority over all other charges, except *bonâ fide* prior mortgages, though these may, by agreement, be postponed (Public Works Loans (Money) Act, 1876 (39 & 40 Vict. c. 31), s. 7). Only an express provision in a special Act can affect the Commissioners' priority (Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 18).

(*r*) Public Works Loans Act, 1911 (1 & 2 Geo. 5, c. 17), s. 4.

(*s*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 11. The Commissioners and the Treasury have in certain cases power to extend or postpone the time for repayment (*ibid.*, ss. 11, 37), or may accept payment before it is due (*ibid.*, s. 29).

(*a*) *Ibid.*, s. 10; Public Works Loans Act, 1892 (55 & 56 Vict. c. 61), s. 2.

(*b*) Public Works Loans Act, 1879 (42 & 43 Vict. c. 77), s. 2; Public Works Loans Act, 1892 (55 & 56 Vict. c. 61), s. 2. Loans from the local loans fund (see p. 59, *ante*) on the security of local rates (Public Works Loans Act, 1897 (60 & 61 Vict. c. 51), ss. 1, 12) have a minimum rate of interest of 2¾ per cent. (*ibid.*, s. 1). By the Public Works Loans Act, 1896 (59 & 60 Vict. c. 42), s. 2, 3¼ per cent. is substituted for 4 per cent. in the case of canal loans collaterally secured.

(*c*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), ss. 21, 22, 24—28; and see title MORTGAGE, pp. 186 *et seq.*; 244 *et seq.*, *post*.

(*d*) Public Works Loans Act, 1881 (44 & 45 Vict. c. 38), s. 7.

(*e*) See, as to the effect of such a mortgage, Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 19.

Commissioners may, on default, levy the rate themselves, with any expenses thereby incurred (*f*).

Remedies on default in payment.

**115.** Where default is made in payment of a loan on personal security the Commissioners may, if they think fit, issue a warrant at any time (*g*) to enforce payment, and the court may thereon issue a writ of extent or *diem clausit extremum* (*h*).

Insolvency of borrower.

**116.** All loans become immediately payable on the insolvency of an individual or company liable as principal or surety to pay the principal or interest of any loan (*i*).

## SECT. 2.—*By Other Persons.*

Creation of loan.

**117.** Local authorities (*k*), notwithstanding any statutory provision passed before the 13th August, 1875, may also borrow (*l*) any loan (*m*) which they are authorised to borrow, in the manner prescribed by the Local Loans Act, 1875 (*n*).

Sanction by Local Government Board.

**118.** A local authority about to raise a loan may apply to the Local Government Board (*o*) to authorise the issue of the

(*f*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 23.

(*g*) *Ibid.*, s. 34.

(*h*) *Ibid.*, s. 33. As to these writs, see title CROWN PRACTICE, Vol. X., pp. 14—18.

(*i*) Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 31.

(*k*) For definition of "local authority" (which includes every authority having power to levy a rate), see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 34; and see the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 242 (1). As to the powers of local authorities to borrow, see p. 59, *ante*, and titles ANIMALS, Vol. I., pp. 430, 431; BURIAL AND CREMATION, Vol. III., pp. 476 *et seq.*; ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 553 *et seq.*; EXPLOSIVES, Vol. XIV., p. 372, note (*h*); LOCAL GOVERNMENT, Vol. XIX., pp. 244, 282, 293, 317, 337, 361, 385; METROPOLIS, Vol. XX., pp. 444, 449; PUBLIC HEALTH AND LOCAL ADMINISTRATION. A local authority may make, rescind, or alter rules for the purposes of the Local Loans Act, 1875 (38 & 39 Vict. c. 83), with the consent of the Local Government Board (*ibid.*, s. 30 (2)).

(*l*) A local authority is deemed to borrow subject to the provisions of the Local Loans Act, 1875 (38 & 39 Vict. c. 83), whenever it raises a loan by the issue of debentures, or debenture stock, or annuity certificates (hereafter referred to as "securities"; see p. 62, *post*), purporting to be created under its powers, or partly in one way and partly in another; but a loan directed to be raised by such securities under the Local Loans Act, 1875 (38 & 39 Vict. c. 83), must be raised only by the mode thereby prescribed (*ibid.*, s. 4; see the text, *infra*). A local authority may in like manner re-borrow in order to discharge any lawfully contracted loan, but the time for repayment must not be extended beyond the unexpired portion of the original term without the sanction of the Local Government Board, nor, in any case, beyond the prescribed period (Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 31). For the definition of "prescribed," see *ibid.*, s. 34, and p. 63, *post*.

(*m*) In this and the following pages "loan" means a loan borrowed or proposed to be borrowed under the Local Loans Act, 1875 (38 & 39 Vict. c. 83).

(*n*) 38 & 39 Vict. c. 83; see *ibid.*, s. 31. The Local Loans Act, 1875 (38 & 39 Vict. c. 83), came into operation on the 1st January, 1876; see *ibid.*, s. 3.

(*o*) As to the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII., p. 103.

SECT. 2. By Other Persons.

securities (*p*) therefor under official sanction (*q*); and the owner of any such security may, on application to the Board, be furnished with a statement of the value of the security and of the priority of the loan thus secured (*r*).

Nature of security.

**119.** Securities (*s*) may take the form of debentures (*t*), debenture stock (*a*), or annuity certificates (*b*). If payable to a person named therein, they are termed "nominal securities" (*c*).

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(*p*) As to these securities, see the text, *infra*, and note (*l*), p. 61, *ante*.

(*q*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 26. As to the particulars and evidence which may be required by the Local Government Board before granting official sanction, and the powers the Board may exercise in this respect, and as to the authentication of securities issued under official sanction, and the effect of such sanction as evidence in relation to the power of the local authority and the security issued, see *ibid.*

(*r*) *Ibid.* Such statement is evidence of the facts therein stated (*ibid.*).

(*s*) For definition of "security," see *ibid.*, s. 34; and see note (*l*), p. 61, *ante*. As to the execution of securities, and as to the supply by the Commissioners of Inland Revenue of forms of security, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 22. As to the issue of fresh securities in case of loss, see *ibid.*, s. 33. As to the power of the Public Works Loans Commissioners (see p. 58, *ante*) to take such securities in relation to loans made by them, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 28; and p. 60, *ante*. As to the investment in securities of deposits in trustee savings banks, see title BANKERS AND BANKING, Vol. I., pp. 577, 578. As to the investment of funds of industrial and provident societies, see title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 21. As to criminal offences in respect of personation and forgery, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 32; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 706, 727, 755, 756.

(*t*) Debentures take effect as deeds and may be "bearer" debentures (that is, transferable by delivery), or "nominal" debentures (that is, payable to a person named therein, his executors, administrators and assigns (Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 5)). For the definitions of "person" and "executors and administrators," see *ibid.*, s. 34. A debenture, when no sum is prescribed, must not be issued for less than £20. For regulations as to the provisions of debentures and the interest thereon, see *ibid.*, s. 5. For provisions relating to coupons for interest on debentures, see *ibid.*, ss. 5, 17—19. As to stamp duty, see titles BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 580, note (*l*); REVENUE. As to the investment of trust funds in nominal debentures, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 5 (3); title TRUSTS AND TRUSTEES. As to the registration of nominal securities, see p. 63, *post*.

(*a*) Such stock may be issued when the local authority has power to issue debenture stock (Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 6). Stock certificates may, or may not, be issued in respect of debenture stock. In the former case, the certificate (defined as "a stock certificate to bearer") is transferable by delivery. In the latter case the stock is defined as "nominal debenture stock" (*ibid.*). For regulations as to the issue and amount of, and evidence of the title to, debenture stock, and as to the recovery of interest thereon, see *ibid.* For provisions relating to coupons on stock certificates to bearer, see *ibid.*, ss. 17, 19. Stock described in a stock certificate to bearer may be converted into nominal debenture stock; see *ibid.*, s. 20. A trustee may in certain circumstances invest trust funds in nominal debenture stock, but, unless authorised by his trust, may not hold a certificate to bearer (Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 5 (3), 7 (1) (c); see title TRUSTS AND TRUSTEES). As to the registration of nominal securities, see p. 63, *post*; see also title LOCAL GOVERNMENT, Vol. XIX., pp. 385, 386.

(*b*) Annuity certificates take effect as deeds, charge the property therein

(*c*) For note (*c*) see next page.

A register of nominal securities must be kept (*d*), and their transfer and transmission are subject to special provisions (*e*).

Registration and transfer.

**120.** Notice of any trust is not receivable by a local authority in respect of any security issued by such authority (*f*); nor is the person advancing money on such security bound to inquire into the application or to be held responsible for the misapplication thereof (*g*).

Notice of trusts.

**121.** Sums due or authorised to be raised on securities issued in respect of the same loan are payable *pari passu*; but if in respect of different loans, they take priority according to the date of the loan (*h*).

Priorities.

**122.** The recovery of any sum due in respect of a security (*i*) may be enforced by mandamus (*k*), and in certain circumstances application may be made for the appointment of a receiver (*l*).

Remedy for non-payment.

**123.** Loans must be discharged within the period (if any) prescribed (*m*) by the Act authorising the local authority to borrow, otherwise within twenty years from the date of the loan; and the discharge must be effected by the issue of annuity certificates (*n*), or debentures (*o*), or by an annual appropriation (*p*), or by the establishment of a sinking fund (*q*).

Discharge of loans.

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specified with payment of the annual sum therein mentioned (Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 7), and may be made payable to the person named therein or to bearer. In the former case the certificate is defined as "a nominal annuity certificate"; in the latter, the certificate is transferable by delivery (*ibid.*). For provisions relating to the issue and amount of annuity certificates, see *ibid.* As to the registration of nominal securities, see the text, *infra.*

(*c*) See Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 23, Sched. (9); and see notes (*t*), (*a*), (*b*), p. 62, *ante.*

(*d*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 23.

(*e*) As to the register, entries thereon, inspection thereof, and rectification thereof, see *ibid.*, ss. 23—25; title COUNTY COURTS, Vol. VIII., p. 666. For the general rules as to transfer and transmission of nominal securities, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), ss. 5, 6, 7, 29, and Sched.; and see title CHOSES IN ACTION, Vol. IV., p. 394. As to stamp duty on loan capital, see titles COMPANIES, Vol. V., p. 362; LOCAL GOVERNMENT, Vol. XIX., p. 386; REVENUE.

(*f*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 9.

(*g*) *Ibid.*, s. 10.

(*h*) *Ibid.*, s. 8. A sum authorised to be borrowed may be raised as one loan or as several loans, so long as the aggregate amount authorised is not exceeded (*ibid.*). As to fixing the date of loans, see *ibid.*

(*i*) As to securities, see note (*s*), p. 62, *ante.*

(*k*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 11; see title CROWN PRACTICE, Vol. X., pp. 106 *et seq.*

(*l*) Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 12. As to the powers of the receiver, see *ibid.*; see also title COUNTY COURTS, Vol. VIII., pp. 666, 667. As to receivers generally, see title RECEIVERS.

(*m*) See the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 34.

(*n*) As to the nature of these certificates, see *ibid.*, s. 13.

(*o*) As to the nature of these debentures, see *ibid.*

(*p*) See *ibid.*, ss. 13, 14.

(*q*) *Ibid.*, s. 13; Local Loans Sinking Funds Act, 1885 (48 & 49 Vict. c. 30), s. 4. As to the creation and operation of the sinking fund, see Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 15. As to annual returns in respect thereof, see *ibid.*, s. 16; Order of Local Government Board, 14th November, 1878.

# MONEY PAID.

*See* AGENCY; CONTRACT; MONEY AND MONEY-LENDING.

# MONEY PAID INTO COURT.

*See* COUNTY COURTS; MAYOR'S COURT, LONDON; PLEADING; PRACTICE AND PROCEDURE.

# MONITION.

*See* ECCLESIASTICAL LAW.

# MONOPOLIES.

*See* PATENTS; TRADE MARKS, TRADE NAMES, AND DESIGNS.

# MONTH.

*See* TIME.

# MONUMENTS.

*See* CHARITIES; CONSTITUTIONAL LAW; ECCLESIASTICAL LAW; OPEN SPACES AND RECREATION GROUNDS.

# MORTGAGE.


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# Part I.—Definition and Classification.

## SECT. 1.—*General Characteristics.*

Definition of mortgage.

**124.** A mortgage is a conveyance of land, or an assignment of a chattel, or of a chose in action, as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation (*a*). No particular words or form of conveyance are necessary to constitute a mortgage. As a general rule, subject to very few exceptions, wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears from the deed itself or by any other instrument or by parol evidence, it is always considered as a mortgage and redeemable (*b*).

Elements:—(i.) Implied obligation to (ii.) security for payment.

A mortgage consists of two things. It is a personal contract for a debt and an estate pledged as a security for the debt (*c*). Every mortgage implies a debt and a personal obligation by the mortgagor to pay it (*d*). If there is a covenant or bond for its payment it is a specialty debt; if not, it is a simple contract debt (*e*). In cases in which the mortgagor is in a fiduciary position mortgaging for the purposes of his trust, it is usual to negative the personal liability by an express declaration (*f*).

(*a*) *Santley* v. *Wilde*, [1899] 2 Ch. 474, C. A., *per* LINDLEY, M.R.; *Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24, 28. For the purposes of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), "mortgage" includes any charge on any property for securing money or money's worth (*ibid.*, s. 2 (vi.)). For a collection of forms suitable for negotiations for and agreements for mortgages, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 482 *et seq.*

(*b*) Co. Litt. 205 a, note; *Maxwell* v. *Mountacute* (1719), Prec. Ch. 526; *Cripps* v. *Jee* (1793), 4 Bro. C. C. 472; *Sevier* v. *Greenway* (1815), 19 Ves. 413; and see p. 142, *post*; but compare *Tull* v. *Owen* (1840), 4 Y. & C. (EX.) 192.

(*c*) *Quarrell* v. *Beckford* (1816), 1 Madd. 269, *per* PLUMER, V.-C., at p. 278.

(*d*) *King* v. *King* (1735), 3 P. Wms. 358; *Sutton* v. *Sutton* (1882), 22 Ch. D. 511, 515, C. A.

(*e*) *King* v. *King*, *supra*; *Ancaster* (*Duke*) v. *Mayer* (1785), 1 Bro. C. C. 454, 464; *Yates* v. *Aston* (1843), 4 Q. B. 182.

(*f*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 559, 561. A covenant by a trustee or other person in a mortgage deed to pay out of a specific fund prevents a personal liability being implied, and an action for money lent does not lie against the covenantor (*Mathew* v. *Blackmore* (1857), 1 H. & N. 762); it has been held that a covenant "as trustee but not so as to impose any personal liability" can be enforced against the covenantor personally (*Watling* v. *Lewis*, [1911] 1 Ch. 414); but see *Re Robinson's Settlement, Gant* v. *Hobbs* (1912), 28 T. L. R. 298, C. A., *per* BUCKLEY, L.J.; and see *Furnivall* v. *Coombes* (1843), 5 Man. & G. 736.

SECT. 1. General Characteristics.

Right of redemption essential.

**125.** Incident to every mortgage is the right of the debtor to redeem, a right which is called his "equity of redemption," and which continues notwithstanding that the mortgagor fails to pay the debt in accordance with the proviso for redemption. This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate (*g*). Any provision inserted in the mortgage to prevent redemption on payment or performance of the debt or obligation for which the security was given is termed a "clog" or "fetter" on the equity of redemption, and is void (*h*). The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall be confined to a particular time or to a particular description of persons (*i*). The right continues unless and until by judgment for foreclosure (*j*) or the operation of the Statute of Limitations (*k*) the character of creditor is changed for that of owner, or the interest of the mortgagor is destroyed by sale either under the process of the court or of a power in the mortgage incident to the security (*l*).

Right of foreclosure not essential.

**126.** Formerly the right of the creditor to foreclosure (*j*) was regarded as so necessary an incident to a mortgage that it was said there is in strictness no mortgage where there is no right of foreclosure (*m*); and a conveyance by way of security for money advanced will be construed as conferring a right to foreclose unless the terms of the instrument exclude that construction (*n*).

But there is no right of foreclosure unless the contract contains a condition upon the breach of which a forfeiture is created, for the court grants foreclosure upon the principle that the mortgagor has broken a condition which forfeits his right to redeem (*o*). For this reason a conveyance of an estate to a person in trust that it should

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(*g*) *Seton* v. *Slade, Hunter* v. *Seton* (1802), 7 Ves. 265, 273. At common law, unless the mortgagor strictly complied as to time and place with the condition of payment, he forfeited his estate, which became the absolute property of the mortgagee (Co. Litt. 205 a, Butler's note). From early times, however, the courts of equity held that until foreclosure by order of the court the mortgagor, by applying within a reasonable time and offering to pay principal and interest and all proper costs, might redeem the estate forfeited at law (*Emanuel College* (*Master etc.*) v. *Evans* (1625), 1 Rep. Ch. 10 [18]). As the right was only enforceable in the courts of equity it was called the "equity of redemption." As to the nature of the equity of redemption, see pp. 138 *et seq.*, *post*.

(*h*) See p. 142, *post*.

(*i*) Co. Litt. 205, note; *Newcomb* v. *Bonham* (1681), 1 Vern. 7; *Howard* v. *Harris* (1683), 1 Vern. 190; and see p. 143, *post*.

(*j*) See p. 283, *post*.

(*k*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 145 *et seq.*

(*l*) For all purposes of dealing with the property the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets (*Casborne* v. *Scarfe* (1738), 1 Atk. 603, *per* Lord HARDWICKE, L.C., at p. 605; *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A., *per* Lord SELBORNE, L.C., at p. 360); and see title DESCENT AND DISTRIBUTION, Vol. XI., p. 5.

(*m*) 2 Davidson, Precedents in Conveyancing, Part II., p. 555; see *Goodman* v. *Grierson* (1813), 2 Ball & B. 274, 279.

(*n*) *Balfe* v. *Lord* (1842), 2 Dr. & War. 480.

(*o*) *Bonham* v. *Newcomb* (1684), 1 Vern. 232; *Sampson* v. *Pattison* (1842), 1 Hare, 533.

SECT. 1. General Characteristics.

stand charged with a principal sum and interest, with a power of sale, does not entitle the grantee to foreclosure (*p*).

Mortgage by way of trust for sale.

The court, however, regards the substance and essence of the transaction, and a mortgagor is entitled to redeem a security by way of trust for sale notwithstanding that no express right to redeem is reserved (*q*), though the mortgagee cannot proceed for foreclosure, but is limited to his remedy by sale (*r*). Such a transaction is not a trust which the mortgagor can require to be carried out, as the discretion to sell is in the mortgagee alone (*s*).

Omission of proviso for redemption.

**127.** An instrument which is in form an absolute conveyance will be treated as a mortgage notwithstanding the absence of a proviso for redemption, if such absence is due to fraud, mistake, or some unfair advantage taken by the mortgagee (*t*). The former practice was to make a mortgage by an absolute conveyance with a defeasance or clause of redemption in a separate deed. This was early condemned on account of the danger of the defeasance being lost or suppressed and an absolute conveyance set up (*a*). Parol evidence is admissible to show that a proviso for redemption was omitted through fraud (*b*).

Sale and option of repurchase.

If, however, the intended arrangement is not a lending and borrowing transaction but an absolute sale, accompanied by a contemporaneous agreement for repurchase or a stipulation that the conveyance should be void upon payment of a certain sum at a fixed time, this does not entitle the vendor to such a right to redeem as is incidental to a mortgage, but creates a mere right of repurchase to be exercised in accordance with the terms of the power (*c*). The question always is—was the original transaction a *bonâ-fide* sale with a contract for repurchase, or was it a mortgage under the form of a sale? (*d*) In the former case the condition for repurchase is

(*p*) *Bonham* v. *Newcomb* (1684), 1 Vern. 232; *Sampson* v. *Pattison* (1842), 1 Hare, 533. As to how far the remedy of foreclosure is available in the case of a charge accompanied by an agreement to give a legal mortgage or by deposit of deeds, see title EQUITY, Vol. XIII., p. 93, and pp. 83, 272, *post*.

(*q*) *Bell* v. *Carter* (1853), 17 Beav. 11; *Chambers* v. *Goldwin* (1801), 5 Ves. 834; *Wicks* v. *Scrivens* (1860), 1 John. & H. 215, 218.

(*r*) *Sampson* v. *Pattison*, *supra*; *Kirkwood* v. *Thompson* (1865), 2 Hem. & M. 392; *Jenkin* v. *Row* (1851), 5 De G. & Sm. 107; *Schweitzer* v. *Mayhew* (1862), 31 Beav. 37; *Locking* v. *Parker* (1872), 8 Ch. App. 30; *Re Alison*, *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.

(*s*) *Re Alison*, *Johnson* v. *Mounsey*, *supra*, at pp. 290, 295.

(*t*) *Douglas* v. *Culverwell* (1862), 4 De G. F. & J. 20, C. A.; *England* v. *Codrington* (1758), 1 Eden, 169; *Williams* v. *Owen* (1840), 5 My. & Cr. 303, 306; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 153.

(*a*) *Baker* v. *Wind* (1748), 1 Ves. Sen. 160; see *Manlove* v. *Bale and Bruton* (1688), 2 Vern. 84; *Whitfield* v. *Parfitt* (1851), 4 De G. & Sm. 240.

(*b*) *Lincoln* v. *Wright* (1859), 4 De G. & J. 16, C. A.; *Walker* v. *Walker* (1740), 2 Atk. 98; *Irnham* (*Lord*) v. *Child* (1781), 1 Bro. C. C. 92; and see titles CONTRACT, Vol. VII., p. 524; EVIDENCE, Vol. XIII., p. 567.

(*c*) *Williams* v. *Owen*, *supra*, *per* Lord COTTENHAM, L.C., at p. 306.

(*d*) *Ibid.*; *St. John* v. *Wareham* (1635), cited 3 Swan. 631; *Mellor* v. *Lees* (1743), 2 Atk. 494; *Goodman* v. *Grierson* (1813), 2 Ball & B. 274; *Longuet* v. *Scawen* (1750), 1 Ves. Sen. 402, 404; *Perry* v. *Meddowcroft* (1841), 4 Beav. 197, 203.

construed strictly against the vendor, and where there is a time limited for the purpose it must be precisely observed (*e*).

SECT. 1. General Characteristics.

**128.** A mortgage of personal chattels is essentially different from a pledge or pawn under which money is advanced upon the security of chattels delivered into the possession of the lender, such delivery of possession being an essential element of the transaction (*f*). A mortgage conveys the whole legal interest in the chattels; a pledge or pawn conveys only a special property, leaving the general property in the pledgor or pawnor (*g*): the pledgee or pawnee never has the absolute ownership of the goods (*h*), but has a special property in them coupled with a power of selling and transferring them to a purchaser on default of payment at the stipulated time, if any, or at a reasonable time after demand and non-payment if no time for payment is agreed upon (*i*).

Mortgage distinguished from pledge or pawn.

**129.** A mortgage differs also from the right of lien at common law, which is only a personal right to hold the goods of another until a debt is paid, and one which cannot be parted with and continues only so long as the possessor of the right holds the goods (*k*). A mortgage differs also from the right of lien given by statute in the case of railways (*l*), shipowners (*m*), solicitors (*n*), and in other like cases, the remedy in each case being controlled by the terms of the statute.

Mortgage distinguished from lien.

## SECT. 2.—*Legal and Equitable Mortgages.*

### SUB-SECT. 1.—*Characteristics of Each.*

**130.** Property of every description, which is capable of absolute sale, may, speaking generally, be the subject of a mortgage, either legal or equitable.

Subject of mortgage.

**131.** A legal mortgage is a conditional assurance to the mortgagee of the mortgagor's general property in real or personal estate.

Legal mortgage.

(*e*) *Barrell* v. *Sabine* (1684), 1 Vern. 268; see *Joy* v. *Birch* (1836), 4 Cl. & Fin. 57, H. L.; *Pegg* v. *Wisden* (1852), 16 Beav. 239, 244.

(*f*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Smith, L.C., 11th ed., 173; *Mills* v. *Charlesworth* (1890), 25 Q. B. D. 421, 424, C. A.; reversed on the facts, *sub nom. Charlesworth* v. *Mills*, [1892] A. C. 231.

(*g*) *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222, C. A., *per* FRY, L.J., at p. 234; and see title PAWNS AND PLEDGES.

(*h*) *Carter* v. *Wake* (1877), 4 Ch. D. 605, 606.

(*i*) *Burdick* v. *Sewell* (1883), 10 Q. B. D. 362, 366; *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222, 232, C. A. WILLES, J., distinguishes the securities thus:—"There are three kinds of security: the first a simple lien; the second a mortgage passing the property out and out; the third a security intermediate between a lien and a mortgage, viz., a pledge—where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt" (*Halliday* v. *Holgate* (1868), L. R. 3 Exch. 299, 302, Ex. Ch.).

(*k*) *Legg* v. *Evans* (1840), 6 M. & W. 36, 41; and see title LIEN, Vol. XIX., pp. 2, 3, 25.

(*l*) See titles CARRIERS, Vol. IV., pp. 40, 92 *et seq.*; RAILWAYS AND CANALS.

(*m*) See title SHIPPING AND NAVIGATION.

(*n*) See title SOLICITORS.

SECT. 2. Legal and Equitable Mortgages.

Its effect is to vest the legal estate in the mortgagee, who, unless the deed expressly provides for possession by the mortgagor until default, is entitled immediately upon the execution of the deed to possession of the property (*o*), though the title only becomes absolute upon default in payment of the mortgage money at the time fixed, and the property remains subject to the right of redemption until such right is destroyed by foreclosure or sale or otherwise.

Equitable mortgage.

**132.** An equitable mortgage is a contract which creates a charge on the property, but does not pass the legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court (*p*).

As a general rule, all property, whether real or personal, which may be the subject of a legal mortgage, can equally be charged in equity, and there is no distinction in this respect between freeholds and copyholds (*q*).

SUB-SECT. 2.—*Kinds of Equitable Mortgage.*

Kinds of equitable mortgage.

**133.** An equitable mortgage may be made either (1) by an agreement to create a legal mortgage (*r*); (2) by a mortgage of an equity of redemption of property which is already subject to a legal mortgage (*r*); (3) by a mortgage of other equitable interests (*s*); (4) by a deposit of title deeds (*a*); or (5) by an equitable charge (*b*).

Effect of Statute of Frauds.

**134.** An equitable mortgage of an interest in land (*c*) (except in the case of a mortgage by deposit of title deeds (*d*) ) is not enforceable, unless a memorandum or note thereof is made in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised (*e*), or unless there has been part performance of the contract sufficient to take it out of the statute (*f*).

(*o*) *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553; see *Partridge* v. *Bere* (1822), 5 B. & Ald. 604; *Doe* d. *Roby* v. *Maisey* (1828), 8 B. & C. 767; *Doe* d. *Fisher* v. *Giles* (1829), 5 Bing. 421; and see p. 189, *post*.

(*p*) See title EQUITY, Vol. XIII., p. 92.

(*q*) *Winter* v. *Anson* (*Lord*) (1828), 3 Russ. 488, 493; *Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303, 325.

(*r*) See p. 75, *post*.

(*s*) See p. 76, *post*.

(*a*) See p. 78, *post*.

(*b*) See p. 83, *post*.

(*c*) A charge on rent to accrue due (*Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, C. A.), or on trade fixtures (*Jarvis* v. *Jarvis* (1893), 69 L. T. 412), is such an interest.

(*d*) See p. 78, *post*.

(*e*) Statute of Frauds (29 Car. 2, c. 3), s. 4; see *Lacon* v. *Mertins* (1743), 3 Atk. 1, 4; and see titles CONTRACT, Vol. VII., p. 361; SALE OF LAND. For a form of equitable mortgage of a building agreement, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 719.

(*f*) See titles CONTRACT, Vol. VII., pp. 379 *et seq.*; EQUITY, Vol. XIII., p. 92. But payment of the consideration is not sufficient part performance (*Re Whitting, Ex parte Hall, supra*, at p. 619; *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 22, 40; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, 479.) As to deposit of title deeds being sufficient part performance, see p. 79, *post*.

An offer to give a security, signed by the debtor and accepted by parol by the creditor, is sufficient (*g*).

Personal chattels are not within the above rule, and an equitable mortgage thereof is not, either at common law or apart from statutory provisions specially applicable to such securities (*h*), required to be in writing (*i*).

SUB-SECT. 3.—*Agreement for a Mortgage.*

Agreement to execute mortgage.

**135.** In equity a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as a security for a certain sum (*k*). The agreement may be enforced according to its terms, even though the legal mortgage when executed will confer on the mortgagee an immediate power of sale (*a*). But the court will not enforce specific performance of an agreement to make or take a loan of money, whether the loan is to be on security or not, if no money has been actually advanced (*b*).

Provisions to be in[illegible] in mortgage.

The legal mortgage, when executed, will contain any clauses and provisions specially stipulated for, but an agreement to execute a legal mortgage, with such powers and provisions and in such form as the mortgagee may require for further securing the principal moneys and interest, only extends to reasonable provisions, and does not enable the mortgagee to insert terms excluding the operation of the statutory provision (*c*) which abolishes consolidation

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(*g*) *Liverpool Borough Bank* v. *Eccles* (1859), 4 H. & N. 139; *Warner* v. *Wellington* (1856), 3 Drew. 523.

(*h*) See title BILLS OF SALE, Vol. III., pp. 1 *et seq.*

(*i*) *Gurnell* v. *Gardner* (1863), 4 Giff. 626; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 854, C. A.; *Parish* v. *Poole* (1884), 53 L. T. 35.

(*k*) *Eyre* v. *McDowell* (1861), 9 H. L. Cas. 619; *Dighton* v. *Withers* (1862), 31 Beav. 423; *Parish* v. *Poole, supra*; *Tebb* v. *Hodge* (1869), L. R. 5 C. P. 73, Ex. Ch. For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 488 *et seq.*, 713; and compare *ibid.*, Vol. VII., p. 297; Vol. XI., p. 58.

(*a*) *Hermann* v. *Hodges* (1873), L. R. 16 Eq. 18; *Ashton* v. *Corrigan* (1871), L. R. 13 Eq. 76; *Matthews* v. *Goodday* (1861), 31 L. J. (CH.) 282.

(*b*) *Sichel* v. *Mosenthal* (1862), 30 Beav. 371; *Rogers* v. *Challis* (1859), 27 Beav. 175; *Western Wagon and Property Co.* v. *West*, [1892] 1 Ch. 271; *Larios* v. *Bonany y Gurety* (1873), L. R. 5 P. C. 346. In *Hunter* v. *Langford* (*Lord*) (1828), 2 Mol. 272, specific performance was ordered of an agreement to grant a mortgage for a loan of £30,000, of which £1,000 was already advanced; but it was refused in *South African Territories* v. *Wallington*, [1898] A. C. 309, where the defendant had applied for and paid a 10 per cent. deposit on some debentures. In the particular case of a contract to take debentures in a limited company, the remedy of specific performance is now, however, available to the company; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 105, and title COMPANIES, Vol. V., p. 352. It is well settled that the actual advance of an agreed loan is not a part performance to take the case out of the Statute of Frauds (*Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, 619, C. A.); but, except in the particular case of debentures. the aggrieved party would have his sole remedy in damages for breach of contract (*South African Territories* v. *Wallington, supra*). As to loans of money, see, further, title MONEY AND MONEY-LENDING, pp. 44 *et seq.*, *ante*, For specific performance generally, see title SPECIFIC PERFORMANCE.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17; see p. 209, *post*. As to the costs of preparing such legal mortgage, see pp. 186, 239, *post*.

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of mortgages (*d*), or extending the subject-matter of the mortgage (*e*). The mortgage should, however, contain a covenant for the payment of the debt and interest (*f*); and even where there is an agreement not to call in the money for a certain time, the mortgage must contain a proviso that the postponement shall be conditional on punctual payment of interest (*g*).

SUB-SECT. 4.—*Mortgage of the Equity of Redemption.*

Mortgage of an equity of redemption.

**136.** Since the owner of property does not, by making a pledge or mortgage of it, cease to be owner of it any further than is necessary to give effect to the security he has thus created (*h*), an equitable mortgage may be created by an actual mortgage of the equity of redemption of property already in mortgage, that is, by a puisne mortgage expressed in legal form (*i*). Such securities are usually referred to according to their priority as second or third mortgages, or as the case may be.

Second and third mortgages.

A mortgagor who has mortgaged his property has a sufficient estate or interest, until foreclosure or sale, to convey to another person either by way of mortgage or sale. The subsequent mortgage as between the mortgagor and the mortgagee is a mortgage of the mortgagor's entire interest, saving only the rights of prior incumbrancers (*k*). When the first mortgage debt is satisfied, the first mortgagee is a trustee of the legal estate for any subsequent incumbrancers according to their priorities, and is bound to convey the estate to the subsequent mortgagee who has the best right to call for it (*l*). As between subsequent mortgagees in order, each one has, as against everyone behind him, a prior right to a reconveyance from a prior mortgagee whose mortgage debt has been satisfied (*m*).

SUB-SECT. 5.—*Mortgage of Equitable Interests in Personal Property.*

Equitable mortgages of personal property.

**137.** Personal property in the possession or under the legal dominion of third persons may be the subject of a valid charge by the equitable owner in favour of his creditor (*n*). Accordingly

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(*d*) *Farmer* v. *Pitt*, [1902] 1 Ch. 954.

(*e*) *Whitley* v. *Challis*, [1892] 1 Ch. 64, C. A., in which case an intended lessee agreed, when a lease of an hotel should be granted, to execute a valid second mortgage in such form and to contain such powers, covenants, and provisions as the solicitor or counsel of the mortgagee should require: it was held that this did not authorise the inclusion of the goodwill of the business in the mortgage.

(*f*) *Sanders* v. *Milsome* (1866), L. R. 2 Eq. 573.

(*g*) *Seaton* v. *Twyford* (1870), L. R. 11 Eq. 591.

(*h*) *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29, *per* Lord BLACKBURN, at p. 36; and see p. 138, *post*.

(*i*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 725 *et seq.*

(*k*) *Frazer* v. *Jones* (1846), 5 Hare, 475, 481.

(*l*) *Sharples* v. *Adams* (1863), 32 Beav. 213; *Grugeon* v. *Gerrard* (1840), 4 Y. & C. (EX.) 119.

(*m*) *Teevan* v. *Smith* (1882), 20 Ch. D. 724, 730, C. A.

(*n*) Formerly at law no possibility, right, title nor thing in action could be assigned to a stranger (*Lampet's Case* (1612), 10 Co. Rep. 46 b). The reasons which induced the courts of law to consider possibilities or choses in action as non-assignable were disregarded by courts of equity, and from early times assignments of a mere naked possibility or of a chose in action

choses in action (*o*), such as debts or funds in the hands of trustees and including future choses in action and after-acquired property, are assignable by way of security (*p*).

What is an equitable assignment.

**138.** Apart from the Judicature Act, 1873 (*q*), any arrangement, whether verbal or in writing (*r*), by which a person agrees to transfer or appropriate his right (*s*) to any specified property (*t*) which is in existence or which may come into existence (*a*) to another person for valuable consideration, is sufficient to operate as a valid equitable assignment (*b*).

Notice.

**139.** As between the assignor and assignee of a debt (*c*) or of a fund in the hands of trustees (*d*), the title of the assignee is complete although no notice is given to the debtor or the trustee. Notice, however, should be given to the debtor or trustee to prevent payment to the assignor, for such payment by the debtor or trustee, without knowledge of the assignment, operates as a satisfaction of the debt or claim (*e*). It is not, however, essential that the notice

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for valuable consideration were held valid in courts of equity (*Squib* v. *Wyn* (1717), 1 P. Wms. 378; *Row* v. *Dawson* (1749), 1 Ves. Sen. 331). See, further, title CHOSES IN ACTION, Vol. IV., pp. 374 *et seq.*

(*o*) As to what is comprised in the term "choses in action," see title CHOSES IN ACTION, Vol. IV., pp. 362 *et seq.*

(*p*) *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348; 1 White & Tud. L. C., 8th ed., 98; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348, 352, C. A. As to the assignability of choses in action, see title CHOSES IN ACTION, Vol. IV., pp. 365 *et seq.* For forms suitable for various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 733 *et seq.*

(*q*) 36 & 37 Vict. c. 66, s. 25 (6). As to the effect of this provision, see title CHOSES IN ACTION, Vol. IV., pp. 367 *et seq.*

(*r*) No writing is necessary unless the agreement is within the Statute of Frauds (29 Car. 2, c. 3) (*Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, C. A.; *Tibbits* v. *George* (1836), 5 Ad. & El. 107; *Gurnell* v. *Gardner* (1863), 4 Giff. 626; *Riccard* v. *Prichard* (1855), 1 K. & J. 277, 279; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848, 854, C. A.; *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A.). Where a writing is relied upon it should show the complete nature of the arrangement (*Percival* v. *Dunn* (1885), 29 Ch. D. 128).

(*s*) The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear (*Tailby* v. *Official Receiver, supra,* at p. 543; *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A.; and see title EQUITY, Vol. XIII., p. 103).

(*t*) *Hoare* v. *Dresser* (1859), 7 H. L. Cas. 290, 317, 324; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, 365.

(*a*) *Tailby* v. *Official Receiver, supra.*

(*b*) *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, 134, C. A. For the law relating to equitable assignments, see titles CHOSES IN ACTION, Vol. IV., pp. 374 *et seq.*; EQUITY, Vol. XIII., pp. 102—104.

(*c*) *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, 248; *Robinson* v. *Nesbitt* (1868), L. R. 3 C. P. 264, 267; *Re Irving, Ex parte Brett* (1877), 7 Ch. D. 419, 421; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works, supra.*

(*d*) *Ward* v. *Duncombe,* [1893] A. C. 369, 392. As to notice, see title CHOSES IN ACTION, Vol. IV., pp. 379 *et seq.*

(*e*) *Norrish* v. *Marshall* (1821), 5 Madd. 475; *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, C. A.; *Re Southampton's (Lord) Estate, Allen* v. *Southampton (Lord)* (1880), 16 Ch. D. 178; *Ward* v. *Duncombe* [1893]

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should be express notice given by the assignee (*f*). An assignor can give no greater right in equity than he himself has (*g*); and a mortgagee of a chose in action takes subject to all equities between the debtor and creditor existing or arising out of circumstances existing before notice is given of the assignment whether the mortgagee has notice of them at the time of taking the assignment or not (*h*). But the debtor or holder of the fund cannot after notice of the assignment alter his rights to the prejudice of the assignee (*i*).

SUB-SECT. 6.—*Mortgage by Deposit of Deeds.*

**Mortgage by deposit of deeds.**

**140.** A good security in equity may be created by the deposit of he title deeds of freehold or leasehold property or copies of court rolls of copyhold property (*k*). A deposit of title deeds is regarded as an imperfect mortgage which the mortgagee is entitled to have perfected; or as a contract for a legal mortgage which gives to the party entitled all such rights as he would have had if the contract had been completed (*l*). By the deposit the mortgagor contracts that his interest in the property comprised in the deeds shall be liable to the debt and binds himself to do all that is necessary to effect the vesting in the mortgagee of such interest as he has (*m*).

**Form.**

The deposit may be of the deeds alone (*n*), or may be accompanied by a memorandum of the terms of the deposit (*o*) or by an agreement to give a mortgage (*p*).

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A. C. 369, 392; and if the debtor has been released in a general settlement of accounts the release is equally effectual (*Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, C. A.).

(*f*) *Lloyd* v. *Banks* (1868), 3 Ch. App. 488.

(*g*) *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C.A.; *Webb* v. *Smith* (1885), 30 Ch. D. 192, 199, C. A.

(*h*) *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A., *per* COTTON, L.J., at p. 578; *Cavendish* v. *Geaves* (1857), 24 Beav. 163; *Rolt* v. *White* (1862), 3 De G. J. & Sm. 360; *Stoddart* v. *Union Trust, Ltd.*, [1912] 1 K. B. 181, C. A.; see, generally, title CHOSES IN ACTION, Vol. IV., pp. 386 *et seq.* As to the special case of a trustee who is also entitled to a share in the trust estate, see *ibid.*, p. 389.

(*i*) *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29; and see p. 339, *post*.

(*k*) *Russel* v. *Russel* (1783), 1 Bro. C. C. 269; 2 White & Tud. L. C., 7th ed., 76.

(*l*) *Parker* v. *Housefield* (1834), 2 My. & K. 419; *Carter* v. *Wake* (1877), 4 Ch. D. 605; *Harrold* v. *Plenty*, [1901] 2 Ch. 314; *Ex parte Wright* (1812), 19 Ves. 255, 258; *Pryce* v. *Bury* (1853), 2 Drew. 41; *Featherstone* v. *Fenwick* (1784), 1 Bro. C. C. 270, n.

(*m*) *Pryce* v. *Bury* (1853), 2 Drew. 41, *per* KINDERSLEY, V.-C., at p. 42; *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A. But where the deposit is made with a surety by way of indemnity, the surety is not, in the absence of express agreement, entitled to call for a legal mortgage (*Sporle* v. *Whayman* (1855), 20 Beav. 607).

(*n*) *Russel* v. *Russel*, *supra*; *Ex parte Langston* (1810), 17 Ves. 227; compare *Ex parte Warner* (1812), 19 Ves. 202, and *Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303 (cases of deposit of copy of court roll).

(*o*) *Ex parte Kensington* (1813), 2 Ves. & B. 79. For forms, see Encyclopædia of Forms and Precedents, Vol. II., pp. 479, 482, 484, 486, 488; Vol. VIII., pp. 713 *et seq.*; and for further charge, see *ibid.*, Vol. II., p. 488. In Yorkshire a memorandum is essential for the purpose of securing priority by registration; see p. 87, *post*.

(*p*) *Lister* v. *Turner* (1846), 5 Hare, 281; *National Provincial Bank of England* v. *Games*, *supra*.

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Deposit of deeds without writing.

A deposit of title deeds as a security for a debt, without writing, or by word of mouth, may create a charge upon the property notwithstanding the Statute of Frauds (*q*), since the delivery of the deeds is sufficient part performance of the implied agreement to give a security (*r*), but where the deposit is accompanied by a written document the latter must be referred to in order to ascertain the exact nature of the charge (*s*), and parol evidence will not be admitted to contradict the writing (*t*) although parol evidence of a subsequent verbal agreement may be given (*u*).

Memorandum without deposit.

**141.** A memorandum or agreement in writing showing an intention to deposit title deeds by way of mortgage or to charge the property comprised in the deeds is sufficient although no deeds are in fact deposited (*a*), and even though some of the deeds are not executed (*b*): so is a written direction or consent that the deeds may be retained as a security (*c*). A mere parol agreement to deposit which is not acted upon (*d*) is, however, not sufficient; but a verbal agreement to mortgage with a subsequent delivery of the deeds is sufficient, and the security relates back to the time of the agreement (*e*).

Deposit of part of deeds.

**142.** To create a valid mortgage by deposit it is not necessary that the whole or even the most material of the title deeds should be deposited, nor that the deeds deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited *bonâ fide* relate to the property or are material evidence of title and are shown to have been deposited with the intention of creating a charge (*f*). All the deeds deposited are included in the security

(*q*) 29 Car. 2, c. 3; see p. 74, *ante*.

(*r*) *Burgess* v. *Moxon* (1856), 2 Jur. (N. S.) 1059; *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, 282, P. C., and see title EQUITY, Vol. XIII., p. 71. Where a third person already has possession of title deeds for another purpose an oral communication from a part owner of the property to which the title deeds relate, purporting to make such third person a trustee of the deeds for a creditor, cannot create an equitable mortgage in favour of such creditor (*Re Beetham, Ex parte Broderick* (1887), 18 Q. B. D. 766, C. A.).

(*s*) *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321, 340; *Wylde* v. *Radford* (1863), 33 L. J. (CH.) 51.

(*t*) *Ex parte Coombe* (1810), 17 Ves. 369.

(*u*) *Ede* v. *Knowles* (1843), 2 Y. & C. Ch. Cas. 172.

(*a*) *Re Carter and Justins, Ex parte Sheffield Union Banking Co.* (1865), 13 L. T. 477; *Re Leathes, Ex parte Leathes* (1833), 3 Deac. & Ch. 112; *Re Daintry, Ex parte Arkwright* (1843), 3 Mont. D. & De G. 129; *Re Blew, Ex parte Jones* (1835), 4 Deac. & Ch. 750.

(*b*) *Re Pye, Ex parte Orrett* (1837), 3 Mont. & A. 153, in which case the agreement was to deposit a lease when granted.

(*c*) *Fenwick* v. *Potts* (1856), 8 De G. M. & G. 506, C. A.

(*d*) *Re Beavan, Ex parte Coombe* (1819), 4 Madd. 249; *Re Collins, Ex parte Perry* (1843), 3 Mont. D. & De G. 252; *Re Ridge, Ex parte Hallifax* (1842), 2 Mont. D. & De G. 544.

(*e*) *Edge* v. *Worthington* (1786), 1 Cox, Eq. Cas. 211. But a mere promise to give security on deeds to a person who already holds them does not of itself create an equitable mortgage (*Re Beetham, Ex parte Broderick, supra*).

(*f*) *Ex parte Wetherell* (1805), 11 Ves. 398; *Lacon* v. *Allen* (1856), 3 Drew. 579; *Roberts* v. *Croft* (1857), 24 Beav. 223; *Re Roche's Estate* (1890),

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although the accompanying memorandum only specifies some of those deeds (*g*). An equitable mortgage may be created by a deposit of a copy of court rolls (*h*), a receipt for purchase-money containing the terms of the agreement for purchase and attached to a plan (*i*), or an agreement for a lease (*k*), though the lease is afterwards granted on different terms (*l*), but not, it seems, by a deposit of an attested copy of a lease (*m*).

**How far mortgagee by deposit bound to examine deeds.**

**143**. It is not legal negligence to accept the owner's statement that the deeds deposited are all that are necessary. If the court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds, then he is not bound to examine the deeds, nor is he bound by constructive notice of their actual contents or of any deficiencies which by examination he might have discovered in them (*n*).

**Effect of mere deposit.**

**144**. A deposit of title deeds does not in itself create a charge, and the mere possession of deeds without evidence of the contract under which possession was obtained, or of the manner in which the possession originated so that a contract may be inferred (*o*), will not create an equitable security (*p*). The deposit is a fact which lets in evidence of an intention to create a charge which would otherwise be inadmissible, and raises a presumption of charge which throws upon the debtor the burden of rebutting it

25 L. R. Ir. 58, 284, C. A. In *Roberts* v. *Croft* (1857), 24 Beav. 223, a solicitor made a deposit of the title deeds of his estate with a client, but omitting the conveyance to himself; he afterwards deposited the latter with his bankers: it was held that the deposit of the earlier deeds constituted a good equitable mortgage and gave the client priority over the bankers; and see *Re Price, Ex parte Pearse and Prothero* (1820), Buck, 525.

(*g*) *Ferris* v. *Mullins* (1854), 2 Sm. & G. 378. For a mortgage of shares in a limited company created by deposit of certificates, see *Harrold* v. *Plenty*, [1901] 2 Ch. 314, and title COMPANIES, Vol. V., p. 197.

(*h*) *Ex parte Warner* (1812), 19 Ves. 202; *Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303, 325.

(*i*) *Goodwin* v. *Waghorn* (1835), 4 L. J. (CH.) 172. In *Simmons* v. *Montague*, [1909] 1 I. R. 87, the deposit of a plan of the property was held sufficient.

(*k*) *Unity Joint-Stock Mutual Banking Association* v. *King* (1858), 25 Beav. 72; *Union Bank of London* v. *Kent* (1888), 39 Ch. D. 238, C. A.; *Tebb* v. *Hodge* (1869), L. R. 5 C. P. 73, Ex. Ch.

(*l*) *Ex parte Reid* (1848), De G. 600.

(*m*) *Re Borrow, Ex parte Broadbent* (1834), 1 Mont. & A. 635.

(*n*) *Dixon* v. *Muckleston* (1872), 8 Ch. App. 155, *per* Lord SELBORNE, L.C., at p. 161.

(*o*) *Re McMahon, McMahon* v. *McMahon* (1886), 55 L. T. 763.

(*p*) *Dixon* v. *Muckleston, supra*; *Chapman* v. *Chapman* (1851), 13 Beav. 308; *Wardle* v. *Oakley* (1864), 36 Beav. 27.

(*q*) *Russel* v. *Russel* (1783), 1 Bro. C. C. 269; *Burgess* v. *Moxon* (1856), 2 Jur. (N. S.) 1059. A mere deposit of title deeds, upon an advance, with intent to create a security thereon, but without a word passing, gives an equitable lien; so that, as between a debtor and creditor, the fact of possession of the deeds raises the presumption that they were deposited by way of security (*Ex parte Langston* (1810), 17 Ves. 227, 230; *Ex parte Mountfort* (1808), 14 Ves. 606; *Maugham* v. *Ridley* (1863), 8 L. T. 309); but, as against strangers, this is only the case where the possession can be accounted

The delivery by mistake of a box of deeds to a creditor does not constitute him an equitable mortgagee, though the delivery may be *primâ facie* evidence of an intention which throws the burden of proving the negative on the owner (*r*).

Deposit by mistake.

Where deeds are delivered for a special purpose other than putting them in pledge, the further purpose of creating a present security cannot be inferred. Thus, where they are delivered merely for the purpose of enabling a solicitor to prepare a legal mortgage, an equitable mortgage by deposit is not created (*s*), unless there is an immediate intention to give a security by the deposit, notwithstanding that a formal legal security is also in contemplation (*a*).

Deposit for special purpose.

**145.** When the deposit of deeds is made for the purpose of obtaining credit, it will not cover moneys previously advanced and still due (*b*), unless an intention to cover them appears from the circumstances (*c*). A deposit will, however, cover subsequent advances upon parol evidence of an agreement that the security should be so extended, and notwithstanding that the original deposit was accompanied by a memorandum in writing limiting the purpose of the deposit (*d*); but it will not extend to an advance by a third person unless connected with some dealing with the estate (*e*), or to a subsequent advance made after a legal mortgage has been taken (*f*).

Extent of security created.

**146.** When the deposit of deeds is made without a memorandum, the delivery should be made to the creditor or his agent, being some person other than the debtor. A deposit with the debtor's

With whom deeds must be deposited.

for in no other way (*Bozon* v. *Williams* (1829), 3 Y. & J. 150, 161), and the simple fact that the title deeds are produced from the custody of a creditor a great number of years after the deposit, without explanation, will not in itself support a claim of a mortgage by deposit (*Chapman* v. *Chapman* (1851), 13 Beav. 308). There should be proof of the time when both the loan and deposit were made (*Kebell* v. *Philpott, Kebell* v. *Daniel* (1838), 2 Jur. 739).

(*r*) *Wardle* v. *Oakley* (1864), 36 Beav. 27, 30, where the deeds of leaseholds were, by mistake, sent with the deeds of freeholds which had been mortgaged by deed, and the possession of the former deeds were held to create no lien on the leasehold property.

(*s*) *Norris* v. *Wilkinson* (1806), 12 Ves. 192; *Lloyd* v. *Attwood, Attwood* v. *Lloyd* (1859), 3 De G. & J. 614, 651, C. A.

(*a*) *Edge* v. *Worthington* (1786), 1 Cox, Eq. Cas. 211; *Ex parte Bruce* (1813), 1 Rose, 374; *Ex parte Wright* (1812), 19 Ves. 255, 258; *Hockley* v. *Bantock* (1826), 1 Russ. 141. If, before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance and the deeds are deposited, under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage; in such case the deeds are pledged from the very nature of the transaction (*Keys* v. *Williams* (1838), 3 Y. & C. (EX.) 55, *per* Lord ABINGER, C.B., at p. 61).

(*b*) *Mountford* v. *Scott* (1823), Turn. & R. 274.

(*c*) *Re New, Ex parte Farley* (1841), 1 Mont. D. & De G. 683.

(*d*) *Ex parte Langston* (1810), 17 Ves. 227; *Ex parte Kensington* (1813), 2 Ves. & B. 79; *Re Burkill, Ex parte Nettleship* (1841), 2 Mont. D. & De G. 124; *James* v. *Rice* (1854), 5 De G. M. & G. 461, C. A.

(*e*) *Ex parte Whitbread* (1812), 19 Ves. 209.

(*f*) *Ex parte Hooper* (1815), 19 Ves. 477.

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wife is not sufficient (*g*). But a deposit with the debtor's solicitor is sufficient, as he is thereby constituted agent and trustee for the creditor (*h*); and a solicitor in mortgaging may make a deposit by placing his own deeds in a box containing the papers of his client the mortgagee (*i*).

Extent of property charged.

**147.** The charge created by a deposit of deeds includes all the property comprised in the deeds (*j*), and extends to every estate and interest possessed by the depositor at the time of the deposit, every interest which he afterwards acquires (*k*), and all incidental rights, such as the goodwill of a business carried on upon the premises (*l*). A limited owner can charge only his own estate by a deposit; but parol evidence of the assent of the remainderman is admissible to charge the inheritance (*m*).

The deposit cannot create an equitable mortgage on property to which the deeds do not relate, notwithstanding that by a misapprehension the creditor believes that they relate to the property (*n*).

Parting with or loss of deeds.

**148.** The creditor with whom deeds are deposited does not lose his lien by parting with the deeds for the purpose of allowing a sale to be effected (*o*), or, if the debtor is the creditor's solicitor, and the deeds remain in his custody as the creditor's agent, by the debtor wrongfully removing them (*p*). Where neither the deeds nor any memorandum of deposit can be produced, secondary evidence of the deposit may be given upon proof that the deeds have been really lost (*q*).

Sub-mortgage by deposit.

**149.** A legal mortgagee may make an equitable sub-mortgage by deposit, and an equitable mortgage by deposit may be sub-mortgaged by redeposit without depositing the memorandum given on the original deposit (*r*). But the derivative mortgagee must

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(*g*) *Ex parte Coming* (1803), 9 Ves. 115. So a memorandum appropriating a policy, which remains in the debtor's possession, as security to a creditor is not sufficient of itself to create a charge thereon (*Adams* v. *Claxton* (1801), 6 Ves. 226; but see *Middleton* v. *Pollock, Ex parte Elliott* (1876), 2 Ch. D. 104, where a memorandum by a solicitor declaring himself trustee, for a client, of leaseholds of which he was mortgagee, was held valid though the fact of the execution of the memorandum was not known to the client).

(*h*) *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd* (1859), 3 De G. & J. 614, 652, C. A.

(*i*) *Mason* v. *Morley* (No. 2) (1865), 34 Beav. 475. As to the relation of solicitor and client, see, generally, title SOLICITORS; and see also title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 115.

(*j*) *Ashton* v. *Dalton* (1846), 2 Coll. 565.

(*k*) *Re Baker, Ex parte Bisdee* (1840), 1 Mont. D. & De G. 333; *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, 282, P. C.; *Re Roche's Estate* (1890), 25 L. R. Ir. 58, 284, C. A.

(*l*) *Chissum* v. *Dewes* (1828), 5 Russ. 29.

(*m*) *Williams* v. *Medlicot* (1819), 6 Price, 495.

(*n*) *Jones* v. *Williams* (1857), 24 Beav. 47.

(*o*) *Ex parte Morgan* (1806), 12 Ves. 6.

(*p*) *Mason* v. *Morley*, *supra*.

(*q*) *Baskett* v. *Skeel* (1863), 11 W. R. 1019.

(*r*) *Re Hildyard, Ex parte Smith* (1842), 2 Mont. D. & De G. 587.

deliver up the deeds to the original mortgagor upon being paid all that is actually due on the original deposit (*s*).

SECT. 2. Legal and Equitable Mortgages.

**150.** Where land is registered (*t*), the registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates, charges, or rights, create a lien on the land by deposit of the land certificate or certificate of charge; and such lien, subject as aforesaid, is equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple or for the term or interest created by the lease for his own benefit, or by a mortgagee beneficially entitled to the mortgage (*u*).

Registered land.

SUB-SECT. 7.—*Equitable Charges.*

**151.** An equitable charge is a security which does not transfer the property with a condition for reconveyance, but only gives a right to payment out of the property. It entitles the holder to have the property comprised therein sold to raise the money charged thereon, but it does not amount to an agreement to give a legal mortgage, and the strict mode of enforcing it is by sale and not by foreclosure (*v*).

Equitable charges.

**152.** An agreement to charge real or personal estate, made, for valuable consideration, by a person who has power to create such a charge, operates as a valid equitable charge thereon (*a*), even though the charge extends to all his existing property (*b*), and if, at the date of the agreement, the property agreed to be charged has been sold, the charge takes effect on the interest of the person making the charge in the purchase-money (*c*). A covenant to charge property ascertained or ascertainable creates a binding charge as soon as the property is ascertained (*d*); and it is sufficient if the land can be ascertained by existing facts and circumstances (*e*). But a simple

Agreement to charge.

When effectual.

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(*s*) *Matthews* v. *Wallwyn* (1798), 4 Ves. 118; *Turner* v. *Smith*, [1901] 1 Ch. 213.

(*t*) Under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65); as to registered charges, see p. 84, *post*.

(*u*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 8 (4). As to giving notice of deposit, see Land Transfer Rules, 1903, rr. 243—251 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, pp. 33 *et seq.*). As to registered land generally, see title REAL PROPERTY AND CHATTELS REAL.

(*v*) *Matthews* v. *Goodday* (1861), 31 L. J. (CH.) 282; see titles CHOSES IN ACTION, Vol. IV., pp. 374, 375; EQUITY, Vol. XIII., p. 93; and p. 273, *post*. For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 717, 718.

(*a*) *Rolleston* v. *Morton* (1842), 1 Dr. & War. 171, 195; *Whitworth* v. *Gaugain* (1844), 3 Hare, 416, 424; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, 134, C. A. A voluntary agreement to give a charge does not create such a charge (*Re Lucan (Earl)*, *Hardinge* v. *Cobden* (1890), 45 Ch. D. 470).

(*b*) *Re Kelcey, Tyson* v. *Kelcey*, [1899] 2 Ch. 530.

(*c*) *Re Selby, Ex parte Rogers* (1856), 8 De G. M. & G. 271, C. A.

(*d*) *Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547; *Ravenshaw* v. *Hollier* (1834), 7 Sim. 3; compare *Legard* v. *Hodges* (1792), 1 Ves. 477.

(*e*) *Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, C. A. "For example, if there is a covenant to charge all the real estate which a man

SECT. 2. **Legal and Equitable Mortgages.**

covenant or agreement to charge land where no lands in particular are mentioned will not create a charge, neither will an agreement for a personal security with power to call for a real one, or where it otherwise appears that the intention was to rely on the covenant (*f*).

Mistake.

A valid agreement to charge will be held effectual notwithstanding any mistake which may have occurred in the attempt to effect it (*g*).

### SECT. 3.—*Registered Charges on Land.*

Charge on registered land.

**153.** In the case of land affected by the Land Transfer Acts (*h*) every registered proprietor of freehold or leasehold land may charge the land (*i*) in manner prescribed by the statutory rules with the payment, at an appointed time, of any principal sum of money either with or without interest, or of an annuity or other periodical payment, and the charge may be with or without a power of sale to be exercised at or after an appointed time (*k*).

Registration of charge.

The charge is completed by the registrar entering on the register the name of the person in whose favour the charge is made as the proprietor of the charge, and the particulars of the charge; and the charges are subject to the provisions as to qualified and possessory titles (*l*).

A person having the right to be registered as proprietor of land can create a charge on the land before he is himself registered as proprietor, and a charge so made has the same effect as if he were registered (*m*).

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has at a particular time, that covenant will itself make a charge. But where the covenant is to charge not all or any definite portion of a man's estate but only that which is worth £1,000 a year, . . . then from the indefiniteness of the matter referred to there will be no charge unless an instrument is afterwards executed to give effect to the covenant" (*Montagu* v. *Sandwich* (*Earl*) (1886), 32 Ch. D. 525, C. A., *per* COTTON, L.J., at p. 538); see *Lyde* v. *Mynn* (1833), 1 My. & K. 683; *Watson* v. *Sadleir* (1829), 1 Mol. 585; and see, generally, title LIEN, Vol. XIX., p. 24.

(*f*) *Fremoult* v. *Dedire* (1718), 1 P. Wms. 429; *Williams* v. *Lucas* (1789), 2 Cox, Eq. Cas. 160; *Collins* v. *Plummer* (1709), 1 P. Wms. 104; *Berrington* v. *Evans* (1839), 3 Y. & C. (EX.) 384.

(*g*) *Re Strand Music Hall Co., Ex parte European and American Finance Corporation* (1865), 3 De G. J. & Sm. 147, C. A.; *Ross* v. *Army and Navy Hotel Co.* (1886), 34 Ch. D. 43, C. A.; *Re Queensland Land and Coal Co., Davis* v. *Martin*, [1894] 3 Ch. 181.

(*h*) Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65). As to registration of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*i*) Three methods of obtaining a charge on registered land are open, namely:—(1) a statutory instrument of charge completed by registration; (2) a mortgage or charge off the register, protected either by a caution or restriction or by a statutory transfer with a caution to protect the equity of redemption; or (3) a deposit of the certificate (see note (*u*), p. 83, *ante*) which may be protected by a notice. For forms of instruments of charge, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 390 *et seq.*, and for forms of notice, see *ibid.*, pp. 420 *et seq.*

(*k*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 22; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (3).

(*l*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), as amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.; see, further, title REAL PROPERTY AND CHATTELS REAL.

(*m*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (6); Land Transfer Rules, 1903, r. 96.

SECT. 3. Registered Charges on Land.

Provisions implied in registered charge.

**154.** A registered charge, in the absence of any entry to the contrary on the register (*n*), implies a covenant, on the part of the registered proprietor at the time of the creation of the charge, with the registered proprietor of the charge for the time being, to pay the principal sum and interest (*o*), and in the case of leaseholds a covenant to pay the rent and observe the covenants in the lease (*p*). The charge also confers on its registered proprietor a power of entry (*q*), a right to foreclosure (*r*) and a power of sale (*s*); and the provisions of the Conveyancing and Law of Property Act, 1881 (*t*), with reference to mortgages are made to apply to registered charges (*u*).

Form of charge.

The instrument of charge must follow a prescribed form, which may be added to or varied (*a*). There is an exception to this rule in favour of a society registered under the Building Societies Acts (*b*). In such a case the mortgage may be in such form as is consistent with the rules of the society (*c*).

Alteration of terms.

**155.** If the terms of a charge are to be altered after it has been registered, the registrar may, on the application or with the consent of the registered proprietor of the land and of the proprietors of all registered charges of equal or inferior priority, alter the terms of the charge (*d*).

Effect of registered charge.

**156.** The charge does not confer the legal estate on the chargee, but he is able, by virtue of his power of sale, to confer it on a purchaser by statutory transfer (*e*). A conveyance of the legal estate may, with the approval of the registrar, be added to the statutory form (*f*).

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(*n*) The registration of the charge negativing or modifying these implied provisions is a sufficient entry for this purpose (Land Transfer Rules, 1903, r. 159).

(*o*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 23.

(*p*) *Ibid.*, s. 24.

(*q*) *Ibid.*, s. 25.

(*r*) *Ibid.*, s. 26. As to registering the mortgagee as proprietor of the land after foreclosure, see Land Transfer Rules, 1903, r. 164; and see p. 295, *post*.

(*s*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 27. For procedure, see Land Transfer Rules, 1903, No. 137. For a form of transfer by the chargee under his power of sale, see Encyclopædia of Forms and Precedents, Vol. XI., p. 372.

(*t*) 44 & 45 Vict. c. 41, ss. 19—24.

(*u*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (1), (2).

(*a*) For forms of charge, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 390 *et seq.*; for some forms of permissive additions, see *ibid.*, pp. 470 *et seq.*, and as to a charge by a limited company, see *ibid.*, p. 407.

(*b*) See title BUILDING SOCIETIES, Vol. III., pp. 321 *et seq.*

(*c*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (3).

(*d*) *Ibid.*, s. 9 (5); see Land Transfer Rules, 1903, r. 165; and for form of application, see Encyclopædia of Forms and Precedents, Vol. XI., p. 411. For form of instrument apportioning a charge, see *ibid.*, p. 413, and as to further advances, see *ibid.*, p. 411.

(*e*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 22—28. For collateral forms of mortgage for use with registered charges, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 523, 526.

(*f*) *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A. A term created for mortgage purposes is not required to be registered (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.), and a mortgagee selling

**Registered Charges on Land.**

Priorities.

**157.** Subject to any stipulations (*g*) varying priorities and appropriate entries thereof made on the register, charges rank according to their priority on the register irrespective of their order of creation. When a charge is satisfied, its cessation must be notified in whole or in part, as the case may require, by an entry on the register (*h*).

Transfer.

**158.** The registered proprietor of any charge may transfer it in the prescribed manner (*i*). The registered proprietor of a charge may also create a sub-charge on his charge (*j*).

Land excepted from local

**159.** The Land Transfer Act, 1875 (*k*), excepts land registered under its provisions, from and after the date of registration, from the jurisdiction of the local registries for Middlesex, Yorkshire, and Kingston-upon-Hull.

Registration in Middlesex.

Subject to this exception, the Middlesex Registry Act, 1708 (*l*), requires that a memorial of every deed and conveyance, whereby any hereditaments in Middlesex are in any way affected in law or equity, shall be registered, and avoids unregistered deeds and conveyances as against any subsequent purchaser or mortgagee for valuable consideration (*l*). This provision includes an instrument of charge not under seal; and a memorandum of charge accompanying a deposit of deeds (*m*), an agreement to give a second mortgage (*n*), and a memorandum of further charge in favour of a registered mortgagee (*o*) are "conveyances" within the Act (*l*); but the Act (*l*) does not apply to an equitable mortgage by deposit without memorandum (*p*); nor does it apply to the City of London, to

such term is not bound to register himself as proprietor thereof (*Re Voss and Saunders' Contract*, [1911] 1 Ch. 42); but notice of the term can be entered on the register (Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 50).

(*g*) For forms, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 408, 412.

(*h*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 28, as amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I. For a form of entry, see Encyclopædia of Forms and Precedents, Vol. XI., p. 416. As to satisfaction of charges, see, further, p. 314, *post*.

(*i*) As to transfer generally, see p. 169, *post*.

(*j*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 22 (6) (c); Land Transfer Rules, 1903, rr. 178—181. For a form of sub-charge, see Encyclopædia of Forms and Precedents, Vol. XI., p. 414.

(*k*) 38 & 39 Vict. c. 87, s. 127.

(*l*) 7 Anne, c. 20, s. 1; and see the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64). But the Middlesex Registry Act, 1708 (7 Anne, c. 20), does not now apply to any instrument made after the passing (30th July, 1900) of the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 4, and capable of registration under that Act or the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51); see title REAL PROPERTY AND CHATTELS REAL. For forms of memorials, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 282 *et seq*.

(*m*) *Moore* v. *Culverhouse* (1860), 27 Beav. 639; *Neve* v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170.

(*n*) *Re Wight's Mortgage Trust* (1873), L. R. 16 Eq. 41.

(*o*) *Oredland* v. *Potter* (1874), 10 Ch. App. 8.

(*p*) *Sumpter* v. *Cooper* (1831), 2 B. & Ad. 223; see *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685.

copyhold estates, or to any chambers in Serjeant's Inn, the Inns of Court, or the Inns of Chancery (*q*).

SECT. 3. Registered Charges on Land.

All assurances of land in Yorkshire and Kingston-upon-Hull are required to be registered in the local registries (*r*). This applies not only, as in the case of Middlesex, to instruments not under seal, but also to charges created by a deposit of deeds without memorandum (*s*). All registered assurances rank in priority according to the dates of registration and not according to the dates of the assurances (*t*). Registration is not required in respect of copyhold hereditaments (*a*).

Registration in Yorkshire.

## SECT. 4.—*Welsh Mortgages.*

**160.** A Welsh mortgage is a practically obsolete form of security. It is an assurance by which, to secure a debt, the property is conveyed to the creditor without any condition for payment or proviso for reconveyance, the bargain being that until redemption the rents and profits are to be set off against the interest (*b*). No covenant is implied therein for payment of the principal or interest (*c*), and no covenant for payment is usually inserted: in its absence the security only creates a debt of a particular nature, and, since the borrower is under no personal obligation to pay the loan, it cannot be sued for (*d*).

Welsh mortgages.

**161.** A Welsh mortgage gives a right to redemption at any time on payment of principal and interest (*e*), but confers no power to

Rights and liabilities of parties.

(*q*) Middlesex Registry Act, 1708 (7 Anne, c. 20), s. 18.

(*r*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26). For forms of memorials, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 291 *et seq.*

(*s*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 7; *Battison* v. *Hobson*, [1896] 2 Ch. 403.

(*t*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14; Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26), s. 4.

(*a*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 28.

(*b*) *Talbot* v. *Braddil* (1688), 1 Vern. 394. "A Welsh mortgage is a kind of security which has fallen into disuse, by which on the one side the land is assured to the lender as his security—his possession of the land and enjoyment of the profits being in lieu of interest—while on the other side the borrower is under no personal obligation to pay the principal money but is entitled to redeem at any time upon its payment" (*Cassidy* v. *Cassidy* (1889), 24 L. R. Ir. 577, *per* JOHNSON, J., at p. 578). Lord ST. LEONARDS describes it as "a conditional sale; under it the lender goes into possession of the rents and continues to receive them until the party who borrowed the money chooses to redeem" (*Balfe* v. *Lord* (1842), 2 Dr. & War. 480, 487).

(*c*) *Lawley* v. *Hooper* (1745), 3 Atk. 278, 280.

(*d*) *Howel* v. *Price* (1715), 1 P. Wms. 291; but the existence of a covenant to pay on demand has been held not to be inconsistent with the nature of such a mortgage (*Lawley* v. *Hooper*, *supra*; *Teulon* v. *Curtis* (1832), You. 610); see *Balfe* v. *Lord*, *supra*, at p. 488; *Cassidy* v. *Cassidy*, *supra*.

(*e*) *Yates* v. *Hambley* (1742), 2 Atk. 360, 363.

SECT. 4. Welsh Mortgages.

compel redemption or to foreclose, for being without condition there can be no forfeiture (*f*).

The possession and receipt of the rents and profits by the mortgagee is of the essence of the transaction. They must be received either in lieu of interest or for payment of the interest and principal. Where the security is a Welsh mortgage properly so called, and the bargain is that the mortgagee is to take the rents in lieu of interest, the mortgagee is under no liability to account for what he has received. But where the rents are to be applied in reduction of principal and interest an account may be directed (*g*). After the mortgage is completely satisfied the mortgagor has the full statutory period of twelve years thereafter within which to redeem the property before the mortgagee's possession becomes a bar to redemption (*h*).

## SECT. 5.—*Mortgages by way of Annuity Deed.*

Mortgages by annuity deeds.

**162.** Grants of an annuity for the life of the grantor or for a term of years certain, accompanied by a proviso giving the grantor the right of repurchase or redemption on prescribed terms, were at one time common securities (*i*). In such a transaction the debtor grants not the property, but an annuity or rentcharge issuing thereout with a clause entitling him to repurchase it on payment of a specific sum. A purchase of a redeemable annuity is not to be confused with an advance as a loan. In the latter case the person who receives the money remains a debtor, in the former case he does not (*k*).

Grants of annuities are perfectly lawful in themselves, and when untainted by fraud the court will not turn such a grant into a simple loan of money repayable with simple interest, but the grantor will have no right to redeem otherwise than in accordance with the terms of the grant (*l*). Where, however, the court is satisfied that the transaction was intended to be a loan, it will be so treated, and a clause for repurchasing the annuity is considered strong evidence that a loan only was intended (*m*).

(*f*) *Balfe* v. *Lord* (1842), 2 Dr. & War. 480.

(*g*) *Teulon* v. *Curtis* (1832), You. 619.

(*h*) *Fenwick* v. *Reed* (1816), 1 Mer. 114, 125; *Orde* v. *Heming* (1686), 1 Vern. 418.

(*i*) While the usury laws were in force such securities were often entered into to evade those laws. A *bonâ fide* sale of an annuity, whether for life or for a term certain, did not come within the scope of the usury laws. The question was not whether the grantee ran a risk or not, but whether the transaction was a *bonâ fide* sale or a loan under cover of a sale. If the transaction was a sale, the fact that the grantee would necessarily receive more than his consideration money, with the legal interest thereon, did not invalidate the transaction (*Kenny* v. *Lynch* (1845), 2 Jo. & Lat. 319). Where the annuity was redeemable it was looked upon as only a loan and an evasion of the usury laws (*Floyer* v. *Sherard* (1744), Amb. 19). For the law affecting annuities generally, see title RENTCHARGES AND ANNUITIES.

(*k*) *Knox* v. *Turner* (1870), 5 Ch. App. 515, *per* Lord HATHERLEY, L.C., at p. 517.

(*l*) *Preston* v. *Neele* (1879), 12 Ch. D. 760, 768; *Secretary of State in Council of India* v. *British Empire Mutual Life Assurance Co.* (1892), 67 L. T. 434, C. A.

(*m*) *Bulwer* v. *Astley* (1844), 1 Ph. 422.

SECT. 5. Mortgages by way of Annuity Deed.

For the protection of the grantees thereof, annuity deeds (*n*) must be registered, for a mortgagee of land is not, without express notice of its existence (*o*), affected by any annuity or rentcharge for life or lives or for any term of years or greater estate determinable on lives charged upon or issuing out of such land unless such annuity or rentcharge has been duly registered (*p*). Registration is effected at the Land Registry (*q*).

Registration of annuity deeds.

## SECT. 6.—*Collateral Transactions accompanying Mortgages.*

### SUB-SECT. 1.—*Suretyship.*

Sureties to mortgage deeds.

**163.** For various reasons, such as the insufficiency of the security, or the fact that the subject-matter of the mortgage is an interest in reversion or the like, third persons, such as friends of the borrower, are frequently made parties to mortgages, to guarantee (*r*) the payment of principal and interest or interest alone, the performance of covenants, or the maintenance of the security. Although a surety only undertakes for the default of another, the practice in mortgage deeds is to make him contract and become bound as a principal so far as concerns the mortgagee, but to let him remain a surety so far as concerns the mortgagor. Accordingly the borrower and surety usually enter into joint and several covenants for payment of principal and interest, with a proviso that although, as between the borrower and the surety, the latter is only a surety, yet, as between the lender and the surety, the latter is to be deemed a principal debtor and not to be released by any indulgences given to the borrower (*s*).

### SUB-SECT. 2.—*Warrant of Attorney.*

Warrant of attorney.

**164.** The advantages possessed by judgment creditors over property was the reason which formerly existed for taking a

(*n*) As to the recovery of annuities, see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44; Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 6; and see titles DISTRESS, Vol. XI., pp. 120, 121; RENTCHARGES AND ANNUITIES.

(*o*) *Greaves* v. *Tofield* (1880), 14 Ch. D. 563, C. A.

(*p*) Judgments Act, 1855 (18 & 19 Vict. c. 15), ss. 12—14.

(*q*) Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 1; see title REAL PROPERTY AND CHATTELS REAL.

(*r*) See title GUARANTEE, Vol. XV., pp. 437 *et seq.*, 443 *et seq.* As to the provisions of the Statute of Frauds (29 Car. 2, c. 3), s. 4, and of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), affecting guarantees, see titles CONTRACT, Vol. VII., pp. 362 *et seq.*, 370; GUARANTEE, Vol. XV., pp. 454 *et seq.*

(*s*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 585, 660, 741; Vol. XVI., pp. 387, 391. The effect of such a clause is to prevent the surety being discharged by the lender giving time to the borrower for payment of interest or otherwise neglecting strictly to enforce his security. As to the effect of an arrangement between two principal debtors to become principal and surety respectively, see title GUARANTEE, Vol. XV., pp. 441, note (*n*), 505, 506, 552, 556, 557. As to effect of concealment or misrepresentation on the liability of a surety, see *ibid.*, pp. 543 *et seq.* As to the effect of non-compliance with conditions precedent, see *ibid.*, pp. 489, 545. As to the effect of material alterations in the instrument of suretyship, see *ibid.*, p. 544.

SECT. 6. Collateral Transactions accompanying Mortgages.

warrant of attorney to confess judgment by way of collateral security, so as to enable the mortgagee to enter up judgment and issue execution; but there is little advantage in it at the present day, and in modern practice a warrant of attorney is seldom resorted to as a collateral security to a mortgage.

Form of warrant of attorney.

By a warrant of attorney (*a*) the borrower authorises a judgment to be entered up against him at the suit of the creditor for a specified sum; a defeasance (analogous to the condition of a bond) is subjoined, which prescribes the use to be made of the judgment as a security for the payment of the money advanced and interest, and also, if the circumstances so require, for the performance of ancillary covenants. When judgment has been entered up by virtue of this authority the lender acquires the position and remedies of a judgment creditor.

Formalities.

**165.** A warrant of attorney must be executed in the presence of a solicitor expressly named by the person giving the warrant of attorney and attending at his request to inform him of the nature and effect of the warrant before it is executed (*b*). The solicitor must subscribe his name as a witness to the due execution of the warrant, and thereby declare himself to be the solicitor for the person executing it and state that he subscribes as such solicitor (*b*).

Registration.

If these provisions are not complied with the warrant is deemed fraudulent and void, and it is not rendered valid by proof that the person executing it did in fact understand its nature and effect, or was fully informed of the same (*c*). The warrant is also deemed fraudulent and void, unless it or a true copy thereof is filed in the Central Office (Bills of Sale Department) within twenty-one days after the execution (*d*). The judgment to be entered up under the warrant of attorney must be registered and re-registered every five years in order to give it priority over other debts (*e*).

SUB-SECT. 3.—*Bond.*

Bond.

**166.** A bond (*f*) by way of collateral security to a mortgage was formerly given, by an instrument separate from the conveyance of the property, for the purpose of suing for the debt; but as an equally effective remedy is given by the covenant for payment in a mortgage, the bond has fallen into disuse in ordinary cases.

Where the money due under a bond is payable by instalments, and default is made in payment of any one instalment at the time

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(*a*) For form, see Encyclopædia of Forms and Precedents, Vol. VII., p. 905; and see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 190. As to stamps, see p. 134, *post*.

(*b*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 24; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 394.

(*c*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 25.

(*d*) *Ibid.*, s. 26; Central Office Practice Rules, r. 25.

(*e*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5; Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 2; and see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 190, 220, 221.

(*f*) See title BONDS, Vol. III., pp. 79 *et seq.*; and see Encyclopædia of Forms and Precedents, Vol. II., pp. 526—563. As to the recovery of interest on a bond, and the total amount recoverable for principal, interest, or damages, see title BONDS, Vol. III., pp. 93—95.

appointed, as the condition is broken, the bond is forfeited (*g*) and the plaintiff is entitled to judgment for the whole penalty, but the court will not allow him to levy execution for more than what is due when the judgment is obtained (*h*).

SECT. 6. Collateral Transactions accompanying Mortgages.

# Part II.—Parties to Mortgages.

## SECT. 1.—*Absolute Owners of Property.*

### SUB-SECT. 1.—*In General.*

**167.** An absolute owner of property, unaffected by any incapacity arising out of status, can, in exercise of the plenary powers of alienation with which the law invests him or her, mortgage such property (*i*). Similarly, one of several co-owners, whether joint tenants or tenants in common, can mortgage his individual share of the common property; but in the case of joint tenants such a mortgage severs the joint tenancy (*k*).

Absolute owner.

Co-owners.

### SUB-SECT. 2.—*Infants.*

**168.** An infant has no power to bind himself by a contract of mortgage. Any mortgage made by an infant, to secure moneys advanced to him otherwise than for necessaries (*l*), is absolutely void (*m*); and it seems that an infant, although he can contract for the supply to him of necessaries (*l*), is not liable to repay money lent for the purchase of necessaries (*n*), unless the money is actually applied in payment for necessaries purchased, in which case the lender stands in the place of the creditor who was paid out of the money (*o*). A mortgage given by an infant for

Infants.

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(*g*) See title BONDS, Vol. III., p. 92.

(*h*) *Darby* v. *Wilkins* (1733), 2 Stra. 957; *Masfen* v. *Touchet* (1770), 2 Wm. Bl. 706; *Talbot* v. *Hodson* (1816), 7 Taunt. 251.

(*i*) Co. Litt. 223 a, where two maxims are cited: "Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem," and "Regulariter non valet pactum de re meâ non alienandâ." As to the extent to which a restriction on alienation can be imposed on absolute ownership, see titles GIFTS, Vol. XV., pp. 422, 423; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

(*k*) *York* v. *Stone* (1709), 1 Salk. 158; *Re Pollard's Estate* (1863), 3 De G. J. & Sm. 541, C. A. For joint tenancy and tenancy in common generally, see title REAL PROPERTY AND CHATTELS REAL.

(*l*) As to necessaries, see title INFANTS AND CHILDREN, Vol. XVII., pp. 67 *et seq.*

(*m*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1; *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6; and see title BUILDING SOCIETIES, Vol. III., p. 363. As to alienation of an infant's property generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 78 *et seq.*; and as to contracts with infants, see *ibid.*, pp. 63 *et seq.*

(*n*) 4 Bac. Abr., tit. Infancy and Age (I) 1, [7th ed., p. 356].

(*o*) *Marlow* v. *Pitfeild* (1719), 1 P. Wms. 558; see *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309, *per* GIFFARD, L.J., at p. 313; *Yorkshire Railway Wagon Co.* v. *Maclure* (1881), 19 Ch. D. 478, *per* KAY, J., at p. 487.

SECT. 1. **Absolute Owners of Property.**

securing money lent for the purchase of necessaries appears to be voidable (*p*).

Property of infant.

**169.** The court has, however, jurisdiction in certain specified cases to mortgage an infant's property and to deal with property vested in an infant as mortgagee (*q*).

SUB-SECT. 3.—*Married Women.*

Married women.

**170.** The power of a married woman to borrow or lend money on mortgage depends on her capacity to undertake obligations and alienate property. Any property over which a married woman has a power of appointment, or which is her separate property without any fetter on alienation, may be disposed of by her by way of mortgage without the concurrence of her husband (*r*).

SUB-SECT. 4.—*Lunatics and Persons of Unsound Mind.*

Lunatics.

**171.** Whether a person of unsound mind not so found by inquisition can engage in a mortgage transaction depends upon his general capacity to contract and to acquire and alienate property. As a rule, the transactions of such a person are binding unless it can be proved that the other party or parties to such transactions knew him to be so insane as to be incapable of understanding what he was doing (*a*).

The court has power to authorise the execution of a mortgage on behalf of a lunatic or person of unsound mind (*b*), and has also power, which, however, is seldom exercised, to authorise the committee of a lunatic to lend the lunatic's money upon mortgage (*c*).

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(*p*) *Martin* v. *Gale* (1876), 4 Ch. D. 428, 451; see *Zouch* d. *Abbot and Hallet* v. *Parsons* (1765), 3 Burr. 1794, 1804; *Inman* v. *Inman* (1873), L. R. 15 Eq. 260.

(*q*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 79, 81, 82, 90; but as to mortgaging the estate of an infant tenant in tail in remainder, see *ibid.*, pp. 90, 91. When land is vested in an infant as a mortgagee, the court in exercise of the powers given to it by the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 28, can make an order vesting or releasing and disposing of the land in, to or in favour of such person as may be thought fit; see title INFANTS AND CHILDREN, Vol. XVII., p. 84. Where personalty is vested in an infant as a mortgagee it is conceived that the court has an inherent jurisdiction to deal with such mortgage; see *Nunn* v. *Hancock* (1871), 6 Ch. App. 850; *Re Wells, Boyer* v. *Maclean*, [1903] 1 Ch. 848 (not following *Peto* v. *Gardner* (1843), 2 Y. & C. Ch. Cas. 312, and *Day* v. *Day* (1845), 9 Jur. 785).

(*r*) The rights of married women to hold and dispose of property are fully dealt with under title HUSBAND AND WIFE, Vol. XVI., pp. 321 *et seq.* As to separate property apart from the Married Women's Property Acts, see *ibid.*, pp. 341 *et seq.*; and as to dispositions of separate and non-separate property, see *ibid.*, pp. 376 *et seq.* The law as regards restraint on anticipation is stated *ibid.*, p. 363. For a form of mortgage by a married woman where the Married Women's Property Acts do not apply, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 551.

(*a*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*

(*b*) See *ibid.*, p. 442.

(*c*) *Ex parte Cathorpe* (1785), 1 Cox, Eq. Cas. 182; *Ex parte Ellice* (1821), Jac. 234; *Norbury* v. *Norbury* (1819), 4 Madd. 191; *Ridgeways, Minors* (1825), 1 Hog. 309. In *Ex parte Johnson* (1828), 1 Mol. 128, the committee was authorised to invest on first mortgage in circumstances which were

SUB-SECT. 5.—*Bankrupts.*

SECT. 1. Absolute Owners of Property.

Bankrupts.

**172.** When a person is adjudicated a bankrupt, his property, with some exceptions, passes from him to his trustee in bankruptcy, and therefore he cannot mortgage it (*d*). But he is not *civiliter mortuus*, and may mortgage whatever property is allowed by law, as an exception to the general rule, to remain vested in him (*e*). Thus a bankrupt may mortgage his expectation of a surplus after payment in full of debts proved in and expenses incurred in relation to his bankruptcy (*f*), or property vested in him upon trust (*g*), or immovables situated in a foreign country if the *lex situs* permits him to do so

Property acquired after bankruptcy.

**173.** Personal property of the bankrupt, acquired after his bankruptcy, can be effectively mortgaged by him, before the intervention of the trustee in bankruptcy, to any person who is dealing with him in good faith and for value, whether with or without knowledge of the bankruptcy (*i*).

Independently of this doctrine, a mortgage by a bankrupt may be effective as against his trustee in two cases—first where the mortgage is of an equitable chose in action, and the trustee has not perfected his title by notice (*k*); secondly, where the trustee has

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of a special character. For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 571, 572.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20, 54; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 87, 88.

(*e*) *Bird* v. *Philpott*, [1900] 1 Ch. 822, *per* FARWELL, J., at p. 828.

(*f*) *Re Evelyn, Ex parte General Public Works and Assets Co.*, [1894] 2 Q. B. 302. It is not necessary that the bankrupt should mortgage the surplus expressly as such; if he mortgages specific property, and that specific property is more than sufficient to satisfy creditors, the surplus of such property is validly mortgaged (*Bird* v. *Philpott, supra*, following *Troup* v. *Ricardo* (1864), 4 De G. J. & Sm. 489, distinguishing *Re Austin, Ex parte Sheffield* (1879), 10 Ch. D. 434, C. A., and *Re Leadbitter* (1878), 10 Ch. D. 388, C. A.; see, also, *Re Adie, Ex parte Rushforth* (1901), 84 L. T. 508).

(*g*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 168. As to transactions protected by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49, see *ibid.*, p. 182; *Re Robinson's Settlement, Gant* v. *Hobbs* (1911), 28 T. L. R. 121 (mortgage after receiving order, in pursuance of request made before receiving order).

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168, which, in terms, includes under the definition of "property" land, whether situate in England or elsewhere. But this provision cannot affect the rule of private international law that the *lex situs* governs the transfer of immovables. Under *ibid.*, s. 24, however, the court has power to compel any bankrupt within its reach to execute such assurance as by the *lex situs* would vest foreign immovables in the trustee in bankruptcy (*Re Harris, Ex parte the Trustee* (1896), 3 Mans. 46); and see, generally, title CONFLICT OF LAWS, Vol. VI., pp. 207, 208.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 164 *et seq.* A mortgage by a bankrupt of realty after adjudication is not rendered effectual as against the trustee in bankruptcy by the fact that it has, and the adjudication has not, been registered in the Middlesex Registry (*Re Calcott and Elvin's Contract*, [1898] 2 Ch. 460, C. A.). As to such registration, see p. 86, *ante*.

(*k*) *Stuart* v. *Cockerell* (1869), L. R. 8 Eq. 607; *Palmer* v. *Locke* (1881), 18 Ch. D. 381, C. A. If, however, the trustee gives notice first, of course

SECT. 1. Absolute Owners of Property.

stood by, and allowed the mortgagee to advance his money upon the supposition that the bankrupt could dispose of the property (*l*).

Mortgage by trustee in bankruptcy.

**174.** The trustee in bankruptcy, with the consent of the committee of inspection, may mortgage any part of the property of the bankrupt which has passed to him under the bankruptcy for the purpose of raising money for the payment of the bankrupt's debts (*m*). A mortgage by a trustee in bankruptcy is exempt from stamp duty (*n*).

SUB-SECT. 6.—*Convicts.*

Convicts.

**175.** A convict, since he cannot enter into a contract or dispose of property (*o*), has no power to lend or borrow money on mortgage; but the administrator of a convict may mortgage any part of the convict's property (*p*). Property which is vested in a convict upon trust or by way of mortgage, except as regards any beneficial interest of the convict therein, does not vest in and cannot be mortgaged by his administrator (*q*).

SUB-SECT. 7.—*Partners.*

Partner's implied power to borrow otherwise than by deed.

**176.** A partner (*r*) has an implied authority to pledge or mortgage (otherwise than by deed) the personal property belonging to the partnership, and probably also the real estate if dealing in it is one of the objects of the partnership, in order to raise money for the carrying on in the usual way of the partnership business, unless the partner so pledging or mortgaging has in fact been precluded from

his title prevails (*Re Beall, Ex parte Official Receiver*, [1899] 1 Q. B. 688, following *Mercer* v. *Vans Colina* (1897), 4 Mans. 363).

(*l*) *Troughton* v. *Gitley* (1766), Amb. 630; *Re Caughey, Ex parte Ford* (1876), 1 Ch. D. 521, C. A., *per* JESSEL, M.R., at p. 528. As to the effect of a trustee in bankruptcy standing by, see *Re Bourne, Ex parte Bourne* (1826), 2 Gl. & J. 137, 141; *Engelback* v. *Nixon* (1875), L. R. 10 C. P. 645; *Re France, Ex parte Tinker* (1874), 9 Ch. App. 716; *Re Rawbone's Trust* (1857), 3 K. & J. 476; *Tucker* v. *Hernaman* (1853), 4 De G. M. & G. 395, C. A.; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 166.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57 (5). A mortgage by a trustee in bankruptcy should relieve him of personal liability and should provide that he shall not be bound personally to do anything in contravention of the Bankruptcy Acts and Rules. A receiver cannot mortgage on the strength of a receiving order (*Re Wells and Croft, Ex parte Official Receiver* (1894), 2 Mans. 41). As to the power of a liquidator to mortgage the company's assets, see title COMPANIES, Vol. V., pp. 446, 573.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 144.

(*o*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8. For the definition of the word "convict," see *ibid.*, s. 6, and as to when a convict ceases to be subject to the operation of the Act, see *ibid.*, s. 7.

(*p*) *Ibid.*, s. 12. The administrator must act *bonâ fide* (*Carr* v. *Anderson*, [1903] 1 Ch. 90; affirmed, 1903] 2 Ch. 279, C. A.). The Forfeiture Act, 1870 (33 & 34 Vict. c. 23), does not appear to give the administrator power to invest capital moneys of the convict upon mortgage, but *semble* he may under *ibid.*, s. 18, so invest the income of the convict's property; and see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429 *et seq.* For a form of conveyance of a convict's estate, see Encyclopædia of Forms and Precedents, Vol. XII., p. 546.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

(*r*) A limited partner under the Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), has no power to bind the firm (*ibid.*, s. 6); see title PARTNERSHIP.

thus acting, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner (*s*). A partner cannot validly mortgage partnership property, known to be such by the mortgagee, to secure his personal debt, without the knowledge and consent of the other partners (*t*), and the burden of proving such consent rests on the mortgagee (*a*).

Duration of implied authority.

This authority to mortgage the property of the partnership continues after dissolution so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of dissolution (*b*).

By deed.

But neither during the continuance of the partnership nor after dissolution can one partner execute a mortgage deed of partnership property so as to bind the other partners (*c*) unless special authority is given him to do so (*d*). It is further conceived that, except in the case above mentioned, he cannot, in the absence of special authority, execute an equitable mortgage of real estate belonging to

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(*s*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5; *Butchart* v. *Dresser* (1853), 4 De G. M. & G. 542, C. A. (equitable mortgage of shares); *Re Ogden, Ex parte Lloyd* (1834), 1 Mont. & A. 494 (equitable mortgage of trade fixtures); *Re Litherland, Ex parte Howden* (1842), 2 Mont. D. & De G. 574 (mortgage of a ship); but one partner cannot mortgage the whole of the future profits of a voyage in the shape of unearned freight (*Guion* v. *Trask* (1860), 1 De G. F. & J. 373, C. A.). See also the analogous cases on pledges (*Ex parte Bonbonus* (1803), 8 Ves. 540, distinguishing *Hope* v. *Cust* (1774), cited 1 East, 53, and *Shirreff* v. *Wilks* (1800), 1 East, 48; *Ridley* v. *Taylor* (1810), 13 East, 175; and see, generally, title PARTNERSHIP.

(*t*) *Shirreff* v. *Wilks, supra*; *Wilkinson* v. *Eykyn* (1866), 14 W. R. 470, following *Young* v. *Keighly* (1808), 15 Ves. 557, and *Allen* v. *Kilbre* (1819), 4 Madd. 464; *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79; see also *Ridley* v. *Taylor, supra, per* Lord ELLENBOROUGH, at p. 182. Where the mortgagee does not know that the property mortgaged is partnership property, the mortgage is good (*Reid* v. *Hollinshead* (1825), 4 B. & C. 867, following *Raba* v. *Ryland* (1819), Gow, 132, and *Tupper* v. *Haythorne* (1815), Gow, 135, n.).

(*a*) *Snaith* v. *Burridge* (1812), 4 Taunt. 684; *Re Wardley, Ex parte Thorpe* (1836), 2 Deac. 16; *Frankland* v. *M'Gusty* (1830), 1 Knapp, 274, P. C.; *Leverson* v. *Lane* (1862), 13 C. B. (N. S.) 278.

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38; *Butchart* v. *Dresser, supra*; *Re Clough, Bradford Commercial Banking Co.* v. *Cure* (1885), 31 Ch. D. 324; *Re Bourne, Bourne* v. *Bourne*, [1906] 2 Ch. 427, C. A., following *Re Langmead's Trusts* (1855), 20 Beav. 20, and *Re Ryan* (1868), 3 I. R. Eq. 222; but a bankrupt partner is deprived of such authority (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 38).

(*c*) *Harrison* v. *Jackson* (1797), 7 Term Rep. 207; *Steiglitz* v. *Egginton* (1815), Holt (N. P.), 141; see also *Hawkshaw* v. *Parkins* (1819), 2 Swan. 539 (where a distinction is suggested between a deed of release and a deed of grant); compare, however, *Juggeewun-das Keeka Shah* v. *Ramdas Brijbookun-das* (1841), 2 Moo. Ind. App. 487. But when a partner executes a mortgage deed on behalf of the firm, the partner may be bound though the firm is not bound (*Elliot* v. *Davis* (1800), 2 Bos. & P. 338; see also *Hawkshaw* v. *Parkins, supra*; *Cumberlege* v. *Lawson* (1857), 1 C. B. (N. S.) 709), unless indeed he shows that his signature was conditional upon the firm being bound (*Cumberlege* v. *Lawson, supra*; see *Antram* v. *Chace* (1812), 15 East, 209; *Brownrigg* v. *Rae* (1850), 5 Exch. 489; *Gordon* v. *Ellis* (1844), 7 Man. & G. 607; *Hawker* v. *Hallewell* (1856), 3 Sm. & G. 194).

(*d*) *Steiglitz* v. *Egginton, supra.* The common law requires that the authority shall be contained in a deed; and it is not enough either at law or in equity that the agreement constituting the partnership is under seal, unless it contain a particular authority to the partners to execute deeds

SECT. 1. Absolute Owners of Property.

the partnership. If a partner executes a deed for himself and his partner in the presence and by the authority of his partner, such execution operates as an execution by both (*e*); and though a mortgage deed, executed by one partner alone, is not at law binding on the firm, yet it may be a good security in equity (*f*).

Change in firm.

**177.** Where a firm mortgages property, and subsequently an alteration in the firm occurs, whether by the retirement or the admission of a partner or partners or by both, the mortgage is not affected. But if the mortgage was not made by deed (*g*), its scope may be enlarged or restricted, after an alteration in the partnership, by parol agreement with the creditor, whether express or implied (*h*).

Mortgage of share in partnership.

**178.** If a partner mortgages his own share in the partnership, the mortgagee takes subject to equities subsisting between the partners (*i*). Such a mortgagee is not entitled during the continuance of the partnership to interfere in the management, or to require accounts, or to inspect the books of the partnership business (*k*). He is entitled to an inquiry as to the value of the share at the date when he took possession under his mortgage; but, if a dissolution of the partnership has previously taken place, the date of dissolution is the date at which the necessary accounts ought to be taken (*l*). He may enforce his security by an action for an account and foreclosure (*m*); and if the mortgage is made by deed,

on behalf of the firm (*Harrison* v. *Jackson* (1797), 7 Term Rep. 207, *per* Lord KENYON, C.J., at p. 210).

(*e*) *Ball* v. *Dunsterville* (1791), 4 Term Rep. 313, approved by Lord LOUGHBOROUGH, L.C., in *Burn* v. *Burn* (1798), 3 Ves. 573, 578; see also *Brutton* v. *Burton and Mills* (1819), 1 Chit. 707.

(*f*) *Re Wilson, Ex parte Bosanquet* (1847), De G. 432.

(*g*) *Re Hopkins, Ex parte Hooper* (1815), 2 Rose, 328; *Bank of Scotland* v. *Christie* (1841), 8 Cl. & Fin. 214, H. L. But though a mortgage made by deed cannot be varied by parol agreement, it would appear from *Re Borron, Ex parte Parr* (1835), 4 Deac. & Ch. 426, that a parol agreement may create an equitable mortgage by or to the new firm subject to the prior legal mortgage by deed.

(*h*) *Ex parte Kensington* (1813), 2 Ves. & B. 79; *Re Ablett, Ex parte Lloyd* (1824), 1 Gl. & J. 389; *Re Worters, Ex parte Oakes* (1841), 2 Mont. D. & De G. 234; *Re Lendon, Ex parte Lane* (1846), De G. 300; see also *Re Burkill, Ex parte Nettleship* (1841), 2 Mont. D. & De G. 124.

(*i*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31; *Smith* v. *Parkes* (1852) 16 Beav. 115; *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Re Garwood's Trusts, Garwood* v. *Paynter*, [1903] 1 Ch. 236; see also *Whetham* v. *Davey* (1885), 30 Ch. D. 574. But compare *Watts* v. *Driscoll*, [1901] 1 Ch. 294, C.A., where it was held, distinguishing *Kelly* v. *Hutton*, *supra*, and *Whetham* v. *Davey*, *supra*, that an assignee of a share in a partnership is not bound by a subsequent agreement between the assignor and another of the partners for the sale to such other partner of such share, though the transaction be *bonâ fide*. A mortgage of a share in a partnership is not a mortgage of chattels but of a chose in action, and need not be registered as a bill of sale (*Re Bainbridge, Ex parte Fletcher* (1878), 8 Ch. D. 218). For a form of equitable mortgage of a share in a partnership, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 736.

(*k*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31; see, generally, title PARTNERSHIP.

(*l*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 31; *Whetham* v. *Davey*, *supra*.

(*m*) *Whetham* v. *Davey*, *supra*; *Redmayne* v. *Forster* (1866), L. R. 2 Eq.

he has probably a power of sale and a power to appoint a receiver (*n*).

SECT. 1. Absolute Owners of Property.

Partner's power to lend on mortgage.

**179.** A partner has authority to lend the moneys of the firm upon mortgage, when such a transaction is part of the ordinary business of the firm (*o*); but a partner has as a rule no authority to take as security any property to which a liability is attached (*p*).

## SECT. 2.—*Limited Owners of Property.*

### SUB-SECT. 1.—*Tenants in Tail.*

Tenant in tail's power to mortgage.

**180.** A tenant in tail may mortgage the lands or other tenements entailed with or without barring his estate tail (*q*). If he completely bars his estate tail (*r*), the mortgage will vest in the mortgagee the same estate as if the mortgagor were entitled in fee simple. If he partially bars his estate tail, so as to create a base fee, the mortgage will vest in the mortgagee an estate which is unimpeachable during the survival of any issue of the tenant in tail, but which is voidable upon the death of the survivor of such issue by any person next entitled in remainder upon the estate tail (*s*). If he purports to

467; see also *Bentley* v. *Bates* (1840), 4 Y. & C. (EX.) 182. The mortgagee's action for an account will not be stayed because of an arbitration clause in the partnership deed, at any rate where such clause does not embrace persons claiming through the partners (*Bonnin* v. *Neame*, [1910] 1 Ch. 732).

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2 (vi.), 19; but a bill of sale in the statutory form is not a mortgage by deed within the meaning of *ibid.*, s. 19 (*Calvert* v. *Thomas* (1887), 19 Q. B. D. 204, C. A).

(*o*) *Weikersheim's Case* (1873), 8 Ch. App. 831.

(*p*) Such as partly paid shares in a company; see *Niemann* v. *Niemann* (1889), 43 Ch. D. 198, C. A.; compare *Weikersheim's Case*, *supra*.

(*q*) For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 553.

(*r*) As early as *Taltarum's Case* (1472), Y. B. 12 Edw. 4, fo. 19, it was decided that an estate tail could be barred, and as early as *Portington's* (*Mary*) *Case* (1612), 10 Co. Rep. 35 b, it was decided that no provision was valid which restricted the barring of an estate tail, and the same rule applies to the enlargement of a base fee (*Dawkins* v. *Penrhyn* (*Lord*) (1878), 4 App. Cas. 51, 64). Since the 31st December, 1833, the procedure by which estates tail can be barred is governed by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74). As to estates tail and the method of disentailing such estates, see title REAL PROPERTY AND CHATTELS REAL. There are three classes of persons who cannot bar their estates tail under any circumstances: (1) tenants in tail of lands, the reversion to which is in the Crown, or tenants in tail who are by any Act of Parliament restrained from barring their estates tail; (2) tenants in tail after possibility of issue extinct; (3) issue inheritable in tail in respect of their expectant estates tail (see Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 18, 20). Tenants in tail within class (1), except where the entailed land was purchased with money provided by Parliament in consideration of public services, and tenants in tail within class (2) have the same powers of mortgaging as tenants for life (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58); see p. 99, *post*.

(*s*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 34, 35. This applies also to a tenant in tail in remainder (*Hankey* v. *Martin* (1883), 49 L. T. 560, following *The Case of Fines* (1602), 3 Co. Rep. 84 a). A contract by the tenant in tail to convey the fee simple will not, if the

SECT. 2. Limited Owners of Property.

create by his mortgage a fee simple or any interest which will not determine at or before his death, but not so as to bar his estate tail, the mortgage will vest in the mortgagee an estate which is unimpeachable during the life of the mortgagor but voidable upon his death by the entry of the issue in tail (*t*). If, however, he creates by his mortgage an estate or interest which will not outlast his life, such estate or interest will not be subject to defeasance. Where a tenant in tail in possession of freeholds mortgages the fee simple of the lands entailed, and the mortgage deed is duly enrolled (*a*), the estate tail is wholly barred. If he is a tenant in tail in remainder, the estate tail will not be wholly barred, unless the consent of the protector of the settlement is obtained (*b*), or there is no protector in existence, but the mortgage will create in the mortgagee a base fee, which, however, will be capable of enlargement into a fee simple, if there ceases to be a protector, or if the protector subsequently gives his consent (*c*).

Extent of disentail by mortgage.

**181.** Where the tenant in tail mortgages the lands entailed so as wholly or partially to bar the entail, the entail is so far barred not only at law but in equity despite any provision in the deed to the contrary, and the equity of redemption is not resettled, but if the mortgage is only of an estate *pur autre vie* or a term of years, or creates an interest, charge, lien, or incumbrance in or upon the lands entailed, the estate tail is barred only so far as is

tenant in tail dies before conveying, be enforced against the issue in tail (*A.-G.* v. *Day* (1749), 1 Ves. Sen. 218; *Hinton* v. *Hinton* (1755), 2 Ves. Sen. 631, *per* Lord HARDWICKE, L.C., at p. 634), or against the remainderman, unless, as in *Pryce* v. *Bury* (1853), 2 Drew. 11, he was a party to the mortgage transaction.

(*t*) *Doe* d. *Daniel* v. *Woodroffe* (1849), 2 H. L. Cas. 811, following *Machil* v. *Clerk* (1702), Holt (K. B.), 615; see also (1906), 50 Sol. Jo. 570, 591.

(*a*) Enrolment was formerly in the Court of Chancery, but is now effected in the Enrolment Department of the Central Office (R. S. C., Ord. 61, r. 9; Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 41). Mortgages of copyholds do not require to be enrolled otherwise than by entry on the court rolls of the manor (*ibid.*, s. 54); see also, as to enrolment, *ibid.*, ss. 73, 74. So long as a disentailing deed is enrolled within six months of execution, it does not matter that it is enrolled after the death of the mortagor tenant in tail (*Re Piers's Estate, Ex parte Browne* (1863), 14 I. Ch. R. 452); and see *Whitmore-Searle* v. *Whitmore-Searle*, [1907] 2 Ch. 332. It is necessary that an equitable tenant in tail of copyholds should enrol his disposition thereof, and an indorsement by the steward of the manor on a disentailing deed that the same was produced before him at his residence is not a sufficient enrolment (*Boyd* v. *Pawle* (1866), 14 W. R. 1009; see also *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99). The enrolment in the case of an equitable estate in copyholds, as in the case of freeholds, must take place within six months of execution (*Gibbons* v. *Snape* (1863), 1 De G. J. & Sm. 621, C. A., following *Honywood* v. *Foster* (No. 1) (1861), 30 Beav. 1). For forms of mortgage, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 553 (by tenant in tail in possession), and p. 662 (by tenant in tail in remainder).

(*b*) For the definition and powers of a protector of the settlement and the way in which he is appointed, see title REAL PROPERTY AND CHATTELS REAL.

(*c*) As to the enlargement of a base fee, see Fines and Recoveries Act, 1333 (3 & 4 Will. 4, c. 74), ss. 19, 35, 39, and title REAL PROPERTY AND CHATTELS REAL.

necessary to give effect to the mortgage, interest, charge, lien, or incumbrance (*d*).

Entailed copyholds.

**182.** The law as to a mortgage of freeholds by a tenant in tail applies to a mortgage of copyholds so far as the circumstances of the different tenures will admit (*e*). A mortgage by a tenant in tail of the legal estate in copyholds must be made by surrender to the mortgagee, but a mortgage of the equitable estate in copyholds may be made either by surrender or grant (*f*).

Agreement to disentail.

**183.** A deposit of title deeds by a tenant in tail with or without an agreement to execute a legal mortgage will not bar the estate tail, so as to constitute an equitable mortgage of the fee simple (*g*). But an agreement to execute a legal mortgage, or otherwise to bar the estate tail, may be specifically enforced against the tenant in tail himself (*h*).

SUB-SECT. 2.—*Limited Owners of Settled Land under Statutory Powers.*

Limited owner of settled land.

**184.** A limited owner of settled land may mortgage it or any part thereof (*i*) where money is required for the purpose of enfranchisement (*j*) or of equality of exchange or partition (*k*), or of discharging any existing incumbrance (*l*), or, if directed by the court,

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(*d*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 21. The proviso for redemption may revive the uses of the original settlement (*Re Oxenden's Settled Estates. Oxenden* v. *Chapman* (1904), 74 L. J. (CH.) 234). As to mortgaging to secure maintenance for an infant tenant in tail, see title INFANTS AND CHILDREN, Vol. XVII., p. 90.

(*e*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4), c. 74), s. 50. As to barring the entail in the case of copyholds, see title COPYHOLDS, Vol. VIII., pp. 71, 72.

(*f*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 50, 53.

(*g*) *Ibid.*, ss. 40, 47. By *ibid.*, s. 47, it is provided that defects in the execution of any deed, the effect of which, but for such defects, would be to disentail lands entailed, should not be supplied or assisted in equity; but this does not deprive the court of its inherent power of rectification of disentailing deeds on the ground of mistake (*Hall-Dare* v. *Hall-Dare* (1885), 31 Ch. D. 251, C. A.). As to the nature of such relief, see title MISTAKE, pp. 21 *et seq.*, *ante*.

(*h*) Specific performance was ordered of an agreement to execute a disentailing deed in *Bankes* v. *Small* (1887), 36 Ch. D. 716, 724, C. A.; see also *Sutton* v. *Stone* (1740), 2 Atk. 100, and *Lewis* v. *Duncombe* (1855), 20 Beav. 398. But in *Davis* v. *Tollemache* (1856), 2 Jur. (N. S.) 1181, the court refused to compel a bankrupt tenant in tail, who had merely covenanted in the mortgage deed for further assurance, to execute a deed disentailing the property comprised in the mortgage. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*i*) For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 572, 578, 623; and generally, as to the powers of tenants for life under the Settled Land Acts, see title SETTLEMENTS.

(*j*) See title COPYHOLDS, Vol. VIII., p. 130.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 18. The money raised is capital money (*ibid.*), and as to its application, see *ibid.*, s. 22; title SETTLEMENTS. For a form of summons where the mortage money is to be paid into court, see Settled Land Act Rules, 1882, Appendix, Form 11 (Stat. R. & O. Rev., Vol. XII., Supreme Court, England, pp. 743 *et seq.*). As to partition generally, see title PARTITION, pp. 809 *et seq.*, *post*.

(*l*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11. The powers

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of raising costs ordered by the court to be paid out of the settled property and raised by mortgage (*m*), or for the purpose of giving effect to a contract to mortgage entered into by his predecessor in title, if such predecessor could have made the mortgage effective against his successors in title (*n*).

Shifting incumbrances.

When a limited owner effects a sale, exchange, or partition in pursuance of the statutory powers (*o*) conferred upon him, and there is an incumbrance affecting land so sold, exchanged or partitioned, the limited owner can, if he obtains the consent of the incumbrancer, charge the incumbrance on any other part of the settled land by mortgaging either the fee simple or a term of years created therein (*p*).

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given by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11, extend so far as to allow a tenant for life under two deeds, each comprising different property, and forming together a compound settlement (see title SETTLEMENTS), to charge the property passing under one deed for the purpose of discharging an incumbrance on property passing under the other (*Re Monson's (Lord) Settlement*, [1898] 1 Ch. 427), or to enable him to charge property free from any mortgage debt, but subject to annuities created by the settlement, in order to discharge other property, subject to mortgage debts and the annuities from such debts (*Hampden* v. *Buckinghamshire* (*Earl*), [1893] 2 Ch. 531, C. A.). In *Re Clifford, Scott* v. *Clifford*, [1902] 1 Ch. 87, it was held that the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11, was not limited to cases where the mortgagee called in his money, but extended to all cases where money was reasonably required having regard to the circumstances of the settled land; see also as to the scope of this provision, *Re Coulls' Settled Estates*, [1905] 1 Ch. 712. As to what is an "incumbrance" within this provision, see *Hampden* v. *Buckinghamshire* (*Earl*), *supra* (where a life annuity was held not to be such an incumbrance); *Re Smith's Settled Estates*, [1901] 1 Ch. 689 (where expenses charged upon settled land under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257, were held to be such an incumbrance); *Re Strangways, Hickley* v. *Strangways* (1886), 34 Ch. D. 423, C. A., and *Annesley* v. *Woodhouse*, [1898] 1 I. R. 69 (in which two cases the question whether a trust for accumulation constitutes an incumbrance is discussed). The method of raising expenses payable under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 17, provided by *ibid.*, is alternative, and does not take away from the tenant for life the right to pay such expenses himself and mortgage the settled land under the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11 (*Re Pizzi, Scrivener* v. *Aldridge*, [1907] 1 Ch. 67); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 235, 236.

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 47. This provision not limited to costs, charges, and expenses incurred in respect of an application to the court, but when the court has ordered the costs of an abortive sale to be paid out of capital moneys as being properly incurred under the Act, it may by virtue of this provision direct that such costs be raised by means of a charge on the settled land (*Re Smith's Settled Estates*, [1891] 3 Ch. 65).

(*n*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 6. As to the power of a limited owner to bind his successors in title, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31; *Re Cleveland's* (*Duke*) *Settled Estates*, [1902] 2 Ch. 350; and, generally, title SETTLEMENTS.

(*o*) As to the powers conferred on limited owners by the Settled Land Acts (see title SETTLEMENTS), see titles PARTITION, pp. 815, 818, *post*; SALE OF LAND; SETTLEMENTS.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 5. A rentcharge created under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), is an incumbrance within the meaning of this provision, and part of the land subject to such rentcharge can be sold free therefrom, and the rentcharge, if the owner thereof consents, charged upon the unsold land (*Re*

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The power of a limited owner to mortgage the whole property subject to the settlement cannot be assigned by him (*q*); nor can it be released by him, nor will any contract by him not to exercise it be enforceable (*r*); nor can it be negatived or restricted by any provision in the settlement, nor will any attempt by the settlor or any other person to negative or restrict it be of any effect (*s*).

Statutory power to mortgage not capable of restriction.

**185.** Every person who is a tenant for life, or who has the powers of a tenant for life within the meaning of the Settled Land Act, 1882 (*t*), is a limited owner capable of exercising the powers of mortgaging given by the Act (*u*). The limited owner, in the exercise of his statutory powers, must have regard to the interests of, and is in the position of a trustee for, all persons entitled under the settlement (*v*).

Who are limited owners.

**186.** A limited owner, before exercising his statutory power of mortgaging the settled land, must give to each of the trustees of the settlement and to their solicitor one month's notice by posting registered letters to each of them respectively (*a*). Consequently,

Formalities precedent to mortgage.

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*Strafford (Earl) and Maples*, [1896] 1 Ch. 235, C. A.); and see title LAND IMPROVEMENT, Vol. XVIII., p. 297.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50. A marriage settlement by a tenant for life is not an assignment within the meaning of this prohibition (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4). Bankruptcy does not prevent a limited owner from exercising his statutory powers (*Re Mansel's Settled Estates*, [1884] W. N. 209); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 146, note (*p*).

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 51, 52. But there is a distinction between limitations which do not bring into existence a limited owner and limitations which, though they bring into existence a limited owner, are accompanied by restrictions limiting or taking away the statutory powers of limited owners (*Re Hazle's Settled Estates* (1885), 29 Ch. D. 78, C. A.; and *Re Atkinson, Atkinson* v. *Bruce* (1886), 31 Ch. D. 577, C. A.).

(*s*) See title SETTLEMENTS. A provision giving the trustees the powers of a tenant for life is an attempt to restrict the powers of the actual tenant for life (*Re Clitheroe Estate* (1885), 31 Ch. D. 135, C. A.). The settlor, though he cannot diminish, can enlarge the statutory powers of the tenant for life (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57).

(*t*) 45 & 46 Vict. c. 38.

(*u*) As to tenants for life and persons having the powers of a tenant for life under the Settled Land Acts, see title SETTLEMENTS.

(*v*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53. This provision does not affect the title of the estate mortgaged by a tenant for life, but it affects the tenant for life personally with liability as a trustee (*Re Ailesbury's (Marquis) Settled Estates*, [1892] 1 Ch. 506, 535, C. A.).

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45. A trustee may by writing under his hand accept less than one month's notice, or waive notice altogether (Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5 (3)). *Ibid.*, s. 5 (1), which allows the notice to be of a general intention only, does not appear to apply to mortgages, and in every case of mortgage the limited owner should specify in his notice the particular mortgage intended (see *Re Ray's Settled Estates* (1884), 25 Ch. D. 464, 469). The notice must be given one month before the actual execution of the mortgage deed (see *Marlborough (Duke)* v. *Sartoris* (1886), 32 Ch. D. 616). Notice cannot be given by the committee of a lunatic until he has obtained leave of the court (*Re Ray's Settled Estates, supra*; see title LUNATICS

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trustees of the settlement must be in existence for the purpose of being served with such notice and also of receiving the mortgage money (*b*).

Effect of mortgage by limited owner.

**187.** A deed of mortgage, executed by a limited owner, and expressed to convey the whole estate or interest comprised in the settlement, has the following statutory effect. It will override, so far as it is expressed or intended to operate, all the limitations, powers, and provisions of the settlement, and all estates, interests, and charges subsisting or to arise thereunder (*c*). It will, however, be subject to all estates, interests, and charges having priority to the settlement (*d*). It will not override any estate, interest, or charge conveyed or created for securing money actually raised at the date of its execution (*e*); nor any lease or easement, or right of common or other right granted or made for value by the limited owner or any of his predecessors in title or any trustees for him or them (*f*).

SUB-SECT. 3.—*Limited Owners with Express Power.*

Express powers to mortgage.

**188.** Before 1883 it was a common practice to insert in settlements an express power (*g*) to mortgage the settled property for certain enumerated purposes. This power was usually given to the trustees of the settlement, to be exercised by them, with the consent or by the direction of the tenant for life; but it might be, and in some cases was, given directly to the tenant for life or other limited owner. Express power to mortgage may still be conferred on the trustees of a settlement, or on a limited owner thereunder, if it be considered that the statutory powers (*h*) do not

AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 444. For form of notice, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 899; Vol. XIII., p. 712.

(*b*) The absence of trustees is not a flaw in the title of a *bonâ fide* mortgagee. Where a mortgagee pays his money into court in ignorance of the fact that there are no trustees in existence, he will get a good title (*Re Fisher and Grazebrook's Contract*, [1898] 2 Ch. 660; see also *Hatten* v. *Russell* (1888), 38 Ch. D. 334, and *Mogridge* v. *Clapp*, [1892] 3 Ch. 382, 396, C. A.).

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2); *Re Keck and Hart's Contract*, [1898] 1 Ch. 617.

(*d*) Settled Land Act, 1883 (45 & 46 Vict. c. 38), s. 20 (2) (i.). As to production to the steward of the manor of the settlement, on the admittance of a mortgagee of settled copyholds, see title COPYHOLDS, Vol. VIII., p. 108.

(*e*) Settled Land Act, 1883 (45 & 46 Vict. c. 38), s. 20 (2) (ii.); and see *Re Sebright's Settled Estates* (1886), 33 Ch. D. 429, C. A.; *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A.; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96. Neither a mortgage by a tenant for life of his own interest (*Cardigan* v. *Curzon-Howe* (1888), 40 Ch. D. 338, following *Re Sebright's Settled Estates*, *supra*; *Re Dickin and Kelsall's Contract*, [1908] 1 Ch. 213), nor a mortgage or charge of his own interest by a beneficiary entitled in remainder, is within the meaning of this exception (*Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A., following *Re Dickin and Kelsall's Contract*, *supra*, and explaining *Re Mundy and Roper's Contract*, *supra*); see title SETTLEMENTS.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2) (iii.).

(*g*) As to the exercise of powers generally, see title POWERS.

(*h*) See pp. 99 *et seq.*, *ante*.

go far enough (*i*). Where settled land is conveyed under a power in the settlement, then even if the power is given to the trustees, and the consent of the tenant for life only is required, the tenant for life must join in the conveyance and covenant for title (*k*).

If a limited owner has no express power to mortgage, but has an express power to lease, and such power is not limited to a lease at a rack-rent, he may mortgage by demise of a term of years (*l*).

Effect of alienation of estate of limited owner.

If a limited owner, with an express power to mortgage or consent to a mortgage, is deprived of his interest either by his own act of alienation or by operation of law, the power is not extinguished, but is still capable of being exercised by him, so far as its exercise does not derogate from or interfere with the interests of his alienee or successor in title (*m*).

SUB-SECT. 4.—*Limited Owners with Special Statutory Powers.*

Mortgage for enfranchisement of copyholds.

**189.** A tenant of copyholds, which expression includes a person with a limited estate in copyholds (*n*), may charge enfranchised land, where the enfranchisement is effected under the Copyhold Act, 1894 (*o*), with money actually paid, or if the lord consents, with money payable, but not yet actually paid, by such tenant as

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57. Where the power is given to trustees, the consent of the tenant for life is now a statutory requirement (*ibid.*, s. 56 (2); *Re Clitheroe Estate* (1885), 31 Ch. D. 135, C. A.). Where the tenant for life is an infant, his guardian may consent on his behalf (*Re Newcastle's (Duke) Estates* (1883), 24 Ch. D. 129). For a form, compare Encyclopædia of Forms and Precedents, Vol. VIII., p. 531.

(*k*) *Poulett (Earl)* v. *Hood* (1868), L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, [1884] W. N. 192.

(*l*) *Sheehy* v. *Muskerry (Lord)* (1848), 1 H. L. Cas. 576, following *Talbot* v. *Tipper* (1694), Skin. 427; *Mostyn* v. *Lancaster*, *Taylor* v. *Mostyn* (1883), 23 Ch. D. 583, C. A.

(*m*) Where the alienee of the tenant for life consents, the power can be exercised (*Eisdell* v. *Hammersley* (1862), 31 Beav. 255; *Alexander* v. *Mills* (1870), 6 Ch. App. 124; *Re Cooper*, *Cooper* v. *Slight* (1884), 27 Ch. D. 565). For the general principle upon which a tenant for life is prevented from exercising his power to the detriment of his alienees, see *Re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332, following *Hole* v. *Escott* (1837), 2 Keen, 444; *Jones* v. *Winwood* (1838), 3 M. & W. 653; *Hurst* v. *Hurst* (1852), 16 Beav. 372; and *Simpson* v. *Bathurst*, *Shepherd* v. *Bathurst* (1869), 5 Ch App. 193. See also *Hardaker* v. *Moorhouse* (1884), 26 Ch. D. 417, following and explaining *Holdsworth* v. *Goose* (1861), 29 Beav. 111; *Eisdell* v. *Hammersley*, *supra*; *Warburton* v. *Farn* (1849), 16 Sim. 625; *Nelson* v. *Seaman* (1860), 1 De G. F. & J. 368, C. A.; and *Alexander* v. *Mills*, *supra*. The power to mortgage given to a limited owner, which is not a mere collateral power, but a power appendant, *i.e.*, a power which affects the interest of the donee in the property over which it is exercisable, can be released by the donee (see *West* v. *Berney* (1819), 1 Russ. & M. 431).

(*n*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 43; and see also *ibid.*, s. 94, where a "tenant" is said to include all persons holding by copy of court roll, or as customary tenants, or holding land subject to any manorial right or incident, and whether the land is held to them and their heirs or to two or more in succession, or for life or lives or years; and see, generally, title COPYHOLDS, Vol. VIII., pp. 1 *et seq.*

(*o*) 57 & 58 Vict. c. 46.

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compensation and consideration for and to meet the expenses of such enfranchisement (*p*).

A similar statutory power is vested in the lord, which expression includes a person with a limited estate in a manor (*q*), in respect of purchase-money and expenses of purchase, where he purchases the tenant's interest, and expenses incurred by him in enfranchisement proceedings under the Copyhold Act, 1894 (*r*).

Priority of mortgage for enfranchisement.

When any such power is exercised, either by the lord or by the tenant, the charge effected has priority to all incumbrances, whether prior in date or not, affecting the manor or land, except tithe rentcharge or any charge having priority by statute (*s*).

Further, if after enfranchisement a tenant of copyholds is evicted on the score of the badness of his title, he has a charge on the lands, from which he is evicted, for his consideration money (*t*).

Inclosure expenses.

**190.** A limited owner has certain statutory powers of mortgaging for the purpose of paying the expenses arising from the inclosure and allotment of common lands (*a*).

Tithe redemption.

**191.** The expenses of the statutory commutation and redemption of tithes may be charged upon the lands (*b*) freed from tithe, or the rentcharge substituted for tithe, by any owner of an estate in such land or rentcharge respectively less in the whole than an immediate estate of fee simple or fee tail, or which shall be settled upon any uses or trusts (*c*).

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(*p*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 36 (1).

(*q*) *Ibid.*, s. 43; and see also *ibid.*, s. 94, where a "lord" is said to include a lord of the manor whether lawfully entitled or not, and also ecclesiastical lords and bodies corporate or collegiate.

(*r*) *Ibid.*, ss. 36 (3), 37. The charge, whether under *ibid.*, s. 36 or s. 37, if by a tenant may, and if by the lord shall, be either by deed by way of mortgage or by certificate of charge under the Act; see *ibid.*, ss. 36 (6), 37 (2).

(*s*) *Ibid.*, s. 36 (7).

(*t*) *Ibid.*, s. 38. As to enfranchisement generally, see title COPYHOLDS, Vol. VIII., pp. 111 *et seq.*

(*a*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 583 *et seq.* The Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 30, was not repealed by the Inclosure Act, 1845 (8 & 9 Vict. c. 118), and is still in force, and, where it is relied on, the mortgage deed must be attested by two witnesses (Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 30). The Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 133, allows allotted lands to be charged with "inclosure expenses." The Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), allows them to be charged with "the expenses incident to and attending the obtaining of an Inclosure Act." Under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 133, a person entitled to mortgage allotted lands may advance the money himself, and the commissioner or commissioners may mortgage the allotment to such person. A mortgage made under either Act must be a mortgage of a term of years, and must contain a proviso for the cesser or an express trust for the reassignment or surrender of the term upon repayment of principal and interest, and a covenant to pay and keep down interest so that the remainderman shall not be burdened with more than six months' arrears of interest (*ibid.*); and see also title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 583.

(*b*) As to the construction of the word "lands," see Tithe Act, 1840 (3 & 4 Vict. c. 15), s. 23.

(*c*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 77. By *ibid.*, s. 78, the expenses

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Land tax.

**192.** A limited owner of settled land can redeem the land tax thereon (*d*), and on so doing is entitled to a charge on the land. The charge has the same effect as if it were a mortgage secured by deed, and has priority over all other charges and incumbrances (*e*). A tenant for life may mortgage the land to pay off such charge (*f*).

Land improvement

**193.** Statutory powers have been conferred (*g*) on limited owners (*h*) to charge the inheritance of the lands, of which they are limited owners, with the repayment of moneys borrowed by them for the purpose of making improvements on such lands (*i*).

## SECT. 3.—*Fiduciary Owners.*

### SUB-SECT. 1.—*Personal Representatives.*

Personal representative's mortgage of personalty.

**194.** An executor can mortgage the personalty of his testator, and his power to do so arises out of his complete and absolute control over the assets, his alienation of which cannot be annulled

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of ecclesiastical tithe-owners may be charged upon the benefice. Where a mortgage is made under the Act, interest at the rate of £4 per cent. per annum may be added to the charge, which, however, must be reduced by one-twentieth thereof in each year following the commutation. The power of mortgaging conferred by the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), was by the Tithe Act, 1839 (2 & 3 Vict. c. 62), s. 16, extended to any corporate body or person, the master or fellows of any college, the dean and chapter of any cathedral or collegiate church, the master or guardian of any hospital, and a parson, vicar, or any other having any spiritual or other ecclesiastical living; and by *ibid.*, s. 17, any ecclesiastical corporation aggregate or collegiate body may charge the expenses of the commutation and redemption of tithes upon lands other than those in respect of which such expenses have been incurred. By the Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 8, the Tithe Commissioners can exercise the powers of charging vested in any spiritual person, where such spiritual person has died or vacated his benefice without exercising them. The power of charging the expenses of redemption of tithe rentcharge is conferred on limited owners by the Tithe Act, 1846 (9 & 10 Vict. c. 73), s. 11, and extended to extraordinary tithe and tithe rentcharge by the Extraordinary Tithe Redemption Act, 1886 (49 & 50 Vict. c. 54), s. 6 (2). For the redemption of tithe and tithe rentcharge generally, see, besides the enactments cited in this note, the Tithe Act, 1847 (10 & 11 Vict. c. 104), and the Tithe Act, 1860 (23 & 24 Vict. c. 93), and title ECCLESIASTICAL LAW, Vol. XI., pp. 750 *et seq.*

(*d*) See title LAND TAX, Vol. XVIII., p. 321. As to such limited owners, see also pp. 99 *et seq.*, *ante*, and title SETTLEMENTS.

(*e*) See title LAND TAX, Vol. XVIII., pp. 325, 326.

(*f*) *Ibid.*, p. 327.

(*g*) See the Land Drainage Act, 1845 (8 & 9 Vict. c. 56); the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114); the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56); the Limited Owners Residences Act (1870), Amendment Act, 1871 (34 & 35 Vict. c. 84); the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30; the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30); the Improvement of Land Act, 1899 (62 & 63 Vict. c. 46); and see, generally, title LAND IMPROVEMENT, Vol. XVIII., pp. 275 *et seq.*

(*h*) For an enumeration of the kinds of limited owners on whom the powers are conferred, see title LAND IMPROVEMENT, Vol. XVIII., pp. 278, 294.

(*i*) For the improvements for which money may be borrowed, see title LAND IMPROVEMENT, Vol. XVIII., pp. 280 *et seq.*

SECT. 3. Fiduciary Owners.

except upon the ground of a fraud to which the alienee is found to be party or privy (*k*). An administrator has the same power to mortgage as an executor (*l*).

Mortgage of real estate.

**195**. A personal representative of a person who died since the 31st December, 1897, has the same power to mortgage the freeholds as he has to mortgage the leaseholds of a deceased person (*m*). But a mortgage of freeholds differs from a mortgage of leaseholds in that some or one only of several joint personal representatives cannot, without the authority of the court, convey freeholds (*n*). A personal representative can mortgage copyholds to which the deceased person was legally entitled, only when expressly authorised to do so by will (*o*), or where a testator charges copyholds with debts or legacies, and there is no person to whom the whole of the testator's estate or interest in such copyholds has been devised as trustee (*p*).

The court has statutory powers to order the money required for the payment of debts of deceased persons to be raised by a mortgage of such person's real estate (*q*).

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(*k*) For cases in which an executor has mortgaged or pledged assets of his testator, see *Mead* v. *Orrery* (*Lord*) (1745), 3 Atk. 235 (mortgage by executor who was also residuary legatee); *Scott* v. *Tyler* (1788), 2 Dick. 712, 724 (pledge); *Taylor* v. *Hawkins* (1803), 8 Ves. 209 (mortgage of leaseholds); *M'Leod* v. *Drummond* (1810), 17 Ves. 152 (pledge); *Vane* (*Earl*) v. *Rigden* (1870), 5 Ch. App. 663 (mortgage of book debts); *Berry* v. *Gibbons* (1873), 8 Ch. App. 747 (pledge); *Solomon* v. *Attenborough*, [1912] 1 Ch. 451, C. A. (where, however, the pledge was invalid as the lenders had no knowledge that the pledgor was an executor). The power of a legal personal representative to mortgage is fully discussed under title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 296 *et seq.*

(*l*) For the position and powers of an administrator, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 293 *et seq.* For forms, see Encyclopædia of Forms and Precedents, Vol. V., p. 628; Vol. VIII., pp. 557, 559.

(*m*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2). For forms, see Encyclopædia of Forms and Precedents, Vol. V., p. 628; Vol. VIII., p. 562. As to the powers of persons authorised to pay estate duty to raise the duty by charge, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 223. As to the powers of personal representatives in the case of persons who died before the 1st January, 1898, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 236.

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (2). Executors who have proved can now convey their testator's freeholds without the concurrence of non-proving executors or the authority of the court (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 12).

(*o*) The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not affect copyholds (*ibid.*, s. 1 (4)); but copyholds in which the deceased had merely an equitable interest pass to his legal personal representatives (*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583).

(*p*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 14, 16; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 236.

(*q*) Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), ss. 11, 12, as amended by the Debts Recovery Act, 1839 (2 & 3 Vict. c. 60), and the Debts Recovery Act, 1848 (11 & 12 Vict. c. 87); see *National Bank* v. *Gourley* (1886), 17 L. R. Ir. 357; *Hill* v. *Maurice* (1847), 1 De G. & Sm. 214; *Garmstone* v. *Gaunt* (1845), 1 Coll. 577; see also Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104); Administration of Estates Act, 1869 (32 & 33 Vict. c. 46); Judicature Act, 1875 (38 & 39 Vict. c. 77). For forms, see Encyclopædia of Forms and Precedents, Vol. V., p. 628; Vol. VIII., p. 564.

SUB-SECT. 2.—*Trustees.*

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Trustee's power to mortgage.

**196.** A trustee cannot mortgage the trust property save in pursuance of a power to do so expressly conferred upon him by the instrument creating the trust (*r*), or in pursuance of the statutory power arising where a testator has charged his real estate, or some portion thereof, with payment of debts and legacies, and devised his whole estate or interest in such real estate, or portion thereof, to such trustee upon trust (*s*), or in pursuance of an order of the court (*t*). A power to mortgage will be implied from a power of sale, if the latter is given for the purpose of raising a particular charge, but not if the testator's object is to effect an absolute conversion of his estate (*a*).

Form of mortgage by trustees.

A trustee who mortgages the trust estate does not usually covenant to pay the money borrowed (*b*). A trustee is under no obligation to exclude the statutory power of sale which is now an implied provision in every mortgage (*c*), but he may not insert a consolidation clause extending to mortgages other than those made by him as trustee (*d*).

Trustee's power to invest on mortgage.

**197.** Trustees may lend trust moneys upon a mortgage of realty (*e*), unless expressly forbidden to do so by the instrument creating the

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(*r*) Such power may be conferred by implication (*Re Bellinger, Durell* v. *Bellinger*, [1898] 2 Ch. 534). As to charity trustees, see p. 111, *post.*

(*s*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 14.

(*t*) Underhill, Trusts and Trustees, 6th ed., p. 203. For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 565. As to a trustee's equitable lien for expenditure on trust property, see titles LIEN, Vol. XIX., p. 21; TRUSTS AND TRUSTEES.

(*a*) *Stroughill* v. *Anstey* (1852), 1 De G. M. & G. 635, following *Haldenby* v. *Spofforth* (1839), 1 Beav. 390, and explaining *Ball* v. *Harris* (1839), 4 My. & Cr. 264; *Page* v. *Cooper* (1853) 16 Beav. 396; *Devaynes* v. *Robinson* (1857), 24 Beav. 86. In *Ball* v. *Harris, supra,* Lord COTTENHAM, L.C., and in *Mills* v. *Banks* (1724), 3 P. Wms. 1, at p. 9, Lord MACCLESFIELD, L.C., stated the law in too wide terms. See also *Bennett* v. *Wyndham* (1857), 23 Beav. 521 (where a prohibition against raising a charge by sale was held to be also a prohibition against raising such charge by mortgage); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 298, 299.

(*b*) See *Stroughill* v. *Anstey, supra,* at p. 635, 642. For clauses to this effect, see Encyclopædia of Forms and Precedents, Vol. V., p. 628; Vol. VIII., pp. 557, 559, 565, 636; Vol. XVI., p. 405. As to the personal liability of a trustee on his covenant in a mortgage, see *Watling* v. *Lewis,* [1911] 1 Ch. 414.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 66; the statutory power is given by *ibid.*, s. 19; see p. 248, *post.* The cases decided before the Act (*Re Chawner's Will* (1869), L. R. 8 Eq. 569, following *Russell* v. *Plaice* (1854), 18 Beav. 21; *Bridges* v. *Longman* (1857), 24 Beav. 27, and *Cook* v. *Dawson* (1861), 29 Beav. 123, 128, but dissenting from *Clark* v. *Royal Panopticon* (1857), 4 Drew. 26) show that a trustee who was mortgaging the trust estate could give a power of sale.

(*d*) See *Thorne* v. *Thorne,* [1893] 3 Ch. 196. Where, however, a trustee brings within the scope of the mortgage security other payments due from the trust estate, the case appears to be different (*Cruikshank* v. *Duffin* (1872), L. R. 13 Eq. 555).

(*e*) If authorised by the settlement, but not otherwise, trustees may lend trust moneys upon the security of personal property (see *Mills* v. *Osborne* (1836), 7 Sim. 30). As to the meaning of an authority to invest in "personal security," see *Forbes* v. *Ross* (1788), 2 Bro. C. C. 430; *Langston* v. *Ollivant* (1807), Coop. G. 33; *Pickard* v. *Anderson* (1872), L. R. 13 Eq. 608; and see, generally, title TRUSTS AND TRUSTEES.

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trust (*f*), but they must invest trust moneys themselves, and are not justified in handing such moneys to their solicitor and requesting him to invest them upon mortgage (*g*). They should as a rule investigate the title to the property which constitutes the proposed security (*h*), and for this purpose they may employ a solicitor (*i*). But they must take additional precautions if they employ the solicitor who is acting for the mortgagor (*k*).

Duties of trustees in lending on mortgage.

**198.** Trustees in lending money upon mortgage must take care that they obtain complete control of the legal estate. Accordingly it is improper for them, in the absence of an express power in the trust instrument, to invest upon either an equitable (*l*) or a contributory mortgage (*m*). They must satisfy themselves as to the adequacy of the proposed security for the sum intended to be

(*f*) The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, authorises investment on real or heritable securities in England or Ireland. Before the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), the better view was that trustees could not invest trust moneys on mortgages of land without express authorisation by the trust instrument, but settlements commonly contained a power to invest on real security. As to whether an investment upon mortgage of the undertaking, future calls, rates, tolls, and sums of money belonging to a railway company, and arising under their Act, is an investment upon real security, see *Mant* v. *Leith* (1852), 15 Beav. 524. Such an investment is not covered by the phrase "security by way of mortgage of any freehold, copyhold, or leasehold hereditaments" (*Mortimore* v. *Mortimore* (1859), 4 De G. & J. 472, C. A.). A loan of trust moneys upon the security of a judgment is not authorised by a power to invest on any mortgage of freehold or leasehold estates, or any other real securities (*Johnston* v. *Lloyd* (1844), 7 I. Eq. R. 252). A loan of trust moneys upon the security of a long term of years in freeholds does not come under the description "real security" (*Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492, C. A.; *Re Boyd's Settled Estates* (1880), 14 Ch. D. 626; *Leigh* v. *Leigh* (1886), 56 L. J. (CH.) 125). But, as to renewable leaseholds in Ireland, see *Macleod* v. *Annesley* (1853), 16 Beav. 600.

(*g*) *Rowland* v. *Witherden* (1851), 3 Mac. & G. 568; *Re Dewar, Dewar* v. *Brooke* (1885), 54 L. J. (CH.) 830; see, further, title TRUSTS AND TRUSTEES. As to how far the trustees of capital moneys are bound to follow directions under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (2), given by a tenant for life to invest capital moneys upon a particular mortgage, see *Re Hotham, Hotham* v. *Doughty*, [1902] 2 Ch. 575, C. A.; and see title SETTLEMENTS.

(*h*) As to the length of title which trustees can accept, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (2); title TRUSTS AND TRUSTEES. As to investigation of title to land, see title SALE OF LAND.

(*i*) See *Blyth* v. *Fladgate, Morgan* v. *Blyth, Smith* v. *Blyth*, [1891] 1 Ch. 337, 360; *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727, 734. As to employment of agents by trustees, see, generally, title TRUSTS AND TRUSTEES.

(*k*) *Waring* v. *Waring* (1852), 3 I. Ch. R. 331; *Sutton* v. *Wilders* (1871), L. R. 12 Eq. 373, 377.

(*l*) *Wyatt* v. *Sharratt* (1840), 3 Beav. 498; *Drosier* v. *Brereton* (1852), 15 Beav. 221; *Fowler* v. *Reynal* (1851), 3 Mac. & G. 500; *Norris* v. *Wright* (1851), 14 Beav. 291; *Webb* v. *Ledsam* (1855), 1 K. & J. 385, 387; *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464, 476; *Swaffield* v. *Nelson*, [1876] W. N. 255; *Hopgood* v. *Parkin* (1870), L. R. 11 Eq. 74; *Chapman* v. *Browne*, [1902] 1 Ch. 785, C. A. In Ireland, however, where there is a system of land registration, there have been decisions to the effect that an investment by trustees upon a second mortgage might not be improper (*Smithwick* v. *Smithwick* (1861), 12 I. Ch. R. 181, *Crampton* v. *Walker* (1893), 31 L. R. Ir. 437; see also *Chapman* v. *Browne, supra*, and *Waring* v. *Waring, supra*).

(*m*) *Webb* v. *Jonas* (1888), 39 Ch. D. 660 (where the power of sale was so

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advanced, and should procure the valuation of a competent and independent valuer. As a general rule, they should not lend upon the security of agricultural land more than two-thirds of the amount of the valuation of such land, nor, upon the security of land which derives its value from buildings erected upon it, or from its use for trade purposes, more than one-half of the amount of the valuation of such land (*n*). An investment on mortgage of property part of which is let on weekly tenancies is not necessarily improper (*o*).

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expressed that either set of mortgagees might sell); *Stokes* v. *Prance*, [1898] 1 Ch. 212, *per* STIRLING, J., at p. 223, following *Re Massingberd's Settlement*, *Clark* v. *Trelawney* (1890), 63 L. T. 296, C. A.; see also *Re Dive*, *Dive* v. *Roebuck*, [1909] 1 Ch. 328. In *Re Godfrey*, *Godfrey* v. *Faulkner* (1883), 23 Ch. D. 483, the contributory mortgage was expressly authorised by the trust deed. In *Re Walker*, *Walker* v. *Walker* (1890), 59 L. J. (CH.) 386, KEKEWICH, J., at p. 389, expressed the opinion that there was not so strong an objection to a contributory investment when there was the same set of trustees for different children and grandchildren as when there was a contributory mortgage in the names of two different sets of trustees claiming under different instruments, as was the case in *Webb* v. *Jonas* (1888), 39 Ch. D. 660. In *Jones* v. *Julian* (1890), 25 L. R. Ir. 45, and *Re Turner*, *Barker* v. *Ivimey*, [1897] 1 Ch. 536, the fact that the security was over an undivided share, and thus the trustees' control of it was less, was one of the considerations which induced the court to hold the investment to be a breach of trust.

(*n*) *Jones* v. *Julian*, *supra*; *Re Olive*, *Olive* v. *Westerman* (1886), 34 Ch. D. 70, *per* KAY, J.; *Shaw* v. *Cates*, [1909] 1 Ch. 389. The trustees should not be content with an out of date valuation (*Macleod* v. *Annesley* (1853), 16 Beav. 600; compare *Re Godfrey*, *Godfrey* v. *Faulkner*, *supra*); nor with a valuation made by or on behalf of the mortgagor (*Ingle* v. *Partridge* (No. 2) (1865), 34 Beav. 411; *Walcott* v. *Lyons* (1886), 54 L. T. 786; *Shaw* v. *Cates*, *supra*); but they are not bound to inquire whether their valuer has at any time advised the mortgagor (*Re Solomon*, *Nore* v. *Meyer*, [1912] 1 Ch. 261). Trustees must choose a valuer themselves, and not follow blindly the guidance of their solicitor (*Fry* v. *Tapson* (1884), 28 Ch. D. 268). They may, however, ask him to name some valuers for them to choose from (*ibid.*). As to the meaning of instructing a valuer "independently" of the owner of the property, see *Re Solomon*, *Nore* v. *Meyer*, *supra*, at p. 956. If trustees do not employ a local valuer, they must show circumstances to explain their selection (*Budge* v. *Gummow* (1872), 7 Ch. App. 719). If a valuer properly appointed makes his valuation on a wrong principle, *e.g.*, upon the cost of erecting buildings, the trustees, having employed a skilled agent, are not liable (*Re Pearson*, *Oxley* v. *Scarth* (1884), 51 L. T. 692). As to the amount which it is proper to lend, see *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727, 733; *Stickney* v. *Sewell* (1835), 1 My. & Cr. 8, *per* PEPYS, M.R., at p. 15.; *Stretton* v. *Ashmall* (1854), 3 Drew. 9; *Macleod* v. *Annesley*, *supra*; *Hoey* v. *Green*, [1884] W. N. 236; *Re Olive*, *Olive* v. *Westerman*, *supra*, *per* KAY, J., at p. 73; *Palmer* v. *Emerson*, [1911] 1 Ch. 758 (a case of business premises); *Re Solomon*, *Nore* v. *Meyer*, *supra*. But the rule as to lending two-thirds or one-half of the amount of the valuation is not inflexible (see cases last cited); as to loans of not more than two-thirds of the amount of the valuation, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (1); title TRUSTS AND TRUSTEES. In considering the adequacy of a security the income derived from it must be considered as well as its capital value (*Macleod* v. *Annesley*, *supra*; *Re Somerset*, *Somerset* v. *Poulett* (*Earl*), [1894] 1 Ch. 231, C. A., *per* KEKEWICH, J., at p. 247). In some cases trustees would not be justified in lending even one-half the valuation (*Learoyd* v. *Whiteley*, *supra*; *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490). As to the duty of the valuer, see *Re Solomon*, *Nore* v. *Meyer*, *supra*, at pp. 274 276, 278, 282, 283; see, further, title TRUSTS AND TRUSTEES.

(*o*) *Re Solomon*, *Nore* v. *Meyer*, *supra*.

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Trustees may invest upon a sub-mortgage (*p*), but not upon a stock mortgage (*q*).

Form of mortgage to trustees.

**199.** A deed of mortgage to trustees should contain a statement that the moneys are advanced out of a joint account (*r*). It should not, unless in exercise of an express authority, contain a provision that the mortgage shall not be called in for a period of years (*s*). The statutory power of sale (*t*) ought not as a rule to be excluded where the mortgagees are trustees, but the exclusion of such power of sale is not necessarily a breach of trust (*u*).

## SECT. 4.—*Corporate or Unincorporate Bodies.*

### SUB-SECT. 1.—*Corporations and Companies.*

Corporations and companies.

**200.** A company which is incorporated by charter can, by deed under its corporate seal, mortgage any part of its property in the same way as can a natural person, who is *sui juris*, unless perhaps it is prohibited by some special restriction inserted in its charter (*v*). Corporations created by statute derive their powers of borrowing money upon mortgage from the statutes under which they are incorporated. They cannot lawfully borrow, when any such enactment forbids them to do so, nor indeed without express statutory authority, where the borrowing is not properly incident to the course and conduct of their business (*w*). A joint stock

(*p*) *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490.

(*q*) *Pell* v. *De Winton* (1857), 2 De G. & J. 13; *Whitney* v. *Smith* (1869), 4 Ch. App. 513, 521; *Bromley* v. *Kelly* (1870), 39 L. J. (CH.) 274.

(*r*) See p. 117, *post*. Where it is declared in a mortgage that the money is advanced by the mortgagees on a joint account, a power of sale given to the mortgagees, their heirs and assigns, is exercisable by the survivor of them (*Hind* v. *Poole* (1855), 1 K. & J. 383). As to whether the court will go behind a joint account clause, see *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch. D. 720; *Re Jackson, Smith* v. *Sibthorpe* (1887), 34 Ch. D. 732; *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340; see also *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

(*s*) *Mant* v. *Leith* (1852), 15 Beav. 524; *Vickery* v. *Evans* (1863), 33 Beav. 376.

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19; see pp. 247 *et seq.*, *post*.

(*u*) *Farrar* v. *Barraclough* (1854), 2 Sm. & G. 231. For the powers and duties of trustees as to investment generally, and for the consequences of an investment being made in breach of trust, see title TRUSTS AND TRUSTEES.

(*v*) *Sutton's Hospital Case* (1612), 10 Co. Rep. 1 a; *Riche* v. *Ashbury Railway Carriage Co.* (1874), L. R. 9 Exch. 224, 263, Ex. Ch.; *Wenlock (Baroness)* v. *River Dee Co.* (1883), 36 Ch. D. 675, n., 685, n., C. A.; *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A. C. 52; see title CORPORATIONS, Vol. VIII., p. 359.

(*w*) See titles COMPANIES, Vol. V., pp. 730 *et seq.*; CORPORATIONS, Vol. VIII., pp. 362 *et seq.*; *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A., *per* Lord SELBORNE, L.C., at p. 70; *Wenlock (Baroness)* v. *River Dee Co.* (1885), 10 App. Cas. 354, *per* Lord WATSON, at p. 362; see also *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H. L. Cas. 331; *Putney Overseers* v. *London and South Western Rail. Co.*, [1891] 1 Q. B. 440, 442, C. A.; *Corbett* v. *South Eastern and Chatham Railways (Managing Committee)*, [1906] 2 Ch. 12, 20, C. A.; *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87, 94.

company, formed under the Companies Acts, 1862 to 1907, or under the Companies (Consolidation) Act, 1908 (*x*), has power to borrow money upon mortgage, if such power is given, expressly or by implication, by its memorandum of association. This power may be restricted, but cannot be enlarged, by the articles of association (*a*). SECT. 4. Corporate or Unincorporate Bodies.

SUB-SECT. 2.—*Charities.*

**201.** The trustees of a charity have statutory powers to mortgage the estates of the charity for the purpose of raising money for improvements (*b*), and they have also statutory powers to invest the moneys of the charity upon mortgages of real estate (*c*). Charities.

SUB-SECT. 3.—*Ecclesiastical Corporations.*

**202.** There is no rule at common law which prevents an ecclesiastical corporation from mortgaging an ecclesiastical benefice (*d*); although a statute of Elizabeth, which is still partly in force, prohibits and avoids the charging of any benefice with any pension or profit out of the same to be yielded or taken (*e*). Other statutes, however, have conferred upon incumbents powers of borrowing and of mortgaging their benefices, so as to bind their successors, for certain specified purposes and subject to certain restrictions and conditions (*f*). Ecclesiastical corporations.

SUB-SECT. 4.—*Building Societies and Friendly Societies.*

**203.** Incorporated building societies have certain powers of borrowing money and mortgaging their property (*g*), and of Building societies and friendly societies.

(*x*) 8 Edw. 7, c. 69.

(*a*) For the law as to borrowing, and the creation of mortgages and floating charges by limited companies, and for references to the appropriate forms and precedents, see title COMPANIES, Vol. V., pp. 337 *et seq.*

(*b*) See title CHARITIES, Vol. IV., pp. 234 *et seq.* For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 568; Vol. XVI., p. 616.

(*c*) Charitable Funds Investment Act, 1870 (33 & 34 Vict. c. 34), s. 1; see, further, title CHARITIES, Vol. IV., pp. 237 *et seq.*

(*d*) *Doe* d. *Cates* v. *Somerville* (1826), 6 B. & C. 126; *Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547; see also *Doe* d. *Broughton* v. *Gully* (1829), 9 B. & C. 344; *Wise* v. *Beresford* (1843), 3 Dr. & War. 276.

(*e*) Stat. (1571) 13 Eliz. c. 20, which, after having been repealed by stat. (1803) 43 Geo. 3, c. 84, was revived as regards charges by stat. (1817) 57 Geo. 3, c. 99 (see *Re Mirams*, [1891] 1 Q. B. 594, *per* CAVE, J., at p. 596); and see title ECCLESIASTICAL LAW, Vol. XI., p. 615, note (*p*). As to what is a "benefice with cure" within the meaning of stat. (1571) 13 Eliz. c. 20, see *Norwich's* (*Dean and Chapter*) *Case* (1598), 3 Co. Rep. 73 a, 75 b (bishop's temporalities); *Errington* v. *Howard* (1757), Amb. 485 (annuity stipend in lieu of tithes); *Grenfell* v. *Windsor* (*Dean and Canons*) (1840), 2 Beav. 544 (temporalities of a canonry at Windsor); *McBean* v. *Deane* (1885), 30 Ch. D. 520 (annuity granted to retiring incumbent upon a union of benefices under the Union of Benefices Act, 1860 (23 & 24 Vict. c. 142), s. 9); *Re Leveson, Ex parte Arrowsmith* (1878), 8 Ch. D. 96, C. A. (pew rents). A mortgage of a canonry carries nothing, because a canonry is the name of an office merely (*Doe* d. *Butcher* v. *Musgrave* (1840), 1 Man. & G. 625), and as to the effect of charges and judgments on benefices, see title ECCLESIASTICAL LAW, Vol. XI., pp. 615, 616.

(*f*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 755 *et seq.*; for forms, see Encyclopædia of Forms and Precedents, Vol. III., pp. 672 *et seq.*

(*g*) See title BUILDING SOCIETIES, Vol. III., pp. 375 *et seq.*

SECT. 4. Corporate or Unincorporate Bodies.

investing their surplus funds on mortgage (*h*), and so have friendly societies (*i*).

SUB-SECT. 5.—*Local Authorities.*

Local authorities.

**204.** The following local authorities (besides any body specially constituted and clothed with particular powers by a private Act of Parliament) have statutory power to borrow upon mortgage (*j*), namely, county councils (*k*), borough councils (both as such and as urban authorities) (*l*), urban district councils (*m*), rural district councils (*n*), parish councils (*o*), burial boards and joint committees for the purposes of the Burial Acts (*p*), port sanitary authorities (*q*), and distress committees under the Unemployed Workmen Act, 1905 (*r*).

# Part III. Modes of Effecting Mortgages of Particular Property.

SECT. 1.—*Freeholds.*

Form of legal mortgage of freeholds.

**205.** A legal mortgage of freehold property, including life estates, is made by the same form of assurance and framed on the same general principles as an absolute conveyance (*s*). It can only be

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(*h*) See title BUILDING SOCIETIES, p. 379. For forms, see Encyclopædia of Forms and Precedents, Vol. III., pp. 43, 46, 49, 51.

(*i*) As to mortgages by a friendly society, see title FRIENDLY SOCIETIES, Vol. XV., p. 164; and as to investment on mortgage of the society's funds, see *ibid.*, pp. 166, 168. For a form, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 271; compare *ibid.*, Vol. VIII., p. 642; and see forms referred to in note (*h*), *supra*.

(*j*) For forms, see Encyclopædia of Forms and Precedents, Vol. III., p. 117; Vol. VI., p. 310; Vol. VIII., pp. 194 *et seq.*; Vol. XVI., p. 394.

(*k*) See title LOCAL GOVERNMENT, Vol. XIX., p. 361. In taking a mortgage from a local authority, the main questions which should be considered are (1) what security can the local authority give, *e.g.*, land or rates; (2) what consents (if any) are necessary to the mortgage, *e.g.*, the consent of the Local Government Board; (3) whether there is a maximum time within which the mortgage money must be repaid; (4) what limit (if any) there is to the borrowing powers of the local authority; and (5) whether there is any special form of mortgage prescribed in the schedule of or otherwise by any statute for the particular case. These questions can be answered by referring to the various statutes, which govern the borrowing powers of the local authority concerned. A county council can advance money on mortgage for the purchase of small holdings; see title SMALL HOLDINGS AND SMALL DWELLINGS. For forms, see Encyclopædia of Forms and Precedents, Vol. I., pp. 493, 495.

(*l*) See title LOCAL GOVERNMENT, Vol. XIX., p. 317.

(*m*) *Ibid.*, p. 282.

(*n*) *Ibid.*, p. 337.

(*o*) *Ibid.*, p. 244.

(*p*) See title BURIAL AND CREMATION, Vol. III., pp. 476 *et seq.*

(*q*) See title LOCAL GOVERNMENT, Vol. XIX., p. 293.

(*r*) See titles POOR LAW; WORK AND LABOUR. As to loans to local authorities, see also title MONEY AND MONEY-LENDING, pp. 58 *et seq.*, *ante*.

(*s*) For a collection of forms of legal mortgages of freeholds applicable to various circumstances, see Encyclopædia of Forms and Precedents,

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created by such an instrument as is operative to transfer the legal estate. A conveyance or an appointment under a power of such freehold estate as the mortgagor is empowered to appoint in the property is the usual method adopted.

Essential provisions.

Apart from the method of passing the legal estate, varied according to the character of the property or the estate, power, or interest of the mortgagor, all ordinary legal mortgages are framed on the same general lines. Special circumstances may require variations in non-essentials, such as recitals, to make the record of the transaction, or the estate of the mortgagor, more clear, but in the essentials there is at the present day little variation. These essentials are (1) a covenant to pay the principal debt and interest on a given date; (2) a covenant to pay interest in the event of default in payment of the principal on the day named; (3) the conveyance of the mortgaged property; (4) the proviso for redemption; and (5) such variations of the statutory provisions with regard to mortgages as the arrangement between the parties calls for.

Covenant for payment.

**206.** The first operative part of a mortgage is usually the covenant by the mortgagor to pay the principal and interest on a day named (*t*). One object in placing it at the commencement of the security is to mark the character of the obligation, that is, a personal debt for which the property assured is only the collateral security. It is independent of any other part of the deed, so as to

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Vol. III., p. 43; Vol. VIII., pp. 516 *et seq.*, 746, 754; Vol. XIV., p. 295; Vol. XVI., pp. 271, 387 *et seq.*; for further charges, see *ibid.*, Vol. VIII., pp. 800 *et seq.*, 815.

(*t*) If there is no covenant and no accompanying bond, there is still an implied promise to pay, and if there is a time fixed, either by recital or otherwise, for the repayment, in many cases depending upon the construction of the instrument, the court will even imply a covenant to pay (*Sutton* v. *Sutton* (1882), 22 Ch. D. 511, C. A., *per* JESSEL, M.R., at p. 515; see *King* v. *King* (1735), 3 P. Wms. 358). As to implied contracts generally, see title CONTRACT, Vol. VII., pp. 463 *et seq.* The promise to pay implied in an instrument under seal may amount either to a covenant or a simple contract to pay. A mere admission of a debt by recital, even in a deed poll, where no other object is declared by the deed, implies a covenant for payment (*Turner* v. *Wardle* (1834), 7 Sim. 80; *Brice* v. *Carre* (1661), 1 Lev. 47; *Saltoun* v. *Houstoun* (1824), 1 Bing. 433; *Marryat* v. *Marryat* (1860), 28 Beav. 224, 226). But an acknowledgment for a collateral purpose will not have that effect. Accordingly, a recital that a debt is due, in the transfer of a mortgage (*Courtney* v. *Taylor* (1843), 6 Man. & G. 851), or in a mortgage to secure the debt (*Marryat* v. *Marryat*, *supra*; *Isaacson* v. *Harwood*, *Brook* v. *Harwood* (1868), 3 Ch. App. 225), or in a conveyance in trust to secure it (*Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573), or in an assignment for the benefit of a creditor (*Stone* v. *Van Heythuysen* (1854), Kay, 721), will not convert a debt into a specialty. But a deed which, after reciting a simple contract debt, contained an agreement to execute a mortgage "including all powers covenants and clauses incidental and necessary thereto," was held to convert the debt into a specialty, as that would be the effect of the security agreed to be given (*Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573). A person named party to a deed, the terms of which would create a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it (*Richardson* v. *Jenkins* (1853), 1 Drew. 477). As to covenants arising by construction, see, generally, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 477 *et seq.*

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constitute in itself a perfect obligation upon which the mortgagee may maintain an action without reference to the character of the deed as a mortgage.

Perpetual loan

Since every loan transaction implies a right to be repaid (*a*), if a person lending money is never to have his principal back, there must be something very definite and clear showing that such was the condition of the contract (*b*).

Date for payment.

Fixing a day for payment does not generally indicate an intention of the parties that actual payment shall be made on the named date, but only that the mortgagee may call for payment on or at any time after that date if so minded, but not before (*c*). The date fixed is usually six calendar months from the date of the loan or deed, but may be at the end of three months or any other period, or the loan may be made repayable upon demand.

Payment by instalments.

The principal may also be made repayable by instalments, with a stipulation that if the instalments and interest are duly paid the repayment of the principal shall not be otherwise enforced (*d*).

When the principal debt is agreed to be repayable by instalments (*e*), the intention of the parties is assumed to be that the whole sum shall become immediately payable if default is made in regular payment of the instalments. This is provided for either (1) by a covenant to pay the principal sum at a given date, with a proviso that if the said sum shall be paid by the instalments therein mentioned the lender will not require payment otherwise; or (2) by a direct covenant to pay by instalments, with a proviso that in case of default in payment of any instalment the whole debt shall become immediately payable. Such a proviso is not in the nature of a penalty and is binding (*f*).

Payment on demand.

A covenant to pay the principal money "immediately on demand" or "immediately after notice" implies such reasonable time as allows the debtor to go to his bankers or the like for the money, or otherwise comply with the demand (*g*). If the demand is by a person representing himself to be an agent of the mortgagee the mortgagor is entitled to have time to inquire into the truth of the alleged agency (*h*).

Payment of interest.

**207.** The covenant fixing the date of payment generally provides for interest in the meantime (*i*). But this is not necessary,

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(*a*) *King* v. *King* (1735), 3 P. Wms. 358, 360.

(*b*) *Hopkins* v. *Worcester and Birmingham Canal Proprietors* (1868), L. R. 6 Eq. 437.

(*c*) As to a covenant to pay a loan on a fixed day in a named month, without stating the year, see *Grannell* v. *Monck* (1889), 24 L. R. Ir. 241.

(*d*) Encyclopædia of Forms and Precedents, Vol. VIII., pp. 506, 533, 568.

(*e*) See *ibid.*, p. 533.

(*f*) *Sterne* v. *Beck* (1863), 1 De G. J. & Sm. 595, C. A.; *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1; *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592, C. A.; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; and see title BUILDING SOCIETIES, Vol. III., p. 365.

(*g*) *Brighty* v. *Norton* (1862), 3 B. & S. 305; *Toms* v. *Wilson* (1863), 4 B. & S. 442, 455, Ex. Ch.; *Massey* v. *Sladen* (1868), L. R. 4 Exch. 13; *Re Burghardt, Ex parte Trevor* (1875), 1 Ch. D. 297.

(*h*) *Moore* v. *Shelley* (1883), 8 App. Cas. 285, P. C.; *Toms* v. *Wilson*, *supra*.

(*i*) As to allowance of interest in accounts, see pp. 215 *et seq.*, *post*; and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 501.

for a mortgage, whether legal or equitable, like a bond (*j*), carries interest although not expressly reserved (*k*). This, however, does not apply if the instrument expressly provides for reconveyance on repayment of the principal only (*l*).

Payment of interest after default.

**208.** In every case in which it is not contemplated that the principal should be actually paid on the day appointed, it is usual to insert a covenant for payment of the interest. This enables the interest to be sued for apart from the principal, though a separate covenant is not absolutely necessary for this purpose (*m*).

Reduction on punctual payment.

To induce punctual payment a proviso is often inserted for reduction of the rate of interest if paid within the time prescribed (*n*). This is legal, and the mortgagor must pay the higher rate unless payment is made within the stipulated time (*o*). The same rule applies in the case of the principal where prompt payment is the consideration for which the creditor agrees to forgo part of his claim (*p*); for the reservation of a right to have full payment of money actually due, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty (*q*).

Mortgagee in possession.

Where the proviso is for reduction of interest on punctual payment, a mortgagee in possession may charge the mortgagor with the

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(*j*) See title BONDS, Vol. III., p. 95.

(*k*) *Farquhar* v. *Morris* (1797), 7 Term Rep. 124; *Anon.* (1813), 4 Taunt. 876, Ex. Ch.; *Re Every, Ex parte Hirtzel, Ex parte Hine* (1850), 3 De G. & J. 464, C. A.; *Ashwell* v. *Staunton* (1861), 30 Beav. 52; *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781, C. A. Even on a mere deposit of deeds by way of equitable mortgage the right to interest is implied without any stipulation for it (*Cary* v. *Doyne* (1856), 5 I. Ch. R. 104; *Re Kerr's Policy* (1869), L. R. 8 Eq. 331); so also where a principal sum is charged on property by order of the court (*Lippard* v. *Ricketts* (1872), L. R. 14 Eq. 291). "Every case that has been cited involves the principle, and the cases have established, that where no interest has been stipulated for, nevertheless the depositee or mortgagee has a right to interest" (*Re King, Ex parte Furber* (1881), 17 Ch. D. 191, *per* BACON, V.-C., at p. 196). A power to charge an estate with a specific sum of money without mentioning interest includes a power to charge with interest (*Kilmurry* (*Lord*) v. *Geery* (1713), 2 Salk. 538). As to implied rights to interest, see, further, pp. 225 *et seq.*, *post*; title MONEY AND MONEY-LENDING, pp. 38 *et seq.*, *ante*.

(*l*) *Thompson* v. *Drew* (1855), 20 Beav. 49.

(*m*) *Dickenson* v. *Harrison* (1817), 4 Price, 282. For a form of deed varying rate of interest, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 915; Vol. XVI., p. 436.

(*n*) A verbal agreement to reduce the rate of interest stipulated for in a mortgage is valid (*Milton* (*Lord*) v. *Edgworth* (1773), 5 Bro. Parl. Cas. 313; *Gregory* v. *Pilkington* (1857), 8 De G. M. & G. 616, C. A.; and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 915.

(*o*) *Jory* v. *Cox* (1701), Prec. Ch. 160; *Stanhope* v. *Manners* (1763), 2 Eden, 197; *Wayne* v. *Lewis* (1855), 25 L. T. (o. s.) 264; *Nicholls* v. *Maynard, Ex parte Powis* (*Marquis*) (1747), 3 Atk. 519; *Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53. For forms of such proviso, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 502; Vol. XI., p. 408. As to how far unpunctuality on one occasion deprives the mortgagor of the benefit of the proviso for the future, see *Stanhope* v. *Manners*, *supra*.

(*p*) Where a mortgagee agreed to take a portion of his debt in lieu of the whole upon payment on a given day, the court refused to grant relief against the effect of non-payment on that day (*Ford* v. *Chesterfield* (*Earl*) (1854), 19 Beav. 428).

(*q*) *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1.

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higher rate although he receives rent more than sufficient to pay the interest, and even though no interest was in arrear at the time of his taking possession (*r*). The receipt of rents by the mortgagee is not a payment by the mortgagor or by anyone on his behalf. The mortgagee receives rents which are his own, subject to the right of redemption (*s*). Under a proviso for the capitalisation of interest if it should be in arrear for twenty-one days, a mortgagee who enters into possession and has in his hands rents sufficient after deducting proper outgoings for payment of interest cannot claim that the interest is in arrear within the meaning of the proviso (*t*).

**Agreement for higher rate.**

An agreement for increasing the rate of interest on failure in punctual payment is regarded as a penalty against which the courts will grant relief (*a*).

**Absence of provision for payment of interest.**

**209.** If the mortgage makes provision for payment of the principal on a day certain, with interest at a fixed rate down to that day, there is no implied contract for the continuance of interest at the same rate or at any rate at all after that day. Interest is given in such cases, not as interest payable under the contract, but by way of damages for detention of the debt (*b*).

**Rate of interest by way of damages.**

**210.** The rate of interest expressed in the mortgage, if not above 5 per cent., was usually given, and it was reduced to 5 per cent. if the rate in the deed was above that amount (*c*); and this rule will generally be still observed, though the court is not bound to give interest above the regular mercantile rate (*d*), and in any case a distinct stipulation as to interest will be binding (*e*).

**Agreement not to call in principal.**

**211.** If a mortgage contains an unqualified stipulation that the principal money shall not be called in for a certain time it is binding though the interest fall into arrear, but the understanding of the parties is generally that such an indulgence is conditional upon punctual payment of the interest (*f*), and upon an agreement for

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(*r*) *Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53; *Bright* v. *Campbell* (1889), 41 Ch. D. 388.

(*s*) See *Cockburn* v. *Edwards* (1881), 18 Ch. D. 499, C. A., *per* JESSEL, M.R., at p. 457, and see *per* COTTON, L.J., at p. 463.

(*t*) *Wrigley* v. *Gill*, [1906] 1 Ch. 165, C. A. For forms providing for the capitalisation of interest, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 501, 828.

(*a*) *Holles* v. *Wyse* (1693), 2 Vern. 289; *Strode* v. *Parker* (1694), 2 Vern. 316; *Nicholls* v. *Maynard*, *Ex parte Powis* (*Marquis*) (1747), 3 Atk. 519; *Bonafous* v. *Rybot* (1763), 3 Burr. 1370, 1374; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, 702.

(*b*) *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27, 32, 37; *Price* v. *Great Western Rail. Co.* (1847), 16 M. & W., 244, 248; *Re Roberts*, *Goodchap* v. *Roberts* (1880), 14 Ch. D. 49, C. A.; *Goldstrom* v. *Tallerman* (1886), 18 Q. B. D. 1, 4, C. A.; and see title MONEY AND MONEY-LENDING, p. 38, *ante*; and p. 226, *post*.

(*c*) *Re Roberts*, *Goodchap* v. *Roberts*, *supra*; *Mellersh* v. *Brown* (1890), 45 Ch. D. 225.

(*d*) See 2 Seton, Judgments and Orders, 6th ed., p. 1387; 3 *ibid.*, p. 1942.

(*e*) *Re King*, *Ex parte Furber* (1881), 17 Ch. D. 191. As to the effect of a proviso limiting the amount to be recovered under a mortgage, see p. 225, *post*.

(*f*) *Seaton* v. *Twyford* (1871), L. R. 11 Eq. 591. A mortgagor who is in arrear for only a day or two cannot take advantage of a clause stipulating

a mortgage with a stipulation that the principal is not to be called in for a given period the mortgage must be framed to make postponement conditional upon punctual payment of interest (*g*). Under an agreement to forgo the right to call in the debt for a term if the interest is punctually paid, and the interest is not paid punctually, the right to call in the principal accrues and there is no equitable relief (*h*). Nor does the mortgagee by the subsequent receipt of interest waive his right to call in the principal before the end of the term (*i*).

Several mortgagees.

**212.** When several persons advance money on mortgage there is a presumption that the money belongs to them in severalty although the conveyance was made to them as joint tenants (*k*). To obviate this, when trustees lend, it is usual to insert a declaration that the money belongs to the lenders on a joint account (*l*). In the case of a mortgage on or after the 1st January, 1882, money advanced by more persons than one is deemed to belong to the survivor either where the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares (*m*). As from that date an expression of the joint account is not necessary, though it is convenient as a specific statement of the rights of the mortgagees (*n*).

A statement that the money belongs to the mortgagees on a joint account does not affect their rights *inter se* if, in fact, they are entitled to the money as tenants in common (*o*).

Form of conveyance

**213.** A legal mortgage of freeholds is usually made by a conveyance in fee of the property by the mortgagor to the mortgagee with

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that the loan shall not be called in so long as the interest is punctually paid (*Hicks* v. *Gardner* (1837), 1 Jur. 541; *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 343, C. A.).

(*g*) *Seaton* v. *Twyford* (1871), L. R. 11 Eq. 591. "The mortgagor who stipulates that he shall have five years to pay the mortgage money must of necessity, whether it is expressed or not, undertake at the same time that if he fails to do that which is incumbent upon him during the period of five years to do, the restriction upon the mortgagee shall thereupon cease" (*ibid.*, *per* BACON, V.-C., at p. 598; *Burrowes* v. *Molloy* (1845), 2 Jo. & Lat. 521, 526; *Edwards* v. *Martin* (1856), 25 L. J. (CH.) 284; *Re Theobald, Ex parte Bignold* (1838), 3 Deac. 151). For usual form of clause, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 506; and see *ibid.*, p. 534; Vol. XI., p. 409; Vol. XVI., p. 419. For a stipulation contained in a subsequent deed, see *ibid.*, Vol. XVI., p. 438.

(*h*) *Hicks* v. *Gardner* (1837), 1 Jur. 541; *Leeds and Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 343, C. A.

(*i*) *Keene* v. *Biscoe* (1878), 8 Ch. D. 201.

(*k*) *Petty* v. *Styward* (1631), 1 Eq. Cas. Abr. 290: *Rigden* v. *Vallier* (1751), 3 Atk. 731, 734; *Robinson* v. *Preston* (1858), 4 K. & J. 505, 511; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; and see title EQUITY, Vol. XIII., p. 69.

(*l*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 535—537, 540; and p. 110, *ante*.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 61 (1). But this provision only applies if and so far as a contrary intention is not expressed in the mortgage (*ibid.*, s. 61 (2)).

(*n*) As to the discharge of securities in favour of joint mortgagees, see p. 308, *post*.

(*o*) *Re Jackson, Smith* v. *Sibthorpe* (1887), 34 Ch. D. 732.

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a proviso or condition for reconveyance on payment of the mortgage debt and interest (*p*). Occasionally, but very seldom, it is made by a conveyance to the lender upon trust for sale in case of non-payment of the debt on a certain day with a declaration that the mortgagee may enter and take the rents and apply them in keeping down the interest (*q*).

Deed necessary.

**214.** A legal mortgage of an interest in hereditaments, whether corporeal or incorporeal, requires to be by deed (*r*).

Statutory form.

A mortgage of freehold or leasehold land by way of statutory mortgage may be made in the form prescribed by the Conveyancing and Law of Property Act, 1881 (*s*), which is deemed to include covenants for payment of principal and interest and a proviso for redemption.

Extent of estate conveyed.

**215.** When a person who has several estates and interests in land purports to convey all his estate and interest, the instrument operates to pass every estate and interest vested in him although not vested in him in the character in which he became a party to it (*t*). Ordinarily a person cannot convey a greater estate in property than that which he possesses. But where a mortgagor who has not the legal estate in fee simple purports to convey it and subsequently acquires it, he and all persons claiming under him

Estoppel.

will be estopped as against the mortgagee from denying that the legal estate passed by the conveyance (*u*). The deed must, however, contain a precise and specific averment that the conveying party has the legal estate (*a*). If a mortgagor with a defective title

(*p*) For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 516 *et seq.*, 746, 754. As to a mortgage by demise for a long term of years by a tenant for life, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 403.

(*q*) *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, 294, C. A.; *Locking* v. *Parker* (1872), 8 Ch. App. 30.

(*r*) Real Property Act, 1845 (8 & 9 Vict. c. 106), ss. 2, 3; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 355 *et seq.*

(*s*) 44 & 45 Vict. c. 41, s. 26; Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 1; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 370; Encyclopædia of Forms and Precedents, Vol. VIII., pp. 518, 626.

(*t*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472; *Carter* v. *Carter* (1857), 3 K. & J. 617, 634. But the whole deed must be looked at, and the frame and context may show that it was to be limited in some way; see, for instance, *Grieveson* v. *Kirsopp* (1842), 5 Beav. 283, and *Francis* v. *Minton* (1867), L. R. 2 C. P. 543; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 472, 473.

(*u*) *Right* d. *Jefferys* v. *Bucknell* (1831), 2 B. & Ad. 278; *Carpenter* v. *Buller* (1841), 8 M. & W. 209; *Stroughill* v. *Buck* (1850), 14 Q. B. 781.

(*a*) *Right* d. *Jefferys* v. *Bucknell, supra*; *Crofts* v. *Middleton* (1855), 2 K. & J. 194; *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1, 14, C. A. A recital that the conveying party is seised in fee is sufficient (*Bensley* v. *Burdon* (1830), 8 L. J. (O. S.) (CH.) 85), but not a recital that he is legally or equitably seised (*Right* d. *Jefferys* v. *Bucknell, supra*), or that he is seised or otherwise well entitled to an estate in fee simple (*Heath* v. *Crealock* (1874), 10 Ch. App. 22, 34), and where there is no distinct averment of title no estoppel is created by the mortgagor's covenants for title (*General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15, 22, 24). As to estoppel by deed generally, see title ESTOPPEL, Vol. XIII., pp. 365 *et seq.*

purports and intends to convey property for value, any interest subsequently acquired by him in that property is available to make the conveyance effectual even though the defect in title is apparent on the face of the conveyance (*b*); and if the mortgagor's title is defeated, but he afterwards acquires the same land under another title, the mortgage attaches to the new title (*c*).

Fixtures.

**216**. A mortgage in fee, whether legal or equitable, comprises, and that without specific mention, all fixtures which at the date of the mortgage (*d*) are, or at any time afterwards during its continuance (*e*) shall be, annexed to the land. This rule applies whether the security is a legal mortgage by deed or an equitable mortgage by deposit, and whether the deposit is or is not accompanied by a memorandum (*f*).

Hire purchase.

Chattels purchased on the hire system and so attached to the land as to become fixtures, although affixed after the date of the mortgage, become subject to the mortgage (*g*).

Trade fixtures.

If, however, the mortgagor is a trader and in possession of the premises, the mortgagee may be taken to have authorised the mortgagor to hire and fix to his premises chattels necessary for his business, and so as to entitle the mortgagor or the owner to remove them at the end of the time for which they were hired. But the removal must be effected before the mortgagee has taken possession (*h*).

Equitable mortgage.

A mere equitable mortgagee does not gain priority over a hire-purchase agreement in respect of the chattels comprised in the agreement (*i*).

Tenant's fixtures.

Where a mortgagor in possession, with the knowledge and acquiescence of the mortgagee, lets premises to a tenant who brings

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(*b*) *Re Bridgwate 's Settlement, Partridge* v. *Ward*, [1910] 2 Ch. 342; *Re Hoffe's Estate Act*, 1855 (1900), 82 L. T. 556.

(*c*) *Seabourne* v. *Powell* (1686), 2 Vern. 11; *Noel* v. *Bewley* (1829), 3 Sim. 103, 116.

(*d*) *Mather* v. *Fraser* (1856), 2 K. & J. 536; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123; *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328, Ex. Ch. As to the rights in respect of a mortgagor and mortgagee of leaseholds, see pp. 126 *et seq.*, *post*.

(*e*) *Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115; *Tottenham* v. *Swansea Zinc Ore Co.* (1885), 52 L. T. 738; *Cullwick* v. *Swindell* (1866), L. R. 3 Eq. 249; *Monti* v. *Barnes*, [1901] 1 K. B. 205, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 416 *et seq.*

(*f*) *Re Inwood, Ex parte Cowell* (1848), 17 L. J. (BCY.) 16; *Longbottom* v. *Berry, supra*; *Re Lusty, Ex parte Lusty* v. *Official Receiver* (1889), 60 L. T. 160; but see *Re Trethowan, Ex parte Tweedy* (1877), 5 Ch. D. 559. As to the rights of a mortgagee to fixtures as against the mortgagor's trustee in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 155, note (*e*).

(*g*) *Hobson* v. *Gorringe*, [1897] 1 Ch. 182, C. A.; *Reynolds* v. *Ashby & Son, Ltd.*, [1903] 1 K. B. 87, C. A.; affirmed, [1904] A. C. 466. But they must be so attached as to have lost their chattel character (*Lyon & Co.* v. *London City and Midland Bank*, [1903] 2 K. B. 135); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 421, 422, note (*f*).

(*h*) *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713, C. A.; *Huddersfield Banking Co., Ltd.* v. *Lister (Henry) & Son, Ltd.*, [1895] 2 Ch. 273, C. A.; *Ellis* v. *Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, C. A. As to hire-purchase generally, see title BAILMENT, Vol. I., pp. 554 *et seq.*

(*i*) *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

SECT. 1. Freeholds.

upon them certain trade fixtures, the fixtures do not pass to the mortgagee, but may be removed by the tenant (*k*).

Accretions.

**217.** Everything that the mortgagor adds to the property to improve its value must be taken to be an accretion for the benefit of the mortgagee (*l*). In like manner, additions made by a second mortgagee enure to the benefit of the first mortgagee (*m*).

Compensation money.

**218.** Money paid for statutory compensation for the licence of a mortgaged public-house belongs to the mortgagee as part of the mortgage security (*n*); and when mortgaged property is taken by a railway company under compulsory powers, the amount apportioned for loss of profits in carrying on the business belongs to the mortgagee (*o*).

Goodwill of business.

**219.** There are certain kinds of goodwill (*p*) to which a mortgagee is entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to it (*q*). But goodwill attaching to personal reputation which a man has made for himself does not go to the mortgagee of the house, but is a thing personal to the man whose skill and whose name have acquired the goodwill (*r*). Nor will the goodwill or

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(*k*) *Sanders* v. *Davis* (1885), 15 Q. B. D. 218.

(*l*) *Re Kitchin, Ex parte Punnett* (1880), 16 Ch. D. 226, 236, C. A.

(*m*) *Landowners West of England and South Wales Drainage and Inclosure Co.* v. *Ashford* (1880), 16 Ch. D. 411, 433. Thus, the mortgagor of a renewable lease who renews the lease or acquires the reversion in fee simple can only hold the new lease or the fee simple reversion subject to the mortgage (*Leigh* v. *Burnett* (1885), 29 Ch. D. 231, 234; *Rakestraw* v. *Brewer* (1729), 2 P. Wms. 511); and see *Maxwell* v. *Ashe* (1752), 1 Bro. C. C. 444, n., and *Moody* v. *Matthews* (1802), 7 Ves. 174 (annuities charged on renewed leases); *Hughes* v. *Howard* (1858), 25 Beav. 575 (new lease after a collusive foreclosure); and *Sims* v. *Helling* (1851), 21 L. J. (CH.) 76 (lease following a building agreement). On enfranchisement of copyhold land effected under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), the mortgage attaches to the freehold for a corresponding estate (*ibid.*, s. 21 (1) (e)). As to acquisition by the lord of the manor of copyholds held of the manor, see p. 128, *post*.

(*n*) *Law Guarantee and Trust Society, Ltd.* v. *Mitcham and Cheam Brewery Co.*, [1906] 2 Ch. 98; *Noakes* v. *Noakes & Co., Ltd.*, [1907] 1 Ch. 64; *Dawson* v. *Braime's Tadcaster Breweries, Ltd.*, [1907] 2 Ch. 359; and see, generally, title INTOXICATING LIQUORS, Vol. XVIII., pp. 68 *et seq*. For a form of mortgage of a public-house, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 593.

(*o*) *Pile* v. *Pile, Ex parte Lambton* (1876), 3 Ch. D. 36, C. A.

(*p*) As to goodwill generally, see titles PARTNERSHIP; TRADE AND TRADE UNIONS.

(*q*) *Cooper* v. *Metropolitan Board of Works* (1883), 25 Ch. D. 472, 479, C. A. Thus mortgages of a graving dock (*Pile* v. *Pile, Ex parte Lambton, supra*), a baker's shop (*King* v. *Midland Rail. Co.* (1868), 17 W. R. 113), a public-house (*Re Kitchin, Ex parte Punnett, supra*), and of an upholsterer's business (*Chissum* v. *Dewes* (1828), 5 Russ. 29), have been held to carry the goodwill. A mortgage of premises comprised in a colliery lease, which was subject to a condition that unless the seams of coal were worked the lessor might re-enter, was held to charge the business (*County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.); compare *Hamilton Gas Co., Ltd.* v. *Hamilton Corporation*, [1910] A. C. 300, P. C.

(*r*) *Cooper* v. *Metropolitan Board of Works, supra*.

business be included where the terms of the security indicate that only the business premises were intended to be charged (*s*).

Licensed property.

A mortgagee of a public-house and the goodwill is entitled to an assignment of the licence (*t*).

Insurance moneys.

**220.** All money received on an insurance effected on the mortgaged property must, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. On the other hand, and without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received under an insurance be applied in or towards discharge of the money due under his mortgage (*a*).

Mortgages of life estates.

**221.** In practice, mortgages of life estates in realty are still met with in the shape of a demise of the property for ninety-nine years if the mortgagor should so long live, instead of a conveyance outright of the mortgagor's whole life estate. This was done inasmuch as it was thought the latter course deprived the mortgagor of the powers of leasing and consenting to sales annexed by the settlement to the life estate. The contrary has, however, been decided, and it is settled that the powers are exercisable with the consent of the alienee of the tenant for life whatever may be the form of the mortgage (*b*). In the same way the consent of his incumbrancers will enable a tenant for life to exercise the powers conferred on him by the Settled Land Act, 1882 (*c*). Mortgages of life estates are now usually made by a grant of the entire estate of the tenant for life.

Proviso for redemption.

**222.** The proper form of proviso for redemption is that if the mortgagor, or any person claiming under him, shall on a given day pay to the mortgagee the mortgage debt and interest thereon at the rate mentioned in the preceding covenant, the mortgagee shall at any time thereafter, at the request and cost of the mortgagor or the person claiming under him, reconvey the mortgaged premises to the mortgagor or as he shall direct (*d*). The mortgagor cannot generally compel the mortgagee to accept payment of the mortgage money

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(*s*) *Whitley* v. *Challis*, [1892] 1 Ch. 64, C. A.

(*t*) *Rutter* v. *Daniel* (1882), 30 W. R. 724, 801, C. A.; *Re O'Brien* (1883), 11 L. R. Ir. 213; *Garrett* v. *Middlesex Justices* (1884), 12 Q. B. D. 620.

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 23 (3), (4). Under the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 83, insurance offices are required, upon the request of any person interested in or entitled to any house or other building burnt down or damaged by fire, to apply the insurance money in reinstating or repairing such house or building; but it has never been decided that this applies as between mortgagor and mortgagee (*Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas. 699, 713, 716; and see title INSURANCE, Vol. XVII., pp. 522, 542, 543).

(*b*) *Alexander* v. *Mills* (1870), 6 Ch. App. 124; *Re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332; and see note (*p*), p. 118, *ante*.

(*c*) 45 & 46 Vict. c. 38, s. 50 (3); see title SETTLEMENTS.

(*d*) This is substantially the statutory proviso provided by the form of mortgage in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 26, and Sched. III., Part I.; and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 505.

SECT. 1. Freeholds.

before the day of payment appointed in the proviso for redemption (*e*). A stipulation in a mortgage that the principal debt shall not be called in for a given period (*f*) is often accompanied by a mutual stipulation that the mortgagor shall not be entitled without the mortgagee's consent to pay off or redeem the mortgage before the expiration of the period (*g*). Although the law will not allow a mortgagor to be precluded from redeeming altogether (*h*), yet he may be precluded from redeeming for a fixed period, such as five or seven years (*i*); but that does not prohibit the court in a proper case from preventing the application of the clause if it is too large or there are circumstances connected with the proviso which renders it, in the opinion of the court, unreasonable and oppressive (*k*). A proviso against redemption for a period is not binding in the absence of a mutual provision for the continuance of the loan for that period (*l*).

Change in mortgagor's estate by virtue of redemption.

Difficulties sometimes arise with regard to provisoes for redemption where the prescribed destination of the estate when reconveyed does not follow the state of the title as existing at the time of the mortgage, and the question is whether the title to the equity of redemption is to be considered as thereby altered or not. The result of the authorities is that the presumption is that limitations in the proviso for redemption different from the previous limitations of the property are not intended to affect the rights of the parties further than is necessary to effect the object immediately contemplated (*m*).

Power of sale.

**223.** An important part of a mortgage is the power to sell the property in default of payment of the debt. An express power is seldom now inserted, reliance being placed upon the statutory power (*n*).

Repair.

**224.** There is no statutory obligation on a mortgagor to keep the premises in repair, so that provision upon the subject should be made where the nature of the property so requires (*o*).

Insurance.

**225.** As to insurance, a mortgagee under a deed made after the 31st December, 1881, has power at any time after the date of the deed to insure, and keep insured, against fire any building, effects, or property of an insurable nature comprised in the mortgage, and

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(*e*) See p. 147, *post*.

(*f*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 506, 534.

(*g*) *Ibid.*, pp. 507, 534.

(*h*) See p. 71, *ante*, and p. 142, *post*.

(*i*) *Teevan* v. *Smith* (1882), 20 Ch. D. 724, 729, C. A.; *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307, 311, C. A.; *Bradley* v. *Carritt*, [1903] A. C. 253, 259.

(*k*) *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, *supra*.

(*l*) *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620. There is no reported case in which a restriction for more than seven years has been held good. As to the periods which have been considered unreasonable, see p. 143, *post*.

(*m*) *Heather* v. *O'Neill* (1858), 2 De G. & J. 399, C. A.; *Plomley* v. *Felton* (1888), 14 App. Cas. 61, P. C.; *Re Byron's Settlement*, *Williams* v. *Mitchell*, [1891] 3 Ch. 474.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1); see pp. 245 *et seq.*, *post*.

(*o*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 503. As to the mortgagee's liability to repair, see p. 202, *post*.

the premiums paid are a charge on the mortgaged property so as to carry interest at the same rate as the mortgage money (*p*). The amount of the insurance effected must not exceed the amount specified in the mortgage deed, or if no amount is so specified, must not exceed two-thirds of the value of the property; and no insurance is to be effected when the deed contains a declaration that no insurance is required, or where an insurance is kept up on behalf of the mortgagor in accordance with the mortgage deed (*q*).

Covenants for title.

**226.** The absolute covenants for title formerly expressed in a mortgage may be implied by the mortgagor conveying "as beneficial owner." The covenants so implied are for right to convey, for quiet enjoyment after default, for freedom from incumbrances, and for further assurance (*r*); and where the mortgage is of leaseholds, the further covenant that the lease is valid and that the rents and covenants have been paid and performed, and for the indemnity of the mortgagee in respect of the rents and covenants in the future (*s*). In the case of a person joining in the assurance, but having no beneficial interest in the property, he will convey as trustee or as mortgagee, which will only imply a covenant against incumbrances. In practice the implied covenants for title are relied upon in drafting mortgages.

Leasing powers.

Some powers conferred by statute are often excluded or qualified. Thus a mortgage frequently imposes restrictions upon the leasing power given to a mortgagor by statute (*t*) by providing that the mortgagor shall not exercise it without the written consent of the mortgagee (*a*).

Attornment clause.

Sometimes an attornment clause is inserted when the mortgagor is himself in occupation of all or any part of the mortgaged property; but such a clause is only of use to enable the mortgagee to obtain possessfon by summary procedure (*b*).

Costs of mortgage.

**227.** When a mortgage is completed the mortgagor is liable to pay to the mortgagee the expenses incident to the transaction (*c*). The mortgagee is primarily liable to his own solicitor for those expenses (*d*). The mortgagor is liable to pay over to the mortgagee

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(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict c. 41), s. 19 (1) (ii.). The premiums are only a charge on the property, and cannot be recovered from the mortgagor as a debt; so the practice still continues of inserting a covenant for their repayment in the mortgage deed; see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 502, 511.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 23.

(*r*) *Ibid.*, s. 7 (1), (C.); and see p. 130, *post*.

(*s*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1), (D.); see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 514, 515.

(*t*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18; and see p. 163, *post*.

(*a*) See Encyclopædia and Forms of Precedents, Vol. VIII., p. 505.

(*b*) As to attornment, see p. 159, *post*.

(*c*) The same conveyancing practice as is followed in the case of sale (see title SALE OF LAND) is adopted in the case of mortgages; thus the mortgagor's solicitor deduces the title, while the mortgagee's solicitor investigates the title and prepares the mortgage deed. As to solicitors' remuneration in general, see title SOLICITORS.

(*d*) See titles CUSTOM AND USAGES, Vol. X., p. 284; SOLICITORS,

SECT. 1. Freeholds.

Costs of abortive negotiations.

what the latter pays to his own solicitor, but there is no debt until the transaction is completed. If the transaction falls through, the intending mortgagee cannot recover his expenses from the intending mortgagor, and to avoid that difficulty it is the practice of solicitors for intending mortgagees before engaging in a mortgage transaction to obtain an undertaking by the intending borrower's solicitor (*e*), or by the borrower, to pay the expenses. When the transaction is completed, the practice is to deduct those charges out of the advance (*f*).

Costs of solicitor-mortgagee.

**228.** A solicitor, to whom either alone or jointly with any other person a mortgage is made, or his firm, may receive the same costs for work done in respect of the mortgage as if the mortgage had been made to a stranger who had employed the solicitor or his firm to transact the business, and, in case a mortgage is made or transferred to him, or to him jointly with another person, to charge against the security the same costs as if the mortgage had been made and remained vested in a person who was not a solicitor who had employed him or his firm to do any business with respect to the mortgage or the property comprised therein (*g*).

## SECT. 2.—*Copyholds.*

Mortgage of copyholds.

**229.** Copyholds properly so called, as distinguished from customary freeholds, are conveyed by surrender and admittance, or by some statutory assurance made with the lord's concurrence which has the same effect (*h*). Both surrender and admittance, or their statutory substitute, must, however, be present to complete the legal title of the alienee. Copyholds may be surrendered absolutely or on condition, and the latter is the usual mode of creating a mortgage.

Covenant to surrender.

**230.** The mortgage in practice is effected by a deed containing a covenant by the mortgagor to surrender the property to the lord of the manor to the use of the mortgagee (*i*), subject to a condition that the surrender shall be void on payment of the principal and interest on a given day. This condition is in substance the same as the proviso for redemption in a mortgage of freeholds (*k*). The deed also contains a covenant for payment of principal and interest,

(*e*) *Re Cowburn, Ex parte Frith* (1882), 19 Ch. D. 419, 427, C. A.; *Pratt* v. *Vizard* (1833), 5 B. & Ad. 808; *Wilkinson* v. *Grant* (1856), 18 C. B. 319. For a form of undertaking, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 483.

(*f*) *Pratt* v. *Vizard, supra*, at pp. 813, 814.

(*g*) Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 3; *Day* v. *Kelland*, [1900] 2 Ch. 745, C. A. As to costs generally, see p. 231, *post*.

(*h*) See, for example, Encyclopædia of Forms and Precedents, Vol. VIII., p. 623, for a form of a legal mortgage by conveyance by a tenant for life of copyholds which operates as a surrender by virtue of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (1), (3), and is perfected by admittance; and see title COPYHOLDS, Vol. VIII., pp. 89 *et seq*. For a collection of forms of mortgages of copyholds applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 609 *et seq*., 746; Vol. XVI., pp. 271, 409, 411; and for further charges, see *ibid*., Vol. VIII., pp. 812, 814, 815. As to devolution on death of mortgages on copyholds, see pp. 184, 185, *post*.

(*i*) See *ibid*., Vol. VIII., pp. 610, 612, 615.

(*k*) See pp. 121, 122, *ante*.

and other clauses required by the nature of the property, as in the case of a mortgage of freeholds (*l*). Where the mortgage is of renewable copyhold for lives, the deed should contain a covenant for obtaining the proper renewals.

Conditional surrender.

**231.** The covenant to surrender is followed by a conditional surrender in accordance with the covenant in the deed (*m*). The lord is not bound to accept a surrender to such uses as the mortgagee may appoint, but only to the use of the mortgagee (*n*). The person to whom the conditional surrender is made seldom takes admission, as that would involve payment of a fine (*o*). Until the mortgagee is admitted, the mortgagor remains tenant on the court rolls and liable to the lord for services and for the purpose of forfeiture (*p*), and, as long as the lord has a tenant on the rolls, that is all that he can ordinarily require, but a special custom enabling the lord to compel admittance of a surrenderee is said to be valid (*q*). All costs relating to the completion of the surrender must be borne by the mortgagor (*r*).

Vesting order.

If the mortgagor refuses to make the conditional surrender, a vesting order can be made in favour of the mortgagee, and therefore an express declaration of trust of the copyholds which was formerly in use is not necessary (*s*).

Admittance.

If the mortgagor has not himself been admitted, he may be ordered to procure himself to be admitted and then surrender to the mortgagee (*a*).

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(*l*) See pp. 113 *et seq.*, *ante*.

(*m*) See Encyclopædia of Forms and Precedents, Vol. V., pp. 209, 212; Vol. VIII., p. 614. An actual surrender to the lord by the mortgagor, involving an entry of that fact on the court rolls, is necessary to prevent a second mortgagee without notice from obtaining a surrender to himself, in which case he may acquire the legal estate and gain priority (*Oxwick* v. *Plumer* (1708), Bac. Abr., tit. Mortgage (E.), 3). To prevent a second mortgagee obtaining priority, therefore, the mortgage money should not be paid until the surrender is made, and when an immediate surrender is impracticable, the mortgagee should take a power of attorney to surrender for the mortgagor. But a legal mortgagee may be postponed to a prior equitable mortgagee of whose security he had actual or constructive notice. An equitable mortgage of copyholds may be created by the mere deposit of the copy of the court rolls; see pp. 78, 80, *ante*; title COPYHOLDS, Vol. VIII., p. 94. It is, therefore, not sufficient for the protection of the mortgagee to search the court rolls for incumbrances; he ought to require the mortgagor to produce an abstract of his title and the copy of his admittance, or account reasonably for its absence (*Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303).

(*n*) *Flack* v. *Downing College* (*Master etc.*) (1853), 13 C. B. 945; and see title COPYHOLDS, Vol. VIII., p. 91.

(*o*) As to fines, see title COPYHOLDS, Vol. VIII., pp. 26 *et seq.*

(*p*) *Doe* d. *Shewen* v. *Wroot* (1804), 5 East, 132; *Minton* v. *Kirwood* (1866), L. R. 1 Eq. 449; see *Copestake* v. *Hoper*, [1908] 2 Ch. 10, C. A., *per* COZENS-HARDY, M.R., at p. 17. As to the relation of surrender and admittance, and the effect of each, see title COPYHOLDS, Vol. VIII., pp. 91, 92, 97.

(*q*) *Baspool* v. *Long* (1602), Cro. Eliz. 899; *King* v. *Dilliston* (1688), 3 Mod. Rep. 221; *Tredway* v. *Fotherley* (1699), 2 Vern. 367.

(*r*) *Pryce* v. *Bury* (1853), 2 Drew. 41; affirmed (1854), L. R. 16 Eq. 153, n., C. A.

(*s*) *Re Crowe's Mortgage* (1871), L. R. 13 Eq. 26; *Re Cuming* (1869), 5 Ch. App. 72.

(*a*) *Masters* v. *Braban* (1735), 1 Russ. 560, n.

SECT. 2. **Copyholds.**

Covenants for title.

**232.** The deed of covenant to surrender, if made before the conditional surrender, is a "mortgage" within the Conveyancing and Law of Property Act, 1881 (*b*). And when in a mortgage made after the 31st December, 1881, the mortgagor covenants to surrender as "beneficial owner," the statutory covenants for title are implied therein (*c*).

Power of sale.

A covenant to surrender by deed also implies a power of sale enabling the mortgagee by deed to convey the property for such estate and interest as is subject to the mortgage (*d*).

Title relates back to surrender.

**233.** Although the legal title of a mortgagee is not complete until actual admittance, yet as against all persons but the lord the title of a surrenderee after admittance is perfect as from the time of the surrender, and will relate back to it and defeat the title of all intermediate incumbrancers, for the admittance is only a circumstance required by law for the sake of the lord (*e*), and where by the custom of a manor no time is limited for presenting a surrender, an incumbrancer whose surrender has not been enrolled until long after a subsequent incumbrance will not be postponed although the subsequent incumbrancer had no notice of the charge (*f*).

Satisfaction of mortgage.

**234.** If the money is repaid before the admittance of the mortgagee, the mortgagee simply acknowledges satisfaction and authorises the steward to enter the acknowledgment on the court rolls (*g*), and thereupon the mortgagor becomes possessed of his old estate and no readmission is required (*h*). But if the mortgagee, in apprehension of default or for some other reason, is actually admitted, then on payment off he must resurrender and the mortgagor requires a new admittance (*i*).

### SECT. 3.—*Leaseholds.*

Mortgages of leaseholds.

**235.** Mortgages of leaseholds are effected either by way of assignment of the whole term or by way of subdemise (*k*). The former method is adopted only when the rent is small and the

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(*b*) 44 & 45 Vict. c. 41, s. 2 (vi.); and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 610.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (C.), (5); see p. 123, *ante*.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19—21; see p. 248, *post*. The mere surrender of copyholds by way of mortgage, if not under seal, would not confer the statutory powers.

(*e*) *Holdfast* d. *Woollams* v. *Clapham* (1787), 1 Term. Rep. 600.

(*f*) *Horlock* v. *Priestley* (1827), 2 Sim. 75; and see, generally, title COPYHOLDS, Vol. VIII., p. 93.

(*g*) For warrant to enter satisfaction, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 880; *ibid.*, Vol. V., p. 213.

(*h*) *Doe* d. *Shewen* v. *Wroot* (1804), 5 East, 132; see p. 313, *post*.

(*i*) Not only does this involve the payment of another fine, but such readmission of the mortgagor creates a new estate in him, altering in some cases the descent of the property, since he is then in the same position as if he had himself acquired the property by purchase (*Doe* d. *Harman* v. *Morgan* (1797), 7 Term Rep. 103). For form of readmittance of a mortgagor where the mortgagee has been admitted, see Encyclopædia of Forms and Precedents, Vol. V., p. 223.

(*k*) For a statutory form of mortgage, either by assignment or subdemise, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 626. For a

lessee's covenants are not burdensome (*l*), for the effect of an assignment is to establish a privity between the lessor and the mortgagee, so that the latter can be sued for rent and breach of covenant (*m*). The alternative course is to subdemise the property to the mortgagee for the whole of the term, less one or more days (*n*). Under this form of security the mortgagee is under no personal liability to the lessor (*o*). The only objection to it is that it leaves the nominal reversion outstanding in the mortgagor. To obviate this it is the practice to insert in the mortgage a declaration by the mortgagor that he is a trustee of the head term in trust for the mortgagee, but subject to the right of redemption. This is supplemented by a power for the mortgagee to remove the mortgagor and appoint a new trustee of the head term in the place of the mortgagor (*p*). Under these provisions a mortgagee can appoint a nominee of his own to be trustee in the place of the mortgagor and vest the head term in the new trustee (*q*). A power of attorney to assign the nominal reversion is sometimes inserted.

Covenants for title.

**236.** In the case of a mortgagor expressed to convey leaseholds as beneficial owner there are implied covenants that the lease is valid, and that all the rents and covenants have been paid and observed, and also that the person conveying will pay the rent and perform the covenants, and keep the mortgagee indemnified against non-payment or non-observance of the same respectively (*r*).

Renewable leases.

**237.** In the case of renewable leaseholds, if either mortgagor or mortgagee is able to obtain a renewal of the lease, the renewed lease is treated as engrafted on the old and as forming part of the mortgage security (*s*).

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collection of forms of mortgages of leaseholds applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. III., p. 46; Vol. VIII., pp. 626 *et seq.* 746, 750, 764; Vol. XVI., pp. 271, 413, 415; and for further charges, see *ibid.*, Vol. VIII., pp. 800 *et seq.*, 818.

(*l*) See *ibid.*, Vol. VIII., p. 631.

(*m*) *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238; see, generally, title LANDLORD AND TENANT, Vol. XVIII., pp. 588 *et seq.*

(*n*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 627. A second mortgage by demise for a term concurrent with the first mortgage by demise creates a legal term, not a mere equitable charge (*Re Moore and Hulme's Contract* (1911), 56 Sol. Jo. 89).

(*o*) Nor has a lessor any equity to compel a person between whom and himself there is no privity to take an assignment of the term or make himself liable on the covenants even though such person has taken possession (*Moores* v. *Choat* (1839), 8 Sim. 508; *Moore* v. *Greg* (1848), 2 Ph. 717).

(*p*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 504.

(*q*) *London and County Banking Co.* v. *Goddard*, [1897] 1 Ch. 642. A declaration of trust in favour of the mortgagee does not render him liable to the lessor for the rent and covenants of the lease (*Walters* v. *Northern Coal Mining Co.* (1855), 5 De G. M. & G. 629); nor does a declaration of trust prevent the trustee in bankruptcy of the mortgagor from disclaiming the nominal reversion (*Re Maughan, Ex parte Monkhouse* (1885), 14 Q. B. D. 956). For forms, see Encyclopædia of Forms and Precedents, Vol. III., pp. 658, 659.

(*r*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1), (D.); see p. 123, *ante*.

(*s*) *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40, 62, C. A.; *Leigh* v. *Burnett* (1885), 29 Ch. D. 231; *Rakestraw* v. *Brewer* (1729), 2 P. Wms. 511.

SECT. 3. Leaseholds — Fixtures.

**238.** Mortgages of leaseholds, whether by assignment or sub-demise, are, so far as fixtures are concerned, on the same footing as freeholds (*t*). If a tenant who has put up fixtures, which as against the landlord he is entitled to remove, mortgages his leasehold interest, the assurance will pass those fixtures whether they are mentioned or not (*u*), and whether the assurance is a legal mortgage or by deposit of deeds (*v*), and whether the articles were affixed before or after the mortgage (*w*). But in the case of a mortgage of leaseholds by demise, the absolute property in the fixtures as separate chattels, with the right to remove and sell them, does not pass to the mortgagee unless an intention to that effect is apparent, but only the right to them during the demise (*x*).

## SECT. 4.—*Incorporeal Hereditaments.*

**Incorporeal hereditaments.**

**239.** Incorporeal hereditaments, such as reversions, remainders, manors, advowsons, commons, tithe rentcharge and other rentcharges, annuities and other property of a like nature existing in gross and apart from the ownership of corporeal property, may be the subject of a legal mortgage which must be created by deed (*y*). Incorporeal hereditaments of a freehold nature are mortgaged in the same way as other freehold hereditaments (*z*).

**Reversions and remainders.**

**240.** Reversions and remainders, whether vested or contingent, may be the subject of a mortgage created by deed (*a*). Where the contingency makes the security a very speculative one, a policy of insurance to guard against the particular risk is frequently taken (*b*).

**Manors.**

**241.** A manor properly consists of demesne lands, jurisdiction in a court baron, and services of free tenants in fee liable to escheat and owing attendance at the court (*c*). The mortgage of a manor includes any copyholds of the manor subsequently purchased by and surrendered to the mortgagor (*d*).

**Advowsons.**

**242.** An advowson is a perpetual right of presentation to a church or an ecclesiastical benefice. An advowson is often

(*t*) *Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481. As to the position in the case of a mortgage of freeholds, see p. 119, *ante*.

(*u*) *Meux* v. *Jacobs*, *supra*.

(*v*) *Re Richards, Ex parte Astbury, Ex parte Lloyd's Banking Co.* (1869), 4 Ch. App. 630; *Re Gawan, Ex parte Barclay* (1855), 5 De G. M. & G. 403; *Williams* v. *Evans* (1856), 23 Beav. 239.

(*x*) *Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64, C. A.

(*y*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 361. For a collection of forms of legal mortgages of incorporeal hereditaments, applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 660 *et seq.*

(*z*) As to this method, see pp. 112 *et seq.*, *ante*.

(*a*) For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 660, 771, 773; Vol. XVI., pp. 419, 426 *et seq.*

(*b*) See *ibid.*, Vol. VIII., pp. 760 *et seq.*

(*c*) As to the nature of a manor or reputed manor, see title COPYHOLDS, Vol. VIII., pp. 3 *et seq.*; and as to what property and rights pass by the grant of a manor, see *ibid.*, p. 19.

(*d*) *Doe* d. *Gibbons* v. *Pott* (1781), 2 Doug. (K. B.) 710.

appendant to a manor, and in such a case it passes by a conveyance of the manor (*e*). When it is severed and in gross it is mortgaged, like any other incorporeal hereditament, by an instrument under seal (*f*). Though the legal right to present to the church is vested in the mortgagee, he is a mere trustee for the mortgagor and must present the person nominated by the latter (*g*). An advowson is a very indifferent security, as it produces no profit and can only be made available by the exercise of the power of sale, and if sold during a vacancy, the purchaser does not acquire the right to present for that turn (*h*).

Rights of common in gross.

**243.** A right of common in gross is a right of common possessed by one person over the lands belonging to another, not as appendant or appurtenant to any lands of his own, but as an independent subject of property (*i*). This is not a common form of property, and is seldom, if ever, met with as the subject of a mortgage.

Tithe rentcharges.

**244.** Tithe rentcharges in lay hands are real estate, and are mortgaged by assurances applicable to corporeal hereditaments (*j*).

Rentcharges.

**245.** Grants of rentcharges for an estate in fee simple are not uncommon in Lancashire and in some other parts of the country. Such rentcharges may be the subject of a mortgage in fee simple (*k*).

Rates.

**246.** Rates levied under different statutory powers may be the subject of a mortgage. But as the power to mortgage is purely statutory, it is necessary in every case to consult the statute under which the borrower is acting to see if the contemplated security is within the purview of the Act (*l*).

## SECT. 5.—*Personal Chattels.*

Personal chattels.

**247.** A mortgage of personal chattels is called a bill of sale (*m*). Every bill of sale made or given in consideration of any sum under

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(*e*) Co. Litt. 307 a; *A.-G.* v. *Sitwell* (1835), 1 Y. & C. (EX.) 559; see title ECCLESIASTICAL LAW, Vol. XI., pp. 564, 565.

(*f*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 673. The Benefices Act, 1898 (61 & 62 Vict. c. 48), does not affect the reservation of a right of redemption in a mortgage of an advowson (*ibid.*, s. 1 (7)).

(*g*) *Amhurst* v. *Dawling* (1700), 2 Vern. 401; *Mackensie* v. *Robinson* (1747), 3 Atk. 559; and the other cases cited in title ECCLESIASTICAL LAW, Vol. XI., p. 574, note (*d*).

(*h*) *Lincoln* (*Bishop*) v. *Wolforston* (1764), 3 Burr. 1504; and as to the restrictions on sale of an advowson, see title ECCLESIASTICAL LAW, Vol. XI., pp. 582 *et seq.*

(*i*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 446, 457.

(*j*) Encyclopædia of Forms and Precedents, Vol. VIII., p. 671. As to tithe rentcharge generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 745 *et seq.*

(*k*) Encyclopædia of Forms and Precedents, Vol. VIII., pp. 667, 669; see title RENTCHARGES AND ANNUITIES.

(*l*) For rates generally, see title RATES AND RATING. For forms of mortgages of rates, see Encyclopædia of Forms and Precedents, Vol. III., p. 117; Vol. VI., p. 310; Vol. VIII., pp. 194 *et seq.*; and as to the powers of local authorities to borrow, see p. 112, *ante*.

(*m*) See title BILLS OF SALE, Vol. III., pp. 1 *et seq.* For the meaning of

SECT. 5. Personal Chattels.

£30 is void (*n*). If given by way of security for the payment of money by the grantor thereof, it is void unless it is in accordance with the statutory form (*o*), and it must have a schedule annexed thereto or written thereon containing an inventory of the personal chattels therein comprised (*p*). Debentures issued by any mortgage, loan or other incorporated company, and secured upon the capital, stock or goods, chattels and effects of such company, are excluded from the operation of the statutory provisions (*q*) affecting bills of sale (*r*).

## SECT. 6.—*Policies of Insurance and Choses in Action.*

Policies of life insurance.

**248.** Policies of insurance on the lives of persons are frequent subjects of mortgage (*s*) either alone or with other property. The policies may either be upon the life of the mortgagor or upon the life of another person. The validity of a policy depends upon the absence of misrepresentation at the time the policy was effected (*t*), the assured not having done any act forbidden by the policy which makes it void, and the person effecting the policy having an insurable interest in the life of the person insured (*u*).

Covenants for title.

**249.** There are no implied covenants (*a*) in the case of a mortgage of a policy of insurance, and the security must contain express covenants for whatever acts the mortgagee requires the mortgagor to perform or abstain from. The covenants by the mortgagor which are usually inserted are as follows (*b*): not to permit the policy to become void, and if it becomes void to effect a new policy in lieu thereof; and to pay the premiums and deliver receipts to the mortgagee. It is also usual to insert a provision that the mortgagee may keep the policy on foot in case the mortgagor

"personal chattels," see title BILLS OF SALE, Vol. III., p. 20. For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 780 *et seq.*

(*n*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 12; *Davis* v. *Usher* (1884), 12 Q. B. D. 490.

(*o*) Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9. See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 780, 783. For forms of affidavit on registration and renewal of registration, see *ibid.*, pp. 793, 794; and for forms of satisfaction, see *ibid.*, p. 898.

(*p*) As to the form of a bill of sale, see title BILLS OF SALE, Vol. III., pp. 34 *et seq.*; Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 5.

(*q*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43).

(*r*) See titles BILLS OF SALE, Vol. III., p. 19; COMPANIES, Vol. V., pp. 345, 365, note (*b*).

(*s*) For forms of mortgages of insurance policies, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 680, 682, 754 *et seq.*; Vol. XVI., p. 389. For a further charge, see *ibid.*, Vol. VIII., pp. 817, 818.

(*t*) See title INSURANCE, Vol. XVII., pp. 550 *et seq.* As to the insurable interest of a mortgagee of property, see *ibid.*, pp. 521 *et seq.*

(*u*) *Ibid.*, pp. 544 *et seq.* As to the effect of suicide, see *ibid.*, pp. 556 *et seq.*

(*a*) As to the covenants for title implied in a conveyance by way of mortgage by the mortgagor conveying "as beneficial owner," see p. 122, *ante*.

(*b*) Encyclopædia of Forms and Precedents, Vol. VIII., pp. 680, 682.

neglects to do so, and that the moneys advanced for that purpose shall be a charge on the policy (*c*).

Priority of mortgages depends on notice.

**250.** The mortgage does not require the insertion of a power of attorney to enable the mortgagee to sue for and recover the amount insured. But notice of the mortgage must be given to the insurance office, and the dates on which several notices are received will regulate the priority of all claims under different assignments (*d*). A second mortgagee with notice of a first mortgage does not, however, gain priority over the first mortgagee by giving the first notice to the insurance company (*e*).

Power of sale.

**251.** The statutory power of sale conferred on mortgagees applies to mortgages executed since the 31st December, 1881, by deed of policies of insurance and other choses in action (*f*).

Ownership of policy.

**252.** When a policy of insurance is taken out by the creditor as part of his security, and the premiums are paid by the debtor or charged against him in account, or if it is agreed or can be inferred from the bargain between the parties that the debtor has undertaken to pay the premiums, the policy, or the balance of the insurance money after discharge of the debt, belongs to the debtor (*g*). But if a mortgagee of an annuity or other property which depends upon a life insures the life of the mortgagor merely for his own protection, paying the premiums out of his own pocket, the policy belongs to the mortgagee (*h*); and the mere fact of the creditor having charged the premiums against the debtor without evidence

(*c*) Even without such an express provision the mortgagee is entitled to charge the property with any sums he may advance for keeping up the policy, and with interest thereon at 4 per cent. (*Bellamy* v. *Brickenden* (1861), 2 John. & H. 137; *Gill* v. *Downing* (1874), L. R. 17 Eq. 316).

(*d*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), ss. 1, 3; and see titles CHOSES IN ACTION, Vol. IV., pp. 379, 395; INSURANCE, Vol. XVII., p. 559. A letter by a debtor enclosing a policy on his life and requesting the creditor to instruct his solicitor to prepare the necessary assignment (*Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421), or a memorandum accompanying a deposit of a policy by which the borrower agrees to execute a valid mortgage upon request (*Spencer* v. *Clarke* (1878), 9 Ch. D. 137), is not an assignment within the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 1.

(*e*) *Newman* v. *Newman* (1885), 28 Ch. D. 674; and non-production of the policy to the second mortgagee affects him with constructive notice of the first mortgage (*Spencer* v. *Clarke, supra*; *Re Weniger's Policy*, [1910] 2 Ch. 291).

(*f*) As to this power, see pp. 248 *et seq.*, *post*.

(*g*) *Holland* v. *Smith* (1806), 6 Esp. 11; *Morland* v. *Isaac* (1855), 20 Beav. 389; *Re Storie's Trusts* (1859), 1 Giff. 94; *Lea* v. *Hinton* (1854), 5 De G. M. & G. 823, C. A.; *Courtenay* v. *Wright* (1860), 2 Giff. 337; *Salt* v. *Northampton* (*Marquess*), [1892] A. C. 1, 16; and if the debtor is charged with the premiums in account with the creditor and has not disputed his liability to pay them, it will not destroy his right to the policy that he has refused to pay the premiums (*Drysdale* v. *Piggott* (1856), 8 De G. M. & G. 546); and see title INSURANCE, Vol. XVII., pp. 562 *et seq.*

(*h*) *Gottlieb* v. *Cranch* (1853), 4 De G. M. & G. 440, C. A.; *Re Jacob's Estate, Lancaster* v. *Gaselee, Ex parte Lancaster* (1851), 4 De G. & Sm. 524; *Preston* v. *Neele* (1879), 40 L. T. 303.

SECT. 6. Policies of Insurance and Choses in Action.

that the debtor agreed to pay them does not give the debtor a right to the policy (*i*).

Choses in action.

**253.** Debts and other legal choses in action and equitable interests in personalty may be the subject of mortgages (*k*).

Sub-mortgage.

Under this class of security falls a mortgage of an already existing mortgage, called a sub-mortgage (*l*). The security consists of—

(1) a personal covenant by the original mortgagee for payment of the principal sum advanced and interest;

(2) an assignment of the original mortgage debt and interest and the benefit of the power of sale (*m*), and all the other securities for the same;

(3) a conveyance of the mortgaged property (including in the case of leaseholds mortgaged by demise the benefit of the trust and provisions contained in the original mortgage of and concerning the nominal reversion thereby reserved), subject to such right of redemption as may be subsisting under the original mortgage; and

(4) a proviso for redemption on payment of the principal and interest secured by the sub-mortgage.

Before completing a sub-mortgage the lender should inquire from the original mortgagor as to the actual amount due on the mortgage, and should give him notice of his sub-mortgage.

On a mortgage of a debt, however secured, the mortgagee should be relieved from any obligation to sue for or require payment of the debt or any part of it, or to take any steps for that purpose, unless he shall think fit, and from any liability for loss occasioned by his omission to do so (*n*).

Stocks and shares.

**254.** The legal title of a mortgagee to stocks and shares in a public company is given by a transfer in accordance with the requirements of the constitution of the corporation and duly registered in the name of the mortgagee (*o*). This is generally accompanied by an independent document setting forth the actual nature of the security (*p*). There is a common practice of executing a transfer of shares in blank, and, only when it becomes necessary to assert the title of the mortgagee, to insert his name and register the

(*i*) *Bruce* v. *Garden* (1869), 5 Ch. App. 32.

(*k*) As to the requirements as to form and notice which are essential in order to give the mortgagee the right to enforce his security and recover the legal chose in action, see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); title CHOSES IN ACTION, Vol. IV., pp. 367, 370 *et seq.* For a collection of forms of mortgages of legal choses in action applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 685 *et seq.*, 750, 754; Vol. XVI., pp. 418, 419.

(*l*) For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 867; and see, further, p. 180, *post*.

(*m*) This will suspend the original mortgagee's power of sale during the continuance of the sub-mortgage; see *Cruse* v. *Nowell* (1856), 25 L. J. (CH.) 709.

(*n*) See *Ex parte Mure* (1788), 2 Cox, Eq. Cas. 63; *Williams* v. *Price* (1824), 1 Sim. & St. 581. As to the right of a sub-mortgagee to prove in the administration of the assets of the deceased mortgagor, see *Re Burrell*, *Burrell* v. *Smith* (1869), L. R. 7 Eq. 399. For forms, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 700, 702, 704, 705.

(*o*) See title COMPANIES, Vol. V., pp. 197 *et seq.*

(*p*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 708, 710; and compare *ibid.*, Vol. II., pp. 484, 486; Vol. XIV., pp. 201, 202.

document. This may be good or bad according as the shares are required to be transferred by deed or not (*q*). A deed cannot be altered after it is once executed (*r*), and a blank transfer, unless it is re-executed and re-delivered after the name of the transferee has been inserted, does not pass the legal title to the stock or shares which require to be transferred by deed (*s*). Where the deed of transfer is invalid, registration of the transferee does not give him any title (*t*); nor does he acquire a legal title until all the conditions required by the articles have been fulfilled to give him, as between himself and the company, a present, absolute and unconditional right to have the transfer registered (*u*).

SECT. 6. Policies of Insurance and Choses in Action.

## SECT. 7.—*Ships, Cargo and Freight.*

Ships.

**255.** A mortgage of a British ship (*v*) is purely a statutory matter (*a*). The instrument creating the security must be in the form given in the statute and must be produced to the registrar of the ship's port of registry and recorded in the register book. Mortgages are registered in the order of time in which they are produced to the registrar (*b*) and rank in priority according to the order in which they are so recorded (*c*). The mortgage confers a power of sale (*d*).

Priorities of mortgages on ships.

No notice of trust is allowed to be entered on the register (*e*), and a legal mortgage of a ship in statutory form and registered has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the equitable charge (*f*).

Property included in mortgage.

A mortgage of a ship passes as incident thereto all articles necessary for the navigation of the ship or the prosecution of the adventure which were on board at the date of the mortgage or were brought on board in substitution for them subsequently to the mortgage (*g*).

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(*q*) See title COMPANIES, Vol. V., p. 191; and see p. 169, *post*.

(*r*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 411.

(*s*) *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555, C. A. But a transfer is not invalidated by a misstatement of the consideration or an erroneous stamp (*ibid.*); and see titles COMPANIES, Vol. V., pp. 191 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 384. As to the effect of an agent acting in excess of his authority in dealing with a blank transfer, see titles COMPANIES, Vol. V., p. 194; EQUITY, Vol. XIII., p. 81; ESTOPPEL, Vol. XIII., pp. 392, 394; *Fry and Mason* v. *Smellie* (1912), 132 L. T. Jo. 443, C. A.

(*t*) *France* v. *Clark* (1884), 26 Ch. D. 257, C. A.; *Hare* v. *London and North Western Rail. Co.* (1860), John. 722. As to a person obtaining a title against the company by estoppel arising from the issue of a certificate, see titles COMPANIES, Vol. V., pp. 182 *et seq*; ESTOPPEL, Vol. XIII., pp. 408 *et seq.*

(*u*) *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, 28; *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Moore* v. *North Western Bank*, [1891] 2 Ch. 599; *Nanney* v. *Morgan* (1887), 35 Ch. D. 598; affirmed, 37 Ch. D. 346, C. A.

(*v*) See, further, p. 138, *post*; title SHIPPING AND NAVIGATION. As to discharge of such mortgages, see p. 313, *post*.

(*a*) For Forms relating to mortgages of ships, see Encyclopædia of Forms and Precedents, Vol. XIV., pp. 55 *et seq.*

(*b*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 31.

(*c*) *Ibid.*, s. 33.

(*d*) *Ibid.*, s. 35; see p. 249, *post*.

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 56.

(*f*) *Black* v. *Williams*, [1895] 1 Ch. 408; *Barclay & Co., Ltd.* v. *Poole*, [1907] 2 Ch. 284.

(*g*) *Coltman* v. *Chamberlain* (1890), 25 Q. B. D. 328.

SECT. 7. Ships, Cargo and Freight.

A mortgagor of a ship remaining in possession retains all the rights and powers of ownership, and his contracts with regard to the ship are valid and effectual provided his dealings do not materially impair the security of the mortgagee (*h*). But the mortgagee is not bound by a charterparty for the carriage at a high rate of contraband of war to belligerents (*i*).

Power of mortgagor to charter.

Mortgage of freight.

**256.** Frequently a statutory mortgage of a ship is accompanied by an independent collateral mortgage by the statutory owner of the freight earnings and the policies of insurance on the ship. With regard to such interests, it is not necessary to comply with the statutory provisions to make a valid security (*k*).

Independently of contract, the mortgagee of a ship does not obtain any assignment of the freight, nor does the mortgagor undertake to employ the ship in any particular way or to employ the ship so as to earn freight at all. Until the mortgagee takes possession the mortgagor may allow the ship to lie tranquil in dock or employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit or for another at a nominal freight (*l*); but when a mortgagee takes actual possession he becomes owner of the ship (*m*), and everything which represents the earnings of the ship which had not been paid before must be paid to the mortgagee as such owner, but this is limited to unpaid freight which the ship was in the course of earning when he took possession (*n*).

## SECT. 8.—*Stamps on Mortgages.*

Legal mortgages etc.

**257.** There are chargeable upon all legal (*o*) mortgages (*p*)

(*h*) *Collins* v. *Lamport* (1864), 4 De G. J. & Sm. 500; *The Heather Bell*, [1901] P. 272, C. A.

(*i*) *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, [1905] 1 K. B. 815, C. A.

(*k*) *Mestaer* v. *Gillespie* (1806), 11 Ves. 621, 629; *Davenport* v. *Whitmore* (1836), 2 My. & Cr. 177; *Gardner* v. *Lachlan* (1838), 4 My. & Cr. 129; *Langton* v. *Horton* (1842), 1 Hare, 549.

(*l*) *Keith* v. *Burrows* (1877), 2 App. Cas. 636, 645.

(*m*) He is justified in taking possession, although there has been no actual default under the mortgage, if the mortgagor is working the ship in such a way as materially to impair the security (*The Manor*, [1907] P. 339, C. A.).

(*n*) *Keith* v. *Burrows* (1877), 2 App. Cas. 636, 646, 660; *Liverpool Marine Credit Co.* v. *Wilson* (1872), 7 Ch. App. 507, 511; *Shillito* v. *Biggart*, [1903] 1 K. B. 683, 687. Further, the first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight in priority to every equitable charge of which he had no notice, and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (*Liverpool Marine Credit Co.* v. *Wilson*, *supra*); and see, further, title SHIPPING AND NAVIGATION.

(*o*) As to duty upon equitable mortgages, see p. 136, *post*.

(*p*) "Mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (1)). By virtue of this provision "mortgage" includes conditional surrenders by way of mortgage (see p. 125, *ante*), further charges (see p. 136, *post*), and any disposition by way of security of any property, real or personal; any conveyance on trust for sale by way of security (see

(including a mortgage of an equity of redemption (*q*)), covenants (*r*) (except marketable securities otherwise chargeable (*s*)), and warrants of attorney to confess and enter up judgment (*t*), being the only (*a*) principal or primary (*b*) security (*c*) for the payment or repayment of money, and upon collateral, auxiliary (*d*), additional, or substituted (*e*) securities (other than equitable mortgages (*f*)), or

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p. 118, *ante*), except conveyances for the benefit of creditors generally (see *Coates* v. *Perry* (1821), 3 Brod. & Bing. 48), or for specified creditors accepting composition in full satisfaction of their debts, or exceeding five in number; any deed or writing qualifying any disposition of property apparently absolute but intended by way of security only; any agreement for a mortgage accompanied by a deposit of deeds and not chargeable as an equitable mortgage (see *United Realization Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 361); any deed operating as a mortgage of any stock or marketable security (see *Gartsides* (*Brookside Brewery*), *Ltd.* v. *Inland Revenue Commissioners* (1900), 82 L. T. 686; *Kennedy* v. *Inland Revenue Commissioners* (1900), 65 J. P. 9). The definition is, however, not necessarily exhaustive (*City of London Brewery Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 121, 139, C. A.). Duty is not payable for interest in arrear unless capitalised (*Barker* v. *Smark* (1841), 7 M. & W. 590), or interest calculated from a past date (*Pierpoint* v. *Gower* (1842), 4 Man. & G. 795), or mortgagee's costs (*Doe* d. *Scrutton* v. *Snaith* (1832), 8 Bing. 146; *Doe* d. *Merceron* v. *Bragg* (1838), 8 Ad. & El. 620; *Wroughton* v. *Turtle* (1843), 11 M. & W. 561; *Lysaght* v. *Warren* (1846), 10 I. L. R. 269), or banker's commission (*Frith* v. *Rotherham* (1846), 15 M. & W. 39). As to money payable only on a contingent event, see *Mortimore* v. *Inland Revenue Commissioners* (1864), 2 H. & C. 838; *Maxwell* v. *Inland Revenue Commissioners* (1866), 2 Sc. L. R. 229.

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (6).

(*r*) If a covenant for the payment or repayment of money comes within the specific definition of an instrument otherwise chargeable, it is to be stamped as such (*Suffield* (*Lord*) v. *Inland Revenue Commissioners*, [1908] 1 K. B. 865); and see also *United Realization Co.* v. *Inland Revenue Commissioners*, *supra*, *per* WILLS, J., at p. 367.

(*s*) As to bonds, see title BONDS, Vol. III., pp. 103 *et seq.* As to debentures, see titles COMPANIES, Vol. V., pp. 362 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., pp. 361, 362; and see also as to marketable securities, *Rowell* v. *Inland Revenue Commissioners*, [1897] 2 Q. B. 194.

(*t*) As to warrants of attorney, see pp. 89, 90, *ante*; title JUDGMENTS AND ORDERS, Vol. XVIII., p. 190.

(*a*) See *United Realization Co.* v. *Inland Revenue Commissioners*, *supra*, *per* WILLS, J., at p. 367.

(*b*) See *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, [1903] 1 K. B. 689, 695, 696, 697, C. A.; *Suffield* (*Lord*) v. *Inland Revenue Commissioners*, *supra*, *per* BRAY, J., at pp. 890, 891.

(*c*) As to the meaning of "security," see *Jones* v. *Inland Revenue Commissioners*, *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484; *Clifford* v. *Inland Revenue Commissioners*, [1896] 2 Q. B. 187; *National Telephone Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 250, C. A.; affirmed, [1900] A. C. 1; *Speyer Brothers* v. *Inland Revenue Commissioners*, [1907] 1 K. B. 246, C. A.; *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, *supra*, at pp. 697, 698, 699. As to "securities for money," see title MONEY AND MONEY-LENDING, p. 48, *ante*, note (*o*).

(*d*) See, as to auxiliary securities, *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, *supra*.

(*e*) As to substituted securities, see *Mount Lyell Mining and Rail. Co.* v. *Inland Revenue Commissioners*, [1905] 1 K. B. 161, 167, 168, 169, C. A.; *Gartsides* (*Brookside Brewery*), *Ltd.* v. *Inland Revenue Commissioners*, *supra*.

(*f*) As to the duty on equitable mortgages, see p. 136, *post*.

SECT. 8. **Stamps on Mortgages.**

securities by way of further assurance for such purposes (*g*), when the principal security is duly stamped, the same duties as are chargeable on bonds (*h*), according as they are principal or collateral securities respectively (*i*). The duty is not affected by the loan being repayable by instalments (*k*).

**Equitable mortgages.**

**258.** Equitable mortgages (*l*) are chargeable with a duty of 1*s.* for every £100 or part of £100 of the amount secured (*m*).

**Further charges.**

**259.** Further charges, whether created by separate instrument or by a further advance made on a transfer of the original security, are chargeable with duty as a principal security for the amount of the advance (*n*), but no duty is chargeable in respect of further security given for the original loan or any additional covenant for the repayment thereof contained in the further charge (*o*).

**Further advances.**

**260.** A security providing for further advances in the future up to a specified limit is chargeable with duty as though the full

(*g*) See *City of London Brewery Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 121, C. A.; *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, [1903] 1 K. B. 689, C. A., *per* STIRLING, L.J., at p. 697; and see *Suffield (Lord)* v. *Inland Revenue Commissioners*, [1908] 1 K. B. 865, 891.

(*h*) See title BONDS, Vol. III., p. 103. The duty is 2*s.* 6*d.* per £100 on the amount secured by principal securities, and 6*d.* per £100 on collateral securities; for the scale of intermediate amounts, see *ibid.* As to stamp duty generally, see title REVENUE.

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (1), Sched. I.; Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7. The limit of 10*s.* set on the duty chargeable on collateral, auxiliary, additional or substituted securities, or securities by way of further assurance, by *ibid.*, s. 7 (see title BONDS, Vol. III., p. 103), is not retrospective (*Suffield (Lord)* v. *Inland Revenue Commissioners*, *supra*).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (2); *Jones* v. *Inland Revenue Commissioners*, *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484, 491, 494; and see *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, *supra*, at p. 697. A perpetual annuity granted in consideration of the payment of a sum of money is not necessarily a mortgage (*Mersey Docks and Harbour Board* v. *Inland Revenue Commissioners*, [1897] 2 Q. B. 316, C. A.); and see p. 88, *ante*; and title RENTCHARGES AND ANNUITIES.

(*l*) An equitable mortgage for the purposes of the Stamp Act, 1891 (54 & 55 Vict. c. 39), is an agreement or memorandum under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title of any property whatsoever, other than stock or marketable security, or creating a charge on such property (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 86 (2)). A pledge of goods accompanied by delivery of documents of title to the goods is not an equitable mortgage (*Harris* v. *Birch* (1842), 9 M. & W. 591), even though a power of sale is thereby given (*Re Attenborough and Inland Revenue Commissioners* (1855), 11 Exch. 461). As to the characteristics of equitable mortgages generally, see pp. 74 *et seq.*, *ante*. The Commissioners of Inland Revenue consider that instruments, though under hand only, by which the mortgagee acquires the powers and advantages of a legal mortgagee, *e.g.*, a power of sale, should be stamped as a legal mortgage; compare *United Realization Co.* v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 361.

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Mortgage" (3).

(*n*) *Ibid.*, Sched. I., "Mortgage" (2), (4). Such duty is payable in addition to the duty chargeable on the consideration for the transfer, as to which see p. 174, *post*. As to reconveyances, see p. 315, *post*.

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (3); and see note (*m*), p. 174

amount of the further advances had already been advanced (*p*). Where the amount of the future advances is not limited by the security, any advance in excess of the amount on which duty has already been paid is chargeable with duty as a new security (*q*).

Copyholds.

**261.** A conditional surrender or grant of copyhold or customary hereditaments alone by way of mortgage, or the memorandum thereof if made out of court, or the copy of court roll thereof if made in court, is chargeable with the same duty as a mortgage (*r*).

Where other property, not of copyhold or customary tenure, is included as security for the same debt, the instrument relating to it is chargeable with duty as a mortgage on the full amount of the debt, and the surrender or memorandum thereof, or copy of court roll as the case may be, is chargeable with not more than 10*s*. (*s*).

Stocks, shares etc.

**262.** Any security for the transfer or re-transfer of any stock, unless under hand only, is chargeable with the same duty as a mortgage for an amount equal to the value of the stock, and dealings therewith are chargeable as similar instruments dealing with a mortgage (*t*).

Dispositions of all marketable securities upon mortgage under hand only are chargeable with a duty of 6*d*. (*u*).

Exemptions.

**263.** Mortgages for certain purposes (*a*) are exempt from stamp duty, such as mortgages of ecclesiastical property for the purposes of repairs and improvements (*b*); mortgages for raising money for redemption of land tax (*c*); mortgages under the Poor Law

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(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 88 (1). This applies also to securities for accounts current (*ibid.*); and see *Suffield (Lord)* v. *Inland Revenue Commissioners*, [1908] 1 K. B. 865, 887.

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 88 (2). The date from which the time for stamping runs is the date of the advance (*ibid.*; and see title REVENUE). A receipt for such further advance indorsed on the security, if the latter is duly stamped, requires no stamp (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Receipt" (11)). Advances for the insurance of mortgaged property, or to keep up a life policy comprised in the security, or for renewing a grant or lease for lives upon the dropping of a life, are not reckoned as further advances for the purpose of calculating duty (*ibid.*, s. 88 (3)).

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (4). Where the surrender is preceded by a deed of covenant to surrender containing a covenant for payment, it is customary to stamp the deed of covenant as the principal security, and the subsequent surrender as a collateral security. As to such a deed of covenant, see pp. 124, 125, *ante*.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (5). The statute omits to mention at what rate duty is chargeable up to the maximum of 10*s*.; presumably the rate for a collateral security applies; see *British Oil and Cake Mills, Ltd.* v. *Inland Revenue Commissioners*, [1903] 1 K. B. 689, 699, C. A.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (1).

(*u*) *Ibid.*, s. 23, Sched. I. Dispositions by deed are chargeable as a mortgage of any other property (*ibid.*, Sched. I., "Mortgage" (4)).

(*a*) See also p. 94, *ante*.

(*b*) Clergy Residences Repair Act, 1776 (17 Geo. 3, c. 53), s. 15; adopted by the Parsonages Act, 1838 (1 & 2 Vict. c. 23), s. 13; the Parsonages Act, 1865 (28 & 29 Vict. c. 69), s. 3; and the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 64; see title ECCLESIASTICAL LAW, Vol. XI., p. 759; and see also the Church Building Act, 1822 (3 Geo. 4, c. 72), s. 28.

(*c*) See title LAND TAX, Vol. XVIII., pp. 326, 327, note (*g*); Land Tax Redemption Act, 1805 (45 Geo. 3, c. 77), s. 1.

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Amendment Act, 1834 (*d*), or the Parish Property and Parish Debts Act, 1842 (*e*); mortgages to a benefit building society by a member of the society for not exceeding £500 (*f*), and ship mortgages (*g*).

Separate deed of covenant.

**264.** A separate deed of covenant made on the mortgage of any property, and relating solely to the enjoyment thereof or title thereto, or the production of the title deeds thereof, or all or any of such things, is chargeable with a duty equal to that on the mortgage, with a maximum of 10*s.* (*h*).

# Part IV.—The Equity of Redemption.

## SECT. 1.—*Nature.*

Nature of equity of redemption.

**265.** The right of a mortgagor to redeem his property upon payment of principal, interest and costs (*i*) is not a mere right, but an equitable estate or interest in the property mortgaged (*j*). Although the mortgagor has mortgaged his property, he may still deal with it in any way consistent with the rights of the mortgagee (*k*). On a mortgage of chattels, even after the mortgagee has seized the goods, the mortgagor can still redeem so long as the

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(*d*) 4 & 5 Will. 4, c. 76, s. 86.

(*e*) 5 & 6 Vict. c. 18, s. 9, incorporating the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76); see title POOR LAW.

(*f*) See title BUILDING SOCIETIES, Vol. III., p. 372. Friendly society mortgages are not exempt; see title FRIENDLY SOCIETIES, Vol. XV., p. 161.

(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "General Exemptions"; and see *Deddington Steamship Co., Ltd.* v. *Inland Revenue Commissioners*, [1911] 2 K. B. 1001, C. A.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Covenant."

(*i*) As to the right of redemption, see, further, p. 71, *ante*. As to the effect of non-payment at common law, see Littleton's Tenures, s. 332; Bac. Abr., tit. Mortgage, 22; and note (*g*), p. 71, *ante*; and see title EQUITY, Vol. XIII., pp. 90 *et seq.*

(*j*) *Santley* v. *Wilde*, [1899] 2 Ch. 474, 475, C. A.; see *Lloyd* v. *Lander* (1821), 5 Madd. 282, 289.

(*k*) "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and, therefore, cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land" (*Casborne* v. *Scarfe* (1738), 1 Atk. 603, *per* Lord HARDWICKE, L.C.; *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, 360, C. A.; affirmed, *sub nom. Pugh* v. *Heath* (1882), 7 App. Cas. 235; *Jennings* v. *Jordan* (1881), 6 App. Cas. 698, *per* Lord BLACKBURN, at p. 714; *Tarn* v. *Turner* (1888), 39 Ch. D. 456, C.A., *per* KEKEWICH, J., at p. 460; *Pawlett* v. *A.-G.* (1667), Hard. 465, 469). A mortgagor is not after execution of a legal mortgage "seised" of the land according to the common law, and, therefore, is not liable to the burdens of tenure incident to customary freeholds, such as a heriot due to the lord of a manor on the death of a tenant seised of a tenement in the manor (*Copestake* v. *Hoper*, [1908] 2 Ch. 10, C. A.). For forms of mortgage of equity of redemption, and notices thereof, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 725, 728, 730, 901, 902; and see p. 76, *ante*.

goods are in the possession of the mortgagee (*l*). The right of redemption is incident to the contract of mortgage, and does not depend on the form of the transaction (*m*), and cannot be negatived by contemporaneous agreement or ever clogged (*n*).

SECT. 1. Nature.

## SECT. 2.—*Persons Entitled to Redeem.*

**266.** The mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem (*o*).

Persons who can redeem.

The mortgagor, until he has absolutely assigned his equity of redemption, can redeem the mortgaged property (*p*), and a mortgagor who has entirely parted with the equity of redemption nevertheless, upon being sued for payment of the mortgage debt by the mortgagee, acquires a new right to redeem (*q*).

Mortgagor.

The following persons claiming under the mortgagor can redeem: volunteers (*r*); subsequent incumbrancers (*s*); a tenant for years by a lease made subsequent to the mortgage which the mortgagee refuses to confirm (*t*); a surety on payment by himself or refusal by the principal debtor to discharge the mortgage debt, or if he has mortgaged his own estate as security for the debt (*u*); tenants

Persons claiming under the mortgagor.

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(*l*) *Johnson* v. *Diprose*, [1893] 1 Q. B. 512, C. A.; and see title BILLS OF SALE, Vol. III., pp. 65 *et seq.* As to the distinction between a mortgage and a pledge of chattels, see p. 73, *ante*.

(*m*) *Sampson* v. *Pattison* (1842), 1 Hare, 533; *Kirkwood* v. *Thompson* (1865), 2 De G. J. & Sm. 613; *Banner* v. *Berridge* (1881), 18 Ch. D. 254; *Wynne* v. *Styan* (1847), 2 Ph. 303; *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Re Alison*, *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.; and see p. 71, *ante*. For redemption of mortgages by way of trust for sale, see *Chambers* v. *Goldwin* (1801), 5 Ves. 834; *Wicks* v. *Scriven* (1860), 1 John. & H. 215.

(*n*) See pp. 142 *et seq.*, *post*.

(*o*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227, 229; *Tarn* v. *Turner* (1888), 39 Ch. D. 456, C. A.; *Green* v. *Wynn* (1869), 4 Ch. App. 204, 207.

(*p*) It is immaterial to the mortgagee, so far as the mortgagor's right to redeem is concerned, whether the mortgagor's title is good or bad; the mortgagee is not entitled to dispute it (*Tasker* v. *Small* (1837), 3 My. & Cr. 63, *per* Lord COTTENHAM, L.C., at p. 70); and an assignee of a mortgage is in the same position as the mortgagee (*Walker* v. *Jones* (1866), L. R. 1 P. C. 50, 66). For the corresponding estoppel binding the mortgagor, see title ESTOPPEL, Vol. XIII., p. 407, note (*q*).

(*q*) *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636, *per* STIRLING, J., at p. 645; *Dashwood* v. *Blythway* (1729), 1 Eq. Cas. Abr. 317; *Lockhart* v. *Hardy* (1846), 9 Beav. 349; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; *Palmer* v. *Hendrie* (No. 2) (1860), 28 Beav. 340; *Walker* v. *Jones*, *supra*, at p. 61.

(*r*) *Thorne* v. *Thorne* (1683), 1 Vern. 182; *Howard* v. *Harris* (1683), 1 Vern. 189, 193. The Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), makes voluntary settlements good as against subsequent mortgages; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 101.

(*s*) *Fell* v. *Brown* (1787), 2 Bro. C. C. 276; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 134; *Faulkner* v. *Daniel* (1843), 3 Hare, 199; *Peto* v. *Hammond* (1860), 29 Beav. 91; *Tomlinson* v. *Gregg* (1866), 15 W. R. 51.

(*t*) *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; *Tarn* v. *Turner*, *supra*.

(*u*) *Gleaves* v. *Paine* (1863), 1 De G. J. & Sm. 87; *Re Gleaves*, *Ex parte Paine* (1863), 3 De G. J. & Sm. 458; *Gedye* v. *Matson* (1858), 25 Beav. 310; *Green* v. *Wynn*, *supra*; *Dixon* v. *Steel*, [1901] 2 Ch. 602.

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in common and joint tenants (*a*); a jointress (*b*); a dowress (*c*); a tenant by the curtesy (*d*); a tenant for life (*e*). Purchasers of the equity of redemption redeem according to the dates of their purchases (*f*).

Assignee *pendente lite*.

An assignee *pendente lite* may make himself a party to an action of redemption by *ex parte* application (*g*) and continue the action, and if he does so he is bound by all the proceedings therein (*h*); but he is under no obligation to make himself a party (*i*).

Settled estates.

**267.** When the equity of redemption has been settled, the owner of the first estate of inheritance and all intermediate life estates can redeem (*k*), but a remainderman cannot redeem a mortgage on the settled property without the consent of the tenant for life (*l*). If the equity of redemption has been assigned to the trustees of a settlement, they and not their *cestuis que trust* can redeem, in the absence of any direction by the court to the contrary (*m*).

Legatees, devisees and heirs.

**268.** Legatees whose legacies are charged on the mortgaged property can redeem to protect their legacies (*n*), but only through the personal representative (*o*). In the case of the death of the mortgagor since the 31st December, 1897, until the personal representative has conveyed to the heir by the common law, or the

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(*a*) *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 134; *Waugh* v. *Land* (1815), Coop. G. 129; *Wynne* v. *Styan* (1847), 2 Ph. 303, 307; *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A.; *Bolton* v. *Salmon*, [1891] 2 Ch. 48. They can redeem the whole property, but not their shares separately; for a mortgagee cannot be required to permit redemption of part of the mortgaged property (*Hall* v. *Heward*, *supra*); but see *Waugh* v. *Land*, *supra*, in which case, however, the order is said to have been made by consent (1 Powell, Law of Mortgages, 6th ed., 342 a, n.).

(*b*) *Howard* v. *Harris* (1682), 1 Vern. 33; *Brend* v. *Brend* (1684), 1 Vern. 213; *Smithett* v. *Hesketh* (1890), 44 Ch. D. 161.

(*c*) *Dawson* v. *Bank of Whitehaven* (1877), 6 Ch. D. 218, C. A.; *Meek* v. *Chamberlain* (1881), 8 Q. B. D. 31.

(*d*) *Casborne* v. *Scarfe* (1738), 1 Atk. 603; *Jones* v. *Meredith* (1739), Bunb. 346. As to a husband paying off a mortgage on his wife's separate property, see title HUSBAND AND WIFE, Vol. XVI., p. 403.

(*e*) *Aynsly* v. *Reed* (1754), 1 Dick. 249; *Kinnoul* (*Earl*) v. *Money* (1767), 3 Swan. 202, n.

(*f*) *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L. R. 4 Eq. 537; *Loveday* v. *Chapman* (1875), 32 L. T. 689.

(*g*) R. S. C., Ord. 17, rr. 3, 4.

(*h*) *Winchester* (*Bishop*) v. *Paine* (1805), 11 Ves. 194; *Wood* v. *Surr* (1854), 19 Beav. 551; *Campbell* v. *Holyland* (1877), 7 Ch. D. 166; *Re Parbola*, *Ltd.*, *Blackburn* v. *Parbola*, *Ltd.*, [1909] 2 Ch. 437.

(*i*) *Patch* v. *Ward* (1867), 3 Ch. App. 203.

(*k*) *Gore* v. *Stacpoole* (1813), 1 Dow, 18, H. L.; *Anderson* v. *Stather* (1845), Coll. 209; *Playford* v. *Playford* (1845), 4 Hare, 546.

(*l*) *Ravald* v. *Russell* (1830), You. 9, 21; *Raffety* v. *King* (1876), 1 Keen, 601; *Wicks* v. *Scriven* (1860), 1 John. & H. 215; *Prout* v. *Cock*, [1896] 2 Ch. 808. As to the nature of estates in remainder, see, generally, title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Mills* v. *Jennings* (1880), 13 Ch. D. 639, C. A.

(*n*) *Faulkner* v. *Daniel* (1843), 3 Hare, 199, 211; *Batchelor* v. *Middleton* (1848), 6 Hare, 75; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265.

(*o*) He who has the legal estate must redeem, unless a special case is made, as that trustees or executors are colluding with the mortgagees, or if they are unsafe (*Troughton* v. *Binkes* (1801), 6 Ves. 573, 575).

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customary heir or devisee of the mortgagor, or, in the case of a devisee, assented to the devise, he can redeem mortgages on freeholds or personalty (*p*). The heir or devisee, after his interest has been so vested, can redeem mortgages on freeholds (*q*). As regards mortgages of copyholds, it would seem that the personal representative of a mortgagor who has died since the 31st December, 1897, can redeem, if the mortgagee has been admitted, because the equitable estate in copyholds of the deceased vests in him (*r*); but if the mortgagee has not been admitted the customary heir or devisee is the only person entitled to redeem (*s*). In the case of the mortgagor dying before the 1st January, 1898, the right to redeem freeholds or copyholds is vested in the heir (*t*), customary heir (*a*), or devisees (*b*), unless, as regards the claim of the heir, the mortgagor had during his life legally converted the equity of redemption in the land into personalty (*c*), or had mortgaged realty and personalty in one mortgage (*d*), and except in the last named events the legal personal representative could not redeem mortgages of real estate whether the mortgage was in fee (*e*) or for a term (*f*).

Persons under disability.

**269.** A guardian of the infant heir of a mortgagor (*g*), an administrator of a convict mortgagor (*h*), a committee of a lunatic mortgagor with the leave of the court (*i*), a sequestrator with the leave of the court (*k*), and a judgment creditor (*l*) can redeem.

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(*p*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1; *Re Harrowby and Paine's Contract*, [1902] W. N. 137.

(*q*) *Lloyd* v. *Wait* (1841), 1 Ph. 61; *Pym* v. *Bowreman* (1793), 3 Swan. 241.

(*r*) *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*s*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4), which excludes from the operation of the Act land of copyhold or customary freehold tenure in any case where an admission or act by the lord of the manor is necessary to perfect the tenant's title; see title COPYHOLDS, Vol. VIII., p. 89.

(*t*) *Jones* v. *Meredith* (1739), Bunb. 346; *Hawkins* v. *Chappel* (1739), 1 Atk. 621, 622. As to an heir being allowed to redeem on presumption of the mortgagor's death, see *Anon.* (undated), 2 Eq. Cas. Abr. 594, n.; *Masten* v. *Cookson* (1735), 2 Eq. Cas. Abr. 414.

(*a*) *Fawcet* v. *Lowther* (1751), 2 Ves. Sen. 300, 304.

(*b*) *Saunders* v. *Hawkins* (1716), 8 Vin. Abr. 156.

(*c*) *Griffith* v. *Ricketts*, *Griffith* v. *Lunell* (1849), 7 Hare, 299; *Biggs* v. *Andrews* (1832), 5 Sim. 424.

(*d*) *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A.

(*e*) *Duncombe* v. *Hanslcy* (1720), 3 P. Wms. 333, n.; *Fray* v. *Drew* (1865), 11 Jur. (N. S.) 130.

(*f*) *Bradshaw* v. *Outram* (1806), 13 Ves. 234; *Catley* v. *Sampson* (1864), 33 Beav. 551; and see *Amherst* v. *Lytton* (1730), 5 Bro. Parl. Cas. 254.

(*g*) *Palmer* v. *Danby* (1701), 1 Eq. Cas. Abr. 219; *Norbury* v. *Norbury* (1819), 4 Madd. 191; and see title INFANTS AND CHILDREN, Vol. XVII., p. 131.

(*h*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 10; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429.

(*i*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 117 (1); Rules in Lunacy, 1892, r. 57; *Ex parte Grimstone* (1772), Amb. 706; and see generally, for the powers of dealing with a lunatic's estate, title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 432 *et seq.*

(*k*) *Jones* v. *Meredith*, *supra*; *Fawcet* v. *Fothergill* (1702), 1 Dick. 19; see title EXECUTION, Vol. XIV., pp. 87, 88.

(*l*) For the rights of a judgment creditor, see p. 146, *post*.

SECT. 2. Persons Entitled to Redeem.

**270.** A person who has contracted to purchase the equity of redemption, unless his rights under the contract are disputed (*m*), and a plaintiff in an action for the administration of the mortgagor's estate, who has obtained a decree for sale, can redeem (*n*).

Purchaser of equity of redemption.

Bankrupts.

**271.** Neither the mortgagor while bankrupt (*o*), nor his general creditors (*p*), can redeem property which he has mortgaged. His trustee in bankruptcy has, however, certain statutory powers to redeem such property (*q*), but he cannot, after a foreclosure order, claim to redeem the mortgaged property at the valuation put upon the security by the mortgagee in the bankruptcy proceedings, unless a special direction is inserted in the foreclosure order (*r*); nor can he redeem a secured creditor who does not prove (*s*).

Escheated land.

**272.** If a mortgagor dies without an heir and intestate in respect of any real estate, the equity of redemption in mortgaged land escheats, and the lord taking it can redeem (*t*).

Persons claiming by possessory title.

**273.** A person who has acquired a possessory title against the mortgagor under the Statutes of Limitation (*a*) can redeem (*b*). A stranger cannot redeem, but if a claimant has a *primâ facie* title to an interest in the equity of redemption, a mortgagee who requires proof of such interest may lose his right to costs (*c*).

### SECT. 3.—*Restrictions on Right to Redeem.*

Clog on equity of redemption.

**274.** As a clog or fetter on the equity of redemption is void (*d*), it follows that once a mortgage always a mortgage (*e*). No

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(*m*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227; but see *Tasker* v. *Small* (1837), 3 My. & Cr. 63, 69, where Lord COTTENHAM, L.C., suggests that the purchase must have been completed.

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(*o*) *Spragg* v. *Binkes* (1880), 5 Ves. 583, 590; *Rochefort* v. *Battersby* (1849), 2 H. L. Cas. 388; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. As to the bankrupt's right to redeem after annulment of his bankruptcy, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 35, 65; title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 229.

(*p*) *Troughton* v. *Binkes* (1801), 6 Ves. 573; *Heath* v. *Chadwick* (1848), 2 Ph. 649.

(*q*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 228 *et seq.*

(*r*) *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502; and see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 228 *et seq.*

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(*t*) *Downe* (*Viscount*) v. *Morris* (1844), 3 Hare, 394; Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4; and see title DESCENT AND DISTRIBUTION, Vol. XI., p. 24, note (*h*).

(*a*) Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27); 1874 (37 & 38 Vict. c. 57); see title LIMITATION OF ACTIONS, Vol. XIX., p. 148.

(*b*) *Fletcher* v. *Bird* (1896), Fisher, Law of Mortgage, 6th ed., p. 1025.

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(*d*) See p. 71, *ante*.

(*e*) *Newcomb* v. *Bonham* (1681), 1 Vern. 7, *per* Lord NOTTINGHAM, L.C., at p. 8; *Santley* v. *Wilde*, [1899] 2 Ch. 474, C. A., *per* LINDLEY, M.R.; *Salt* v. *Northampton* (*Marquess*), [1892] A. C. 1; *Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24, 34; *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323, 329; *Seton* v. *Slade*, *Hunter* v. *Seton* (1802), 7 Ves. 265. As to the effect of an omission from the deed of a proviso for redemption, see p. 72, *ante*.

agreement between mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable (*f*); and no contract between a mortgagor and mortgagee made at the time of the mortgage, and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it provides that the mortgaged property shall become the absolute property of the mortgagee upon any event whatsoever (*g*). Redemption may, however, be postponed for a reasonable time where there is a corresponding provision for the continuance of the loan, and there do not exist any circumstances which make the clause unreasonable or oppressive (*h*).

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**275**. It is not possible in a mortgage contract to give to the mortgagee a collateral benefit outside the mortgage contract and continuing after redemption (*i*), nor to impose any burden or restriction upon a mortgagor after he has paid the principal, interest, and costs due under the mortgage (*k*). Such a contract limited to

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(*f*) *Courtenay* v. *Wright* (1860), 2 Giff. 337. This rule does not apply to debentures issued by a limited company (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103); see title COMPANIES, Vol. V., p. 362.

(*g*) *Mellor* v. *Lees* (1743), 2 Atk. 494; *Toomes* v. *Consett* (1745), 3 Atk. 261; *Vernon* v. *Bethell* (1762), 2 Eden, 110, 113; *Spurgeon* v. *Collier* (1758), 1 Eden, 55; *Courtenay* v. *Wright, supra*; *Re Edwards' Estate* (1861), 11 I. Ch. R. 367; *Lisle* v. *Reeve*, [1902] 1 Ch. 53, C. A.; *London and Globe Finance Corporation* v. *Montgomery* (1902), 18 T. L. R. 661; *Samuel* v. *Jarrah Timber and Wood Paving Corporation*, [1904] A. C. 323. It seems doubtful whether the rule against clogging the equity of redemption has any application to debentures issued by a company (*De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A. C. 52).

(*h*) *Teevan* v. *Smith* (1882), 20 Ch. D. 724, C. A.; *Re Hone's Estate* (1873), 8 I. R. Eq. 65; *Biggs* v. *Hoddinott, Hoddinott* v. *Biggs*, [1898] 2 Ch. 307; see p. 71, *ante*. The following periods have been held to be unreasonable: thirty years (*Talbot* v. *Braddill* (1683), 1 Vern. 183); twenty years (*Cowdry* v. *Day* (1859), 1 Giff. 316); twenty-eight years (*Morgan* v. *reys*, [1910] 1 Ch. 620); the life of the mortgagor (*Price* v. *Perrie* (1702), Freem. (CH.) 258; *Salt* v. *Northampton* (*Marquess*), [1892] A. C. 1); unless the mortgagor intended a kindness or benefit to the mortgagee (*Bonham* v. *Newcomb* (1684), 1 Vern. 232); and see p. 122, *ante*. A restriction of redemption to the heirs male of the body of the mortgagor does not prevent the mortgagor from redeeming (*Howard* v. *Harris* (1682), 1 Vern. 33).

(*i*) For instance, a contract to sell, if required, to the mortgagee, part of the mortgaged property at a fixed price (*Jennings* v. *Ward* (1705), 2 Vern. 520; *Re Edwards' Estate, supra*), or an option contained in the mortgage deed to the mortgagee to purchase at a fixed price (*Samuel* v. *Jarrah Timber and Wood Paving Corporation, supra*), is invalid. It has been suggested that an option of purchase, in the contract of mortgage, giving the mortgagee the refusal of the property without fixing the price, might be upheld.

(*k*) Contracts to buy beer from a brewer-mortgagee (*Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24); to pay to the mortgagee a share of the profits of an hotel (*Santley* v. *Wilde*, [1899] 2 Ch. 474, C. A.); to employ the mortgagee as auctioneer (*Broad* v. *Selfe* (1863), 11 W. R. 1036; *Browne* v. *Ryan*, [1901] 2 I. R 653, C. A.), or as a broker (*Bradley* v. *Carritt*, [1903] A. C. 253), are not enforceable after redemption. A covenant in a mortgage deed allowing pre-emption was rejected where the mortgagee had concealed it (*Orby* v. *Trigg* (1722), 9 Mod. Rep. 2). On a sale, where part of the purchase-money remains on mortgage, a covenant for pre-emption is good, if it is part of the contract of sale, and not part of the contract of mortgage (*Davies* v. *Chamberlain* (1909), 26 T. L. R. 138, C. A.). In spite

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### SECT. 3.—*Restrictions on Right to Redeem.*

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(*m*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227; but see *Tasker* v. *Small* (1837), 3 My. & Cr. 63, 69, where Lord COTTENHAM, L.C., suggests that the purchase must have been completed.

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SECT. 3. Restrictions on Right to Redeem.

agreement between mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable (*f*); and no contract between a mortgagor and mortgagee made at the time of the mortgage, and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it provides that the mortgaged property shall become the absolute property of the mortgagee upon any event whatsoever (*g*). Redemption may, however, be postponed for a reasonable time where there is a corresponding provision for the continuance of the loan, and there do not exist any circumstances which make the clause unreasonable or oppressive (*h*).

Collateral benefits.

**275**. It is not possible in a mortgage contract to give to the mortgagee a collateral benefit outside the mortgage contract and continuing after redemption (*i*), nor to impose any burden or restriction upon a mortgagor after he has paid the principal, interest, and costs due under the mortgage (*k*). Such a contract limited to

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SECT. 3. **Restrictions on Right to Redeem.**

the continuance of the mortgage is, however, good (*l*), and a restrictive covenant not so limited may bind the mortgagor during the continuance of the mortgage, but after redemption it is no longer binding (*m*).

Subsequent and independent transactions.

**276.** But the rule against clogging the equity of redemption does not invalidate subsequent and independent transactions between the mortgagor and mortgagee relating to the mortgaged property. Thus the mortgagee may, subsequently to the mortgage, stipulate for an option of purchase of the property (*n*), or for a sale (*o*) or release (*p*) to him of the equity of redemption (*o*). Such a sale or release is, however, liable to be set aside if there has been any oppression or unfairness on the part of the mortgagee (*q*); but mere inadequacy of price is not in itself ground for setting it aside (*r*). Moreover, a contract contemporaneous with a mortgage, but wholly independent of it and forming no part of the consideration for the mortgage, is valid (*s*).

As regards leases by a mortgagor to his mortgagee, a lease for a long period at an inadequate rent will not be upheld (*t*), but an ordinary occupation lease at a fair rent is not objectionable (*a*).

Bonus.

**277.** As a general rule, any device by which a mortgage is made to pay on redemption more than principal, interest and costs is void (*b*), but a contract for payment to the mortgagee of a bonus in addition to the sum advanced is valid if the bonus is reasonable and the contract was freely entered into by the mortgagor (*c*).

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of a sale from the mortgagor to the mortgagee, redemption has been allowed on special grounds (*Bowen* v. *Edwards* (1661), 1 Rep. Ch. 117, [221]). As to an option to call for shares in consideration of a loan, see *London and Globe Finance Corporation* v. *Montgomery* (1902), 18 T. L. R. 661.

(*l*) *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307.

(*m*) *John Brothers Abergarw Brewery Co.* v. *Holmes*, [1900] 1 Ch. 188.

(*n*) *Reeves* v. *Lisle*, [1902] A. C. 461; *Bonham* v. *Newcomb* (1684), 1 Vern. 232; *Kevans* v. *Joyce*, [1896] 1 I. R. 442, C. A.

(*o*) *Knight* v. *Marjoribanks* (1849), 2 Mac. & G. 10, 14; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 108 *et seq.*

(*p*) *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, P. C.; *Cotterell* v. *Purchase* (1735), Cas. *temp.* Talb. 61; see also *Rushbrook* v. *Lawrence* (1869), 5 Ch. App. 3, where an agreement for a release was treated as abandoned, since for twelve years no step had been taken to complete the transaction.

(*q*) *Prees* v. *Coke* (1871), 6 Ch. App. 645; *Ford* v. *Olden* (1867), L. R. 3 Eq. 461; *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661. The burden of proof of such oppression or unfairness lies on the mortgagor (*Melbourne Banking Corporation* v. *Brougham*, *supra*).

(*r*) *Knight* v. *Marjoribanks*, *supra*, at p. 13; *Purdie* v. *Millet* (1829), Taml. 28; and see *Waters* v. *Groom* (1844), 11 Cl. & Fin. 684, H. L.

(*s*) *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A. C. 52, 67; and see note (*k*), p. 143, *ante*.

(*t*) *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661; *Hickes* v. *Cooke* (1816), 4 Dow, 16, 24, 25, H. L.; and see *Gubbins* v. *Creed* (1804), 2 Sch. & Lef. 214.

(*a*) *Morony* v. *O'Dea* (1809), 1 Ball & B. 109.

(*b*) *Booth* v. *Salvation Army Building Association* (1897), 14 T. L. R. 3.

(*c*) *James* v. *Kerr* (1889), 40 Ch. D. 449; *Potter* v. *Edwards* (1857), 26 L. J. (CH.) 468; *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126. A valid bonus can be claimed by a mortgagee either in taking account of what is due on his mortgage or under the head of just allowances (*Bucknell* v. *Vickery* (1891), 64 L. T. 701, P. C.); and see p. 224, *post*.

Instances of loans with a bonus are debentures issued at a discount, and loans by building societies where a premium is charged (*d*).

A solicitor-mortgagee can charge his costs for all work done in completing and preparing a mortgage, and no such mortgage can be redeemed except upon payment of such charges and remuneration (*e*).

Costs.

**278.** Although no contract between mortgagee and mortgagor can make a mortgage irredeemable, the circumstances of the case may make redemption, for a time, impossible; as, for example, when a mortgage is made to secure an annuity, or as an indemnity against future liabilities, or for any other object not capable of immediate pecuniary valuation (*f*).

Mortgages temporarily unredeemable.

## SECT. 4.—*Terms of Redemption.*

**279.** The terms on which a mortgagor or those claiming under him are entitled to redeem are the same, whether they are ascertained in an action for redemption or for foreclosure (*g*), except as regards the right of the mortgagee to recover arrears of interest barred by lapse of time (*h*). These terms are payment to the mortgagee of the principal debt, interest thereon, all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgage security, the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the mortgage security, and the mortgagee's costs of the redemption action (*i*). However small may be the interest in the mortgaged property of the person seeking redemption, he must pay to the mortgagee all that is due (*k*).

Terms of redemption.

## SECT. 5.—*Disposal or Devolution of Equity of Redemption Inter Vivos or at Death.*

**280.** Inasmuch as the mortgagor after the mortgage still retains an estate or interest in the mortgaged property (*l*), he can sell (*m*),

General power of disposition *inter vivos*.

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(*d*) *Re Anglo-Danubian Steam Navigation and Colliery Co.* (1875), L. R. 20 Eq. 339; *Re Phillips, Ex parte Bath* (1884), 27 Ch. D. 509, C. A.

(*e*) Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25); see p. 124, *ante*. For the law prior to this Act, see *Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A.; *Eyre* v. *Wynn-Mackenzie*, [1896] 1 Ch. 135, C. A. The Act is not retrospective (*Day* v. *Kelland*, [1900] 2 Ch. 745, C. A.).

(*f*) *Fleming* v. *Self* (1854), 3 De G. M. & G. 997.

(*g*) *Sober* v. *Kemp* (1847), 6 Hare, 155. As to actions for redemption, see p. 149, *post*. As to foreclosure, see pp. 272 *et seq.*, *post*.

(*h*) See note (*h*), p. 211, *post*, and title LIMITATION OF ACTIONS, Vol. XIX., pp. 101, 102.

(*i*) *Re Wallis, Ex parte Lickorish* (1890), 25 Q. B. D. 176, C. A.; and see pp. 231 *et seq.*, 317 *et seq.*, *post*. For the special rights of a mortgagee under the doctrine of consolidation, see pp. 208 *et seq.*, *post*. As to the costs of reconveyance, see pp. 149, 317, 318, *post*.

(*k*) *Cholmonde'ey* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 134; *Palk* v. *Clinton* (*Lord*) (1805), 12 Ves. 48, 59; *Wilson* v. *Cluer* (1840), 3 Beav. 136; compare *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610.

(*l*) See pp. 71, 138, *ante*.

(*m*) For form of conveyance of an equity of redemption in freeholds, see Encyclopædia of Forms and Precedents, Vol. XII., p. 558. The purchaser

SECT. 5. **Disposal or Devolution of Equity of Redemption etc.**

mortgage (*n*), or otherwise dispose (*o*) of this estate or interest during his life, or dispose of the same by will (*p*). A mortgagor beneficially entitled to possession of property for a long term of years capable of enlargement can enlarge the term into a fee simple, notwithstanding the incumbrances on the term which upon enlargement affect the fee simple so created (*q*). But a co-owner who has mortgaged his share to another co-owner cannot enforce partition of the mortgaged property without the consent of the mortgagee (*r*).

**Devolution on death.**

**281.** On the death of the mortgagor intestate the equity of redemption in his mortgaged property descends and devolves in the same manner (*s*) and is subject to the same incidents of dower (*t*), curtesy (*t*), and escheat (*u*) as any other equitable estate.

SECT. 6.—*Liability of Equity of Redemption to Execution for Debts.*

**Equitable execution.**

**282.** The interest of a judgment debtor in an equity of redemption in either freehold (*a*) or leasehold (*b*) land cannot be taken in execution under a writ of *elegit* at the suit of a subject, but it may be reached by the appointment of a receiver (*c*). Every judgment creditor to whom the land of his mortgagor has been actually delivered in execution by registration of the order appointing a receiver has an interest in the equity of redemption (*d*); he can redeem prior incumbrancers, and is a necessary party to foreclosure and redemption (*e*). He may also obtain by summons an order for the sale of his debtor's interest in such land (*f*).

of an equity of redemption is under an implied obligation to indemnify his vendor against the mortgage debt (*Bridgman* v. *Daw* (1892), 40 W. R. 253), and see as to such implied indemnity generally, p. 270, *post*, and the cases cited in note (*m*), *ibid.*; and see, generally, title SALE OF LAND.

(*n*) For forms of mortgages of an equity of redemption in land, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 725 *et seq.*

(*o*) See *Casborne* v. *Scarfe* (1739), 1 Atk. 603, and other cases cited in note (*k*), p. 138, *ante*.

(*p*) See title WILLS.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 65 (1), (2), (4); see title REAL PROPERTY AND CHATTELS REAL.

(*r*) *Gibbs* v. *Haydon* (1882), 30 W. R. 726; *Sinclair* v. *James*, [1894] 3 Ch. 554; and see title PARTITION, p. 840, *post*. As to the priority of the claim by a mortgagee of an undivided share of land over a claim by the owners of the other undivided shares to charge the mortgagor with an occupation rent, see *Hill* v. *Hickin*, [1897] 2 Ch. 579 (legal mortgage); *Heckles* v. *Heckles*, [1892] W. N. 188 (equitable mortgage).

(*s*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 1 *et seq.*

(*t*) See title REAL PROPERTY AND CHATTELS REAL.

(*u*) See title DESCENT AND DISTRIBUTION, Vol. XI., pp. 23 *et seq.*

(*a*) *Beckett* v. *Buckley* (1874), L. R. 17 Eq. 435; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, C. A.

(*b*) *Salt* v. *Cooper* (1880), 16 Ch. D. 544, C. A.

(*c*) See title EXECUTION, Vol. XIV., pp. 118 *et seq.*, 124 *et seq.*, and generally as to the appointment of a receiver and registration of the order appointing a receiver, see *ibid.*, pp. 122 *et seq.*

(*d*) *Mildre* v. *Austin* (1869), L. R. 8 Eq. 220; *Cork* (*Earl*) v. *Russell* (1871), L. R. 13 Eq. 210; *Hood Barrs* v. *Cathcart*, [1895] 2 Ch. 411.

(*e*) *Winchester* (*Bishop*) v. *Beavor* (1797), 3 Ves. 314; *Rolleston* v. *Morton* (1842), 1 Dr. & War. 171, 191; *Adams* v. *Paynter* (1844), 1 Coll. 530; *Joyce* v. *Joyce* (1846), 10 I. Eq. R. 128.

(*f*) Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4; R. S. C., Ord. 55,

The receiver holds the mortgaged property subject to the prior incumbrances, but the judgment creditor can obtain a sale of the interest of the debtor in the land without redeeming such prior incumbrances (*g*).

SECT. 6. Liability of Equity of Redemption to Execution for Debts.

## SECT. 7.—*Enforcement of the Equity of Redemption.*

### SUB-SECT. 1.—*When Right Enforceable.*

Day fixed in contract for payment.

**283.** A mortgagor is not entitled to redeem the mortgaged property before the day fixed in the mortgage contract for payment of the principal (*h*), unless the mortgagee has taken steps to recover payment by taking possession of the property or otherwise (*i*). On that day the mortgagor has a legal right, on payment of what is due, to recover the mortgaged property (*k*). After that day has passed and default has been made, he has an equitable right to redeem the property, although by reason of the condition for payment having been broken the mortgagee's estate has become absolute at law (*l*).

### SUB-SECT. 2.—*Conditions of Redemption.*

Notice to pay off mortgage.

**284.** It is a settled rule of practice that after default has been made by a mortgagor in payment of the principal and interest in accordance with the proviso for redemption, he must either give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or pay him six months' interest in lieu of notice (*m*); and it seems that if the mortgagor, after giving notice of his intention to pay off the mortgage, makes default in so doing the mortgagee is entitled to a fresh six months' notice or six months' interest in lieu of notice (*n*). Neither the nature of the mortgaged

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r. 9B. A legal remainder cannot be sold under this Act; see *Re Harrison and Bottomley*, [1899] 1 Ch. 465, C. A.; and title EXECUTION, Vol. XIV., p. 67.

(*g*) *Wells* v. *Kilpin* (1874), L. R. 18 Eq. 298; see title EXECUTION, Vol. XIV., pp. 115 *et seq.*

(*h*) *Brown* v. *Cole* (1845), 14 Sim. 427; and see *Harding* v. *Tingey* (1865), 34 L. J. (CH.) 13.

(*i*) *Bovill* v. *Endle*, [1896] 1 Ch. 648; *Ex parte Wickens*, [1898] 1 Q. B. 543, 548, C. A. As to the right to redeem where the period fixed for redemption is unreasonably distant, see note (*h*), p. 143, *ante*.

(*k*) *Crickmore* v. *Freeston* (1870), 40 L. J. (CH.) 137, C. A.; *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, C. A. As to the nature of the mortgagor's rights until the time for payment has arrived, see 1 Powell, Law of Mortgages, 6th ed. 268 a, n.; and title EQUITY, Vol. XIII., p. 90.

(*l*) See p. 71, *ante*.

(*m*) *Smith* v. *Smith*, [1891] 3 Ch. 550, *per* ROMER, J., at p. 553; *Browne* v. *Lockhart* (1840), 10 Sim. 420, 424; *Johnson* v. *Evans* (1889), 61 L. T. 18, C. A.; *Garforth* v. *Bradley* (1755), 2 Ves. Sen. 675, 678; 2 Cases with Opinions of Counsel. 51.

(*n*) *Re Moss, Levy* v. *Sewill* (1885), 31 Ch. D. 90. *per* PEARSON, J., at p. 94; *Bartlett* v. *Franklin* (1867), 15 W. R. 1077. The latter case is not an authority for the proposition that the same rule applies if the notice to pay off has been given by the mortgagee (*Edmondson* v. *Copland*, [1911] 2 Ch. 301, 308). Mere delay in drawing up an order directing payment out of a fund in court to a mortgagee is not a ground for demanding a further notice or interest in lieu of notice (*Sharpnell* v. *Blake* (1737), 2 Eq. Cas. Abr. 603; *Harmer* v. *Priestley* (1853), 16 Beav. 569).

SECT. 7. Enforcement of the Equity of Redemption.

property (*o*), nor the fact that the property has been realised otherwise than by the act of the mortgagee (*p*), gives rise to any exception from these rules.

Effect of steps taken by mortgagee.

If, however, the mortgagee himself demands payment or takes steps to realise his security (*q*), whether the time fixed by the mortgage deed for redemption has arrived or not (*r*), or consents to a sale of the mortgaged property in an administration action (*s*), or to payment of his debt out of a fund in court (*t*), he is not entitled to the usual six months' notice or interest, even though after he has taken proceedings to recover his debt the mortgagor has given him notice of intention to pay in six months (*u*): nor can a mortgagee who has demanded payment refuse a tender of principal and interest to date of payment, though the time limited in the mortgagee's demand has been exceeded (*a*). But where a day for redemption has been fixed by a foreclosure order, the mortgagor, if he wishes to redeem before that day, must pay interest up to the day appointed (*b*).

The mortgagee is not entitled to notice, or interest in lieu of notice, if his loan is merely of a temporary character, as, for instance, in the case of an equitable mortgage by deposit of title deeds (*c*).

Nature of tender.

**285.** A mortgagor who desires to discharge the mortgage debt must tender to the mortgagee the full amount that is due in legal currency (*d*) and produce the same before the mortgagee unless he waives the production (*e*) or refuses to accept money then available

(*o*) *Smith* v. *Smith*, [1891] 3 Ch. 550.

(*p*) *Spencer-Bell to London and South Western Rail. Co. and Metropolitan District Rail. Co.* (1885), 33 W. R. 771, where the mortgaged property was acquired by a railway company compulsorily.

(*q*) Such steps may be taken by going into possession of the mortgaged property (*Bovill* v. *Endle*, [1896] 1 Ch. 648; see p. 189, *post*), or selling it (*Banner* v. *Berridge* (1881), 18 Ch. D. 254, C. A.; see p. 291, *post*), or bringing an action for foreclosure (*Hill* v. *Rowlands*, [1897] 2 Ch. 361, 363; see p. 272, *post*), or to administer the mortgagor's estate (*Re Alcock, Prescott* v. *Phipps* (1883), 23 Ch. D. 372, C. A.), or giving notice to pay off in such a form as to enable the mortgagee to exercise his statutory power of sale (*Edmondson* v. *Copland*, [1911] 2 Ch. 301, 306). For the rules affecting redemption under bills of sale, see title BILLS OF SALE, Vol. III., p. 66.

(*r*) *Bovill* v. *Endle*, *supra*.

(*s*) *Day* v. *Day* (1862), 31 Beav. 270; and see *Matson* v. *Swift* (1841), 5 Jur. 645.

(*t*) *Re Moss*, *Levy* v. *Sewill* (1885), 31 Ch. D. 90.

(*u*) *Re Alcock*, *Prescott* v. *Phipps*, *supra*.

(*a*) *Edmondson* v. *Copland*, *supra*.

(*b*) *Hill* v. *Rowlands*, *supra*.

(*c*) *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385; and as to such mortgages, see pp. 78 *et seq.*, *ante*.

(*d*) *Sentance* v. *Porter* (1849), 7 Hare, 426; *Rhodes* v. *Buckland* (1852), 16 Beav. 212. As to tender generally, see title CONTRACT, Vol. VII., pp. 417 *et seq.*

(*e*) *Douglas* v. *Patrick* (1790), 3 Term Rep. 683; *Powney* v. *Blomberg* (1844), 8 Jur. 746 (a letter saying "D. D. now tenders," without enclosing any money, not a good tender, although the mortgagee's solicitor wrote back, "I decline your tender"); *Blumberg* v. *Life Interests, etc. Corporation*, [1897] 1 Ch. 171 (an unsuccessful attempt to establish a tender by cheque to the mortgagee's agent); *Re Farley, Ex parte Danks* (1852), 2 De G. M. & G. 936.

for immediate payment (*f*). The tender must be unconditional, but may be under protest (*g*).

Unless a place for payment is named in the mortgage deed, the tender must be made to the mortgagee or to some person entitled on his behalf to receive all that is due under the mortgage (*h*). Where more than one person is entitled to the money a tender is good which is, after full notice to all parties, made at the office of one of them who is a solicitor (*i*).

A stranger cannot make a valid tender; it must be made by a person having a *primâ facie* right to redeem (*k*).

A mortgagee may lose his right to receive costs or be ordered to pay the costs if, by refusal of a proper tender, he renders necessary an action of redemption (*l*), or after a sufficient tender commences an action of foreclosure (*m*). Refusal of a proper tender is not equal to payment, but if the money, after the refusal, has been paid into court or kept ready for immediate payment to the mortgagee, no further interest is payable (*n*). If it is intended that on receipt of the money the mortgagee should execute a reconveyance, a draft of the proposed deed should be sent to him at a reasonable time before the tender (*o*). Money extorted by a mortgagee in excess of what is due can be recovered by the mortgagor as money had to his use (*p*).

SECT. 7. **Enforcement of the Equity of Redemption.**

Place for tender.

Person to make tender.

Effect of refusal of tender.

SUB-SECT. 3.—*Action for Redemption.*

(i.) *Parties.*

**286.** All persons entitled to redeem (*q*), and all persons entitled to any part of the security or debt, are necessary parties to a

Absent party.

(*f*) *Robarts* v. *Jefferys* (1830), 8 L. J. (o. s.) (CH.) 137.

(*g*) *Manning* v. *Lunn* (1845), 2 Car. & Kir. 13; *Thorpe* v. *Burgess* (1840), 8 Dowl. 603; *Scott* v. *Uxbridge and Rickmansworth Rail. Co.* (1866), L. R. 1 C. P. 596; *Sweny* v. *Smith* (1869), L. R. 7 Eq. 324; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1, C. A.

(*h*) Co. Litt. 210 a, b.

(*i*) *Cliff* v. *Wadsworth* (1843), 2 Y. & C. Ch. Cas. 598.

(*k*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227.

(*l*) *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, P. C.

(*m*) *Smith* v. *Green* (1844), 1 Coll. 555.

(*n*) *Gyles* v. *Hall* (1726), 2 P. Wms. 378; *Harmer* v. *Priestley* (1853), 16 Beav. 569; *Bishop* v. *Church* (1751), 2 Ves. Sen. 371; *Garforth* v. *Bradley* (1755), 2 Ves. Sen. 675; *Hodges* v. *Croydon Canal Co.* (1840), 3 Beav. 86; *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610. For the purpose of stopping interest the tender need not be such a tender as would afford a defence at law (*Manning* v. *Burges* (1663), 1 Cas. in Ch. 29; *Webb* v. *Crosse*, [1912] 1 Ch. 323, 328; and see p. 229, *post*).

(*o*) *Wiltshire* v. *Smith* (1744), 3 Atk. 89; *Rourke* v. *Robinson*, [1911] 1 Ch. 480; *Webb* v. *Crosse*, *supra*, at p. 329; and as to reconveyance, see, further, p. 311, *post*.

(*p*) *Close* v. *Phipps* (1844), 7 Man. & G. 586; *Fraser* v. *Pendlebury* (1861), 10 W. R. 104; and see title CONTRACT, Vol. VII., p. 479. The duty of the mortgagee is to produce and hand over, on payment of all that is due, the title deeds and a duly executed reconveyance, and a refusal to do this, when a sufficient tender has been made, will amount to a refusal of the tender (*Rourke* v. *Robinson*, [1911] 1 Ch. 480; *Walker* v. *Jones* (1866), L. R. 1 P. C. 50, 61).

(*q*) See p. 139, *ante*. If the mortgagors are tenants in common they must all be parties to the action (*Bolton* v. *Salmon*, [1891] 2 Ch. 48). As to the proper parties to a foreclosure action, see p. 279, *post*.

SECT. 7. Enforcement of the Equity of Redemption.

redemption action (*r*), but the court will not stop redemption on account of the absence of a party who cannot be found if the mortgagee runs no risk (*a*), and the court can protect the rights of the absent party by preserving them in the decree (*b*). The rule requiring the presence of all parties is based on the right of the mortgagee to account once for all, which can only be done if the account is taken in the presence of all parties who could demand an account (*c*).

Incumbrancers paid off.

The mortgagee after assignment and intermediate assignees are not necessary parties unless they have been in possession, and the mortgagor, alleging receipts in excess of the debt, claims personal repayment (*d*).

Sub-mortgagee.

**287.** When a mortgage has been sub-mortgaged, both the original mortgagee and the sub-mortgagee are necessary parties in an action of redemption by the original mortgagor (*e*), but the original mortgagee may redeem the sub-mortgagee without making the original mortgagor a party. If numerous assignments upon trust have been made by the mortgagee, it is sufficient if the persons having the legal estate are parties. In the case of a strict settlement of the mortgaged property by the mortgagee, the first tenant in tail and those having intermediate estates for life are necessary parties (*f*).

Personal representatives.

In the case of the death of a mortgagee of freehold lands, his personal representatives are necessary parties (*g*).

Copyholds.

In the case of copyholds, which do not vest in the personal representatives of the mortgagee (*h*), and where the mortgaged property and mortgage debt are not in the same hands, it is necessary to join as parties the person who can reconvey the mortgaged property and the person who can give a discharge for the mortgage debt (*i*).

Representative parties.

It is not necessary to make parties persons having an interest in the mortgaged property subsequent to a vested estate of inheritance

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(*r*) *Fell* v. *Brown* (1787), 2 Bro. C. C. 276; *Farmer* v. *Curtis* (1829), 2 Sim. 466; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 134; *Audsley* v. *Horn* (1858), 26 Beav. 195; *Hood* v. *Easton* (1856), 2 Jur. (N. S.) 729 (where a stranger had, by authority of the mortgagee, obtained possession of part of the mortgaged property). As to an infant party in a redemption action, see title INFANTS AND CHILDREN, Vol. XVII., pp. 82, 84.

(*a*) *Faulkner* v. *Daniel* (1843), 3 Hare, 199, 212.

(*b*) *Francis* v. *Harrison* (1889), 43 Ch. D. 183; *Griffith* v. *Pound* (1890), 45 Ch. D. 553; *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A.

(*c*) A person entitled to redeem cannot be omitted because his interest is very small (*Hunter* v. *Macklew* (1846), 5 Hare, 238).

(*d*) *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 269; *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, C. A.; *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A.; *Re Prytherch*, *Prytherch* v. *Williams* (1889), 42 Ch. D. 590.

(*e*) *Chambers* v. *Goldwin*, *supra*, at p. 269; *Re Burrell*, *Burrell* v. *Smith* (1869), L. R. 7 Eq. 399; *Hobart* v. *Abbot* (1731), 2 P. Wms. 643. As to sub-mortgages, see p. 132, *ante*, and p. 180, *post*.

(*f*) *Gore* v. *Stacpoole* (1813), 1 Dow, 18, 31, H. L.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30.

(*h*) See title COPYHOLDS, Vol. VIII., p. 88.

(*i*) *Smith* v. *Chichester* (1842), 2 Dr. & War. 393.

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the owner of which is on the record (*k*), nor beneficiaries represented by trustees, executors, or administrators (*l*). The receipt of the trustees is a sufficient discharge for the money when the mortgage debt has been paid (*m*).

**288.** In the case of successive mortgages a puisne mortgagee must make all mortgagees subsequent to himself, as well as the mortgagor, parties in an action to redeem a prior mortgagee (*n*), and if he seeks to redeem any other mortgagee than the one immediately prior to himself he must make parties all mortgagees between himself and the mortgagee whom he seeks to redeem (*o*); but he need not make a mortgagee prior to such mortgagee a party unless the amount due cannot be ascertained in his absence. As between himself and all behind him, a puisne mortgagee has a prior right to redeem a prior mortgagee (*p*).

Action by puisne incumbrancer.

**289.** Where two properties are subject to the same mortgage the owner of the equity of redemption of the one property is a necessary party in an action to redeem the other property (*q*).

Mortgage on two properties.

(ii.) *Institution of Proceedings.*

**290.** Any mortgagor, whether legal or equitable, or any person having the right to redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for redemption, reconveyance, and delivery of possession by the mortgagee (*r*). A summons cannot, it seems, be issued for possession only (*s*). The

Originating summons.

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(*k*) *Lloyd* v. *Johnes* (1804), 9 Ves. 37; *Giffard* v. *Hort* (1804), 1 Sch. & Lef. 386, 406; *Cockburn* v. *Thompson* (1809), 16 Ves. 321, 326.

(*l*) R. S. C., Ord. 16, r. 8; *Jennings* v. *Jordan* (1881), 6 App. Cas. 698; *Re Cooper, Cooper* v. *Vesey* (1882), 20 Ch. D. 611, C. A. For the rights of creditors under deeds of assignment to trustees for payment of debts, see *Slade* v. *Rigg* (1843), 3 Hare, 35; *Smith* v. *Baker* (1842), 1 Y. & C. Ch. Cas. 223; *Morley* v. *Morley* (1858), 25 Beav. 253; *Troughton* v. *Binkes* (1801), 6 Ves. 573; *Yeatman* v. *Yeatman* (1877), 7 Ch. D. 210.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 36.

(*n*) *Fell* v. *Brown* (1787), 2 Bro. C. C. 276; *Johnson* v. *Holdsworth* (1850), 1 Sim. (N. S.) 106, 109; *Farmer* v. *Curtis* (1829), 2 Sim. 466; *Rose* v. *Page* (1829), 2 Sim. 471; *Ramsbottom* v. *Wallis* (1835), 5 L. J. (CH.) 92; *Richards* v. *Cooper* (1842), 5 Beav. 304; *Slade* v. *Rigg, supra*; *Teevan* v. *Smith* (1882), 20 Ch. D. 724, C. A.

(*o*) *Teevan* v. *Smith, supra.*

(*p*) *Kensington* (*Lord*) v. *Bouverie* (1852), 16 Beav. 194. As to a case where the subsequent mortgagee cannot make the mortgagor a party, *e.g.*, by reason of a covenant not to foreclose for a certain period, see *Ramsbottom* v. *Wallis, supra*; *Smith* v. *Green* (1844), 1 Coll. 555; *Rhodes* v. *Buckland* (1852), 16 Beav. 212.

(*q*) *Palk* v. *Clinton* (*Lord*) (1805), 12 Ves. 48, 59; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 134; *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A. A mortgagee who holds several distinct mortgages under the same mortgagor may, as a general rule, consolidate them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all (*Jennings* v. *Jordan, supra, per* Lord SELBORNE, L.C., at p. 700; *Ireson* v. *Denn* (1796), 2 Cox, Eq. Cas. 425; and see p. 208, *post*).

(*r*) R. S. C., Ord. 55, r. 5A. An originating summons can now be served by leave of the court out of the jurisdiction (R. S. C., Ord. 11, r. 8A); see title PRACTICE AND PROCEDURE.

(*s*) Yearly Practice of the Supreme Court, 1912, p. 831: *Hill* v. *Stephens*

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action can be commenced by writ, but at the plaintiff's risk of being allowed only the costs of an originating summons (*t*).

(iii.) *Pleadings.*

Statement of claim or affidavit in support of summons.

**291.** The plaintiff must set forth in his statement of claim, or in an affidavit in support of the summons, the mortgage contract and all the material facts, showing how he derives his right to redeem if he is not the original mortgagor. He should also state shortly any special circumstances, such as that the defendant mortgagee has been in possession. The mortgagee can deny the plaintiff's right to redeem (*u*), or any of the allegations in the statement of claim or affidavit (*a*).

When offer to redeem unnecessary.

Every action against a mortgagee by the owner of the equity of redemption who admits the mortgage must expressly or by implication contain an offer to redeem (*b*), except in the following cases, namely, when a person entitled to redeem asks for a sale of the mortgaged property instead of redemption (*c*), when the question raised is one merely of construction arising under the mortgage deed (*d*), or when the mortgagee has become a party to trusts affecting the equity of redemption, in which case any person interested in those trusts may enforce their due performance without offering to redeem (*e*).

Redemption in proceedings brought to impeach mortgage.

A mortgagor who does not admit the mortgage, and has failed in an action, containing no prayer for redemption, brought to impeach the mortgage, will not be allowed in that action to redeem a

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(1887), unreported. The practice is otherwise in Ireland, where, however, the rule corresponding to R. S. C., Ord. 55, r. 5A, is slightly different (*Bank of Ireland* v. *Slattery*, [1911] 1 I. R. 33).

(*t*) *Johnson* v. *Evans* (1889), 60 L. T. 29. No appeal by a mortgagor as to costs can be brought except by leave of the judge (*Charles* v. *Jones* (1886), 33 Ch. D. 80, C. A.). A writ instead of an originating summons is justifiable when the decision does not depend solely on the construction of the documents, but there are disputed facts of such complexity that they cannot be conveniently adjudicated upon unless they are brought before the court in a statement of claim. It would seem that questions of priorities among mortgagees cannot be decided on an originating summons (*Re Giles, Real and Personal Advance Co.* v. *Michell* (1890), 43 Ch. D. 391, C. A.).

(*u*) This denial, if unfounded, may be a ground for depriving the mortgagee of his costs (*Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 334). As to pleading generally, see title PLEADING.

(*a*) R. S. C., Part I., Appendix C, s. II., No. 6; and Appendix D, s. II.

(*b*) *Troughton* v. *Binkes* (1801), 6 Ves. 573; *Dalton* v. *Hayter* (1844), 7 Beav. 313; *Tasker* v. *Small* (1837), 3 My. & Cr. 63; *Inman* v. *Wearing* (1850), 3 De G. & Sm. 729; *Harding* v. *Tingey* (1865), 34 L. J. (CH.) 13; *Hughes* v. *Cook* (1865), 34 Beav. 407; *Gordon* v. *Horsfall* (1846), 5 Moo. P. C. C. 393. But it is not necessary to offer to redeem annuities (*Knight* v. *Bowyer* (1858), 2 De G. & J. 421, 446, C. A.).

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25. Under the old practice an offer to redeem had to be pleaded expressly or in substance; but if the pleadings made a case for redemption the court would give leave to amend (*Palk* v. *Clinton* (*Lord*) (1805), 12 Ves. 48), and would require the mortgagor to undertake to redeem (*Balfe* v. *Lord* (1842), 2 Dr. & War. 480).

(*d*) R. S. C., Ord. 54A, r. 1; *Re Nobbs, Nobbs* v. *Law Reversionary Interest Society*, [1896] 2 Ch. 830.

(*e*) *Dalton* v. *Hayter, supra*; *Jefferys* v. *Dickson* (1866), 1 Ch. App. 183.

mortgagee who has relied wholly on his title as mortgagee, but must commence a new action for redemption (*f*). He may, however, redeem in the same action if the mortgagee has not relied solely on his title as mortgagee, but has claimed that he has become absolute owner (*g*).

(iv.) *Discovery.*

Discovery in redemption action.

**292.** In an action for redemption discovery can be enforced of the amount claimed to be due (*h*), of the mortgagee's securities (*i*), and of the names of incumbrancers (*j*). So long as his right to redeem subsists, a mortgagor, if the mortgage was made since the 31st December, 1881, is entitled at his own cost to inspect and take copies or abstracts of or extracts from the documents of title in the mortgagee's custody or power relating to the mortgaged property (*k*).

(v.) *Order for Redemption or Sale.*

Order for redemption.

**293.** The common form order for redemption directs an account of what is due to the mortgagee under the mortgage, and for his taxed costs of the redemption action, and directs a reconveyance (*l*) of the mortgaged property to the mortgagor, free from all incumbrances done by the mortgagee or persons claiming under him, and delivery up of the title deeds, upon the mortgagor paying to the mortgagee the amount certified to be due within six months (*m*) after the date of the master's certificate, at a time and place to be appointed by such certificate (*n*); and it further directs that if the mortgagor makes default in such payment his action is to stand dismissed with costs (*o*). If the mortgagee has been in possession the order directs

(*f*) *Martinez* v. *Cooper* (1826), 2 Russ. 198, 215; *Johnson* v. *Fesenmeyer* (1858), 25 Beav. 88; *Crenver etc. Mining Co.* v. *Willyams* (1866), 35 Beav. 353; *Jervis* v. *Berridge* (1873), 8 Ch. App. 351.

(*g*) *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, P. C.

(*h*) *Bridgwater* v. *De Winton* (1863), 33 L. J. (CH.) 238; *Elmer* v. *Creasy* (1873), 9 Ch. App. 69, C. A.; *Beavan* v. *Cook* (1869), 17 W. R. 872. For the law of discovery generally, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 35 *et seq.*

(*i*) *West of England and South Wales Bank* v. *Nickolls* (1877), 6 Ch. D. 613.

(*j*) *Union Bank of London* v. *Manby* (1879), 13 Ch. D. 239, C. A.

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 16; see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 81. Inspection can be enforced by a mortgagor by an action in the Chancery Division (*Burn* v. *London and South Wales Coal Co.*, [1890] W. N. 209). For the liability of the mortgagee to produce title deeds, see p. 206, *post.*

(*l*) If one of two mortgagees has disappeared, the costs of obtaining a vesting order to get in his interest must be borne, in the absence of misconduct by the other mortgagee, by the mortgagor (*Webb* v. *Crosse*, [1911] 1 Ch. 323).

(*m*) This means calendar months (R. S. C., Ord. 64, r. 1; and see title TIME). A longer or shorter time may be given in special circumstances (*Lewis* v. *Aberdare and Plymouth Co.* (1884), 53 L. J. (CH.) 741).

(*n*) For the form of the master's certificate, which is the same in this respect both in foreclosure and redemption actions, see Daniell's Chancery Forms, 5th ed., p. 771. As to payment of arrears of interest, see title LIMITATION OF ACTIONS, Vol. XIX., p. 101.

(*o*) See 3 Seton, Judgments and Orders, 6th ed., p. 1926.

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as against the mortgagee an account of the rents and profits of the mortgaged property on the footing of wilful default (*p*); and if the mortgagor alleges that nothing is due on the mortgage, a direction is added for reconveyance within twenty-one days after the date of the certificate, if on taking the accounts it appears that nothing is in fact due (*q*).

Special directions.

Special directions are sometimes added as to improvements or substantial repairs by the mortgagee (*r*); but sums expended in necessary repairs, and any sums properly included under the mortgage contract, are allowed as "just allowances" without special direction (*s*). Special directions may also be added to charge the mortgagee with wilful neglect in allowing the mortgaged property to deteriorate (*t*), or for improper management (*a*), waste (*b*), or improper sale (*c*), or to bring out any special circumstance, such as a valuation of the security in the mortgagor's bankruptcy (*d*), and accounts may be directed to be taken with rests (*e*). If the order for redemption is made after tender, the account is directed of what was due on the date of such tender, with consequential directions to meet the alternative results of the amount due exceeding or not exceeding the amount tendered (*f*).

Successive incumbrancers.

**294.** Where there are successive incumbrancers, the order directs redemption by them according to their priorities, a puisne mortgagee on redeeming the prior mortgagees being given the right to foreclose subsequent mortgagees and the mortgagor unless they in their turn redeem him (*g*). The order may declare the priorities of the various incumbrancers (*h*), or direct an inquiry as to priorities (*i*). If the action is brought by a puisne mortgagee to redeem the first mortgagee and he fails to redeem, the action will be dismissed with costs as against both the first mortgagee and the mortgagor (*k*), but a puisne mortgagee of two properties, separately

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(*p*) See 3 Seton, Judgments and Orders, 6th ed., pp. 1896, 1926. As to wilful default, see pp. 198, 199, *post*.

(*q*) 3 Seton, Judgments and Orders, 6th ed., p. 1926.

(*r*) *Ibid.*, pp. 1957, 1959.

(*s*) R. S. C., Ord. 33, r. 8; *Blackford* v. *Davis* (1869), 4 Ch. App. 304; *Wilkes* v. *Saunion* (1877), 7 Ch. D. 188; *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.* (1877), 7 Ch. D. 192; *Shepard* v. *Jones* (1882), 21 Ch. D. 469, C. A.; and see p. 240, *post*.

(*t*) 3 Seton, Judgments and Orders, 6th ed., p. 1960.

(*a*) *Wragg* v. *Denham* (1836), 2 Y. & C. (EX.) 117; *Batchelor* v. *Middleton* (1848), 6 Hare, 75, 85.

(*b*) See p. 203, *post*.

(*c*) 3 Seton, Judgments and Orders, 6th ed., p. 1962.

(*d*) *Ibid.*, p. 1964; *Knowles* v. *Dibbs* (1889), 37 W. R. 378; *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 228.

(*e*) 3 Seton, Judgments and Orders, 6th ed., p. 1956. As to rests, see p. 220, *post*.

(*f*) 3 Seton, Judgments and Orders, 6th ed., pp. 1926, 1928. As to tender, see p. 148, *ante*.

(*g*) *Ibid.*, p. 1982; *Archdeacon* v. *Bowes* (1824), M'Cle. 149.

(*h*) *Jones* v. *Griffith* (1845), 2 Coll. 207.

(*i*) *Duberly* v. *Day* (1851), 14 Beav. 9.

(*k*) *Pelly* v. *Wathen* (1849), 7 Hare, 351; *Hallett* v. *Furze* (1885), 31 Ch. D. 312.

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mortgaged to different prior incumbrancers, is entitled on redeeming the prior incumbrance on one property to foreclose the mortgagor as regards such property, although the prior incumbrance on the other property remains unredeemed (*l*).

Effect of failure to redeem.

**295.** As a rule, failure by a mortgagor to pay the amount certified due to the mortgagee within the time fixed by the order for redemption involves the dismissal of the action (*m*), unless the court for good cause (*n*) extends the time. The court will not readily extend the time in a redemption action (*o*), but it will do so in a case of *bonâ fide* mistake (*p*).

Effect of dismissal: (i.) Legal mortgage;

**296.** Dismissal for any cause, except want of prosecution (*q*), of an action for the redemption of a legal mortgage, is equivalent to a final order of foreclosure against the plaintiff (*r*), and in the case of successive mortgages, if the mortgagor is the plaintiff, the effect of excluding his interest is that the last of the incumbrancers becomes *quasi*-mortgagor, the prior mortgagees ranking according to their priorities (*s*). Such dismissal forecloses not only the mortgagor and his heirs, but also a person who has purchased the equity of redemption after the date of the writ or summons if the action has been duly registered as a *lis pendens* (*t*); but the trustee in bankruptcy of a mortgagor who becomes bankrupt after the writ or summons is not foreclosed unless he has been made a party to the action (*a*).

(ii.) equitable mortgage by deposit of deeds.

Dismissal of an action for redemption of an equitable mortgage by deposit of deeds does not pass the legal estate to the mortgagee (*b*).

Order for sale.

**297.** Instead of making an order for redemption the court has power in an action for redemption or sale, or redemption alone or sale alone, to make an order for sale of the mortgaged property

(*l*) *Pelly* v. *Wathen* (1849), 7 Hare, 351.

(*m*) *Faulkner* v. *Bolton* (1835), 7 Sim. 319; and see form of orders in 3 Seton, Judgments and Orders, 6th ed., pp. 1926 *et seq.* The dismissal of the action is obtained on motion of course, supported by affidavit of attendance to receive payment and non-payment (Daniell's Chancery Forms, p. 782).

(*n*) *Jones* v. *Creswicke* (1839), 9 Sim. 304.

(*o*) *Novosielksi* v. *Wakefield* (1811), 17 Ves. 417; *Faulkner* v. *Bolton*, *supra*.

(*p*) *Collinson* v. *Jeffery*, [1896] 1 Ch. 644.

(*q*) *Hansard* v. *Hardy* (1812), 18 Ves. 455.

(*r*) *Cholmley* v. *Oxford* (*Countess Dowager*) (1742), 2 Atk. 267; *Winchester* (*Bishop*) v. *Paine* (1805), 11 Ves. 194; *Inman* v. *Wearing* (1850), 3 De G. & Sm. 729; *Re Alison*, *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, 293, C. A. But not against other persons entitled to redeem (*Re Greaves*, *Ex parte Paine* (1863), 3 De G. J. & Sm. 458, 463; *Chappell* v. *Rees* (1852), 1 De G. M. & G. 393).

(*s*) *Cottingham* v. *Shrewsbury* (*Earl*) (1843), 3 Hare, 627, 637.

(*t*) *Garth* v. *Ward* (1741), 2 Atk. 174.

(*a*) *Wood* v. *Surr* (1854), 19 Beav. 551. As to foreclosing a surety who has mortgaged his own property, see *Beckett* v. *Micklethwaite* (1821), Madd. & G. 199; *Aldworth* v. *Robinson* (1840), 2 Beav. 287.

(*b*) *Marshall* v. *Shrewsbury* (1875), 10 Ch. App. 250.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25 (1). It has been said that such an order is a matter of right (*Clarke* v. *Pannell* (1884), 29 Sol. Jo. 147); but see *Brewer* v. *Square*, [1892] 2 Ch. 111, where the matter is treated as one for the exercise of judicial discretion; and see p. 291, *post*.

SECT. 7. Enforcement of the Equity of Redemption.

and such an order can be made even on an interlocutory application (*d*). Any person entitled to redeem can procure the order if the action is brought by him (*e*). The sale may be made out of court (*f*), provided that all persons interested are before the court or bound by the order (*g*), but the purchase-money is ordered to be paid into court (*f*).

(vi.) *Costs.*

Costs.

**298.** In an action of redemption the mortgagor, as a rule, pays his own costs. The right of the mortgagee is to add all costs, charges, and expenses properly incurred in relation to the mortgaged property to his mortgage debt (*h*).

## SECT. 8.—*Loss of Right to Redeem.*

By sale of equity of redemption.

**299.** The right of redemption is lost on a sale or release of the equity of redemption by the mortgagor to the mortgagee made by a separate transaction subsequent to the mortgage and entirely independent of any bargain contemporaneous with it (*i*), or by a valid sale of the property by the mortgagee under his power of sale (*j*).

By lapse of time.

The right of redemption may also be lost by lapse of time (*k*), or by the operation of an order for foreclosure (*l*).

By concealment of prior mortgage.

A mortgagor who, having mortgaged his lands, grants a subsequent mortgage thereof without giving the subsequent mortgagee notice in writing of the prior incumbrance, is deprived by statute of all equity of redemption in respect of the subsequent mortgage (*m*); but he can redeem at the time fixed in the mortgage (*n*). The statutory restriction does not apply to equitable charges (*o*) or to cases where the subsequent mortgage contains property of substantial value in addition to that comprised in the earlier

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(*d*) *Woolley* v. *Colman* (1882), 21 Ch. D. 169.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25 (1).

(*f*) *Woolley* v. *Colman, supra*; *Davies* v. *Wright* (1886), 32 Ch. D. 220; *Brewer* v. *Square*, [1892] 2 Ch. 111.

(*g*) R. S. C., Ord. 51, r. 1A.

(*h*) *Hewitt* v. *Loosemore* (1851), 9 Hare, 449; *Dunstan* v. *Patterson* (1847), 2 Ph. 341; *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295; *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A. The proper costs, charges, and expenses of a mortgagee, his right to them, and the circumstances under which he may be deprived of them, or even ordered to pay the mortgagor's costs made necessary by the mortgagee's misconduct, are dealt with at pp. 231 *et seq.*, *post*.

(*i*) See pp. 71, 144, *ante*.

(*j*) See p. 71, *ante*, and pp. 245, 256, *post*.

(*k*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 149; and see *ibid.*, p. 133, note (*f*). For an appropriate recital of such a title, see Encyclopædia of Forms and Precedents, Vol. V., p. 561, and for a conveyance thereunder see *ibid.*, Vol. XII., pp. 566, 902.

(*l*) See p. 293, *post*. Property which becomes vested in trustees as the result of foreclosure, or by virtue of the Statutes of Limitation, is held by them on a statutory trust for sale with power to postpone such sale so long as they think fit (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 9); see title TRUSTS AND TRUSTEES.

(*m*) Stat. (1692) 4 Will. & Mar. c. 16, ss. 2, 3.

(*n*) *Ibid.*; *Kennard* v. *Futvoye* (1860), 2 Giff. 81.

(*o*) *Kennard* v. *Futvoye, supra*.

mortgage (*p*), or where the subsequent mortgagee has been guilty of unfair dealing (*q*).

SECT. 8 Loss of Right to Redeem.

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# Part V.—Rights and Liabilities of the Mortgagor.

## SECT. 1.—*As regards the Mortgagee.*

### SUB-SECT. 1.—*Right to Possession and Receipt of Rents and Profits.*

Right to possession until demand made by mortgagee.

**300.** When a legal mortgage (*a*) is executed, the mortgagee becomes the legal owner of the mortgaged property, and in the absence of express stipulation to the contrary (*b*) is entitled to immediate possession (*c*) or receipt of the rents and profits (*d*); but until the mortgagee demands possession (*e*), or enters into receipt of the rents and profits of the mortgaged property, it is of the nature of the transaction that the mortgagor should remain in possession, and such possession is rightful (*f*).

Right to receipt of rents.

No occupation rent can, prior to demand for possession, be charged against the mortgagor for that part of the mortgaged land which is in his occupation, nor can the mortgagee claim back rents (*g*) or profits (*h*) accrued due and received before his demand

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(*p*) *Stafford* v. *Selby* (1707), 2 Vern. 589.

(*q*) *James* v. *Kerr* (1889), 40 Ch. D. 449, 455.

(*a*) As to legal and equitable mortgages, see pp. 73, 74, *ante*. As to how far an equitable mortgagee is entitled to possession, see p. 190, *post*.

(*b*) See *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; *Gibbs* v. *Cruikshank* (1873), L. R. 8 C. P. 454, 461; *Moore* v. *Shelley* (1883), 8 App. Cas. 285, P. C.

(*c*) *Pope* v. *Biggs* (1829), 9 B. & C. 245, *per* LITTLEDALE, J., at p. 253; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1817), 2 Mer. 171, *per* GRANT, M.R., at p. 359; and see pp. 73, 74, *ante*, 189, *post*.

(*d*) *Pope* v. *Biggs*, *supra*.

(*e*) *Bagnall* v. *Villar* (1879), 12 Ch. D. 812. The mortgagor can rightfully retain possession against the mortgagee's receiver until demand for possession is made, unless the order appointing the receiver directs the mortgagor to attorn or deliver up possession (*Randfield* v. *Randfield* (1859), 7 W. R. 651; *Yorkshire Banking Co.* v. *Mullan* (1887), 35 Ch. D. 125).

(*f*) *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A., *per* Lord SELBORNE, L.C., at p. 359; affirmed, *sub nom. Pugh* v. *Heath* (1882), 7 App. Cas. 235. For a form of consent by a mortgagee exercising his statutory powers, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 716.

(*g*) *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; *Yorkshire Banking Co.* v. *Mullan*, *supra*; see also *Green* v. *Rheinberg* (1911), 104 L. T. 149, C. A. (rent paid to mortgagor in advance). Back rents received by a sequestrator are *in custodiâ legis*, and can be recovered from him by a mortgagee. Rents received by a receiver do not belong to a mortgagee unless they were originally received on his behalf. The remedy of the mortgagee is to move to discharge the receiver and enter into possession (*Thomas* v. *Brigstocke* (1827), 4 Russ. 64; *Re Hoare, Hoare* v. *Owen*, [1892] 3 Ch. 94). As to the appointment of a receiver by the mortgagee, see p. 264, *post*.

(*h*) *Higgins* v. *York Buildings Co.* (1740), 2 Atk. 107; *Ex parte Wilson* 1813), 2 Ves. & B. 252; *Hele* v. *Bexley* (*Lord*), *Whitfield* v. *Bowyer, Whitfield*

SECT. 1. As regards the Mortgagee.

for possession. The mortgagor receives the profits for his own use and not as agent or bailiff for the mortgagee, even though the mortgaged property is a life estate or other wasting security (*i*).

Right of management.

While rightfully in possession the mortgagor can, so far as is consistent with the mortgagee's rights (*k*), cut and sell the crops and underwood in the ordinary course of management (*l*), remove tenants' fixtures (*m*), nominate to livings (*a*), hold the title deeds against everyone except the mortgagee (*b*), and vote at parliamentary elections in respect of the mortgaged land (*c*).

SUB-SECT. 2.—*Position as Tenant.*

Position of mortgagor as tenant.

**301.** A mortgagor who remains in possession of the mortgaged property by permission of the mortgagee, without express provision (*d*), is a tenant to the mortgagee, but his tenancy differs in some material respects from any other tenancy. He has not the rights of a tenant at will (*e*), and he may be turned out of possession without notice, and is not entitled to emblements. His tenancy is only *quodam modo* a tenancy at will (*f*). The mortgagee may treat

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v. *Knight* (1855), 20 Beav. 127. Where a mortgaged fund was misappropriated, and the mortgagor recovered capital and arrears of income, the mortgagee was held to have no claim to the arrears (*Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 271).

(*i*) *Colman* v. *St. Albans* (*Duke*) (1796), 3 Ves. 25; *Trent* v. *Hunt* (1853), 9 Exch. 14; *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224, 236; *Markwick* v. *Hurdingham* (1880), 15 Ch. D. 339, 349, C. A.; and see *Re Anglesey's* (*Marquis*) *Estate*, *Paget* v. *Anglesey* (1874), L. R. 17 Eq. 283, where a mortgagee of a life estate, though he had not entered into possession, unsuccessfully claimed an apportioned part of the rents accruing due after the mortgagor's death by virtue of the Apportionment Act, 1833 (4 & 5 Will. 4, c. 22).

(*k*) As to the mortgagee's right of possession, see p. 189, *post*.

(*l*) *Hampton* v. *Hodges* (1803), 8 Ves. 105 (underwood); *Bagnall* v. *Villar* (1879), 12 Ch. D. 812 (crops); *Re Phillips*, *Ex parte National Mercantile Bank* (1880), 16 Ch. D. 104, C. A.; and as to timber, see *Hippesley* v. *Spencer* (1820), 5 Madd. 422; *Humphreys* v. *Harrison* (1820), 1 Jac. & W. 581; *King* v. *Smith* (1843), 2 Hare, 239, 243; *Kekewich* v. *Marker* (1851), 3 Mac. & G. 311, 329; *Re Phillips*, *Ex parte National Mercantile Bank* (1868), 16 Ch. D. 104, 106, C. A.; *Harper* v. *Aplin* (1886), 54 L. T. 383.

(*m*) *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 713, C. A.; *Huddersfield Banking Co., Ltd.* v. *Lister* (*Henry*) *& Son, Ltd.*, [1895] 2 Ch. 273, 282, 286, C. A.; *Ellis* v. *Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, C. A.; and see p. 119, *ante*.

(*a*) See p. 129, *ante*.

(*b*) *Davies* v. *Vernon* (1844), 6 Q. B. 443; *Newton* v. *Beck* (1858), 3 H. & N. 220.

(*c*) Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 74; and see title ELECTIONS, Vol. XII., p. 150.

(*d*) For cases of express provisions as to tenancies, see *Doe* d. *Bastow* v. *Cox* (1847), 11 Q. B. 122 (mortgagor tenant at will and pleasure of mortgagee at yearly rent); *Doe* d. *Dixie* v. *Davies* (1851), 7 Exch. 89 (covenant for quiet enjoyment by mortgagor as tenant at will at yearly rent); *Walker* v. *Giles* (1848), 6 C. B. 662 (mortgagors to retain possession until default, with proviso they should be tenants at will at a rent); and see p. 159, *post*.

(*e*) As to the nature of a tenancy at will, see title LANDLORD AND TENANT, Vol. XVIII., pp. 434 *et seq.*; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 293.

(*f*) *Moss* v. *Gallimore* (1779), 1 Doug. (K. B.) 279, *per* Lord MANSFIELD, at

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the mortgagor, as against a stranger, as his tenant at will, and as reversioner bring an action of trespass against a third person (*g*), but the mortgagee is not bound to recognise such tenancy, and may bring ejectment against the mortgagor as a trespasser without a previous demand of possession (*h*). A mortgagor is not a tenant at will of the mortgagee within the meaning of the Statute of Limitations (*i*).

Without express agreement.

**302.** A tenancy may be expressly created, and an express provision in the mortgage deed that the mortgagor may remain in possession until some certain event may amount to a redemise by the mortgagee (*k*).

Express agreement.

**303.** If the mortgagor by the mortgage deed attorns (*l*) to the mortgagee, the relationship of landlord and tenant arises between them, and the mortgagee can avail himself of the appropriate summary procedure for recovery of possession (*m*). Such a clause is invalid so far as it purports to confer a right to distrain upon any chattels (*n*), unless the mortgagee has actually entered into possession and demised the land to the mortgagor as his tenant at a fair and reasonable rent (*o*), in which case the mortgagee can

Attornment clause.

p. 282; *Christophers* v. *Sparke* (1820), 2 Jac. & W. 223; *Partridge* v. *Bere* (1822), 5 B. & Ald. 604; *Hitchman* v. *Walton* (1838), 4 M. & W. 409; *Re Knight, Ex parte Isherwood* (1882), 22 Ch. D. 384, C. A., *per* JESSEL, M.R., at p. 392.

(*g*) *Partridge* v. *Bere, supra.*

(*h*) *Doe* d. *Roby* v. *Maisey* (1828), 8 B. & C. 767, 768; *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307, 314.

(*i*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 113, note (*f*), 123.

(*k*) A demise is implied by a covenant that the mortgagor may remain in possession until default, but there is no such implication where the covenant is that the mortgagee may enter after default (*Wilkinson* v. *Hall* (1837), 4 Scott, 301; *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553; *Clowes* v. *Hughes* (1870), L. R. 5 Exch. 160; *Gibbs* v. *Cruikshank* (1873), L. R. 8 C. P. 454; *Moore* v. *Shelley* (1883), 8 App. Cas. 285, P. C.); and see p. 191, *post.*

(*l*) See title LANDLORD AND TENANT, Vol. XVIII., p. 336. For form of attornment clause in a mortgage, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 507.

(*m*) R. S. C., Ord. 3, r. 6 (F.), Ord. 14; *Daubuz* v. *Lavington* (1884), 13 Q. B. D. 347; *Hall* v. *Comfort* (1886), 18 Q. B. D. 11; *Mumford* v. *Collier* (1890), 25 Q. B. D. 279; *Kemp* v. *Lester*, [1896] 2 Q. B. 162, C. A.; and see titles DISTRESS, Vol. XI., p. 127; LANDLORD AND TENANT, Vol. XVIII., pp. 558, 559.

(*n*) Inasmuch as it is incapable of being registered as a bill of sale; see title BILLS OF SALE, Vol. III., p. 14; *Green* v. *Marsh*, [1892] 2 Q. B. 330, C. A. As to the effect of a covenant for payment in a void bill of sale, see *Davies* v. *Rees* (1886), 17 Q. B. D. 408, C. A.; title BILLS OF SALE, Vol. III., p. 34; and compare *Re Burdett, Ex parte Bryne* (1888), 20 Q. B. D. 310, C. A.

(*o*) *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D. 384, C. A. As to what is a fair and reasonable rent, see *Re Thompson, Ex parte Williams* (1877), 7 Ch. D. 138, C. A.; *Re Bowes, Ex parte Jackson* (1880), 14 Ch. D. 725, C. A.; *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, C. A. The rent may be fluctuating in amount (*Re Knight, Ex parte Voisey, supra*; *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A. (a mortgage to

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Estoppel.

distrain on the goods either of the mortgagor (*p*) or of a stranger as fully as an ordinary landlord (*q*).

A mortgagor who has attorned to a puisne mortgagee is estopped from denying the tenancy although it may appear from the deed that the legal estate is vested in the first mortgagee (*r*).

SUB-SECT. 3.—*Liability for Waste.*

Liability of mortgagor.

**304.** The power of the mortgagor while in possession to exercise all the rights of ownership is subject to the limitation that he may not diminish the security so as to render it insufficient. Waste (*a*) by a mortgagor in possession, for example, by felling timber or pulling down a house, will be restrained by injunction on proof that the security is thereby made deficient (*b*), or after order for foreclosure (*c*) without such proof.

## SECT. 2.—*As regards Third Parties.*

SUB-SECT. 1.—*Leases Created before the Mortgage.*

Effect of mortgage on leases.

**305.** A mortgage of land in lease at the date of the mortgage is an assignment of the reversion to the mortgagee, who is bound

secure a current account); title BILLS OF SALE, Vol. III., pp. 15, 16). And as to what amounts to possession by a mortgagee, see p. 193, *post*.

(*p*) *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, C. A.; *Re Threlfall, Ex parte Queen's Benefit Bu lding Society* (1880), 16 Ch. D. 274, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., p. 336; see also title BILLS OF SALE, Vol. III., p. 24.

(*q*) *Pinhorn* v. *Souster* (1853), 8 Exch. 763; *Kearsley* v. *Philips* (1883), 11 Q. B. D. 621, C. A. As to the rights of an ordinary landlord in this respect, see title DISTRESS, Vol. XI., pp. 115 *et seq*. The right to distrain on the goods of a stranger is now subject to the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53); see title DISTRESS, Vol. XI., pp. 143 *et seq*.

(*r*) *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; *Re Kitchin, Ex parte Punnett* (1880), 16 Ch. D. 226, C. A.; *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch.; and see title DISTRESS, Vol. XI., p. 127.

(*a*) As to waste generally, see titles AGRICULTURE, Vol. I., p. 295; LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq.*; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*b*) *Usborne* v. *Usborne* (1740), 1 Dick. 75; *Hippesley* v. *Spencer* (1820), 5 Madd. 422; *Hampton* v. *Hodges* (1803), 8 Ves. 105; *King* v. *Smith* (1843), 2 Hare, 239, 243; *Simmins* v. *Shirley* (1877), 6 Ch. D. 173. Trustees of a turnpike road have been restrained from reducing tolls which had been mortgaged (*Crewe* (*Lord*) v. *Edleston* (1857), 1 De G. & J. 93, C. A.; *Re Blakely Ordnance Co., Blakely* v. *Dent* (1867), 15 W. R. 663; *Re Humber Ironworks Co., Ex parte Warrant Finance Co.* (1868), 16 W. R. 474, 667, C. A.). The right of the mortgagee to restrain the felling of timber on a property which is an insufficient security is unaffected by the fact that the timber ought in a prudent course of management to be cut (*Harper* v. *Aplin* (1886), 54 L. T. 383). It seems that a mortgagee might restrain the removal of fixtures if such removal rendered the security insufficient (*Ellis* v. *Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, 399, C. A.; and see *Hitchman* v. *Walton* (1838), 4 M. & W. 409; *Ackroyd* v. *Mitchell* (1860), 3 L. T. 236). See also titles INJUNCTION, Vol. XVII., pp. 232 *et seq*., 251; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 518.

(*c*) *Goodman* v. *Kine* (1845), 8 Beav. 379 (pulling down a house); *Farrant* v. *Lovel* (1750), 3 Atk. 723; and see further, as to the right of the mortgagee to protect his security, p. 186, *post*.

by and can take advantage of the covenants, rights, and liabilities contained in such lease (*d*).

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The mortgage does not release the lessees from their liability to the mortgagor, who can sue for such rent if no notice of intention to take possession or enter into receipt of the rents and profits of the mortgaged land has been given by the mortgagee (*e*); but possession by the mortgagee, or a notice by a mortgagee to a tenant under a lease created before the mortgage to pay the rent to him, deprives the mortgagor of the right to recover from the tenant, by distress or action, any rent accruing due since the mortgage (*f*).

Right to rent.

A mortgage does not without express words entitle the mortgagee to receive rent in arrear at the date of the mortgage (*g*), or to sue for breaches of covenant committed prior to the mortgage (*h*), unless he became entitled to the rent after the 31st December, 1911 (*i*).

Rent in arrear.

Breaches of covenant.

A tenancy at will is determined by a mortgage of which the tenant has notice, but the creation of a new tenancy may be inferred from the circumstances (*j*).

Tenancy at will.

**306.** In the case of leases made before the creation of the mortgage, but after the 31st December, 1881, a mortgagor entitled to the possession (*k*) or receipt of the rent and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits has been given by the mortgagee, can sue the lessee for possession or recovery of rent, or for damages for any wrong or breach of covenant, and can, subject to certain

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(*d*) Stat. (1540) 32 Hen. 8, c. 34 (which does not apply to a tenancy created by parol); *Birch* v. *Wright* (1786), 1 Term Rep. 378; *Rogers* v. *Humphreys* (1835), 4 Ad. & El. 299; see, further, title DISTRESS, Vol. XI., p. 127; *Rudd* v. *Bowles* (1911), 105 L. T. 864.

(*e*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5); and see note (*f*), *infra*. Before the passing of this Act the mortgagor in receipt of the rents and profits of the land could distrain for them as bailiff of the mortgagee (*Doe* d. *Marriott* v. *Edwards* (1834), 5 B. & Ad. 1065; *Trent* v. *Hunt* (1853), 9 Exch. 14; *Snell* v. *Finch* (1863), 13 C. B. (N. S.) 651; *Reece* v. *Strousberg* (1885), 54 L. T. 133).

(*f*) *Moss* v. *Gallimore* (1779), 1 Doug. (K. B.) 279; *Rogers* v. *Humphreys*, *supra*; *Evans* v. *Elliott* (1838), 9 Ad. & El. 342; *Delaney* v. *Fox* (1857), 2 C. B. (N. S.) 768, *per* WILLES, J., at p. 774; *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A. This rule is not affected by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5), or the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10 (*Re Ind, Coope & Co., Ltd., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co.*, [1911] 2 Ch. 223). The mortgagor cannot distrain after the appointment of a receiver and notice to the tenant (*Woolston* v. *Ross*, [1900] 1 Ch. 788).

(*g*) *Rose* v. *Watson* (1864), 10 H. L. Cas. 672, 684.

(*h*) *Salmon* v. *Dean* (1851), 3 Mac. & G. 344. If such are expressly assigned, the mortgagee can sue for them as an assignee of choses in action.

(*i*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 2.

(*j*) *Jarman* v. *Hale*, [1899] 1 Q. B. 994.

(*k*) As to the meaning of these words, see *Bennett* v. *Hughes* (1886), 2 T. L. R. 715. A mortgagor, where the legal reversion on a lease made before 1st January, 1882, is in the mortgagee, cannot forfeit for breach of covenant, and sue for possession in his own name (*Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A.).

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restrictions (*l*), re-enter for breach of condition (*m*). Before a tenant receives notice of the mortgage he is not prejudiced by the payment of rent to the mortgagor (*n*). In the absence of any special agreement any damages belong to the mortgagor (*o*).

SUB-SECT. 2.—*Leases by Mortgagor and Mortgagee Jointly.*

When necessary.

**307.** A joint lease by mortgagor and mortgagee is the only method of leasing lands mortgaged before the 1st January, 1882, unless express powers of leasing are contained in the mortgage deed.

Effect of joint lease.

The lease in such case is made by the mortgagee who has the legal estate, and the mortgagor merely confirms it, inasmuch as being a stranger in law to the mortgaged property he can make no legal demise, and no covenant can be implied from him (*p*). A condition of re-entry reserved to the mortgagor and the mortgagee, or either of them, gives a right of re-entry to the mortgagee while his estate lasts, and to the mortgagor when the mortgage is paid off (*q*). If the rent is payable at one time to the mortgagee and at another to the mortgagor, a covenant by the lessee with both for payment of rent can be sued upon by the one then entitled to the rent (*a*).

Covenants enforceable by both mortgagor and mortgagee.

If the lease was granted after the 31st December, 1881, the covenants, even though made with the mortgagor alone, can be enforced by the mortgagee in possession (*b*).

Failure of mortgagor to join.

If the mortgagee agrees to grant a lease with the concurrence of

(*l*) See Conveyancing and Law of Property Act, 1881 (45 & 46 Vict. c. 41), s. 14; Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 2 (2); and see title LANDLORD AND TENANT, Vol. XVIII., p. 539.

(*m*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5); Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; *Municipal Permanent Investment Building Society* v. *Smith* (1888), 22 Q. B. D. 70, C. A.; *Fairclough* v. *Marshall* (1878), 4 Ex. D. 37, C. A.; *Matthews* v. *Usher*, [1900] 2 Q. B. 535, C. A.; *Molyneux* v. *Richard*, [1906] 1 Ch. 34; *Turner* v. *Walsh*, [1909] 2 K. B. 484, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 535, 596. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, does not apply to leases made before the 1st January, 1882.

(*n*) Stat. (1705) 4 & 5 Anne, c. 3, ss. 9, 10; *Pope* v. *Biggs* (1829), 9 B. & C. 245. Although payment of rent before it is due is not within the protection of the Act (*De Nicholls* v. *Saunders* (1870), L. R. 5 C. P. 589; *Cook* v. *Guerra* (1872), L. R. 7 C. P. 132), the mortgagee, as a purchaser, is affected by constructive notice of the tenant's rights, and is bound by any settlement made, previous to the mortgage, between mortgagor and lessee, by way of satisfaction of claims for all rent reserved during the term (*Green* v. *Rheinberg* (1911), 104 L. T. 149, C. A.; see *Hunt* v. *Luck*, [1901] 1 Ch. 45; *Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18, 23); and see title LANDLORD AND TENANT, Vol. XVIII., p. 595; and as to the position of the tenant and the mortgagee generally, see *ibid.*, p. 357.

(*o*) *Turner* v. *Walsh*, *supra*.

(*p*) *Smith* v. *Pocklington* (1831), 1 Cr. & J 445. For forms, see Encyclopædia of Forms and Precedents, Vol. VII., pp. 654, 656.

(*q*) *Doe* d. *Barney* v. *Adams* (1832), 2 Cr. & J. 232.

(*a*) *Harrold* v. *Whitaker* (1846), 11 Q. B. 147.

(*b*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 2; *Turner* v. *Walsh*, *supra*. As to the old rule, see *Webb* v. *Russell* (1789), 3 Term Rep. 393; and see title LANDLORD AND TENANT, Vol. XVIII., p. 595, note (*n*); and p. 164, *post*.

the mortgagor, which concurrence is withheld, an intending tenant who knows the title cannot insist on a lease from the mortgagee alone, nor, apparently, claim damages (*c*).

SUB-SECT. 3.—*Leases by Mortgagor under Express Power.*

Where express powers in mortgage necessary.

**308**. Express powers of leasing must be inserted in a mortgage if it is desired that the mortgagor should have powers of granting mining leases, or of granting building and agricultural or occupation leases, apart from the statutory provisions (*d*). If the lease is made in accordance with the power, the benefit and apparently the burden of the covenants are annexed to the reversion, and so are available by or against the mortgagee, although the covenants are in form between the mortgagor as lessor and the lessee (*e*).

SUB-SECT. 4.—*Leases by Mortgagor or Mortgagee under Statutory Powers.*

Statutory power.

**309**. Statutory powers of leasing are given (*f*) to mortgagees and mortgagors if in possession (*g*) in the case of mortgages made after the 31st December, 1881, but these powers may be extended, by agreement in writing, to mortgages made before that date. The mortgagor or the mortgagee, when respectively in possession, can, subject to the statutory restrictions and unless the statutory power is excluded by the mortgage (*h*), grant leases of any land of any tenure which is in mortgage. The leases authorised are agricultural or occupation (*i*) leases for any term not exceeding twenty-one

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(*c*) *Hungerford* v. *Clay* (1722), 9 Mod. Rep. 1; *Franklinski* v. *Ball* (1864), 33 Beav. 560.

(*d*) These are contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18; see the text, *infra*.

(*e*) *Greenaway* v. *Hart* (1854), 14 C. B. 340; *Yellowly* v. *Gower* (1855), 11 Exch. 274; and see *Re Ind, Coope & Co., Ltd., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co.*, [1911] 2 Ch. 223. As to leases under powers generally, see title LANDLORD AND TENANT, VOL. XVIII., pp. 361 *et seq.*

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, the provisions of which may be extended by agreement of the parties (*ibid.*, s. 18 (14)); for a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 916. See, further, titles DISTRESS, Vol. XI., pp. 128, 129; LANDLORD AND TENANT, Vol. XVIII,. pp. 356 *et seq.*

(*g*) For this purpose a mortgagee who has appointed a receiver is in possession (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (11)), and the expression "mortgagor" does not include an incumbrancer deriving title under the original mortgagor (*ibid.*, s. 3 (10)).

(*h*) A clause excluding the operation of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, is not a "usual" clause (*Re Nugent and Riley* (1883), 49 L. T. 132). For a form of consent to a lease, where the operation of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (1), is excluded, see Encyclopædia of Forms and Precedents, Vol. XVI., p. 439.

(*i*) A lease of a furnished mansion with some land adjoining and the sporting rights over the remainder of the mortgaged lands, which had been let before the mortgage was created to agricultural tenants with a reservation of sporting rights, is valid as an occupation lease (*Brown* v. *Peto*, [1900] 2 Q. B. 653, C. A.; see also *Sheehy* v. *Muskerry* (*Lord*) (1848), 1 H. L. Cas. 576, 589; *Edwards* v. *Millbank* (1859), 4 Drew. 606). The lease must not be of the mortgaged property and other property at a single rent (*King* v. *Bird*, [1909] 1 K. B. 837), and may contain power to the lessee to determine (*ibid.*).

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years, and building (*j*) leases for any term not exceeding ninety-nine years. Every such lease must be made to take effect in possession not later than twelve months after its date, and must reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken. It must contain a covenant by the lessee for payment of such rent, and a condition of re-entry if the rent is not paid within a period to be specified in the lease, not exceeding thirty days (*k*).

Rent.

In the case of a building lease a nominal or other rent less than the rent ultimately payable may be made payable for the first five years, or any less part of the term (*l*). The adequacy of the rent reserved must be judged by the particular circumstances. A lessor is justified in taking a rent from a good tenant substantially less than that offered by an inferior tenant. The court will not, unless it is satisfied that the inadequacy is substantial, interfere with a rent which is the result of a *bonâ fide* bargain between the mortgagor and the lessee (*m*), but it seems that the mortgagor cannot accept a lump sum as rent for future years (*n*).

Counterpart.

If the lease is made by the mortgagor he must, within one month after making the lease, deliver to the mortgagee a counterpart of the lease duly signed by the lessee, but the lessee is not concerned to see that this provision is complied with (*o*).

Effect on mortgagee's rights.

The statutory power enables the mortgagor to create a term out of the estate of the mortgagee so as to convert that estate into one expectant on the term granted by the lease (*p*). The mortgagee is bound by a lease thus made by the mortgagor (*q*), and on giving notice to the lessee to pay the rent to him, and on default by the lessee, he can sue for it and bring an action for breach of any covenant contained in the lease, and these rights of the mortgagee are not affected by a collateral agreement between the mortgagor and the lessee after the date of the mortgage (*r*).

SUB-SECT. 5.—*Leases Granted by Mortgagor Ultra Vires.*

Valid by estoppel.

**310.** A lease granted by a mortgagor after a mortgage without statutory or express powers is good by estoppel between mortgagor and lessee, but void as between mortgagee and lessee (*s*). The

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(*j*) As to the definition of a building lease, see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (9).

(*k*) *Ibid.*, s. 18 (7).

(*l*) *Ibid.*, s. 18 (10).

(*m*) Compare *Sutherland* (*Dowager Duchess*) v. *Sutherland* (*Duke*), [1893] 3 Ch. 169, 195; *Pease* v. *Courtney*, [1904] 2 Ch. 503; *Gilbey* v. *Rush*, [1906] 1 Ch. 11 (cases on the Settled Land Acts).

(*n*) *Municipal Permanent Investment Building Society* v. *Smith* (1888), 22 Q. B. D. 70, C. A. But a mortgagee will be bound by such an arrangement made prior to the mortgage (*Green* v. *Rheinberg* (1911), 104 L. T. 149); see note (*n*), p. 162, *ante*.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (11).

(*p*) *Municipal Permanent Investment Building Society* v. *Smith*, *supra*, *per* FRY, L.J., at p. 72.

(*q*) *E.g.*, a mortgagee cannot block the lessee's lights (*Wilson* v. *Queen's Club*, [1891] 3 Ch. 522; *Turner* v. *Walsh*, [1909] 2 K. B. 484, C. A.).

(*r*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; *Municipal Permanent Investment Building Society* v. *Smith*, *supra*.

(*s*) *Trent* v. *Hunt* (1853), 9 Exch. 14; *Cuthbertson* v. *Irving* (1860), 6

lessee can, however, protect himself from eviction (*t*) by the mortgagee by redeeming the mortgage (*u*). The reversion by estoppel in the lessor passes by assignment, so that an assignee of the equity of redemption can enforce the lessee's covenants (*v*).

Effect of estoppel on tenant.

A tenant under a lease granted *ultra vires* is, until eviction, actual or constructive, by paramount title, estopped from denying the mortgagor's title, and therefore is bound to pay the rent to the mortgagor, but payment of the rent to a mortgagee who demands it, and threatens eviction in case of refusal, is a good payment against the mortgagor or his assignee both in respect of rent accruing due after the demand, and of rent which accrued due before the demand but was then unpaid (*a*).

Lessee's remedy in damages.

A lessee under such a lease can claim damages against the mortgagor for eviction, but cannot obtain a decree that the mortgagor should pay off the mortgage and so acquire the legal estate and be able to give effect to the contract (*b*).

Mortgagee and tenant.

**311.** A mortgagee who has recognised the tenant as his tenant cannot treat him as a trespasser and evict him (*c*). No privity can be assumed between the tenant and the mortgagee, but evidence is

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H. & N. 135, Ex. Ch.; *Hassard* v. *Fowler* (1892), 32 L. R. Ir. 49. A mortgagor cannot repudiate his own lease by paying off the mortgage and enforcing the rights which the mortgagee had; and see, further, title DISTRESS, Vol. XI., p. 128. A mortgagee is not bound because on being informed of a proposed tenancy he does not object (*Re O'Rourke's Estate* (1889), 23 L. R. Ir. 497). But a mortgagee who purchases the equity of redemption may be bound by tenancy agreements made by the mortgagor (*Smith* v. *Phillips* (1887), 1 Keen, 694; *O'Loughlin* v. *Fitzgerald* (1873), 7 I. R. Eq. 483).

(*t*) As to the mortgagee's rights against a tenant under a tenancy not binding on the mortgagee, see p. 192, *post*.

(*u*) *Tarn* v. *Turner* (1888), 39 Ch. D. 456, C. A.

(*v*) *Cuthbertson* v. *Irving* (1860), 6 H. & N. 135, Ex. Ch. Two exceptions have been stated to the above rule that a reversion by estoppel passes by assignment, namely, (1) in the case of a mortgage of copyhold land when the mortgagee has not been admitted (*Doe* d. *North* v. *Webber* (1837), 3 Bing. (N. C.) 922; *Rayson* v. *Adcock* (1863), 9 Jur. (N. S.) 800); and (2) when the want of title appears on the face of the lease (*Pargeter* v. *Harris* (1845), 7 Q. B. 708; *Saunders* v. *Merryweather* (1865), 3 H. & C. 902); but these latter cases, it has been said, must be taken to be overruled on this point by the case of *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; see *Morton* v. *Woods* (1869), L. R. 4 Q. B. 293, Ex. Ch., *per* KELLY, C.B., at p. 303; and see title ESTOPPEL, Vol. XIII., p. 367.

(*a*) *Johnson* v. *Jones* (1839), 9 Ad. & El. 809; *Boodle* v. *Cambell* (1844), 7 Man. & G. 386; *Delaney* v. *Fox* (1857), 2 C. B. (N. S.) 768; *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A. Notice alone is not sufficient (*Alchorne* v. *Gomme* (1824), 2 Bing. 54; *Waddilove* v. *Barnett* (1837), 2 Bing. (N. C.) 538; *Trent* v. *Hunt* (1853), 9 Exch. 14; *Hickman* v. *Machin* (1859), 4 H. & N. 716); and see *Wilton* v. *Dunn* (1851), 17 Q. B. 294.

(*b*) *Costigan* v. *Hastler* (1804), 2 Sch. & Lef. 160; *Carpenter* v. *Parker* (1857), 3 C. B. (N. S.) 206; *Howe* v. *Hunt* (1862), 31 Beav. 420.

(*c*) *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A.; *Corbett* v. *Plowden* (1884), 25 Ch. D. 678, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 475, 476. Recognition is a question of fact. Receipt of money from a tenant is not conclusive, for it may have been received by the mortgagee as part of the principal, or as interest. An encouragement by the mortgagee to the tenant to spend money may be evidence of a recognition of the lease (*Doe* d. *Parry* v. *Hughes* (1847), 11 Jur. 698; *Doe* d. *Rogers* v. *Cadwallader* (1831), 2 B. & Ad. 473; *Evans* v. *Elliot* (1838),

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admissible to prove that the mortgagor in granting the lease acted as agent for the mortgagee (*d*). The mortgagee and tenant can agree to have as between themselves the relationship of landlord and tenant (*e*). Such an agreement destroys the old lease between the mortgagor and tenant (*f*) and creates a tenancy between mortgagee and tenant, which, except under very special circumstances, would be a yearly one (*g*). The terms of such tenancy are ascertained by evidence and inference from the facts (*h*), and are not necessarily those on which the tenant held under the mortgagor (*i*). A mortgagee cannot, however, by notice to a tenant compel him to be his tenant, and the continuance in possession after notice from the mortgagee is no evidence of an agreement that he would become tenant (*j*).

New tenancy.

SUB-SECT. 6.—*Surrenders of Leases to the Mortgagor.*

Statutory power of mortgagor.

**312.** A mortgagor, not having the legal estate in the reversion vested in him, has no general power to accept a surrender of a lease of the mortgaged property although such lease was made by him under his statutory powers (*k*), nor without the consent of the mortgagee can he determine tenancies (*l*): but for the purpose of enabling a lease (*m*) to be granted in the case of a mortgage made on or after the 1st January, 1912 (*n*), a mortgagor (*a*) of land, while

9 Ad. & El. 342; see *Doe* d. *Whitaker* v. *Hales* (1831), 7 Bing. 322; *Doe* d. *Bowman* v. *Lewis* (1844), 13 M. & W. 241; *Doe* d. *Wilkinson* v. *Goodier* (1847), 10 Q. B. 957).

(*d*) *Corbett* v. *Plowden* (1884), 25 Ch. D. 678, C. A., *per* Lord SELBORNE, L.C., at p. 681.

(*e*) *Brown* v. *Storey* (1840), 1 Man. & G. 117, *per* TINDAL, C.J., at p. 126.

(*f*) *Corbett* v. *Plowden, supra*, at p. 682.

(*g*) *Ibid.*, at p. 681. Payment of rent by a tenant to the mortgagee raises an implication of a new tenancy (*Partington* v. *Woodcock* (1837), 6 Ad. & El. 690; *Doe* d. *Higginbotham* v. *Barton* (1840), 11 Ad. & El. 307, 315; title LANDLORD AND TENANT, Vol. XVIII., p. 357).

(*h*) Notice by mortgagee to lessee to pay rent to him and payment accordingly would be such evidence (*Corbett* v. *Plowden, supra*; *Keith* v. *Gancia* (*R.*) *& Co., Ltd.*, [1904] 1 Ch. 774, C. A.); and see title DISTRESS, Vol. XI., p. 127.

(*i*) *Keith* v. *Gancia* (*R.*) *& Co., Ltd., supra*, at p. 783; and see *Oakley* v. *Monck* (1866), L. R. 1 Exch. 159, Ex. Ch.

(*j*) *Evans* v. *Elliot* (1838), 9 Ad. & El. 342; *Towerson* v. *Jackson*, [1891] 2 Q. B. 484, C. A., disapproving on this point *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A.; and see *Brown* v. *Storey, supra*: *Pope* v. *Biggs* (1829), 2 B. & C. 245, and *Waddilove* v. *Barnet* (1836), 4 Dowl. 348, must be treated as overruled on this point by *Evans* v. *Elliot, supra*.

(*k*) *Robbins* v. *Whyte*, [1906] 1 K. B. 125. As to surrenders generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 546 *et seq.*

(*l*) *Miles* v. *Murphy* (1871), 5 I. R. C. L. 382; *Cadle* v. *Moody* (1861), 7 Jur. (N. S.) 1249; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (17).

(*m*) The lease must be authorised by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, as varied by the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3, or under an agreement made pursuant to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18, or by the mortgage deed (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (1)).

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (16); Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (7).

(*a*) This expression does not include an incumbrancer deriving title

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in possession, has power, in like manner as if the legal estate were vested in him, and as against every incumbrancer, to accept such surrender of the whole or any part of the land comprised in the lease (*b*), and on a surrender of part of the land the rent may be apportioned (*c*) and the original lease may be varied if the lease so varied would have been an authorised lease by the person accepting the surrender (*d*). A mortgagee in possession (*e*) has, as against prior incumbrancers and the mortgagor, similar powers (*f*). But these powers do not authorise surrenders for any consideration except an agreement to accept an authorised lease (*g*).

Mortgagee's power.

Such a surrender is invalid unless,

Essentials to validity of surrender.

(1) an authorised lease is granted of the whole of the land or mines and minerals comprised in the surrender to take effect in possession or within one month after the date of the surrender (*h*);

(2) the term certain or interest granted by the new lease is not less than the unexpired term or interest which would have been subsisting under the old lease if it had not been surrendered (*i*); and

(3) if the whole of the land, mines, and minerals originally leased has been surrendered, the rent reserved by the new lease is not less than the rent under the original lease, or if part only has been surrendered, the aggregate rents remaining payable or reserved under the original and the new lease are not less than the rent which would have been payable if there had been no surrender (*k*).

Contract to surrender.

A contract to make or accept an authorised surrender may be enforced by or against every person on whom the surrender, if completed, would be binding (*l*).

Extent of statutory powers.

The statutory powers do not authorise a surrender which could not have been accepted by the mortgagor and all the incumbrancers prior to the 1st January, 1912 (*m*), but the mortgage deed may confer further powers of accepting surrenders (*n*), and the mortgagor and mortgagees may by agreement in writing make the statutory powers applicable to mortgages executed before the 1st January, 1912 (*o*). On the other hand, the statutory powers may be excluded by the mortgagee and mortgagor in the mortgage deed or otherwise in writing (*p*). The statutory powers of accepting

under the original mortgagor (Conveyancing Act, 191 (1 & 2 Geo. 5, c. 37), s. 3 (10)).

(*b*) *Ibid.*, s. 3 (1). The surrender may except, or include only, the mines and minerals (*ibid.*).

(*c*) *Ibid.*

(*d*) *Ibid.*, s. 3 (3).

(*e*) See note (*g*), p. 163, *ante*.

(*f*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (2).

(*g*) *Ibid.*, s. 3 (4).

(*h*) *Ibid.*, s. 3 (5) (a).

(*i*) *Ibid.*, s. 3 (5) (b).

(*k*) *Ibid.*, s. 3 (5) (c).

(*l*) *Ibid.*, s. 3 (6). For a form of surrender to a mortgagee, see Encyclopædia of Forms and Precedents, Vol. VII., p. 670.

(*m*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (9).

(*n*) *Ibid.*, s. 3 (8).

(*o*) *Ibid.*, s. 3 (7); Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (16).

(*p*) *Ibid.*, s. 18 (13); Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (7).

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surrenders apply to any letting or to agreements, whether in writing or not, for leasing or letting (*q*).

SUB-SECT. 7.—*Other Rights and Liabilities.*

As regards

**313**. A mortgagor as owner of the property, subject only to the right of the mortgagee, can, while in possession, bring an action to restrain any injury to the mortgaged property, and can recover damages for the same. If the questions raised in the action concern the mortgagee, so that the whole matter cannot be settled in his absence, the defendants can claim that the mortgagee should be made a party to the action as co-defendant (*r*).

As regards possession by

Should a mortgagor allow judgment to go against himself in an action brought by a stranger to recover possession of the mortgaged property, the mortgagee may intervene even after judgment (*s*).

# Part. VI.—The Mortgagee's Estate and Interest.

SECT. 1.—*Nature.*

Where mort-

**314**. Where a mortgage is made by conveyance, the mortgagee takes the estate or interest of the mortgagor to the extent to which the conveyance is effectual to pass it (*a*); and if the conveyance is so framed as, either expressly or by statute (*a*), to convey the whole of the mortgagor's estate and interest, every estate, whether legal or equitable, which is vested in him passes to the mortgagee (*b*), and is held by him, subject only to the mortgagor's legal right of redemption, until the day fixed for payment, and thereafter subject to his equity of redemption (*c*).

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(*q*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (7); Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18 (17).

(*r*) *Fairclough* v. *Marshall* (1878), 4 Ex. D. 37, C. A.; *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (1890), 44 Ch. D. 374, C. A.; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493, C. A.; see, further, title INJUNCTION, Vol. XVII., p. 251.

(*s*) *Jacques* v. *Harrison* (1884), 12 Q. B. D. 165, C. A.

(*a*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 63, which implies in conveyances the former "all estate" clause; and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472.

(*b*) *Carter* v. *Carter* (1857), 3 K. & J. 617, 634; see p. 118, *ante*, and title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472. As to passing an estate vested in the mortgagor as trustee or executor, see *Dorrell* v. *Collins* (1582), Cro. Eliz. 6; *Fausset* v. *Carpenter* (1831), 2 Dow. & Cl. 232, commented on in *Carter* v. *Carter*, *supra*; and see *Ex parte Marshall* (1839), 9 Sim. 555. Where, in a mortgage of settled estates, the premises are by the operative part assured subject to a power to appoint a sum of money as portions, the scope of the conveyance is not enlarged by a covenant for quiet enjoyment free from portions (*Nottidge* v. *Dering*, *Raban* v. *Dering*, [1910] 1 Ch. 297, C. A.; compare *Nightingale* v. *Reynolds*, [1903] 2 Ch. 236). As to the effect of a conveyance by way of mortgage by one of several joint tenants, see p. 91, *ante*.

(*c*) See pp. 71, 74, 147, *ante*.

SECT. 1. Nature.

The mortgagee has the rights and is subject to the liabilities which are incident to the estate thus vested in him; hence, if he has acquired a legal estate in the premises, he has, in general, all the rights of a legal owner, both as against the mortgagor and as against third parties (*d*), and he is subject to the liabilities which fall on a legal owner (*e*). If he has acquired an equitable estate only he has not the rights of a legal owner, and he loses the protection frequently afforded by the possession of the legal estate (*f*); but he does not incur the liabilities of a legal owner (*g*).

Where legal estate acquired.

Where equitable estate acquired.

**315.** Where the mortgage is not made by conveyance, but by way of charge only (*h*), the mortgagee takes no estate in the premises, but he has an equitable interest, enforceable by sale and sometimes by foreclosure (*i*).

Where mortgage made by charge.

## SECT. 2.—*Assignment and Devolution.*

### SUB-SECT. 1.—*Transfer of Mortgage.*

**316.** The mortgagee is entitled to transfer his mortgage, and he may do this either absolutely or by way of sub-mortgage (*k*). But

Mortgagee's right to transfer.

(*d*) But as long as the mortgagor is in possession he has now, by statute, the rights of action for certain purposes of a legal owner; see pp. 161, 163, 166, *ante*.

(*e*) Thus, in the case of freehold lands his estate is subject to the legal incidents of tenure (see, generally, title REAL PROPERTY AND CHATTELS REAL), and the mortgagor is freed from such incidents, save where, as in the case of dower and escheat, the strict rule has been varied by statute (see title EQUITY, Vol. XIII., pp. 95, 96). And the mortgagee is personally liable for a rentcharge payable out of the land (*Cundiff* v. *Fitzsimmons*, [1911] 1 K. B. 513). In the case of leaseholds the mortgagee is subject as an assignee to the liability of the lessee under the covenants of the lease (see title LANDLORD AND TENANT, Vol. XVIII., p. 589; *Galbraith* v. *Cooper* (1860), 8 H. L. Cas. 315, 326); the liability is usually avoided by taking the mortgage by way of subdemise (see pp. 126, 127, *ante*), whereby the mortgagor ceases to be liable (see *Re Gee, Ex parte Official Receiver* (1889), 24 Q. B. D. 65). A mortgagee by subdemise from an assignee of leasehold premises escapes liability to indemnify the lessee against the rent and covenants (*Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q. B. 161, C. A.; see title LANDLORD AND TENANT, Vol. XVIII., p. 407). In the case of a mortgage of shares by actual transfer, the mortgagee assumes the liabilities of the shareholder (see p. 132, *ante*; title COMPANIES, Vol V., p. 197); and, unless the mortgagor asserts his right of redemption, he is under no liability to indemnify the mortgagee against these liabilities (*Phené* v. *Gillan* (1845), 5 Hare, 1).

(*f*) See pp. 327 *et seq.*, *post*; and see title EQUITY, Vol. XIII., p. 81.

(*g*) As to leaseholds, see title LANDLORD AND TENANT, Vol. XVIII., p. 589. The fact that the equitable mortgagee has gone into possession and paid rent does not entitle the lessor to require him to take a legal assignment (*Moore* v. *Greg* (1848), 2 Ph. 717). As to the position of an equitable mortgagee of shares, see title COMPANIES, Vol. V., p. 197.

(*h*) Whether by writing or by deposit of deeds with or without writing; see pp. 78, 83, *ante*.

(*i*) See p. 83, *ante*; and see p. 272, *post*.

(*k*) *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273, 279; *Taylor* v. *Russell*, [1892] A. C. 244, 255. But a mortgagee of shares by blank transfer, where the transfer requires to be under hand only, has, perhaps, only authority to insert his own name—not that of a sub-mortgagee—and procure registration of himself; though, after he has done this, he can transfer his mortgage title; see *France* v. *Clark* (1883,, 22 Ch. D. 830; 26 Ch. D. 257, C. A.; and p. 132, *ante*.

SECT. 2. **Assignment and Devolution.**

before the 1st January, 1882, he could, on being paid off, refuse to transfer the mortgaged premises to anyone who would by the transfer be in the position of mortgagee, and he could only be required to reconvey to the person entitled to the equity of redemption (*a*). Now, however, where a mortgagor is entitled to redeem, he has, by statute, whenever the mortgage was made, and notwithstanding any stipulation to the contrary, power to require the mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs (*b*). This power, however, cannot be exercised if the mortgagee is or has been in possession (*c*).

**Mortgagor's right to call for transfer.**

**When not exercisable.**

**Rights of subsequent incumbrancers.**

Where there are subsequent incumbrancers, the power can be exercised by any incumbrancer or by the mortgagor. Any incumbrancer can exercise it in preference to the mortgagor, and as between incumbrancers it is exercisable in the order of their priority (*d*).

**Terms on which mortgagor can call for transfer.**

The mortgagor can, however, only require the mortgagee to transfer upon the terms on which he would be bound to reconvey (*e*), that is, not merely on the terms as to payment of principal, interest, and costs, but on the terms of reconveyance generally; and if, owing to the equity of redemption being settled, the reconveyance would be to the tenant for life as trustee for all parties entitled, the tenant for life cannot as of right require a transfer to his nominee absolutely (*f*).

(*a*) *James* v. *Biou* (1819), 3 Swan. 234, 241; *Dunstan* v. *Patterson* (1847), 2 Ph. 341, 345; *Colyer* v. *Colyer*, *Pawley* v. *Colyer* (1863), 3 De G. J. & Sm. 676, 693. But a first mortgagee was bound to accept payment from, and convey the mortgaged property to, a second mortgagee (*Smith* v. *Green* (1844), 1 Coll. 555, 563).

(*b*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 15 (1), (3). In this Act "mortgage" includes charge (*ibid.*, s. 2 (vi.)), and hence a shareholder can require the company to transfer to his nominee its lien on his shares for a debt due from him (*Everitt* v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506).

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 15 (2). The case of the mortgagee being in possession is excluded, because he remains liable to account as mortgagee in possession notwithstanding the transfer (see pp. 199, 200, *post*); and though a transfer at the request of the mortgagor or of an incumbrancer might release him from this liability as regards the mortgagor or such incumbrancer, he would not be released as regards other persons interested in the equity of redemption. Hence, after a mortgagee has been in possession, he cannot with safety transfer his security except under the direction of the court; see *Hall* v. *Heward* (1886), 32 Ch. D. 430, 435, C. A.

(*d*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 12. This provision overruled the construction placed on the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 15, in *Teevan* v. *Smith* (1882), 20 Ch. D. 724, C. A., namely, that the mortgagee could only be required to transfer at the direction of a person who could call for a reconveyance, that is, in the case of subsequent incumbrancers, the second mortgagee. Perhaps, in a foreclosure suit, the mortgagee cannot be required to transfer to a person who is not a party (*Smithett* v. *Hesketh* (1890), 44 Ch. D. 161). The statutes do not authorise a first mortgagee to join in a conveyance on a sale by the mortgagor to the prejudice of a subsequent incumbrancer (*West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954, C. A.).

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 15 (1).

(*f*) *Alderson* v. *Elgey* (1884), 26 Ch. D. 567; but here the tenant for life

SECT. 2. Assignment and Devolution.

**317.** The mortgage security consists of the debt and the mortgaged property, and a complete transfer includes an assignment of the debt and a conveyance of the property; but either may be assigned or conveyed separately. An assignment of the debt, with a reservation of the security to the assignor, leaves the assignor as the person who is the proper party in foreclosure or redemption, though he is a trustee of any money thereby obtained for the assignee of the debt (*g*). A transfer of the security without an assignment of the debt carries the benefit of the debt so far as it is charged on the property, since the mortgagor cannot redeem without paying the debt to the transferee (*h*).

Assignment of debt or security separately.

**318.** The form of the transfer varies according as the mortgagor is or is not a party, and according as he has or has not incumbered the equity of redemption; and also according to the nature of the mortgaged property (*i*). Where the mortgagor is a party he usually enters into a new covenant with the transferee for payment of the mortgage debt and interest; but, whether there is a new covenant or not, the original debt is assigned in order that it may be kept alive for the protection of the transferee against subsequent incumbrancers (*k*), though the old covenant is in effect extinguished as regards the mortgagor if he enters into a new covenant inconsistent with it (*l*).

Form of transfer.

Covenant for payment.

The assignment of the debt is also expressed to include the full benefit of all powers, rights, remedies and securities given by the mortgage for securing the principal and interest, and these words operate as showing an intention that any express power of sale and

Assignment of benefit of mortgagee's powers.

requesting a transfer was indebted to the inheritance for arrears of interest which he should have kept down, and this circumstance was a factor in the decision.

(*g*) *Morley* v. *Morley* (1858), 25 Beav. 253, 258. But where a legal mortgagee makes a voluntary settlement of the debt and does not transfer the security, this is an incomplete gift which will not be assisted in equity (*Woodford* v. *Charnley* (1860), 28 Beav. 96; *Bizzey* v. *Flight* (1876), 24 W. R. 957; see title GIFTS, Vol. XV., p. 414); *contra*, where the settlement trustees have power to dispose of the mortgaged property (*Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82, C. A., where it was suggested that *Woodford* v. *Charnley*, *supra*, and *Bizzey* v. *Flight*, *supra*, might require reconsideration).

(*h*) *Jones* v. *Gibbons* (1804), 9 Ves. 407, 411. Hence, where an incumbrancer pays off a prior mortgage and takes a conveyance of the property, the debt is kept alive without express assignment as a charge on the property (*Phillips* v. *Gutteridge* (1859), 4 De G. & J. 531, C. A.); see p. 324, *post*.

(*i*) For a collection of forms of transfer applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 822 *et seq.*; Vol. XVI., pp. 422, 424, 426.

(*k*) See *ibid.*, Vol. VIII., p. 826. The production by the transferor's solicitor of a deed of transfer, with a receipt, in the body of the deed or indorsed thereon, for the mortgage money, is a sufficient authority for payment to the solicitor; see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (1). Otherwise the transferor must inquire as to the solicitor's authority (*Gordon* v. *James* (1885), 30 Ch. D. 249, C. A.); and see titles AGENCY, Vol. I., p. 205; SOLICITORS.

(*l*) *Bolton* v. *Buckenham*, [1891] 1 Q. B. 278, C. A.; and if the new covenant postpones the date for payment, a surety who does not concur is released (*ibid.*); and see title GUARANTEE, Vol. XV., p. 552.

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other remedies shall be kept alive (*m*); but they are not necessary in order to give the transferee the full benefit of the mortgage. In general, express powers are so framed as to pass to a transferee (*n*), and the statutory powers are vested in him by virtue of the provision that "mortgagee" includes any person from time to time deriving title under the original mortgagee (*o*).

Collateral securities.

**319.** Collateral securities for the mortgage debt must be assigned expressly; they do not pass under general words giving the transferee the benefit of the mortgage security (*p*). Unless the transferor has agreed to hold them for the transferee he will, on being paid off in full by the transferee, hold them in trust for the mortgagor (*q*).

New proviso for redemption.

**320.** In a transfer of a mortgage of freehold or leasehold property, the property is conveyed to the transferee subject to the existing equity of redemption (*r*); or, if the mortgagor is a party and has not incumbered the equity of redemption, so that he is in a position to deal with it, the conveyance may be made free from the old equity of redemption and subject to a new equity of redemption.

Transfer of mortgage of copyholds.

**321.** Where the mortgaged property is copyhold, the transfer will vary according as the mortgage was effected by covenant to surrender, or by conditional surrender, or by surrender followed by admittance (*s*). If there was only a covenant to surrender, and there has been no surrender in pursuance of it, the transferor assigns the benefit of the covenant (*a*), and, if the mortgagor is a party and has not incumbered the equity of redemption, a new covenant by him to surrender is added (*b*). If there has been a

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(*m*) *Boyd* v. *Petrie* (1872), 7 Ch. App. 385, 392. It is proper to insert these words in order to prevent any doubt (*Young* v. *Roberts* (1852), 15 Beav. 558); and where a mortgage is given for a further advance, any express powers on which the mortgagee relies should, for the same reason, be mentioned in the second mortgage (*Curling* v. *Shuttleworth* (1829), 6 Bing. 121). A recital in a transfer that it is not intended to exercise the power of sale does not necessarily extinguish it (*Boyd* v. *Petrie*, *supra*). The express assignment of the benefit of securities will not keep alive the liability of a surety which, by other terms of the deed, is released (*Bolton* v. *Buckenham*, [1891] 1 Q. B. 278, C. A.).

(*n*) *I.e.*, by a definition clause (see Encyclopædia of Forms and Precedents, Vol. VIII., p. 519), or by conferring the powers expressly on the mortgagee and his assigns.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (vi.). As to the person entitled to exercise the power of sale, see *ibid.*, s. 21 (4).

(*p*) If the mortgagee holds a negotiable instrument as collateral security, and, after a transfer of the mortgage alone for full value, he indorses the instrument to a *bonâ fide* holder for value, such holder will be able to recover on the instrument (*Glasscock* v. *Balls* (1889), 24 Q. B. D. 13, C. A.).

(*q*) See *Glasscock* v. *Balls*, *supra*, at p. 16.

(*r*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 826.

(*s*) See pp. 124—126, *ante*.

(*a*) On a surrender by the mortgagor to the transferee, the transferee will be entitled to be admitted on payment of one fine only (*R.* v. *Hendon* (*Lord of Manor*) (1788), 2 Term Rep. 484); and see title COPYHOLDS, Vol. VIII., p. 29.

(*b*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 838.

conditional surrender, and the mortgagor is a party and has not made any further surrender or otherwise incumbered the property, the conditional surrender is vacated and the mortgagor makes a new conditional surrender to the transferee; but if the mortgagor is not a party or has further incumbered the property, the transferor covenants to surrender to the transferee (*c*). The transferor may then be admitted and surrender to the transferee subject to the equity of redemption, or, to avoid expense, the transferee may rely on the transferor's covenant. If there has been a surrender followed by admittance, the transferor should surrender to the transferee subject to the equity of redemption (*d*).

Mortgage to building society.

**322**. On the transfer of a building society mortgage the mortgagor should be a party, since it is doubtful whether the transferee can exercise the express power of sale which is usually contained in such a mortgage (*e*); but if an advance made by a subsequent incumbrancer is used, in whole or in part, in paying off the building society, who are legal mortgagees, he has, as between himself and a mesne incumbrancer, the better equity to call for the legal estate, and the effect of an indorsed receipt by the building society is to vest in him the legal estate (*f*). He can then hold the legal estate as security for the money used in paying off the building society, and also, if he has no notice of the mesne incumbrance, for his entire advance (*g*).

Mortgage to trustees.

**323**. Upon a mortgage to trustees it is the practice not to disclose the trust, and when a transfer is made to new trustees it is sufficient to recite that they have become entitled in equity to the mortgage debt and securities on a joint account (*h*). This justifies the transfer to them and the trust will still be kept off the title (*i*). A married woman can transfer or join in the transfer of a mortgage as though she were a *feme sole*, whether she is entitled as mortgagee on her own account (*k*) or as trustee (*l*).

(*c*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 840.

(*d*) See *ibid.*, p. 841.

(*e*) *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A.; see title BUILDING SOCIETIES, Vol. III., pp. 364, 369.

(*f*) *Pease* v. *Jackson* (1868), 3 Ch. App. 576; *Hosking* v. *Smith* (1888), 13 App. Cas. 582; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866; see *Fourth City Mutual Benefit Building Society* v. *Williams*, *Marson* v. *Cox* (1879), 14 Ch. D. 140; *Sangster* v. *Cochrane* (1884), 28 Ch. D. 298; title BUILDING SOCIETIES, Vol. III., p. 371.

(*g*) *Hosking* v. *Smith*, *supra*, overruling on this point *Pease* v. *Jackson*, *supra*, and *Robinson* v. *Trevor* (1883), 12 Q. B. D. 423, C. A.; see title BUILDING SOCIETIES, Vol. III., p. 371.

(*h*) See p. 110, *ante*; and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 836.

(*i*) See *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch. D. 720; *Carritt* v. *Real and Personal Advance Co.* (1889), 42 Ch. D. 263, 272; *Re Blaiberg and Abrahams' Contract* (1899), 47 W. R. 634; and p. 174, *post*.

(*k*) *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647.

(*l*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1; she could also do so under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), if the trust was not disclosed (*Re West and Hardy's Contract*, [1904] 1 Ch. 145; and see title HUSBAND AND WIFE, Vol. XVI., p. 380).

SECT. 2. Assignment and Devolution.

Stamp duty.

**324.** The transfer must bear a stamp of 6*d.* for every £100 or fractional part of £100 of the amount transferred, exclusive of interest not in arrear (*m*); that is, on the nominal value of the mortgage debt and arrears of interest, notwithstanding that a less sum is paid by the transferee (*n*); but where the transfer is made for effectuating the appointment of a new trustee (*o*), or the retirement of a trustee, although no new trustee is appointed (*p*), the duty is limited to 10*s.* The fact that the transfer is stamped with 10*s.*, instead of *ad valorem*, does not disclose the trust (*q*).

Costs.

**325.** The costs on a transfer of mortgage are dealt with elsewhere (*r*).

Form of transfer.

**326.** A transfer of a mortgage is usually made by deed, and this is essential in order to pass the legal estate in real or leasehold property; but, as regards the mortgage debt, an assignment under hand only is effectual, notwithstanding that it was created by deed (*s*); and an assignment under hand is effectual to pass any equitable interest in property which is vested in the mortgagee (*t*).

How far writing essential.

A deposit of title deeds by way of security does not create a pledge of the deeds, but confers on the mortgagee an equitable interest in the property (*u*), and this should be assigned in writing (*a*); but a transferee who pays off the mortgagee and takes delivery of the deeds is entitled to stand in the mortgagee's place, and in effect the equitable charge can thus be assigned for value without writing (*b*).

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Mortgage." As to stamp duty on mortgages, see p. 134, *ante*. A transfer of a stock mortgage is stamped on the money value of the stock, presumably at the date of transfer (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 87 (1)). The transfer is not stamped with additional duty by reason of its including additional security or any new provision in relation to the mortgage debt (*ibid.*, s. 87 (3)). In applying this provision the substance of the transaction is to be looked at, and the transaction may be a transfer notwithstanding that the debt is not formally assigned and the old equity of redemption is extinguished (*Wale* v. *Inland Revenue Commissioners* (1879), 4 Ex. D. 270). If there is a further advance, this will carry *ad valorem* mortgage duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Mortgage"); see p. 136, *ante*.

(*n*) See p. 176, *post*.

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 62.

(*p*) Finance Act, 1902 (2 Edw. 7, c. 7), s. 9.

(*q*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 13.

(*r*) See titles CUSTOM AND USAGES, Vol. X., p. 284; SOLICITORS.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); see titles BONDS, Vol. III., p. 97; CHOSES IN ACTION, Vol. IV., p. 368; and see p. 77, *ante*.

(*t*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 375.

(*u*) See pp. 78—80, *ante*.

(*a*) *Re Richardson, Shillito* v. *Hobson* (1885), 30 Ch. D. 396, C. A.; see DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 375; Encyclopædia of Forms and Precedents, Vol. VIII., p. 853.

(*b*) See p. 180, *post*; *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173, 182, 183; and as to personal property, see *France* v. *Clark* (1884), 26 Ch. D. 257, 261, C. A. Perhaps, apart from subrogation, just as an equitable charge can be created by deposit of title deeds notwithstanding the Statute of Frauds (29 Car. 2, c. 3), so the charge can be assigned

SECT. 2. Assignment and Devolution.

Statutory transfer.

**327.** A mortgage of freehold or leasehold land made by statutory mortgage (*c*) may be transferred by statutory transfer (*d*). A deed of statutory transfer purports to convey and transfer to the transferee the benefit of the mortgage (*e*), and the effect is to vest in the transferee (*f*) (1) the right to sue for and receive the mortgage debt and interest, and to sue on the covenants with, and to exercise all the powers of, the mortgagee (*g*); and (2) all the estate and interest of the mortgagee in the mortgaged land, subject to redemption (*h*).

Transfer of registered charge.

**328.** Where land has been registered under the Land Transfer Acts, 1875 and 1897 (*i*), a registered charge on it (*k*) can be transferred by the registered proprietor of the charge to another person as proprietor (*l*). The transfer must be in the form prescribed by the Land Transfer Rules (*m*), and is completed by the registrar entering on the register the transferee as the proprietor of the charge (*n*). The transferee thereupon has the statutory rights conferred on the registered proprietor of the charge (*o*). But until the transferee

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for value without writing (see *Dryden* v. *Frost* (1838), 3 My. & Cr. 670, 673). Further, a mortgagee by deposit can create a sub-mortgage by handing over the deeds which will be effective to the extent of his own charge (*Rayne* v. *Baker* (1859), 1 Giff. 241; and see p. 82, *ante*). Where after a deposit of deeds with a firm of bankers to secure a current account there is a change in the firm, and a continuance of dealings with the new firm, the benefit of the equitable mortgage passes to the new firm (*Re Worters, Ex parte Oakes* (1841), 2 Mont. D. & De G. 234; *Re O'Brien* (1883), 11 L. R. Ir. 213).

(*c*) See p. 118, *ante*.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 27.

(*e*) *Ibid.*, Sched. III., Part II.; Form A (mortgagor not joining); Form B (a covenantor joining); Form C (statutory transfer and statutory mortgage combined); see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 822, 823, 825. These forms can only be used to transfer a statutory mortgage (*Re Beachey, Heaton* v. *Beachey*, [1904] 1 Ch. 67, C. A.)

(*f*) Including his executors, administrators and assigns (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 27 (2) (i.)).

(*g*) *Ibid.*, s. 27 (2) (i.).

(*h*) *Ibid.*, s. 27 (2) (ii.). Where the mortgage is not a statutory mortgage the statute gives no technical efficacy to the words "benefit of the mortgage"; and apart from the statute they do not carry the legal estate in the mortgaged property (*Re Beachey, Heaton* v. *Beachey, supra*).

(*i*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65. As to registration of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*k*) As to the creation of such a charge, see pp. 84 *et seq.*, *ante*.

(*l*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 40; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 18, Sched. I.

(*m*) Land Transfer Rules, 1903, r. 168; see Sched. I., Form 49; Encyclopædia of Forms and Precedents, Vol. XI., p. 415.

(*n*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 40. The certificate of charge must be produced on registration of the transfer, and an indorsement of the transfer will be made thereon or a new certificate issued (*ibid.*; Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 8 (1); Land Transfer Rules, 1903, r. 259).

(*o*) *I.e.*, under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 23—27, which confer the rights there mentioned on the registered proprietor for the time being of the charge, and the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (2), which incorporates in registered charges certain of the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); see p. 85, *ante*.

SECT. 2. **Assignment and Devolution.**

is registered, the transferor is deemed to remain the proprietor the charge (*p*).

**Transfer of statutory mortgage of ship.**

**329**. A statutory mortgage of a ship or shares in a ship is transferred by execution of the form of transfer indorsed on the mortgage (*q*). If there is a collateral agreement accompanying it (*r*), this must be separately assigned.

**Transfer of bill of sale.**

**330**. A registered bill of sale can be transferred so as to constitute a valid security in favour of the transferee (*s*); but if the bill of sale is unregistered, the transfer, in order to create an effective security, requires the same formalities as an original bill of sale (*t*).

**Transfer for less than mortgage debt.**

**331**. The value of the mortgage debt to the transferee will depend on the soundness of the security, and he may purchase the debt and security at less than the nominal amount of the debt; but notwithstanding that he has done so, he is entitled to recover the whole amount due at the time of the transfer (*a*), unless he stands in a position which would make this inequitable (*b*). The rule applies not only in favour of a stranger who purchases the mortgage debt (*c*), but also in favour of a creditor (*d*) or subsequent incumbrancer (*e*), or any other person interested in the estate, such as a reversioner, provided that he did not create the charge (*f*); and it applies both against the mortgagor (*g*) and his heirs (*h*), and against a purchaser of or incumbrancer on the equity of redemption (*i*). But a trustee of the mortgaged property (*k*), or an agent of the mortgagor (*l*), or the mortgagor's heir-at-law or personal

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(*p*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 40.

(*q*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 37, Sched. I., Form C; see title SHIPPING AND NAVIGATION; and see Encyclopædia of Forms and Precedents, Vol. XIV., p. 57. As to mortgages of ships, see pp. 133, 134, *ante*.

(*r*) See Encyclopædia of Forms and Precedents, Vol. XIV., p. 60.

(*s*) See title BILLS OF SALE, Vol. III., p. 72; Encyclopædia of Forms and Precedents, Vol. VIII., p. 865. As to mortgages of personal chattels, see pp. 129, 130, *ante*.

(*t*) *Jarvis* v. *Jarvis* (1893), 63 L. J. (CH.) 10. As to transfers of mortgages of rates, see titles BURIAL AND CREMATION, Vol. III., p. 478; RATES AND RATING.

(*a*) *Anon.* (1707), 1 Salk. 155; *Davis* v. *Barrett* (1851), 14 Beav. 254, 554.

(*b*) See the text, *infra*, and p. 177, *post*.

(*c*) *Phillips* v. *Vaughan* (1685), 1 Vern: 336; *Davis* v. *Barrett*, *supra*.

(*d*) *Morret* v. *Paske* (1740), 2 Atk. 52, 54.

(*e*) *Darcy* v. *Hall* (1682), 1 Vern. 49; *Dobson* v. *Land* (1850), 8 Hare, 216, 220; *Shaw* v. *Bunny* (1865), 2 De G. J. & Sm. 468, 472, C. A.

(*f*) *Davis* v. *Barrett*, *supra*.

(*g*) *Dobson* v. *Land*, *supra*; *Shaw* v. *Bunny*, *supra*.

(*h*) *Phillips* v. *Vaughan*, *supra*; it applies also against personal representatives; see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.

(*i*) *Davis* v. *Barrett*, *supra*. Originally the purchaser of the mortgage was only allowed to hold it for the amount of his purchase-money against a purchaser or subsequent incumbrancer (*Long* v. *Clopton* (1687), 1 Vern. 464; *Williams* v. *Springfield* (1687), 1 Vern. 476).

(*k*) *Darcy* v. *Hall*, *supra*; *Anon.* (1707), 1 Salk. 155; *Morret* v. *Paske*, *supra*; *Dobson* v. *Land*, *supra*; *Re Imperial Land Co. of Marseilles*, *Ex parte Larking* (1877), 4 Ch. D. 566, C. A. If a vendor is bound to clear the property of incumbrances and the purchaser buys them up, he can only recover against the vendor the amount actually paid by him (*Cane* v. *Allen* (*Lord*) (1814), 2 Dow, 289, 296, H. L.).

(*l*) *Morret* v. *Paske*, *supra*; *Reed* v. *Norris* (1837), 2 My. & Cr. 361, 374; *Lawless* v. *Mansfield* (1841), 1 Dr. & War. 557, 629. The disability applies

representatives (*m*), are not allowed to hold the mortgage as a security for more than they gave for it. Moreover, where the transferee of an invalid security has only an equitable right to enforce it, so that relief is given to him on equitable terms, he can recover no more than the sum which he has actually advanced (*n*).

Effect of transfer on arrears of rent or interest.

**332.** The conveyance to the transferee operates in the same manner as an ordinary conveyance of land, and does not, in the absence of special words, give the transferee a title to rents in arrear at the date of the transfer (*o*); and, where interest is in arrear at the date of transfer and the mortgagor does not concur, the transferee, on paying the arrears to the transferor, cannot treat them as principal so as to carry future interest (*p*). The mortgagee and the persons claiming under him cannot, without the privity of the mortgagor, add to what is due or turn interest into principal (*q*).

Transfer is taken subject to outstanding equities.

**333.** So far as the security consists of the mortgage debt, it is a chose in action, and is only assignable in accordance with the rule that a transferee of a chose in action takes it subject to any equities and rights of set-off existing between the debtor and the transferor (*r*); and since the mortgage of the property is incident

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to a solicitor (*Nelson* v. *Booth* (1857), 5 W. R. 722; *Macleod* v. *Jones* (1883), 24 Ch. D. 289, 300, 303, C. A.; and see title SOLICITORS), or other person standing in a relation to the mortgagor giving special opportunities of buying up the mortgage (*Hobday* v. *Peters* (No. 1) (1860), 28 Beav. 349, 351); and it applies after the agency or other confidential employment has ceased if the purchase of the mortgage is due to knowledge obtained during such employment (*Carter* v. *Palmer* (1842), 8 Cl. & Fin. 657, 705, H. L.); see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 109. A surety is subject to the same rule as an agent (*Reed* v. *Norris* (1837), 2 My. & Cr. 361, 374); see title GUARANTEE, Vol. XV., p. 524.

(*m*) *Darcy* v. *Hall* (1682), 1 Vern. 49; *Morret* v. *Paske* (1740), 2 Atk. 52; *Lancaster* v. *Evors* (1844), 1 Ph. 349, 354; *Lancaster* v. *Evors* (1846), 10 Beav. 154, 165. And apparently a tenant for life who buys up an incumbrance on the inheritance can hold it only for what he has paid (*Hill* v. *Browne* (1844), Drury *temp.* Sug. 426). But under special circumstances an heir has been allowed to recover the full debt (*Darcy* v. *Hall*, *supra*). For forms of such transactions, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 832, 834.

(*n*) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85, 93.

(*o*) *Salmon* v. *Dean* (1851), 3 Mac. & G. 344.

(*p*) *Ashenhurst* v. *James* (1746), 3 Atk. 270; see p. 230, *post*; and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 836.

(*q*) *Matthews* v. *Wallwyn* (1798), 4 Ves. 118, 128. Where a trustee of a mortgaged estate agrees, in excess of his powers, to allow a transferee to capitalise arrears of interest, this will not prejudice the transferee's right to claim the interest as such (*Cottrell* v. *Finney* (1874), 9 Ch. App. 541, 549).

(*r*) *Cockell* v. *Taylor* (1852), 15 Beav. 103, 117; *Smith* v. *Parkes* (1852), 16 Beav. 115, 119; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A. As to equitable set-off, see *Dodd* v. *Lydall*, *Lydall* v. *Dodd* (1842), 1 Hare, 333; *Re Poulter, Poulter* v. *Poulter*, *Edwards* v. *Poulter* (1912), 56 Sol. Jo. 291; titles CHOSES IN ACTION, Vol. IV., pp. 386 *et seq.*; EQUITY, Vol. XIII., pp. 161 *et seq.*; SET-OFF AND COUNTERCLAIM. Originally the debt was only assignable in equity; the assignee had to sue in the name of the assignor, and was therefore liable to be met by any defence or right of set-off available for the mortgagor against the assignor; thus the assignee of a chose in action was not in the position of a purchaser of real estate who

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to the debt, the same rule extends to this portion of the security, and the transferee can only hold the property as security for repayment of the amount properly due from the mortgagor to the mortgagee at the date of assignment, allowing for any claims which the mortgagor may on his side have against the mortgagee and which are part of the mortgage transaction (*s*).

(i.) As regards amount originally advanced;

As regards the amount originally advanced on the mortgage, the mortgagor's receipt contained in or indorsed on the mortgage deed is usually a sufficient protection to a transferee (*t*). In favour of a transferee of the mortgage for value, who has no notice that the money was not advanced, the receipt is conclusive (*a*); but, if the mortgage was created in circumstances which call for inquiry, he is bound, if he has notice of such circumstances (*b*), to inquire whether the advance was made, and cannot recover more than the actual advance (*c*), unless there are special circumstances depriving the mortgagor of the benefit of this exception (*d*).

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took the legal estate for value without notice (*Cockell* v. *Taylor* (1852), 15 Beav. 103, 117); and though by statute the debt can now be assigned at law, yet the statute expressly makes the assignment subject to equities which would, apart from the statute, have priority over the right of the assignee (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); *Re Milan Tramways Co., Ex parte Theys* (1882), 22 Ch. D. 122, 127). In *Judd* v. *Green* (1875), 45 L. J. (CH.) 108, and *Nant-y-glo and Blaina Ironworks Co.* v. *Tamplin* (1876), 35 L. T. 125, BACON, V.-C., held that where the mortgagor's equity was to set aside the mortgage, a transferee for value had a better equity and was entitled to his security; but this is opposed to the general principle and is doubtful. Where a security given by a company is invalid, a transferee who takes after a winding-up order cannot maintain it against the liquidator, even if he could have done so against the company (*Re Gwelo (Matabeleland) Exploration and Development Co., Williamson's Claim*, [1901] 1 I. R. 38, C. A.). See, further, title EQUITY, Vol. XIII., pp. 102 *et seq.*

(*s*) *Norrish* v. *Marshall* (1821), 5 Madd. 475.

(*t*) See titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464; ESTOPPEL, Vol. XIII., p. 371; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 115.

(*a*) This was formerly the rule in equity (*Bickerton* v. *Walker* (1885), 31 Ch. D. 151, C. A.), and the rule has received statutory confirmation by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 55, which provides that a receipt for consideration money in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser—which includes a mortgagee (*ibid.*, s. 2 (viii.))—not having notice that the money was not in fact paid, wholly or in part, be sufficient evidence of the payment of the whole amount (*Bateman* v. *Hunt*, [1904] 2 K. B. 530, C. A.; see *Re Gwelo (Matabeleland) Exploration and Development Co., Williamson's Claim, supra*, at p. 55). Hence, although no money has been in fact advanced, the mortgagor's receipt is conclusive in favour of a transferee (*French* v. *Hope* (1887), 56 L. J. (CH.) 363). *Parker* v. *Clarke* (1861), 30 Beav. 54, *contra*, is overruled by *Bickerton* v. *Walker*, *supra*.

(*b*) *Bateman* v. *Hunt*, *supra*; see, for example (solicitor and client), title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 465.

(*c*) See *Gresley* v. *Mousley* (1862), 3 De G. F. & J. 433, C. A.; *Powell* v. *Browne* (1907), 97 L. T. 167.

(*d*) Thus, if the client has handed the mortgage deed containing the receipt to the solicitor for the purpose of enabling him to raise money, he is estopped, as against a sub-mortgagee, from saying that the original amount was not advanced (*Powell* v. *Browne* (1907), 97 L. T. 854, C. A., reversing on this ground *Powell* v. *Browne* (1907), 97 L. T. 167); and see title ESTOPPEL, Vol. XIII., p. 371.

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(ii.) as regards dealings with mortgage debt prior to transfer.

As regards dealings with the mortgage debt subsequent to the creation of the mortgage, the rule referred to above (*e*) applies, and the transferee of the mortgage takes it, when the mortgagor is no party to the transfer, subject to the state of accounts then subsisting between the mortgagor and mortgagee (*f*). He must at his peril inquire what is due on the mortgage, and if all or part of the principal has been paid off by the mortgagor, or has been discharged by receipt of rents and profits, the transferee, although he takes without notice, cannot set up again the whole debt against the mortgagor (*g*). Further, whatever the mortgagor can claim by way of set-off or mutual credit against the mortgagee, he can equally claim against the transferee (*h*). Hence, for the protection of the transferee, it is proper, either to make the mortgagor a party to the transfer, or to obtain an admission from him in writing that the sum claimed by the transferor is really due (*i*).

Payment of mortgage debt by mortgagor without notice of transfer.

**334**. Moreover, the mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it (*k*). Such notice may be actual or constructive (*l*). The mortgagor is not, by reason of omitting to call for production of the mortgage deed on payment of part of the principal (*m*), or even on payment of the whole (*n*), guilty of such

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(*e*) See p. 177, *ante*.

(*f*) *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 264.

(*g*) *Bradwell* v. *Catchpole* (*circa* 1700), 3 Swan. 78, n. As to payment of all the money so that the debt is non-existent, see *Turner* v. *Smith*, [1901] 1 Ch. 213, and cases cited in notes (*k*), (*n*), *infra*.

(*h*) *Norrish* v. *Marshall* (1821), 5 Madd. 475, 481.

(*i*) See *Matthews* v. *Wallwyn* (1798), 4 Ves. 118, 127; title CHOSES IN ACTION, Vol. IV., p. 389.

(*k*) *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, 158, C. A.; *Dixon* v. *Winch*, [1900] 1 Ch. 736, 742, C. A.; see *Williams* v. *Sorrell* (1799), 4 Ves. 389; *Re Frazer, Ex parte Monro* (1819), Buck, 300, 303; *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, C. A.; *Wheatley* v. *Bastow* (1855), 7 De G. M. & G. 261, 275, C. A.; *Reeve* v. *Whitmore*, *Martin* v. *Whitmore* (1863), 4 De G. J. & Sm. 1, 19; *Re Southampton's* (*Lord*) *Estate*, *Allen* v. *Southampton* (*Lord*), *Banfather's Claim* (1880), 16 Ch. D. 178, 186; *Berwick & Co.* v. *Price*, [1905] 1 Ch. 632, 643. The notice stops the mortgagor's right of set-off in respect of matters subsequently arising (*Cavendish* v. *Geaves* (1857), 24 Beav. 163); see title SET-OFF AND COUNTERCLAIM, and compare *Re Poulter*, *Poulter* v. *Poulter* (1912), 56 Sol. Jo. 291. For a form of notice, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 900.

(*l*) *Dixon* v. *Winch*, *supra*, where the mortgagee was the mortgagor's solicitor, and the mortgagor left the dealings with the property in his hands: hence, on a transfer of the mortgage the mortgagor had constructive notice thereof, and when, on a subsequent sale, the solicitor, with the mortgagor's consent, retained the mortgage money out of the purchase-money, this was not a payment by the mortgagor without notice of the transfer so as to discharge the mortgage in favour of the purchaser as against the transferee.

(*m*) *Stocks* v. *Dobson*, *supra*, at p 17; *Berwick & Co.* v. *Price*, *supra*, at p. 644.

(*n*) *Norrish* v. *Marshall*, *supra*; *Re Southampton's* (*Lord*) *Estate*, *Allen* v. *Southampton* (*Lord*), *Banfather's Claim*, *supra*. The principle of these decisions was doubted by COZENS-HARDY, J., in *Dixon* v. *Winch*, *supra*, at p. 743.

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negligence as to be postponed to the transferee, the latter being on his side guilty of negligence in not having given notice of the assignment. A payment, to be good against the transferee, need not be made in money; it may be made in any manner which is equivalent to payment, for instance by delivery of goods (*o*), or by a release founded on any fair and *bonâ fide* arrangement (*p*). But the payment must be made to the mortgagee or to a person authorised to receive it on his behalf (*q*).

Equitable rights of person paying off mortgage debt.

**335.** Although there has been no actual transfer of the mortgage, a person who advances money for the purpose of paying it off, and whose money is thus applied, becomes an equitable assignee of the mortgage and is entitled to have it kept alive for his benefit (*r*). If he advances the money at the request of the mortgagor in order to prevent the equity of redemption from being forfeited, this result is assisted on the ground of salvage, and he is subrogated to the rights of the mortgagee (*s*). But the doctrine is not confined to such cases. Although there is no question of salvage (*a*), and even though the mortgagor is not a party (*b*), a stranger who pays off a mortgage is presumed to intend to keep it alive for his own benefit, and effect is given to this intention. The result is the same notwithstanding that he contemplated taking a different security, in which case he is entitled to the benefit of the old mortgage until the new security is given (*b*), and even though he has actually taken a mortgage of part of the property, since the remedy given by this later mortgage is not co-extensive with that given by the earlier (*c*).

SUB-SECT. 2.—*Sub-Mortgage.*

Disposal of mortgage by way of security.

**336.** The mortgage debt and the security for it, being the property of the mortgagee, can in their turn form the security for

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(*o*) *Norrish* v. *Marshall* (1821), 5 Madd. 475.

(*p*) *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11, 16, C. A.; and it is sufficient if, on a balance of account between the mortgagor and mortgagee, there is a sum in the mortgagor's favour sufficient to satisfy the debt (*Norrish* v. *Marshall, supra*), provided that the balance has been appropriated to the debt before notice of the assignment (*Rayne* v. *Baker* (1859), 1 Giff. 241).

(*q*) *Withington* v. *Tate* (1869), 4 Ch. App. 288.

(*r*) See *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, 18, C. A.; and title HUSBAND AND WIFE, Vol. XVI., p. 403. Similarly, an assignee of the mortgaged property is a trustee for the person who finds the money to pay off the mortgagee (*Walcott* v. *Condon* (1853), 6 Ir. Jur. 15); and see Encyclopædia of Forms and Precedents, Vol. VIII., p. 834.

(*s*) *Patten* v. *Bond* (1889), 60 L. T. 583.

(*a*) *Chetwynd* v. *Allen*, [1899] 1 Ch. 353.

(*b*) *Butler* v. *Rice*, [1910] 2 Ch. 277; compare *Manks* v. *Whiteley*, [1912] W. N. 87, C. A.; p. 324, *post*.

(*c*) In such a case there is no merger of the mortgage in the charge (*Chetwynd* v. *Allen, supra*; see *Bell* v. *Banks* (1841), 3 Man. & G. 258). Where two properties, A and B, are comprised in the same mortgage, and the person entitled to the equity of redemption in A pays off the mortgage and takes a reconveyance of both properties, he will be entitled to have the mortgage kept alive, at any rate in part, on B, notwithstanding that he may not be able to keep it alive on A against subsequent incumbrancers (*Taws* v. *Knowles*, [1891] 2 Q. B. 564, 572, C. A.; see p. 318, *post*).

an advance to or a liability incurred by him. Hence the right of the mortgagee to dispose of his mortgage includes the right to deal with it by way of security, that is, to create a sub-mortgage; and this can be done either by actual transfer (*d*), so as, if the original mortgage is a legal mortgage, to create a legal sub-mortgage, or by equitable charge, whether by instrument under hand or seal, or by deposit of deeds (*e*). The sub-mortgage is completed by giving notice to the mortgagor (*f*).

Effect of sub-mortgage by transfer.

**337**. A sub-mortgage by transfer will, during the continuance of the sub-mortgage, place the sub-mortgagee in the position of a transferee of the original mortgage. He can, subject to any stipulations contained in the sub-mortgage, call in the original mortgage, and can exercise the mortgagee's right to sue for (*g*) and receive the mortgage money, and to realise the security (*h*). If he receives the mortgage money he will reconvey to the mortgagor, and, after satisfying his own debt, will account for the surplus to the mortgagee (*i*). If he realises the mortgage security by exercising the power of sale arising under the mortgage, he will set aside the amount due under that mortgage and pay the surplus to the mortgagor (*k*); and out of the amount so set aside he will retain the sub-mortgage debt and pay the remainder to the mortgagee.

Effect of payment off.

Exercise of power of sale under mortgage.

Exercise of power of sale under sub-mortgage

There may also be a power of sale incident to the sub-mortgage (*l*), but the exercise of this does not affect the mortgagor. The sub-mortgagee, in pursuance of this power, transfers the mortgage so as to extinguish the mortgagee's equity of redemption, and accounts for the surplus proceeds to the mortgagee. The mortgagor's equity of redemption, however, continues to exist, and the purchaser under the power of sale holds the mortgaged property subject to it.

Sub-mortgagee takes subject to outstanding equities.

**338**. Since the sub-mortgagee is in the position of a transferee of the mortgage, he takes, like any other transferee, subject to the

(*d*) For the effect of a transfer by way of sub-mortgage, see p. 132, *ante*. For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 867; for a form of transfer of sub-mortgage, see *ibid.*, p. 873.

(*e*) See pp. 82, 83, *ante*.

(*f*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); title CHOSES IN ACTION, Vol. IV., p. 367.

(*g*) And the mortgagee, since he is responsible to the sub-mortgagee for the debt due to the latter, can require him to sue for the mortgage debt; compare *Gurney* v. *Seppings* (1846), 2 Ph. 40; and title GUARANTEE, Vol. XV., p. 506.

(*h*) The mortgagee, after transferring his power of sale to the sub-mortgagee, cannot himself exercise it; see note (*m*), p. 132, *ante*.

(*i*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 21 (3), 22 (2).

(*k*) See p. 259, *post*.

(*l*) See pp. 245 *et seq.*, *post*. If the assistance of the court is necessary for a sale, and the original mortgage is to secure an unascertained amount, an account must first be taken of what is due on it (*Re Wright, Ex parte Mackay* (1841), 1 Mont. D. & De G. 550). As to the form of order for sale on the application of an equitable sub-mortgagee in the bankruptcy of the mortgagee, see *Re Vaughan, Ex parte Powell* (1847), De G. 405. Where the bankrupt mortgagee has purchased the equity of redemption, a sub-mortgagee by deposit is entitled to a sale of the bankrupt's entire interest (*Re Watts, Ex parte Tuffnell* (1834), 4 Deac. & Ch. 29).

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accounts between the mortgagor and the mortgagee at the date of the sub-mortgage (*m*); and he will be affected by dealings between the mortgagor and mortgagee until the mortgagor has had notice of the sub-mortgage (*n*). But the mortgagor's receipt for the mortgage money, incorporated in the mortgage or indorsed thereon, is usually conclusive in favour of the sub-mortgagee that the original mortgage money was in fact advanced (*o*).

SUB-SECT. 3.—*Disposition by Will.*

Mortgage secured on freeholds, leaseholds and other personalty.

**339.** On the death of the mortgagee leaving a will, both the mortgage debt and the mortgaged property, if it is of freehold tenure (*p*), or consists of leaseholds or other personal property, vest, in the first instance, in the executors, notwithstanding any disposition contained in the will (*q*), and the executors can exercise the powers

(*m*) *Norrish* v. *Marshall* (1821), 5 Madd. 475; *Cockell* v. *Taylor* (1852), 15 Beav. 103; see pp. 177 *et seq.*, *ante*.

(*n*) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore* (1863), 4 De G. J. & Sm. 1, 19.

(*o*) See p. 178, *ante*.

(*p*) As to copyholds, see 184, *post*. As to a convict mortgagee, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 235.

(*q*) It has been long settled that a mortgage security is personal estate, since the principal right of the mortgagee is to the money, and his right to the land is only a security for the money (*Thornborough* v. *Baker* (1675), 3 Swan. 628, 630; *Canning* v. *Hicks* (1686), 1 Vern. 412; *Tabor* v. *Grover* (1699), 2 Vern. 367; see *Winn* v. *Littleton* (1681), 1 Vern. 3, 4, n.; titles EQUITY, Vol. XIII., p. 91; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 234, 235); but formerly the mortgaged property, if it was real estate, might devolve on one person, while the mortgage debt devolved on another. In such case he who took the mortgaged estate by devise or by descent was a trustee for the person entitled to the mortgage debt (*A.-G.* v. *Meyrick* (1750), 2 Ves. Sen. 44, 46). It is now provided that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested by way of mortgage in any person solely, the same, on his death, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representatives or representative for the time being, in like manner as if the same were a chattel real vesting in them or him (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30). Hence, provided that the executors have not assented to any bequest of the mortgage, they hold the legal estate in freehold mortgaged property, and can either reconvey or transfer, or, if they exercise the power of sale, can convey. Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 4 (repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30), they could reconvey on payment of all sums secured by the mortgage, but could not transfer (*Re Brook's Mortgage* (1877), 25 W. R. 841; *Re Spradbery's Mortgage* (1880), 14 Ch. D. 514), nor convey to the purchaser upon a sale (*Re White's Mortgage* (1881), 29 W. R. 820). This provision applied where the mortgagee died between the 7th August, 1874, and the 1st January, 1882, and perhaps where he had died before the earlier date; see *Re White's Mortgage*, *supra*. As to testamentary dispositions generally, see title WILLS. Formerly it was the practice to insert in wills an express devise of mortgage estates to the executors in order to avoid the inconvenience of the legal estate being separated from the mortgage debt. Where there was no such express devise, a general devise of real estate passed the legal estate in the testator's mortgages, unless an intention to the contrary could be collected from expressions in the will, or the purposes or objects of the

SECT. 2. Assignment and Devolution.

of the mortgagee under the mortgage (*r*). A mortgage on land is an immovable, and its devolution is governed by the *lex loci rei sitæ* (*s*).

Effect of specific bequest of mortgage.

**340.** A specific bequest of the mortgage entitles the legatee both to the mortgage debt and to the mortgaged property (*t*), subject to the executors' assent; and, upon this assent being given, the legal title to the debt, and all the interest of the mortgagee in the mortgaged property, legal or otherwise, vests in the legatee (*u*). Mortgages can be bequeathed for charitable purposes (*a*).

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testator (*Braybroke* (*Lord*) v. *Inskip* (1803), 8 Ves. 417; see *Clarke* v. *Abbot* (1741), Barn. (CH.) 457, 461). Such an intention to the contrary was shown where the testator imposed on the real estate a charge of debts or legacies (*Leeds* (*Duke*) v. *Munday* (1797), 3 Ves. 348; *Re Horsfall* (1825), M'Cle. & Yo. 292; *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553; *Re Packman and Moss* (1875), 1 Ch. D. 214; *Re Bellis's Trusts* (1877), 5 Ch. D. 504, 509; *contra, Re Stevens' Will* (1868), L. R. 6 Eq. 597); or otherwise treated it as though it were his own, free from rights of other persons (such as an equity of redemption of a mortgagor), where, for example, he devised it in strict settlement (*Thompson* v. *Grant* (1819), 4 Madd. 438; *A.-G.* v. *Vigor* (1803), 8 Ves. 256, 276), or to tenants in common (*Thirtle* v. *Vaughan* (1854), 24 L. T. (O. S.) 5; *Re Finney's Estate* (1862), 3 Giff. 465; *Martin* v. *Laverton* (1870), L. R. 9 Eq. 563, 568; *Re Franklyn's Mortgages*, [1888] W. N. 217), or on trust for sale (*Ex parte Marshall* (1839), 9 Sim. 555). Further, a bequest of mortgages, or securities for money, or the right to receive moneys on mortgage, passed, not only mortgage debts, but also the legal estate in the mortgaged property, without any express devise of such estate (*Renvoize* v. *Cooper* (1822), 8 Madd. & G. 371; *Mather* v. *Thomas* (1833), 6 Sim. 115; (1833), 10 Bing. 44; *Doe* d. *Guest* v. *Bennett* (1851), 6 Exch. 892; *Re Walker's Estate* (1852), 21 L. J. (CH.) 674; *Rippen* v. *Priest* (1862), 13 C. B. (N. S.) 308; *Garnham* v. *Skipper* (1885), 53 L. T. 940); and this was so notwithstanding that the bequest was subject to payment of debts (*Re Field's Mortgage* (1851), 9 Hare, 414; *Re King's Mortgage* (1852), 5 De G. & Sm. 644), or of debts and legacies (*Knight* v. *Robinson* (1856), 2 K. & J. 503), or that there was a trust for sale (*Re Tyas, Ex parte Barber* (1832), 5 Sim. 451); and a devise and bequest to trustees of real and personal estate in trust to get in debts owing on any security implied that they were to have full dominion over the mortgaged property, and hence they took the legal estate (*Re Arrowsmith's Trusts, Re Thompson* (1858), 4 Jur. (N. S.) 1123, C. A.).

(*r*) For the purposes of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, the personal representatives for the time being are to be deemed in law the heirs and assigns of the mortgagee within the meaning of all trusts and powers (*ibid.*); hence they can exercise all express powers conferred on the mortgagee, his heirs and assigns: further, by virtue of the definition of "mortgagee," as including any person from time to time deriving title under the original mortgagee (*ibid.*, s. 2 (vi.)), they can exercise the statutory powers.

(*s*) *Re Hoyles, Row* v. *Jagg*, [1911] 1 Ch. 179, C. A.; see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, C. A.; *contra* for revenue purposes, see *Lawson* v. *Inland Revenue Commissioners*, [1896] 2 I. R. 418; and reference to this case in *Re Hoyles, Row* v. *Jagg, supra*, at p. 182; title ESTATE AND OTHER DEATH DUTIES, Vol. X., pp. 193, 235. As to circumstances rendering it necessary to consider the division of property into movables and immovables, see *Re Hoyles, Row* v. *Jagg, supra, per* FARWELL, L.J., at p. 185; and see title CONFLICT OF LAWS, Vol. VI., pp. 197, 209.

(*t*) *Martin* d. *Weston* v. *Mowlin* (1760), 2 Burr. 969, 978; *Renvoize* v. *Cooper, supra*; *Mather* v. *Thomas, supra*; *Doe* d. *Guest* v. *Bennett, supra*.

(*u*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 265 *et seq.*

(*a*) Before the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3, this could not be done; see title CHARITIES, Vol. IV., p. 125; and see *Re Hoyles, Row* v. *Jagg, supra*.

2. Assignment and Devolution.

Circumstances causing property to devolve as realty.

**341.** So long as the equity of redemption is not released or foreclosed or extinguished by lapse of time, the mortgagee's interest continues to be personal estate, notwithstanding that he may have entered into possession (*b*), and will not pass under a general devise of real estate (*c*); and if, in addition to his mortgage interest, the mortgagee has an estate in the property, a specific devise of the property will pass his proprietary estate only, and not his interest as mortgagee (*d*). But if he has entered into possession, a specific devise of the property will pass all his interest, and will, consequently, include the mortgage debt (*e*).

If, at the time of the mortgagee's death, the equity of redemption is already extinguished, the property is real estate in his hands and devolves as such (*f*); and if in his will he disposes of the property as though his interest were still that of mortgagee only, the property none the less passes under the disposition

Mortgage of copyholds.

**342.** Where the mortgaged property is of copyhold tenure the devolution of the mortgagee's estate depends on whether he had or had not been admitted. If he had been admitted, then the statutory provision vesting the property in his personal representatives does not apply (*h*), and the right to be admitted on presentment of his death vests in his devisees, if he has devised his copyhold mortgage

(*b*) *Noy* v. *Ellis* (1676), 2 Cas. in Ch. 220; *Re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859.

(*c*) *Strode* v. *Russel* (1708), 2 Vern. 621.

(*d*) Thus, if he is mortgagee of a term and also reversioner, a specific devise does not carry the mortgage, notwithstanding that the term has at law merged in the reversion (*Bowen* v. *Barlow* (1872), 8 Ch. App. 171).

(*e*) *Woodhouse* v. *Meredith* (1816), 1 Mer. 450; *Re Carter, Dodds* v. *Pearson*, [1900] 1 Ch. 801; and a limitation in the will to the devisee and his heirs may make the mortgage real estate as between mortgagee and devisee, though it is personal estate as between mortgagee and mortgagor (*Noys* v. *Mordaunt* (1707), 2 Vern. 581, 582; *Garret* v. *Evers* (1730), Mos. 364). But where a testator, after specifically devising a house, sells it and takes a mortgage for part of the purchase-money, the specific devise does not carry the mortgage (*Re Clowes*, [1893] 1 Ch. 214, C. A.).

(*f*) See note (*n*), p. 185, *post*. As to extinguishment of title by lapse of time, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 149 *et seq.*

(*g*) *Silberschildt* v. *Schiott* (1814), 3 Ves. & B. 45, where the equity of redemption had been extinguished by foreclosure.

(*h*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88, reproducing the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, and enacting that the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls on trust or by way of mortgage. Between the 7th August, 1874, and the 1st January, 1882, the executors of a mortgagee of copyholds who had been admitted could surrender on payment off, but could not surrender on transfer of the mortgage or on sale (note (*q*), p. 182, *ante*). From the 31st December, 1881, to the 16th September, 1887 (the date of commencement of the Copyhold Act, 1887 (50 & 51 Vict. c. 73)), the right of admittance vested in the executors of the mortgagee (*Re Hughes*, [1884] W. N. 53; *Hall* v. *Bromley*, [1886] W. N. 211), and dealings by them with the mortgaged property between those dates were effectual (*Re Mills' Trust* (1887), 37 Ch. D. 312; see [1888] W. N. 155). Since the 16th September, 1887, the old law has been restored, and only the devisees or the customary heir can deal with the legal estate in the mortgaged property, at whatever date the mortgagee died (*Re Mills' Trust*, *supra*; affirmed on another point (1888), 40 Ch. D. 14, C. A.).

estates (*i*), or otherwise in his customary heir-at-law (*j*). If he had not been admitted, the mortgage will have been taken either by conditional surrender, or covenant to surrender not followed by surrender (*k*). In either case an equitable interest in the copyholds is vested in the mortgagee, and this interest devolves on his personal representatives (*l*).

SUB-SECT. 4.—*Devolution on Intestacy.*

Mortgage secured on freeholds, and on leaseholds and other personalty.

**343**. By virtue of the statutory provision already referred to (*m*), the mortgaged property, if of freehold tenure, devolves, on the death of a sole mortgagee intestate, on his administrator; and if it is leasehold or other personal property, it devolves in the same manner. Consequently both the mortgage debt and the mortgaged property devolve on the administrator, whose duty it is to get in the mortgage money and apply it in due course of administration, the beneficial interest in any surplus being in the next of kin (*n*); or, if it is not required for payment of debts and expenses, the administrator can, with the consent of the next of kin, transfer it to them, or some one or more of them, as part of the intestate's estate.

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(*i*) See Encyclopædia of Forms and Precedents, Vol. XV., p. 657.

(*j*) See titles COPYHOLDS, Vol. VIII., pp. 86, 88; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 234, and as to escheat, see title COPYHOLDS, Vol. VIII., p. 55; EQUITY, Vol. XIII., p. 95.

(*k*) See pp. 124 *et seq.*, *ante*.

(*l*) There seems to be no reason for excluding equitable interests in copyholds from the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30. The decisions that it applied to the legal estate before 1887 (see note (*h*), p. 184, *ante*) are authorities that it applied and still applies to equitable interests; compare *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583, decided on the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30; see note (*q*), p. 182, *ante*. Under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 4, the administrator, where the mortgagee died between the 7th August, 1874, and the 1st January, 1882, could reconvey on payment off of the mortgage, but could not transfer (see note (*q*), p. 182, *ante*). Formerly mortgaged freeholds devolved on the heir-at-law of the mortgagee, who held them as trustee for the administrator; see *Ex parte Marshall* (1839), 9 Sim. 555; and see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 5, 6.

(*n*) That is, if the mortgage is still personal estate at the death of the mortgagee (*Re Loveridge, Drayton* v. *Loveridge*, [1902] 2 Ch. 859; see *Flack* v. *Longmate* (1845), 8 Beav. 420); but if the equity of redemption has been released or foreclosed in his life, or if he has entered into possession and the equity of redemption has been extinguished in his life by lapse of time, then freehold property is held by the administrator for the heir-at-law (*Thompson* v. *Grant* (1819), 4 Madd. 438; *Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518). As to copyholds, see p. 184, *ante*.

# Part VII.—Rights and Liabilities of the Mortgagee.

## SECT. 1.—*Right to Protect his Security.*

### SUB-SECT. 1.—*As against the Mortgagor.*

SECT. 1. **Right to Protect his Security.**

Right to protect security:

**344.** The mortgagee, being entitled to the full benefit of the security which the mortgagor has agreed to give him, may protect it both as regards the title to the mortgaged property, and as regards the value of the property itself.

(i.) As regards title;

As regards the title to the mortgaged property, if the mortgagee has in the first instance taken an equitable title, but with an agreement for a legal mortgage (*o*), he is entitled to have a legal mortgage executed on request, and will be allowed any charges and expenses properly incurred in preparing the mortgage (*p*); and, if the mortgagor has conveyed to the mortgagee a defective title, and subsequently acquires an interest which enables him to cure the defect, the mortgagee can call upon him to perfect the mortgage title (*q*).

(ii.) as regards value of property.

As regards the value of the property itself, the rights of the mortgagee possibly depend to some extent upon the circumstance that the mortgagor while in possession is a *quasi*-tenant (*a*), but, substantially, on the general principle that the mortgagee is entitled to have the security kept unimpaired. Hence, the mortgagor must not deal with the property so as to diminish its value (*b*). Moreover, the mortgagee, if in possession, is entitled to lay out any moneys necessary for the maintenance of the property (*c*).

Apart from the doctrine of waste (*d*), the mortgagee is entitled to restrain the mortgagor from conduct which would prejudice the

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(*o*) See pp. 75, 78, *ante*.

(*p*) *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A.; see p. 239, *post*.

(*q*) "The doctrine of the Court of Chancery is, that if a man contracts to convey, or to mortgage, or to settle an estate, and he has not at the time of his contract a title to the estate, but he afterwards acquires such a title as enables him to perform his contract, he shall be bound to do so" (*Smith* v. *Osborne* (1857), 6 H. L. Cas. 375, *per* Lord CRANWORTH, L.C., at p. 390); as to mortgages, see *Seabourne* v. *Powell* (1686), 2 Vern. 11; and compare, as to sales, *Taylor* v. *Debar* (1676), 1 Cas. in Ch. 274; *Smith* v. *Baker* (1842), 1 Y. & C. Ch. Cas. 223. The right of the mortgagee to have his title perfected gives him an equitable interest which will prevail against a subsequent incumbrancer who takes the legal estate with notice (*Jennings* v. *Moore* (1708), 2 Vern. 609), but not if he takes without notice (*Oxwick* v. *Plumer* (1708), Bac. Abr., tit. Mortgage (E.) 3 (7th ed., Vol. V., p. 664)). But where the mortgagor has no title at all at the time of the mortgage, and subsequently acquires a title, it has been doubted whether his heir is bound to convey (*Morse* v. *Faulkner* (1792), 1 Anst. 11).

(*a*) See *Partridge* v. *Bere* (1822), 5 B. & Ald. 604, 605, n.; *Hitchman* v. *Walton* (1838), 4 M. & W. 409; and p. 158, *ante*.

(*b*) See p. 160, *ante*, and note (*b*), *ibid.*

(*c*) *Sandon* v. *Hooper* (1843), 6 Beav. 246; and as to repairs and improvements, see p. 240, *post*.

(*d*) See p. 160, *ante*.

mortgage security (*e*); and upon a mortgage of goods, where the mortgagor retains the right of possession till default, an improper sale by him determines his right, and gives the immediate right of possession to the mortgagee, who can thereupon sue for conversion (*f*).

SUB-SECT. 2.—*As against Third Parties.*

Right to protect title against third parties.

**345**. The mortgagee is entitled, as against third parties, to protect his own or the mortgagor's title to the mortgaged property, and to maintain the value of that property. Thus, if the mortgagor's title is impeached, the mortgagee may take any step necessary to support it (*g*). If he is an equitable mortgagee, and third parties with an inferior title are proposing to dispose of the legal estate, he can obtain an injunction to restrain them (*h*). But in general he will have to defend, at his own expense, proceedings brought by third parties to impeach the mortgage security (*i*).

Right to recover and maintain property.

**346**. As regards the recovery or preservation of the mortgaged property, the mortgagee may be entitled to bring actions against third persons either by virtue of his legal or other estate in the property, or of his possession or immediate right to possession. Where he is legal owner of the property he is *primâ facie* the proper person to bring actions which depend on ownership (*k*), and he may be a necessary party to such actions (*l*). But since the

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(*e*) Thus, under a mortgage of tolls by the trustees of a road, the trustees may be restrained from reducing the tolls (*Crewe* (*Lord*) v. *Edleston* (1857), 1 De G. & J. 93, 110, C. A.); under a mortgage of calls, the company cannot make a second call and get it in first at the expense of the mortgagee (*Re Humber Ironworks Co., Ex parte Warrant Finance Co.* (1868), 16 W. R. 667, C. A.); and where property is subject to a vendor's lien, a sale of part will be restrained (*Re Blakely Ordnance Co., Blakely* v. *Dent* (1867), 15 W. R. 663); and see title INJUNCTION, Vol. XVII., pp. 251, 266, 267.

(*f*) *Fenn* v. *Bittleston* (1851), 7 Exch. 152; and see title TROVER AND DETINUE.

(*g*) *Godfrey* v. *Watson* (1747), 3 Atk. 517, 518; *Sandon* v. *Hooper* (1843), 6 Beav. 246, 248; see pp. 236, 238, *post*.

(*h*) *London and County Banking Co.* v. *Lewis* (1882), 21 Ch. D. 490, C. A. In general, questions between the mortgagee and mortgagor can be determined without bringing in third persons: where, for instance, the mortgagee sues to compel disentailing by a tenant in tail in pursuance of his contract, persons who are not parties to the contract need not be joined (*Petre* v. *Duncombe* (1848), 7 Hare, 24); but where, as in redemption and foreclosure, other persons claiming an interest in the equity of redemption are affected, they must be made parties (*Evans* v. *Jones* (1853), Kay, 29); and see title INJUNCTION, Vol. XVII., pp. 251, 252.

(*i*) *Parker* v. *Watkins* (1859), John. 133; see p. 238, *post*. But where in an action for the execution of trusts, the beneficiaries desire to impeach a mortgage by the trustees, and for that purpose make the mortgagee a party, he will apparently, if successful, be allowed his costs; see *Langton* v. *Langton* (1855), 7 De G. M. & G. 30, C. A.

(*k*) Thus where a restrictive covenant has been entered into with the mortgagee, he is the person to sue on it so long as the title remains in him; if the covenant is not required for the purpose of his security, he should sue at the instance of, and on being indemnified by, the persons entitled to the benefit of the covenant (*Manners* (*Lord*) v. *Johnson* (1875), 1 Ch. D. 673). As to the rights of a mortgagee of a co-owner of a mine against the other co-owners, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 556.

(*l*) Even though the mortgagor can sue alone by virtue of his equitable

SECT. 1. **Right to Protect his Security.**

beneficial interest, subject to the mortgagee's security, is in the mortgagor, the mortgagor can usually sue in his own name (*m*), and, while he is in possession, the right to do so in certain cases is conferred on him by statute (*n*).

Right to sue for trespass,

**347.** Where the mortgagee is in possession of land he can sue a third party in trespass (*o*); and after entry, his right of possession relates back to the time when his right to possession accrued, so as to enable him to maintain an action for trespass committed by a stranger before his entry. This is so whether the mortgagee has the

or conversion.

legal estate or not (*p*). Further, where he is in possession, or has the immediate right to possession of goods, he can sue for trespass or conversion, or to recover the goods (*q*). But these actions are not open to him if the mortgagor is entitled under the mortgage to retain possession till a certain event—such as demand of payment and default,—and that event has not happened (*r*); though, if the mortgage is by way of assignment to the mortgagee upon trust to allow the mortgagor to remain in possession till demand of payment, the mortgagee is considered to have the right to immediate possession upon the analogy of the case of trustee and *cestui que trust* (*s*).

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ownership, it may be necessary to join the mortgagee; if, for instance, it is necessary for the legal estate to be before the court, or if accounts have to be taken which should be made binding on the mortgagee; see *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (1890), 44 Ch. D. 374, 392, C. A.

(*m*) *Fairclough* v. *Marshall* (1878), 4 Ex. D. 37, C. A.; *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society, supra.*

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5); Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10; and see p. 161, *ante.*

(*o*) Perhaps he can do so also if he has the immediate right to possession as against the mortgagor, for it has been said that a lessor at will can sue in trespass (Bro. Abr., tit. "Trespass," pl. 131); and see p. 159, *ante:* but if the security is by way of demise, the mortgagee cannot sue in trespass before he has entered (*Wheeler* v. *Montefiore* (1841), 2 Q. B. 133, 142; *Doe* d. *Parsley* v. *Day* (1842), 2 Q. B. 147, 156). As to trespass generally, see title TRESPASS.

(*p*) *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493, C. A.

Trespass, trover and detinue were all possessory actions, and the plaintiff had to show either actual possession or the right to immediate possession (*Gordon* v. *Harper* (1796), 7 Term. Rep. 9; see title ACTION, Vol. I., pp. 41, 43, 44). Thus a mortgagee in possession of goods, or a pledgee, is the proper person to sue in trover or detinue (*Sewell* v. *Burdick* (1884), 10 App. Cas. 74, 92; *Bristol and West of England Bank* v. *Midland Rail. Co.*, [1891] 2 Q. B. 653, C. A.), though the mortgagor or pledgor, on tendering the money due, is entitled to sue the mortgagee or pledgee in trover (*Franklin* v. *Neate* (1844), 13 M. & W. 481, 484); and, similarly, as to a vendor who retains possession of goods subject to his lien (*Lord* v. *Price* (1874), L. R. 9 Exch. 54). Under the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, the indorsee of a bill of lading, to whom the property in the goods therein mentioned passes, has transferred to and vested in him all rights of suit in respect of the goods, but apparently an indorsement by way of mortgage does not pass the property for this purpose (*Sewell* v. *Burdick, supra*, at p. 96); see *Burgos* v. *Nascimento* (1908), 100 L. T. 71; and see titles SALE OF GOODS; TROVER AND DETINUE.

(*r*) *Bradley* v. *Copley* (1845), 1 C. B. 685.

(*s*) *White* v. *Morris* (1852), 11 C. B. 1015; compare *Barker* v. *Furlong*, [1891] 2 Ch. 172.

Where the mortgagee is entitled to sue in trover he can recover as damages the full value of the goods (*t*), whether he is or is not liable to account for any surplus to the mortgagor (*u*).

SECT. 1. Right to Protect his Security.

Damages in trover.

**348.** A mortgagee, generally, is entitled to bring proceedings to prevent the deterioration of his security. Where the property is taken for public purposes, notice to treat must be served on him as well as on the mortgagor (*a*). If the property consists of licensed premises, the mortgagee can appeal to quarter sessions against non-renewal of the licence (*b*). A prior mortgagee is also entitled to an injunction to prevent the mortgaged property being taken or dealt with by a subsequent incumbrancer (*c*). But the mortgagee cannot obtain an injunction unless he is prejudiced by the conduct complained of (*d*).

General right to prevent deterioration.

## SECT. 2.—*Right to Possession of the Mortgaged Property.*

### SUB-SECT. 1.—*When the Right Arises.*

**349.** Where the mortgage vests the legal estate in the mortgaged property in the mortgagee and no provision is made for retention of possession by the mortgagor (*e*), the mortgagee is entitled to enter at any time after the execution of the mortgage, notwithstanding that there has been no default on the part of the mortgagor (*f*), or that a bill of exchange has been given for the debt (*g*).

Right of first mortgagee.

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(*t*) *Brierly* v. *Kendall* (1852), 17 Q. B. 937, 943.

(*u*) *The Winkfield*, [1902] P. 42, C. A., overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422; see titles DAMAGES, Vol. X., p. 344; TROVER AND DETINUE.

(*a*) *Cooke* v. *London County Council*, [1911] 1 Ch. 604. As to the interest of mortgagees in a parliamentary deposit, see *Re Potteries, Shrewsbury, and North Wales Rail. Co.* (1883), 25 Ch. D. 251, C. A.; and as to the position of mortgagees in regard to compulsory purchase, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 66, 142 *et seq.*

(*b*) *Garrett* v. *Middlesex Justices* (1884), 12 Q. B. D. 620; see Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (1); title INTOXICATING LIQUORS, Vol. XVIII., p. 79; and as to registration of the mortgagee, see *ibid.*, p. 103.

(*c*) *Legg* v. *Mathieson* (1860), 2 Giff. 71; *Wildy* v. *Mid-Hants Rail. Co.* (1868), 16 W. R. 409.

(*d*) Thus, if the mortgage comprises the goodwill of a business and the right to use a name, the mortgagee, if he does not intend to use the name, cannot prevent the assignees of the mortgagor from using it (*Beazley* v. *Soares* (1882), 22 Ch. D. 660); and see, generally, title INJUNCTION, Vol. XVII., p. 251. As to goodwill generally, see titles PARTNERSHIP; TRADE AND TRADE UNIONS.

(*e*) As to the effect of a redemise by the mortgagee of the mortgaged property to the mortgagor either expressly or by implication, see p. 159, *ante*, and title LANDLORD AND TENANT, Vol. XVIII., pp. 336, note (*j*), 357, note (*d*).

(*f*) *Doe* d. *Roylance* v. *Lightfoot* (1841), 8 M. & W. 553; *Rogers* v. *Grazebrook* (1846), 8 Q. B. 895; *Green* v. *Burns* (1879), 6 L. R. Ir. 173; and see p. 157, *ante*; title INJUNCTION, Vol. XVII., p. 251. But a mere power of sale on default does not, it seems, give a right of entry except on default, and then only for the purpose of a sale (*Watson* v. *Waltham* (1835), 2 Ad. & El. 485). It is optional with the mortgagee whether he takes possession or not. He can foreclose without taking possession (*Penrhyn* (*Lord*) v. *Hughes* (1799), 5 Ves. 99, 106). As to foreclosure, see p. 272, *post*.

(*g*) *Bramwell* v. *Eglinton* (1864), 5 B. & S. 39. As to the loss of the

SECT. 2. **Right to Possession of the Mortgaged Property.**

Where a second mortgage has been created by conveyance of the equity of redemption, and the first mortgagee does not take possession, the second mortgagee, since he is entitled to possession as against the mortgagor (*h*), has, it would seem, a similar right of entry (*i*), and certainly so if the mortgage expressly gives him the right (*k*).

Right of subsequent mortgagee.

Registered proprietor of charge.

The registered proprietor of a charge registered under the Land Transfer Acts, 1875 and 1897 (*l*), may also, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of the charge, enter upon the land charged, subject to the rights of prior registered incumbrancers (*m*).

Equitable incumbrancer.

An incumbrancer not included in the foregoing classes has no right to possession of the land, but if his charge is created by instrument under seal he can appoint a receiver (*n*), and if his charge arises otherwise he can obtain the appointment of a receiver from the court (*o*). If he does not obtain a receiver, but obtains an order for sale, he is entitled to the rents from the date of the order (*p*).

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right by effluxion of time, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 145 *et seq.*

(*h*) *Re Gordon, Ex parte Official Receiver* (1889), 61 L. T. 299.

(*i*) Formerly an action of ejectment might be defeated, except as against a mere wrongdoer, by showing that the plaintiff had not the legal estate, where, for instance, there was an outstanding term; though an express power of re-entry, created prior to the term, would prevail (*Doe* d. *Butler* v. *Kensington* (*Lord*) (1846), 8 Q. B. 429). But an action for recovery of land is not liable to be defeated on this ground. All that is necessary is that the plaintiff should be entitled to possession as against the defendant (*General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15, 24; *Antrim County Land Building and Investment Co.* v. *Stewart*, [1904] 2 I. R. 357, C. A.; see *Campion* v. *Palmer*, [1896] 2 I. R. 445, C. A.). *Allen* v. *Woods* (1893), 68 L. T. 143, C. A., appears to favour the old rule, but there the plaintiff was only entitled under an executory trust, and it was necessary for the legal owner to be before the court in order that the trust might be established against him. *Feehan* v. *Mandeville* (1891), 28 L. R. Ir. 90, so far as it insisted on a legal estate in the plaintiff in ejectment, is not law, but the decision depended on the relative rights of the plaintiff (the assignee of a legal mortgage) and a sub-mortgagee to whom he had assigned the legal estate; it was considered that the mortgagor ought not to be compelled to give possession to the mortgagee in the absence of the sub-mortgagee. The *dictum* of NORTH, J., in *Garfitt* v. *Allen*, *Allen* v. *Longstaffe* (1887), 37 Ch. D. 48, 50, that an equitable mortgagee cannot take possession applies only where, as in that case, the incumbrance is by mere charge. As to equitable charges, see p. 83, *ante*. In *Langton* v. *Langton* (1855), 7 De G. M. & G. 30, C. A., first mortgagees with an equitable estate were put into possession by the court.

(*k*) Compare *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493, C. A.; see p. 192, *post*.

(*l*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65. As to registration of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*m*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 25.

(*n*) See p. 264, *post*.

(*o*) See p. 261, *post*. As to the classes of equitable mortgages, see p. 74, *ante*.

(*p*) It is not clearly settled whether the equitable mortgagee is entitled to rents from the date of the order for sale or from the date of his application on which the order for sale is made. In the following cases the rents were allowed from the date of the order for sale:—*Re Postle*,

**350.** Where the right of entry is to arise only on default in payment of the mortgage debt on demand, a reasonable time should be allowed for compliance with the demand before the mortgagee enters (*a*).

SUB-SECT. 2.—*Exercise of the Right.*

**351.** When the mortgagee has a right of entry and allows the mortgagor to remain in possession, he is not bound to give any notice to the latter before entering (*b*); and similarly he can bring an action to recover the land without any previous notice or demand of possession (*c*). Where the mortgagor has attorned tenant to the mortgagee, the necessity for any demand previous to

Right of entry arising on default of payment on demand.

When entry can be made or action brought without notice.

*Ex parte Bignold* (1835), 4 Deac. & Ch. 259; *Re Tombs, Ex parte Living* (1835), 2 Mont. & A. 223; *Re Birks, Ex parte Carlon* (1837), 3 Mont. & A. 328; *Re Norman, Ex parte Burrell* (1838), 3 Mont. & A. 439; *Re Pearson, Ex parte Scott* (1838), 3 Mont. & A. 592; and so, too, notwithstanding that the mortgagee did not establish his title till subsequently (*Re Teesdale and Swales, Ex parte Thorpe* (1838), 3 Mont. & A. 441). The mortgagee does not entitle himself to earlier rents by giving notice to the tenants to pay the rents to him (*Re Pearson, Ex parte Scott, supra*), unless, of course, his mortgage entitles him to go into possession. In *Re Keer, Ex parte Bignold* (1832), 2 Deac. & Ch. 398, the mortgagee only asked for the rents from the date of the order for sale. But in *Re Harvey, Ex parte Bignold* (1827), 2 Gl. & J. 273, it was held that the mortgagee was entitled to the produce of the mortgaged property from the time of presenting a petition for sale, and in *Re Feaver, Ex parte Smith* (1844), 3 Mont. D. & De G. 680, he was allowed the rents from the date of an order for inquiry as to title, and not only from the date when the title was affirmed and an order for sale made. In *Re Tills, Ex parte Alexander* (1827), 2 Gl. & J. 275, Lord ELDON, L.C., held that the mortgagor's assignees in bankruptcy took the rents till the actual sale, but this ruling has not been followed; and as to the report of this case, see *Re Norman, Ex parte Burrell, supra.*

(*a*) *Toms* v. *Wilson* (1863), 4 B. & S. 455, Ex. Ch.; and if the demand is made by an agent, there is no default, and entry is unlawful, until the mortgagor has had an opportunity of inquiring into the alleged agency (*Moore* v. *Shelley* (1883), 8 App. Cas. 285, P. C.). If a mortgagee of goods seizes them too soon, the mortgagor recovers as damages, not the value of the goods, but the value of his interest in them (*Brierly* v. *Kendall* (1852), 17 Q. B. 937; *Chinery* v. *Viall* (1860), 5 H. & N. 288; *Toms* v. *Wilson, supra*); but a premature taking of possession does not prevent the mortgagee from taking possession in due time (*Bramwell* v. *Eglinton* (1864), 5 B. & S. 39). As to seizure of goods under the present law, see title BILLS OF SALE, Vol. III., p. 68.

(*b*) *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; 1 Smith, L. C., 11th ed., 511; *Birch* v. *Wright* (1786), 1 Term Rep. 378, 383; and see p. 158, *ante.* The court will not interfere with the mortgagee's right to possession on account of the pendency of an administration action (*Crowle* v. *Russell* (1878), 27 W. R. 84, C. A.), or of a suggestion that the mortgage deed is invalid (*Re Hart, Ex parte Bayly* (1880), 15 Ch. D. 223, C. A.).

(*c*) *Doe* d. *Fisher* v. *Giles* (1829), 5 Bing. 421; *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224, 236; see pp. 158, 159, *ante.* In *Keech* d. *Warne* v. *Hall, supra,* the mortgagor was described as tenant at will, but this analogy is misleading, and it is, perhaps, more correct to say that he remains at the will of the mortgagee; or that the mortgagee is entitled at any moment to treat him as a trespasser (*Doe* d. *Roby* v. *Maisey* (1828), 8 B. & C. 767; *Jolly* v. *Arbuthnot, supra*). But if by the contract the mortgagor is made tenant at will, he holds subject to the legal incidents of that relation (*Re Skinner, Ex parte Temple and Fisher* (1822), 1 Gl. & J. 216). As to tenancies at will, see title LANDLORD AND TENANT, Vol. XVIII., pp. 434 *et seq.*

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entry is usually avoided by express provision that the mortgagee shall be entitled to enter without notice at any time after default in payment of the principal money (*d*).

Where property in lease or subject to tenancy.

**352.** When the mortgaged property is in the occupation of the mortgagor, or of a tenant of the mortgagor whose tenancy is not binding on the mortgagee (*e*), the mortgagee exercises his right to possession by either entering on the land if this can be done peaceably (*f*), or by bringing an action to recover possession of the land (*g*).

If the mortgaged property is in the occupation of a tenant whose tenancy is binding (*h*) on the mortgagee, the mortgagee exercises his right by giving the tenant notice to pay the rent to him (*i*).

Rights of second mortgagee.

**353.** Where a second mortgage contains an express power for the mortgagee to take possession, and the mortgagee gives notice to the tenant to pay rent to him, this, by virtue of the agreement, entitles the mortgagee to the rents as against a judgment creditor, apart from the question of the mortgagee's right to recover possession (*k*); and an equitable mortgagee by deposit who gives notice to, and receives rent from, the tenant, can retain it as against him (*l*).

Effect of prior possession by receiver.

**354.** If, at a time when the mortgagee wishes to go into possession, he finds a receiver appointed by the court in possession, and the rights of prior incumbrancers have not been preserved, he must apply in the action in which the receiver was appointed for the discharge of the receiver and for liberty to take possession (*m*). But if the existence of prior incumbrancers is known, the order is made subject to, or with a proviso that it shall not affect their right to take possession (*n*). Tenants will then be justified in paying

(*d*) *Doe* d. *Garrod* v. *Olley* (1840), 12 Ad. & El. 481; *Doe* d. *Snell* v. *Tom* (1843), 4 Q. B. 615; *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224, 236; *Metropolitan Counties Assurance Co.* v. *Brown* (1859), 4 H. & N. 428; and as to attornment clauses, see, further, p. 159, *ante*. But a provision reserving a right of re-entry without notice does not convert a yearly tenancy into a tenancy at will (*Re Threlfall, Ex parte Queen's Benefit Building Society* (1880), 16 Ch. D. 274, C. A.). The mortgagee might re-enter notwithstanding that he had previously recognised the tenancy by distraining (*Doe* d. *Garrod* v. *Olley*, *supra*); but at the present time a mortgagee cannot distrain for interest as for rent in arrear; see p. 159, *ante*; title DISTRESS, Vol. XI., p. 127.

(*e*) As to such tenancies, see p. 164, *ante*.

(*f*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 474; LANDLORD AND TENANT, Vol. XVIII., p. 557.

(*g*) See title LANDLORD AND TENANT, Vol. XVIII., p. 558; p. 159, *ante*.

(*h*) As to such tenancies, see pp. 160 *et seq.*, *ante*.

(*i*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 904.

(*k*) *Campion* v. *Palmer*, [1896] 2 I. R. 445, C. A.

(*l*) *Re Freeman, Ex parte Williams* (1865), 13 W. R. 564; *Finck* v. *Tranter*, [1905] 1 K. B. 427. As to equitable mortgages by deposit, see p. 78, *ante*.

(*m*) *Angel* v. *Smith* (1804), 9 Ves. 335; *Thomas* v. *Brigstocke* (1827), 4 Russ. 64; *Langton* v. *Langton* (1855), 7 De G. M. & G. 30, C. A.; see *Searle* v. *Choat* (1884), 25 Ch. D. 723, C. A.; note (*g*), p. 157, *ante*; and pp. 262, 263, *post*.

(*n*) 1 Seton, Judgments and Orders, 6th ed., pp. 759, 760; see title RECEIVERS.

their rents to the mortgagee after notice from him, and he is entitled to possession as against the receiver (*a*); but if any difficulty arises in asserting his right he should apply to the court in the action in which the receiver was appointed (*b*).

SECT 3. Right to Possession of the Mortgaged Property.

SUB-SECT. 3.—*What Amounts to Possession.*

**355.** A mortgagee who is entitled to vacant possession of the property acquires possession of the whole of the property by entering on part, provided that the property is so bounded and defined that entry on part can be regarded as entry on the whole (*c*); but a mortgagee is entitled to limit his possession to part of the property, and, if such is his intention, he will not be charged as being constructively in possession of the whole (*d*).

Entry on part.

Even though the entry of the mortgagee is forcible so as to be a breach of the Statutes of Forcible Entry (*e*), and subject him to penalties under the criminal law (*f*), yet, directly he has entered, his right to possession gives him the possession for civil purposes, and he can treat the mortgagor or any other person who is on the property as a trespasser (*g*).

Forcible entry.

A guardian who takes an assignment of a mortgage on the ward's estate will be treated as mortgagee in possession (*h*). A solicitor, who pays off a mortgage for a client and receives the rents, receives them as agent for the client, and is not a mortgagee in possession (*i*).

Who may be treated as in possession.

If necessary an inquiry as to the fact of possession will be directed (*k*), but not where the mortgagee has admitted this on his pleadings (*l*).

Inquiry as to possession.

**356.** When a mortgagee takes actual possession of the property, there is no doubt as to his intention to take possession, and he thereby

Actual possession.

(*a*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 137; *Underhay Read* (1887), 20 Q. B. D. 209, 219, C. A.

(*b*) *Searle* v. *Choat* (1884), 25 Ch. D. 723, C. A.

(*c*) Compare *Low Moor Co.* v. *Stanley Coal Co.* (1876), 34 L. T. 186.

(*d*) *Soar* v. *Dalby* (1852), 15 Beav. 156. Thus, where a farm is let to a tenant without the shooting or timber, a notice to pay rent to the mortgagee will put him in possession of the farm only, not of the shooting and timber (*Simmins* v. *Shirley* (1877), 6 Ch. D. 173).

(*e*) Stats. (1380) 5 Ric. 2, st. 1, c. 8; (1391) 15 Ric. 2, c. 2; see title LANDLORD AND TENANT, Vol. XVIII., p. 557, note (*m*).

(*f*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 474.

(*g*) *Lows* v. *Telford* (1876), 1 App. Cas. 414; see *Harvey* v. *Brydges* (1845), 14 M. & W. 437; *Beddall* v. *Maitland* (1881), 17 Ch. D. 174, 188. But the person forcibly ejected, while he cannot recover damages for the entry, since it violates no civil right of his, can recover damages for injury to his family or his furniture, because the entry is unlawful (*Beddall* v. *Maitland*, *supra*; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199); though, if the entry is peaceable, he cannot recover damages for subsequent injury occasioned to his goods in the course of the exercise of the mortgagee's rights as owner (*Jones* v. *Foley*, [1891] 1 Q. B. 730).

(*h*) *Bishop* v. *Sharp* (1704), 2 Vern. 469, 471.

(*i*) *Ward* v. *Carter* (1865), L. R. 1 Eq. 29; and see title AGENCY, Vol. I., p. 192.

(*k*) *Dobson* v. *Lee* (1842), 1 Y. & C. Ch. Cas. 714; see *Wills* v. *Palmer* (1905), 53 W. R. 169.

(*l*) *Parker* v. *Watkins* (1859), John. 133, 137.

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assumes the liability of a mortgagee in possession (*m*). When he gives notice to the tenants to pay their rents to him, it is equally clear that he intends to go into receipt of rents and profits, and this, as regards the liability to account, is equivalent to taking possession (*n*).

Notice to tenants.

Mere receipt of sum equivalent to rent.

But if he merely receives from the mortgagor's agent a sum equal to the rents which the agent has collected, while the agent has not served on the tenants any notice on behalf of the mortgagee, this is not enough. In order to burden himself with the liability of a mortgagee in possession, the mortgagee must act in such a manner as to substitute himself for the mortgagor in the control and management of the estate (*o*).

Tenancy created by the mortgage.

Where the mortgage deed creates a tenancy in the mortgagor under the mortgagee at a rent (*p*), this does not put the mortgagee in possession so as to make him liable to account to subsequent incumbrancers for the amount of the rent reserved (*q*).

Possession once taken cannot be relinquished.

**357.** A mortgagee, when he has once taken possession, cannot give up possession (*r*), and usually the court will not relieve him of his liability by appointing a receiver; but in exceptional cases this will be done, where, for instance, the mortgagee by going into possession has got into a difficulty which puts him in an unfair position (*s*).

SUB-SECT. 4.—*Rights of Mortgagee in Possession.*

(i.) *Receipt and Application of Rents and Profits.*

When mortgagee becomes entitled.

**358.** So long as the mortgagee allows the mortgagor to remain in possession, the latter, if in occupation, takes the profits of the land,

(*m*) As to taking possession of goods situated on different premises, see *Re Eslick* (*S. J.*), *Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch. D. 496.

(*n*) See *Horlock* v. *Smith* (1842), 6 Jur. 478; and so, too, if the mortgagee gives notice to the tenants not to pay rent to the mortgagor. The mortgagee must either take possession or leave the mortgagor in possession (*Heales* v. *M'Murray* (1856), 23 Beav. 401). A receiver who, on being discharged, continues to receive the rents, and pays them to the mortgagee, will become the agent of the mortgagee so as to put the latter into possession (*Horlock* v. *Smith, supra*). As to the appointment of a receiver, see, generally, pp. 261 *et seq., post.*

(*o*) *Noyes* v. *Pollock* (1886), 32 Ch. D. 53, C. A. A mortgagee does not assume possession by insuring the property (*Ward* v. *Cartar* (1865), L. R. 1 Eq. 29); nor by merely making arrangements with the tenants, if they do not recognise him as landlord (*ibid.*).

(*p*) See p. 159, *ante.*

(*q*) *Stanley* v. *Grundy* (1883), 22 Ch. D. 478; see *Re Knight, Ex parte Isherwood* (1882), 22 Ch. D. 384, 392, C. A.; though there have been several *dicta* to the contrary (*Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, 356, C. A.; *Re Kitchin, Ex parte Punnett* (1880), 16 Ch. D. 226, C. A.; *Re Betts, Ex parte Harrison* (1881), 18 Ch. D. 127, 135, C. A.; *Green* v. *Marsh*, [1892] 2 Q. B. 330, 336, C. A.); and, of course, the mortgagee is not liable in such a case to account as mortgagee in possession to the mortgagor (*Re Betts, Ex parte Harrison, supra*).

(*r*) *Re Prytherch, Prytherch* v. *Williams* (1889), 42 Ch. D. 590, 599.

(*s*) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A. Previously it had been held that a mortgagee in possession was entitled to be relieved by the appointment of a receiver (*Tillett* v. *Nixon* (1883), 25 Ch. D. 238; *Mason* v. *Westoby* (1886), Ch. D. 206).

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and if only reversioner on leases or tenancies, takes the rents, in either case for his own use and without liability to account to the mortgagee (*t*). But the mortgagee on going into possession is entitled to take the rents and profits by virtue of the legal or equitable ownership which the mortgage confers upon him (*a*).

**Rent from tenancies binding on mortgagee.**

As regards tenancies created before the mortgage, or created by the mortgagor after the mortgage under an express or statutory power, the mortgagee, since he is entitled to the reversion, can require payment to himself of all arrears of rent then existing (*b*).

**Rent from tenancies not binding on mortgagee.**

As regards tenancies created after the mortgage which are not binding on the mortgagee, he is not entitled to demand payment of the rents as such, but after notice from him to the tenants to pay the rents to him, they must not pay rents to the mortgagor, and they are justified in paying the rents to the mortgagee, since otherwise, on recovering possession, he would be entitled to recover the rents as mesne profits (*c*).

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(*t*) *Trent* v. *Hunt* (1853), 9 Exch. 14, 22; see p. 158, *ante;* note (*q*), p. 201, *post.*

(*a*) See *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, 457, C. A. As to the rights of a mortgagee of an advowson, see title ECCLESIASTICAL LAW, Vol. XI., p. 574.

(*b*) *Moss* v. *Gallimore* (1779), 1 Doug. (K. B.) 279; 1 Smith, L. C., 11th ed., 514 (rent under lease before mortgage); *Rogers* v. *Humphreys* (1835), 4 Ad. & El. 299, 314 (lease made under express power); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 357, 596, note (*p*); and pp. 160, 161, *ante.* As to leases under the statutory power, see *Municipal Permanent Investment Building Society* v. *Smith* (1888), 22 Q. B. D. 70, C. A.; and p. 163, *ante.* The law on those points has not been affected by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5), or the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10 (*Re Ind, Coope & Co., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co.*, [1911] 2 Ch. 223). The rule applies to yearly as well as other tenancies, and the mortgagee can recover also an increased rent which the tenant has agreed with the mortgagor to pay after the date of the mortgage (*Burrowes* v. *Gradin* (1843), 1 Dow. & L. 213; see title LANDLORD AND TENANT, Vol. XVIII., p. 467, note (*c*) ). But it is restricted to rents proper; it does not extend, in a mortgage of warehouses, to charges for warehousing goods, though called rents, and recoverable by statute by distraint and sale of the goods (*Anderson* v. *Butler's Wharf Co.* (1879), 48 L. J. (CH.) 824), or to freight (*Rusden* v. *Pope* (1868), L. R. 3 Exch. 269, 275). A mortgagee is not bound by a collateral agreement between the mortgagor and the lessee under a lease created before the mortgage (*Thomas* v. *Jennings* (1896), 66 L. J. (Q. B.) 5); but, if he takes his mortgage with knowledge that the land is used for a particular purpose, he cannot object to such user (*Moreland* v. *Richardson* (1857), 24 Beav. 33).

(*c*) *Pope* v. *Biggs* (1829), 9 B. & C. 245, 257; *Wyse* v. *Myers* (1854), 4 I. C. L. R. 101; *Underhay* v. *Read* (1887), 20 Q. B. D. 209, C. A.; see *Rusden* v. *Pope, supra.* Technically the action for mesne profits is trespass, and requires that the mortgagee shall have been in possession during the time for which mesne profits are claimed (see *Turner* v. *Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932); but upon entry by the mortgagee or judgment in ejectment and possession taken, his possession relates back to the date of the mortgage (see p. 188, *ante*), and he can recover the rent accrued due within six years (see title LIMITATION OF ACTIONS, Vol. XIX., p. 97) during that period (*Barnett* v. *Guildford* (*Earl*) (1855), 11 Exch. 19, overruling *Litchfield* v. *Ready* (1850), 5 Exch. 939; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B 493, 498, C. A.; see *Harris* v. *Mulkern* (1875), 1 Ex. D. 31). The mortgagee can now insert a claim for mesne profits in his writ for recovery of possession

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Right to arrears.

The result is that whether the leases are or are not binding on the mortgagee, he is entitled both to arrears existing when he goes into possession, and also to rent accruing due subsequently. If the tenant has paid rent to the mortgagor before it was due, this is not a good payment against the mortgagee as regards rent accruing due after notice of the mortgage has been given to the tenant, and the tenant is liable to pay such rent over again to the mortgagee (*d*).

Effect of pre-payment.

Rents in hands of receiver.

**359.** Where a receiver has been appointed, the mortgagee obtains possession by applying for his discharge (*e*): whether rents then received by and remaining in the hands of the receiver belong to the mortgagee or not depends on the object of the appointment of the receiver (*f*). If he has been appointed in proceedings only affecting the title to the equity of redemption, for example, in proceedings to administer the trusts of the will of the mortgagor (*g*); or in other proceedings in which the title of the mortgagee is not in question (*h*), the mortgagee is not entitled to past rents, but only to rents paid after he applied to discharge the receiver (*i*). But if the receiver is appointed on behalf of incumbrancers on the property generally, or to settle a dispute as to title in which the mortgagee is interested, the mortgagee is entitled to rents in the hands of the receiver (*j*); and where sequestrators have been appointed, the mortgagee is entitled to rents received by the sequestrators and remaining in their hands when he makes his claim (*k*).

Application of rents received by mortgagee.

**360.** The rents received by the mortgagee are applicable in the first instance in paying the current outgoings, such as rents, rates and taxes, repairs, insurance premiums and the interest on prior

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of land (R. S. C., Ord. 18, r. 2; *Dunlop* v. *Macedo* (1891), 8 T. L. R. 43; see *Brandreth* v. *Shears*, [1883] W. N. 89); and he will be allowed to prove when his title to possession accrued, and to recover from the tenant the rents, accrued within six years before action, which have not been paid to the mortgagor.

(*d*) *De Nicholls* v. *Saunders* (1870), L. R. 5 C. P. 589; *Cook* v. *Guerra* (1872), L. R. 7 C. P. 132; but, if before the mortgage the tenant has paid a lump sum in satisfaction of all rent accruing during the term, and the mortgagee makes no inquiry of the tenant, he is bound by this payment (*Green* v. *Rheinberg* (1911), 104 L. T. 149, C. A.).

(*e*) See pp. 157, note (*g*), 192, *ante*.

(*f*) *Re Hoare, Hoare* v. *Owen*, [1892] 3 Ch. 94, 103.

(*g*) *Thomas* v. *Brigstocke* (1827), 4 Russ. 64.

(*h*) *Gresley* v. *Adderley, Gresley* v. *Heathcote* (1818), 1 Swan. 573, 579; see *Bertie* v. *Abingdon* (*Lord*) (1817), 3 Mer. 560. Where the receiver is appointed in a debenture-holder's action to which the mortgagee is not a party, and the debenture-holders are not in fact entitled, the rents are received for the mortgagor and will not be paid over to the mortgagee (*Re Land's Securities Co., Ex parte Norwich Life Insurance Society* (1894), 13 R. 48).

(*i*) *I.e.*, after the date of service of his application (*Preston* v. *Tunbridge Wells Opera House, Ltd.*, [1903] 2 Ch. 323).

(*j*) *Gresley* v. *Adderley, Gresley* v. *Heathcote, supra; Re Hoare, Hoare* v. *Owen, supra*.

(*k*) *Walker* v. *Bell* (1816), 2 Madd. 21, 24; see *Tatham* v. *Parker* (1853), 1 Sm. & G. 506, 514; and see note (*g*), p. 157, *ante*. A receiver holds, *primâ facie*, for the person who obtains his appointment; thus, it is believed that a first mortgagee cannot take rents in the hands of the receiver for an equitable mortgagee. As to the appointment of a receiver, see, further, pp. 261 *et seq.*, *post*.

incumbrances (*l*): the balance is then applicable, first, in payment of interest on the mortgage debt and on expenses of improvements (*m*) and otherwise, which the mortgagee is entitled to add to principal; and secondly, in payment of the principal and of capital expenditure added to principal (*n*). The mortgagee is not restricted to paying his interest out of the rents unless special provision to that effect is made by the mortgage deed (*o*). The mode in which the rents are thus applied depends on whether the accounts are taken with or without rests (*p*).

(ii.) *Conduct of Business.*

Powers and liability of mortgagee.

**361.** Where the mortgage security includes a business carried on upon the mortgaged premises, the mortgagee on entering is entitled to carry on the business for a reasonable time with a view to sale (*q*). He does not thereby render himself liable on the existing contracts of the business, unless he adopts them so as to effect a novation (*r*), but he is personally liable on any new contracts into which he enters (*s*). He becomes owner of the business, and stands, as regards his powers, in the place of the mortgagor (*t*).

(iii.) *Crops.*

Right of legal mortgagee.

**362.** A tenant at will, whose tenancy is determined by the landlord, is entitled to such of the crops then growing as are emblements (*a*). Possibly a mortgagor who is by express contract tenant at will to the mortgagee has the same right (*b*); but otherwise a mortgagor, though a *quasi*-tenant at will, is not tenant at will for

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(*l*) Compare the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (8), as to application of money received by a mortgagee's receiver; *Bompas* v. *King* (1886), 33 Ch. D. 279, C. A.; and see p. 266, *post*. As to the application of rents in the case of a Welsh mortgage, see p. 88, *ante*.

(*m*) See p. 240, *post*.

(*n*) See the order in *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661, 676.

(*o*) *Re Betts, Ex parte Harrison* (1881), 18 Ch. D. 127, 136, C. A.; *Re Knight, Ex parte Isherwood* (1882), 22 Ch. D. 384, 392, C. A.

(*p*) See p. 220, *post*.

(*q*) *Cook* v. *Thomas* (1876), 24 W. R. 427. Similarly the court, in such a case, can appoint a receiver and manager; see title RECEIVERS. As to whether the mortgage includes the business, see *Whitley* v. *Challis*, [1892] 1 Ch. 64, C. A.; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; *Re Leas Hotel Co., Salter* v. *Leas Hotel Co.*, [1902] 1 Ch. 332; *Leney & Sons, Ltd.* v. *Callingham and Thompson*, [1908] 1 K. B. 79, C. A.; and see p. 120, *ante*; and *Re Bennett, Clarke* v. *White*, [1899] 1 Ch. 316. As to goodwill generally, see titles PARTNERSHIP; TRADE AND TRADE UNIONS.

(*r*) Thus the entry by the mortgagee operates as a dismissal of the servants (*Reid* v. *Explosives Co.* (1887), 19 Q. B. D. 264, C. A.); *contra*, where the court appoints a receiver and manager (*Whinney* v. *Moss Steamship Co., Ltd.*, [1910] 2 K. B. 813, 826, C. A.; compare *Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corporation* v. *Marriage, Neave & Co.*, [1896] 2 Ch. 663, 672, C. A.); and see title MASTER AND SERVANT, Vol. XX., pp. 95, 96.

(*s*) Compare *Burt, Boulton and Hayward* v. *Bull*, [1895] 1 Q. B. 276, C. A.

(*t*) *Chaplin* v. *Young* (No. 1) (1864), 33 Beav. 330, 337.

(*a*) See titles AGRICULTURE, Vol. I., p. 282; LANDLORD AND TENANT, Vol. XVIII., p. 565.

(*b*) *Re Skinner, Ex parte Temple and Fisher* (1822), 1 Gl. & J. 216.

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this purpose (*c*), and the mortgagee on entering into possession is entitled to all the growing crops (*d*). The mortgagor is not, however, bound to account for crops which he has severed and taken away (*e*); and the mere cutting of the crops converts them into personal chattels, so that, if the mortgagee has not taken possession before the mortgagor's bankruptcy, they belong to his trustee in bankruptcy (*f*).

Right of equitable mortgagee.

An equitable mortgagee, who has an interest entitling him to possession as against the mortgagor (*g*), and who takes possession, is entitled, like a legal mortgagee, to the growing crops (*h*); and although he has no right to possession, yet if he peaceably obtains possession, he takes the crops as from that time (*i*); otherwise he is only entitled to the crops as from the date of an order for sale (*i*).

SUB-SECT. 5.—*Leasing Powers of Mortgagee in Possession.*

powers of mortgagee.

**363.** Apart from statutory or express powers, a mortgagee has no power to grant a lease without the mortgagor's consent (*k*), which will be binding on the mortgagor after redemption (*l*); but in the case of mortgages made since the 31st December, 1881, a mortgagee who is in possession (*m*), or who has appointed a receiver of the rents and profits of the mortgaged property (*n*), has the same rights of leasing and accepting surrenders of leases (*o*) as are enjoyed by a mortgagor in possession (*p*).

SUB-SECT. 6.—*Liabilities of Mortgagee in Possession.*

(i.) *To Account.*

Wilful default account.

**364.** A mortgagee who goes into possession of the mortgaged property, and thereby excludes the mortgagor from control of it, is bound to account to the mortgagor, not only for the rents and profits which he actually receives, but also for the rents and profits

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(*c*) *Keech* d. *Warne* v. *Hall* (1778), 1 Doug. (K. B.) 21; *Moss* v. *Gallimore* (1779), 1 Doug. (K. B.) 279, 283; *Birch* v. *Wright* (1786), 1 Term Rep. 378, 383; see p. 158, *ante*.

(*d*) *Bagnall* v. *Villar* (1879), 12 Ch. D. 812; see title INTERPLEADER, Vol. XVII., p. 589.

(*e*) See note (*l*), p. 158, *ante*.

(*f*) *Re Phillips, Ex parte National Mercantile Bank* (1880), 16 Ch. D. 104, C. A.

(*g*) See p. 190, *ante*.

(*h*) *Re Gordon, Ex parte Official Receiver* (1889), 61 L. T. 299.

(*i*) *Re Postle, Ex parte Bignold* (1835), 4 Deac. & Ch. 259.

(*k*) A consent under seal is not necessary to preclude the mortgagor from repudiating a legal demise by the mortgagee (*Chapman* v. *Smith*, [1907] 2 Ch. 97, 102).

(*l*) See title LANDLORD AND TENANT, Vol. XVIII., p. 358. Such a lease is binding, however, on a purchaser from the mortgagee (*Chapman* v. *Smith*, *supra*).

(*m*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18.

(*n*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 3 (11).

(*o*) *Ibid.*, s. 3 (2). A mortgagee in whom the legal estate in the reversion is vested can accept surrenders apart from this Act; see title LANDLORD AND TENANT, Vol. XVIII., p. 547. For a form of surrender to a mortgagee, see Encyclopædia of Forms and Precedents, Vol. VII., p. 670.

(*p*) For these powers, see pp. 163, 166, *ante*.

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which, but for his wilful default or neglect, he might have received (*q*); that is, for everything which he has received, or might or ought to have received, while he continued in possession (*r*). The rule applies both to tangible property and to the goodwill of a business (*s*), and not only to rents and profits—such as the rents and profits of land, the profits of a business (*t*), or the royalties from a patent (*u*)—but also to the *corpus* of the mortgaged property (*v*). It is based on the principle that, since the property is only a security for the money, the mortgagee must be diligent in realising the amount due in order that he may restore the property to the mortgagor (*w*). But he does not account for profits arising from business done in connection with the mortgaged premises which do not arise from the premises (*x*).

How far rule applied.

The mortgagee accounts on the like footing to all persons interested in the equity of redemption, and he remains liable to

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(*q*) *Hughes* v. *Williams* (1806), 12 Ves. 493: *Quarrell* v. *Beckford* (1816), 1 Madd. 269, 274: *Rowe* v. *Wood* (1822), 2 Jac. & W. 553, 556; *Williams* v. *Price* (1824), 1 Sim. & St. 581, 587: *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1, 14; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, 409, P. C.; *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, 691, C. A. There is an early decision to the contrary (*Anon.* (1675), 1 Cas. in Ch. 258). As to accounts between mortgagee and mortgagor generally, see pp. 215 *et seq.*, *post*.

(*r*) *Chaplin* v. *Young* (No. 1) (1864), 33 Beav. 330, 337. The usual form of order is for an account of the rents and profits of the hereditaments comprised in the mortgage received by the mortgagee, or by any other person for the order or use of the mortgagee, or which, without the wilful default of the mortgagee, might have been so received (3 Seton, Judgments and Orders, 6th ed., p. 1896); see note to *Harnard* v. *Webster* (1725), Cas. *temp.* King, 53; and see pp. 219 *et seq.*, 288, *post*.

(*s*) *Mayer* v. *Murray* (1878), 8 Ch. D. 424. Possibly, where stock is mortgaged, and the mortgagee makes a profit by selling and repurchasing, he must account for this; see *Langton* v. *Waite* (1869), 4 Ch. App. 402.

(*t*) *Chaplin* v. *Young* (No. 1), *supra*.

(*u*) But a co-owner of a patent, who is also mortgagee of the share of another co-owner, while bound to account to his mortgagor for royalties, need not account for the profits derived from his own use of the patent, since he is entitled to this use as co-owner (*Steers* v. *Rogers*, [1892] 2 Ch. 13, C. A.; compare *Heyl-Dia* v. *Edmunds* (1899), 48 W. R. 167). As to patent rights, see title PATENTS AND INVENTIONS.

(*v*) Thus if the assignee of a judgment debt issues execution on it, and thereby in effect goes into possession, but omits to proceed with the execution, whereby the debt is lost, he must account for it (*Williams* v. *Price*, *supra*); so, also, must an assignee of a debt who is empowered to sue (*Ex parte Mure* (1788), 2 Cox, Eq. Cas. 63, 75); but not a mere equitable assignee (*Glyn* v. *Hood* (1860), 1 De G. F. & J. 334, 348, C. A.). Where a lease is forfeited through the default of the mortgagee, he is liable (*Perry* v. *Walker* (1855), 3 Eq. Rep. 721). An account against a mortgagee in possession who has sold is on the footing of wilful default (*Mayer* v. *Murray* (1878), 8 Ch. D. 424; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.*, *supra*; 3 Seton, Judgments and Orders, 6th ed., p. 1958).

(*w*) *Kensington* (*Lord*) v. *Bouverie* (1855), 7 De G. M. & G. 134, 157, C. A.; see *Sherwin* v. *Shakspear* (1854), 5 De G. M. & G. 517, 536, C. A.

(*x*) *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, C. A. (profits of mortgagees as brewers from sale of beer to tenant to whom they had let the premises).

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account notwithstanding that he has assigned the mortgage (*y*), unless he has assigned it under the order of the court (*z*).

The rule applies to a mortgage by way of trust for sale, and the mortgagee accounts as mortgagee in possession from the time when he enters into possession, but not before (*a*).

But the rule only applies when the mortgagee enters in his character as mortgagee, so that he knows that he is in possession and chargeable accordingly (*b*). Hence one who enters as a purchaser, and who, on the sale going off, has a lien for purchase-money which he has paid, is not liable to account as mortgagee in possession (*c*); and a mortgagee can escape the liabilities of a mortgagee in possession by entering as agent for a prior incumbrancer, but not, it seems, as agent for the mortgagor (*d*).

Amount charged when property let or unlet.

**365**. When the mortgaged property is let at the time of the mortgagee taking possession, he is charged with the rents at the rate reserved (*e*), provided that he could with due diligence have recovered them (*f*). When the property is not let, he must use due diligence to let it (*g*); and, if it remains unlet through his

(*y*) *Hinde* v. *Blake* (1841), 11 L. J. (CH.) 26; *Hall* v. *Heward* (1886), 32 Ch. D. 430, C. A.; see *Venables* v. *Foyle* (1660), 1 Cas. in Ch. 2.

(*z*) *Hall* v. *Heward, supra.*

(*a*) *Beare* v. *Prior* (1843), 6 Beav. 183. The mortgagee accounts as such and not as trustee (*Chambers* v. *Goldwin* (1801), 5 Ves. 834, 837; (1804), 9 Ves. 254); and as to such mortgages, see *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.; *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's Case*, [1911] 1 Ch. 698. As to a trustee's liability to account, see title TRUSTS AND TRUSTEES.

(*b*) *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1, 14: Thus a mortgagee in occupation as tenant does not account as mortgagee in possession (*Page* v. *Linwood* (1837), 4 Cl. & Fin. 399, 434, H. L.; compare *Morony* v. *O'Dea* (1809), 1 Ball & B. 109, 117); nor does a mortgagee of the inheritance who is in possession as purchaser of the life estate (*Whitbread* v. *Smith* (1854), 3 De G. M. & G. 727, 741, C. A.; compare *Kensington* (*Lord*) v. *Bouverie* (1855), 7 De G. M. & G. 134, 144, C. A.; and see *Blennerhassett* v. *Day* (1812), 2 Ball & B. 104, 125). But where a tenancy is created in favour of the mortgagee after a second mortgage, the prior mortgagee accounts as mortgagee in possession to the second mortgagee (*Gregg* v. *Arrott* (1835), L. & G. *temp.* Sugd. 246).

(*c*) *Parkinson* v. *Hanbury, supra*, where, however, the contrary decision in *Adams* v. *Sworder* (1864), 2 De G. J. & Sm. 44, 60, C. A., was not referred to. A vendor in possession, with a lien for the unpaid purchase-money, is not ordinarily chargeable as mortgagee in possession (*Sherwin* v. *Shakspear* (1854), 5 De G. M. & G. 517, C. A.); though he may become so chargeable by insisting on retaining possession when he might properly give it up (*Phillips* v. *Silvester* (1872), 8 Ch. App. 173; see titles EQUITY, Vol. XIII., p. 99; LIEN, Vol. XIX., p. 15; SALE OF LAND).

(*d*) *Re M'Kinley's Estate* (1873), 7 I. R. Eq. 467, 470. The mortgagee must account, notwithstanding that the agent who received the rents is dead (*Noyes* v. *Pollock* (1885), 30 Ch. D. 336, C. A.).

(*e*) *Trimleston* (*Lord*) v. *Hamill* (1810), 1 Ball & B. 377, 385.

(*f*) *Noyes* v. *Pollock* (1886), 32 Ch. D. 53, 61, C. A.; see *Brandon* v. *Brandon* (1862), 10 W. R. 287. A mortgagee must use the usual means to recover the rents, if they are likely to prove effectual (*Bucks* (*Duke*) v. *Gayer* (1684), 1 Vern. 258); but he is not bound to distrain on goods of a stranger which may be on the demised premises (*Cocks* v. *Gray* (1857), 1 Giff. 77; title DISTRESS, Vol. XI., p. 129). For recent restrictions on the right of distress, see the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53); title DISTRESS, Vol. XI., p. 143.

(*g*) It has been said that the rent obtained will be deemed to be the same

default, he is charged with the rents which ought to have been obtained (*h*). If by obtaining an advantage for himself (*i*), or by underhand dealing with the tenant (*k*), or by wantonly changing the tenant (*l*), the mortgagee lets the property at less than the full rent, he is charged with the full rent.

Mortgagee in occupation.

If the mortgagee goes into actual occupation himself (*m*), he will be charged with a fair occupation rent (*n*); but he is not to be charged a higher rent on account of improvements effected by himself, unless he is allowed the expense of the improvements (*o*).

Property incapable of occupation.

The mortgagee is not liable for rent while the property, from its ruinous condition or otherwise, is incapable of beneficial occupation (*p*).

Liability to subsequent incumbrancer.

**366.** A mortgagee, if he has surplus rents in hand after satisfying his interest, can pay them to the mortgagor, provided that he has received no notice of any subsequent incumbrance, and neither he nor the mortgagor is liable to account for them to a subsequent incumbrancer (*q*); but so soon as the mortgagee has

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for the whole time of possession, unless the mortgagee shows the contrary (*Blacklock* v. *Barnes* (1725), Cas. *temp.* King, 53).

(*h*) The burden of proving wilful default is, in the first instance, on the party charging it; but if he shows that the premises were capable of being let, and were left vacant, the burden is shifted, and the mortgagee must prove that no tenant could be obtained (*Metcalf* v. *Campion* (1828), 1 Mol. 238; *Brandon* v. *Brandon* (1862), 10 W. R. 287). The mortgagee, if resident at a distance, is justified in acting on the advice of an agent as to letting the property (*Brandon* v. *Brandon, supra*). If the mortgagor is a party to any act to prevent the letting, this is an answer to the charge of wilful default (*Metcalf* v. *Campion, supra*): if he knows that the property is let at an undervalue, he should give notice of the fact to the mortgagee (*Hughes* v. *Williams* (1806), 12 Ves. 493).

(*i*) *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, C. A. (where brewers who were mortgagees let a public-house with a tied-house covenant).

(*k*) *Metcalf* v. *Campion, supra.*

(*l*) *Hughes* v. *Williams, supra.* Similarly if the mortgagee turns out, or refuses to accept, a suitable tenant (*Anon.* (1682), 1 Vern. 45).

(*m*) See *Trulock* v. *Robey* (1846), 15 Sim. 265, 273; *Shepard* v. *Jones* (1882), 21 Ch. D. 469, 475, C. A. Unless the mortgagee admits occupation, an inquiry will be directed (3 Seton, Judgments and Orders, 6th ed., p. 1959). The mortgagee is not chargeable with an occupation rent on the ground that, on selling the property, he has let the purchaser into possession before the date for completion (*Shepard* v. *Jones, supra*).

(*n*) *Metcalf* v. *Campion, supra*; *Fee* v. *Cobine* (1847), 11 I. Eq. R. 406, 410; *Marriott* v. *Anchor Reversionary Co.* (1861), 3 De G. F. & J. 177, 193, C. A. In *Trimleston* (*Lord*) v. *Hamill* (1810), 1 Ball & B. 377, it was said that the mortgagee would be charged with the utmost value the property was found to be worth; but this statement is too wide. If the mortgagee occupies under a lease from the mortgagor, he is chargeable only with the rent reserved if the amount is proper, notwithstanding that the lease is set aside (*Gubbins* v. *Creed* (1804), 2 Sch. & Lef. 214: *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661, 674).

(*o*) *Bright* v. *Campbell* (1885), 54 L. J. (CH.) 1077, C. A.

(*p*) *Marshall* v. *Cave* (*circa* 1824), 3 L. J. (O. S.) (CH.) 57.

(*q*) This is in accordance with the rule that the mortgagor is not bound to account for rents which the mortgagee allows him to receive (see p. 158, *ante*; *Drummond* v. *St. Albans* (*Duke*) (1800), 5 Ves. 433, 438). The rule applies to a mortgage for a term (*Gresley* v. *Adderley*, *Gresley* v. *Heathcote* (1818), 1 Swan. 573, 579), and of a life estate (*Colman* v. *St. Albans* (*Duke*)

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notice of a subsequent incumbrance entitling such incumbrancer to the rents and profits, he will be liable to the subsequent incumbrancer for any surplus rents paid to the mortgagor (*r*).

Where separate properties subject to separate mortgages are included in the same lease, the rent is apportioned between the two mortgagees, notwithstanding that by error the whole has been reserved to one of them (*s*).

(ii.) *To Execute Repairs.*

**Extent of liability.**

**367.** The liability of the mortgagee to keep the mortgaged premises in repair depends on the considerations that by taking possession he has excluded the mortgagor from control of the property, and that the rents are the proper fund out of which to provide for repairs. But the mortgagee is not judged by the degree of care which a man would take of his own property. He is chargeable in respect of gross negligence (*t*), and he must—at any rate to the extent of surplus rents in his hands after the interest due on his mortgage is satisfied—do such repairs as are required to maintain the premises in a proper state of preservation (*a*). On a *primâ facie* case being made out, an inquiry as to deterioration will be directed (*b*). But the mortgagee is not bound to keep the premises in as good repair as he found them, and when he has done ordinary repairs, he will not be charged with deterioration due to the lapse of time (*c*); nor, where the buildings are in such a state that a prudent owner would pull them down and rebuild, is the mortgagee bound to do this (*d*).

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(1796), 3 Ves. 25); and notwithstanding that a receiver is in possession, appointed otherwise than on behalf of the mortgagee (*Flight* v. *Camac* (1856), 25 L. J. (CH.) 654). It applies also to receipt by the mortgagor's trustee in bankruptcy, unless he has retained the rents in violation of an agreement to apply them in payment of interest (*Ex parte Calwell* (1828), 1 Mol. 259).

(*r*) *Berney* v. *Sewell* (1820), 1 Jac. & W. 647, 650; *Archdeacon* v. *Bowes* (1824), 13 Price, 353, 368; see *Maddocks* v. *Wren* (1680), 2 Rep. Ch. 109 [209]; *Holton* v. *Lloyd* (1827), 1 Mol. 30, 31; *Clark* v. *Cook* (1849), 3 De G. & Sm. 333, 336. A second incumbrancer fortifies his title to receive surplus rents by taking proceedings to enforce his security (*Parker* v. *Calcraft*, *Dunn* v. *Same* (1821), Madd. & G. 11, 12); but where his mortgage is by conveyance of the equity of redemption, such proceedings are not necessary; see pp. 76, 190, *ante*.

(*s*) *Harryman* v. *Collins* (1854), 18 Beav. 11.

(*t*) *Wragg* v. *Denham* (1836), 2 Y. & C. (EX.) 117; and if his default may cause the forfeiture of leasehold property, he is bound to act as a provident owner, and do what is necessary to prevent the forfeiture (*Perry* v. *Walker* (1855), 3 Eq. Rep. 721). As to depreciation of a ship owing to improper working by mortgagees, see *Marriott* v. *Anchor Reversionary Co.* (1861), 3 De G. F. & J. 177, C. A.

(*a*) *Richards* v. *Morgan* (1753), 4 Y. & C. (EX.) 570 (Appendix); see *Moore* v. *Painter* (1842), 6 Jur. 903.

(*b*) See 3 Seton, Judgments and Orders, 6th ed., p. 1960; compare *Batchelor* v. *Middleton* (1847), 6 Hare, 75, 85, where an inquiry was directed whether the mortgagee, to the damage and injury of the mortgagor, had allowed buildings to fall down.

(*c*) *Russel* v. *Smithies* (1792), 1 Anst. 96; *Wragg* v. *Denham*, *supra*.

(*d*) *Moore* v. *Painter*, *supra*; and the mortgagee must not pull down buildings (*Sandon* v. *Hooper* (1843), 6 Beav. 246), except to substitute new

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**368.** The mortgagee must not burden the equity of redemption so as to make it more difficult for the mortgagor to redeem (*e*), and on redemption he must be able to hand back the property as far as possible in its original condition. Hence, he must not make a large outlay on permanent improvements unless he obtains the mortgagor's consent, or unless the mortgagor, after notice, acquiesces (*f*), nor may he change the character of the property, even though such change constitutes an improvement (*g*); but he may make reasonable improvements without notice to the mortgagor (*h*). On the other hand, the mortgagee is not bound to rebuild or to lay out large sums beyond the rent, for this would be to lend more money upon, perhaps, a deficient security (*i*). Expenditure properly made is allowed to the mortgagee in his accounts (*j*).

Extent of repair authorised.

(iii.) *For Waste.*

**369.** A mortgagee who takes the legal estate in fee simple becomes the absolute owner at law, and hence he cannot, in strictness, commit waste (*k*); but in equity he is subject to the rule that he must on redemption give back the property unimpaired, and, therefore, unless his security is deficient, he cannot destroy any part of the inheritance; if he does so, he must make good the loss to the mortgagor in taking the accounts (*l*).

General rule.

**370.** A mortgagee in possession has statutory power (*m*) to cut and sell timber (*n*) and other trees ripe for cutting, and not planted or left standing for shelter or ornament; and he may contract for any such cutting and sale, on the terms of the contract being completed within a year; but the power may be varied or excluded by the mortgage deed. The proceeds of any such cutting or sale are applied as rents and profits.

Power to cut and sell timber.

When the statutory power (*m*) does not apply, the mortgagee of

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buildings for decayed old buildings without changing their purpose (*Marshall* v. *Cave* (*circa* 1824), 3 L. J. (O. S.) (CH.) 57). As to insurance by the mortgagee, see pp. 122, 123, *ante*.

(*e*) The mortgagee must not improve the mortgagor out of his estate (*Sandon* v. *Hooper* (1843), 6 Beav. 246).

(*f*) *Sandon* v. *Hooper*, *supra*; *Shepard* v. *Jones* (1882), 21 Ch. D. 469, 479, C. A.; compare *Gubbins* v. *Creed* (1804), 2 Sch. & Lef. 214, 227. Mere notice does not affect the mortgagor, if he does nothing: there must be some specific sign of acquiescence (*Shepard* v. *Jones*, *supra*).

(*g*) *Moore* v. *Painter* (1842), 6 Jur. 903 (where shops and malt-houses had been converted into a warehouse); see *Bright* v. *Campbell* (1885), 54 L. J. (CH.) 1077, C. A.

(*h*) *Shepard* v. *Jones*, *supra*.

(*i*) *Richards* v. *Morgan* (1753), 4 Y. & C. (EX.) 570 (Appendix).

(*j*) See p. 240, *post*.

(*k*) As to the liability of the mortgagor for waste, see p. 160, *ante*.

(*l*) *Millett* v. *Davey* (1862), 9 Jur. (N. S.) 92; see *Re Yates*, *Batcheldor* v. *Yates* (1888), 38 Ch. D. 112, 117, C. A. As to the rights of a mortgagee in possession of mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 518, 519, 539, 555.

(*m*) See the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1) (iv.).

(*n*) As to timber, see titles AGRICULTURE, Vol. I., pp. 295, 296; LANDLORD AND TENANT, Vol. XVIII., p. 431.

SECT. 2. **Right to Possession of the Mortgaged Property.**

the fee simple may cut timber by virtue of his ownership without committing waste at law; but in equity he will be restrained unless his security is defective (*o*). In that case he may cut the timber and sell it (*p*), provided he applies the proceeds in payment of principal and interest (*q*).

Damage to cultivation.

A mortgagee in possession of agricultural land is liable for damage occasioned by his gross negligence in regard to cultivation (*r*); and he should take proper means for preventing damage by strangers; but he is not liable for waste committed under a claim of right which he has not authorised (*s*).

Remedies for wrongful waste.

**371.** Waste committed by the mortgagee which is not justified by the terms or the deficiency of his security, in addition to rendering him liable to an injunction, may be a ground for depriving him of possession, either by replacing the mortgagor in possession or by the appointment of a receiver (*t*).

## SECT. 3.—*As regards Title Deeds.*

### SUB-SECT. 1.—*Right to Custody.*

Mortgagee of legal estate.

**372.** A mortgagee who takes the legal estate in fee simple has the right, as owner of the inheritance, to the custody of the title deeds (*a*), and it is his duty to see that these are handed over to him; otherwise he may be postponed to a puisne incumbrancer who lends his money on the faith of the deeds (*b*).

Mortgagee of term.

But a mortgagee for a term has no such right: the title deeds go to him who has the inheritance in preference to a termor, however long the term (*c*); and if the security takes the form of the creation of a mortgage term, the mortgagee must obtain delivery

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(*o*) *Withrington* v. *Banks* (1725), Cas. *temp.* King. 30.
(*p*) *Millett* v. *Davey* (1862), 31 Beav. 470, 476.
(*q*) *Farrant* v. *Lovel* (1750), 3 Atk. 723.
(*r*) *Wragg* v. *Denham* (1836), 2 Y. & C. (EX.) 117.
(*s*) *Anon.* (1823), 1 L. J. (O. S.) (CH.) 119.
(*t*) *Hanson* v. *Derby* (1700), 2 Vern. 392.
(*a*) *Harrington* v. *Price* (1832), 3 B. & Ad. 170; *Smith* v. *Chichester* (1842), 2 Dr. & War. 393, 401; and see *Heath* v. *Crealock* (1874), 10 Ch. App. 22, 32. The mortgage gives the mortgagee a property in all the deeds relating to the mortgaged land (*Newton* v. *Beck* (1858), 3 H. & N. 220, 222). Hence a mortgagee with a good title, to whom a forged copy of a genuine deed has been delivered, can recover the genuine deed from a subsequent incumbrancer (*ibid.*). In *Davies* v. *Vernon* (1844), 6 Q. B. 443, 447, it was suggested that, though it was a mortgage in fee, yet if the deeds remained with the mortgagor, he might lawfully retain them in respect of his equity of redemption as against the mortgagee. This was said *obiter*, and was probably wrong. The decision was that the mortgagor could recover the deeds from a stranger. To avoid any such question it was formerly usual to insert in mortgages a special grant of the title deeds, and, if the *dictum* in *Davies* v. *Vernon*, *supra*, was right, this would still be necessary; see Sugden, Law of Vendors and Purchasers, 14th ed., p. 442. For a form of agreement in circumstances where the deeds are not held by the mortgagee, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 920. As to registered charges, see pp. 84 *et seq.*, *ante*.
(*b*) See pp. 330, 342, *post*.
(*c*) *Austin* v. *Croome* (1842), Car. & M. 653; *Hunt* v. *Elmes* (1860), 2 De G. F. & J. 578, C. A.

of the deeds at the time, or else take a covenant for delivery. He will not be able to enforce such delivery after the mortgage (*d*), unless there was an implied agreement that they should be delivered up (*e*).

Right as between tenant for life and mortgagee.

**373.** When the property is in settlement, the legal tenant for life in possession is entitled to the deeds (*f*), and a mortgagee of the life estate has the same right; moreover, the life estate confers the right to them as against a mortgagee for a term, and when they have been brought into court for the purpose of raising portions by the creation of a mortgage term, they will, after the mortgage has been executed, be delivered out to the tenant for life (*g*).

Right as between co-owners and mortgagee.

**374.** As between co-owners, whoever of them obtains the deeds is entitled to hold them, subject to the right of the others to have the deeds produced (*h*); accordingly, a mortgagee of the interest of a co-owner is not entitled to the custody of the deeds as against another co-owner who has them in his possession (*i*).

Right when power of sale exercisable.

**375.** As soon as the statutory power of sale has become exercisable, the mortgagee can demand and recover from any person, other than a person entitled in priority to himself, all the documents of title which a purchaser under the power of sale would be entitled to recover from him (*j*).

Right of equitable mortgagee by deposit.

**376.** An equitable mortgagee by deposit of deeds (*k*) is entitled to retain the deeds until payment or tender of the amount due on his security, and till then the mortgagor has no direct claim to recover the deeds; but if a proper tender has been made and refused, the mortgagor can, in a redemption action or other suitable proceeding, obtain an order for delivery of the deeds on payment into court of a stated sum sufficient to cover principal, interest, and costs (*l*).

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(*d*) *Wiseman* v. *Westland* (1826), 1 Y. & J. 117; see *Knight* v. *Knight and Matthew* (1832), 1 L. J. (CH.) 125. *Primâ facie* a person in possession under a title, which gives a freehold interest at the least, has a right to the custody of the title deeds (*Strode* v. *Blackburne* (1796), 3 Ves. 222, 225).

(*e*) *Stokes* v. *Stokes*, [1886] W. N. 184.

(*f*) *Garner* v. *Hannyngton* (1856), 22 Beav. 627; see Sugden, Law of Vendors and Purchasers, 14th ed., p. 445, n. As to the custody of deeds as between tenant for life and trustees or remaindermen, see titles SETTLEMENTS; TRUSTS AND TRUSTEES.

(*g*) *Jenner* v. *Morris* (1866), 1 Ch. App. 603, where the tenant for life had previously taken the deeds abroad, and a special order was made for his giving security for safe custody and production; see, further, title

(*h*) *Foster* v. *Crabb* (1852), 12 C. B. 136: *Wright* v. *Robotham* (1886), 33 Ch. D. 106, C. A.; Sugden, Law of Vendors and Purchasers, 14th ed., p. 443; see *Lambert* v. *Rogers* (1817), 2 Mer. 489.

(*i*) See *Yea* v. *Field* (1788), 2 Term Rep. 708, though the actual decision in that case may not have been correct (see Sugden, Law of Vendors and Purchasers, 14th ed., p. 441).

(*j*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (7); that is, apparently, the deeds which the purchaser could recover from the holder of them after the sale.

(*k*) See p. 78, *ante*.

(*l*) *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, 283, P. C.; see *Mills* v. *Finlay* (1839), 1 Beav. 560.

SECT. 3.

**As regards Title Deeds.**

**377.** A mortgagee who has taken a bad title and is compelled to deliver up the deeds can keep the mortgage deed, so as to be able to avail himself of the covenant for payment (*m*).

SUB-SECT. 2.—*Liability for Production.*

**Right of mortgagee with bad title.**

**Statutory liability.**

**378.** When the mortgage has been made after the 31st December, 1881, the original mortgagor, and any person deriving title under him or entitled to redeem the mortgage, so long as his right to redeem subsists, is entitled from time to time, at reasonable times, on his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This right cannot be excluded by contract (*n*).

**Liability apart from statute.**

Apart from the above statutory provision, a mortgagee, when the day fixed for redemption is passed, is not bound to produce the deeds to the mortgagor except on payment of all moneys secured by the mortgage (*o*); and he can refuse to produce the deeds in proceedings

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(*m*) *Opie* v. *Godolphin* (1720), Prec. Ch. 548.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 2 (vi.), 16; see *Armstrong* v. *Dixon*, [1911] 1 I. R. 435. Apparently, where the mortgagee has sub-mortgaged, he must arrange for production by the sub-mortgagee; see *Rogers* v. *Rogers* (1842), 6 Jur. 497. As to possession of documents for the purpose of discovery, see title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., p. 85. Documents in the possession of a solicitor are under the control of his client (*Fenwick* v. *Reed* (1816), 1 Mer. 114; *Bligh* v. *Berson* (1819), 7 Price, 205, 207). A director of a mortgagor company cannot insist on inspection under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 16 (*Burn* v. *London and South Wales Coal Co.*, [1890] W. N. 209). Where the mortgagor is bankrupt, the mortgagee can be required to produce the deeds in bankruptcy proceedings (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27; *Re White, Ex parte Caldecott* (1830), Mont. 55; *Re Marks' Trust Deed* (1866), 1 Ch. App. 429). Production of deeds on which an equitable lien is claimed can be required under the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 6 (*Owen* v. *Nickson* (1861), 7 Jur. (N. S.) 497). As to production of the deeds on a sale by the court, see *Armstrong* v. *Dixon*, [1911] 1 I. R. 435.

(*o*) *Browne* v. *Lockhart* (1840), 10 Sim. 420; *Greenwood* v. *Rothwell* (1844), 7 Beav. 291; *Cannock* v. *Jauncey* (1853), 1 Drew. 497, 507; *Chichester* v. *Donegall* (*Marquis*) (1870), 5 Ch. App. 497; see *Senhouse* v. *Earl* (1752), 2 Ves. Sen. 450; *Sparke* v. *Montriou* (1835), 1 Y. & C. (EX.) 103; *Jones* v. *Jones* (1853), Kay, Appendix, vi. *Latimer* v. *Neate* (1837), 4 Cl. & Fin. 570, H. L., which appears *contra*, was explained in *Browne* v. *Lockhart*, *supra*, and *Glover* v. *Hall* (1848), 2 Ph. 484, 490. Payment into court of the utmost amount due was not sufficient to give a right to production (*Postlethwaite* v. *Blythe* (1818), 2 Swan. 256; but see *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, *per* Lord MACNAGHTEN, at p. 283); nor was the mortgagee bound to show the deeds to an intending purchaser (*Postlethwaite* v. *Blythe*, *supra*), or transferee (*Damer* v. *Portarlington* (*Earl*) (1846) 15 Sim. 380), unless the sale was being made in court (*Livesey* v. *Harding* (1838), 1 Beav. 343), or out of court (*Anon.* (1729), Mos. 246), with his consent. A *cestui que trust* who had mortgaged his interest to the trustee lost his ordinary right to production as against the trustee (*Johnston* v. *Tucker* (1847), 11 Jur. 382). The rule was treated as an instance of the general rule that a defendant is not bound to produce his title deeds, and it therefore extended to the mortgage deed itself (*Beaumont* v. *Foster* (1835), 5 L. J. (CH.) 4; *Crisp* v. *Platel* (1844), 8 Beav. 62; *Dendy* v. *Cross* (1848), 11 Beav. 91), and to a transfer (*Gill* v. *Eyton* (1843), 7 Beav. 155; *Lewis* v.

between the mortgagor and a third person (*p*), in which case secondary evidence of them can be given (*q*).

SECT. 3. As regards Title Deeds.

**379.** A tenant for life holds the deeds subject to liability to produce them for the inspection of remaindermen with a vested, but not with a contingent, interest; and the mortgagee from the tenant for life takes the deeds subject to the same liability (*r*); and generally the mortgagee of a partial interest in property, who obtains the deeds, is bound to produce them to other persons interested (*s*).

Liability of mortgagee of limited interest.

SUB-SECT. 3.—*Liability for Loss.*

**380.** Upon redeeming, the mortgagor is entitled to a reconveyance and to delivery of the title deeds and writings relating to

Nature of mortgagor's remedy.

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*Davies* (1853), 17 Jur. 253). The attempt in *Patch* v. *Ward* (1865), L. R. 1 Eq. 436, to revive the early right to production of the mortgage deed itself (2 Cases with Opinions of Counsel, 53; *Anon.* (1729), Mos. 246; *Re White, Ex parte Caldecott* (1830), Mont. 55, 59) was not approved (*Carter* v. *Hubback* (1876), 24 W. R. 354, C. A.), possibly because the mortgage deed belongs to the mortgagee; see *Sheffield* v. *Eden* (1878), 10 Ch. D. 291, C. A. The rule applied, notwithstanding that the mortgagor was contesting the validity of the mortgage (*Crisp* v. *Platel* (1844), 8 Beav. 62; *Dendy* v. *Cross* (1848), 11 Beav. 91); and it was not excluded by a mere allegation of fraud (*Bassford* v. *Blakesley* (1842), 6 Beav. 131; see *Gill* v. *Eyton* (1843), 7 Beav. 155); but in such a case production might be ordered if the circumstances under which the mortgage was obtained, or other circumstances, made this reasonable (*Balch* v. *Symes* (1823), Turn. & R. 87; *Bassford* v. *Blakesley*, *supra*; *Costa Rica Republic* v. *Erlanger* (1874), L. R. 19 Eq. 33, 45). The rule applied, notwithstanding that the mortgagee in his pleadings had craved leave to refer to the deeds (*Howard* v. *Robinson* (1859), 4 Drew. 522); and it extended to drafts and copies (*Bycroft* v. *Sibel* (1852), 1 W. R. 96); but not necessarily to vouchers (*Gibson* v. *Hewett* (1846), 9 Beav. 293; *Freeman* v. *Butler* (1863), 33 Beav. 289); and a mortgage deed might be ordered to be produced for inspection of an indorsement on it (*Phillips* v. *Evans* (1843), 2 Y. & C. Ch. Cas. 647). Where a trustee had mortgaged, and had then released the equity of redemption to the mortgagee, who had notice of the trust, the *cestui que trust* was entitled to production against the mortgagee (*Smith* v. *Barnes* (1865), L. R. 1 Eq. 65).

(*p*) *Schlenker* v. *Moxey* (1824), 1 C. & P. 178.

(*q*) *Mills* v. *Oddy* (1834), 6 C. & P. 728; *Doe* d. *Gilbert* v. *Ross* (1840), 7 M. & W. 102, 122; *Phelps* v. *Prew* (1854), 3 E. & B. 430; *contra*, *Doe* d. *Bowdler* v. *Owen* (1837), 8 C. & P. 110. But though in general a mortgagee cannot be required to disclose the mortgagor's title, production may sometimes be ordered in favour of a third party in the absence of the mortgagor (*Gough* v. *Offley* (1852), 5 De G. & Sm. 653); and, similarly, a mortgagor may be ordered to produce copies of deeds to a third party (*Hercy* v. *Ferrers* (1841), 4 Beav. 97). As to secondary evidence generally, see title EVIDENCE, Vol. XIII., p. 422.

(*r*) *Noel* v. *Ward* (1816), 1 Madd. 322; *Davis* v. *Dysart* (*Earl*) (1855), 20 Beav. 405. If the mortgage is paramount to the settlement, the remainderman cannot as such require production (*Chichester* v. *Donegall* (*Marquis*) (1870), 5 Ch. App. 497); but since he has a right to redeem (see p. 140, *ante*), he would have the statutory right to production (see p. 206, *ante*).

(*s*) In *Lambert* v. *Rogers* (1817), 2 Mer. 489, it was held that a mortgagee of the share of a co-owner was not bound to produce the deeds to another co-owner, since a mortgagee could not be compelled to disclose his mortgagor's title; but the other co-owner's rights cannot be prejudiced by the mortgage. On the principle stated in the text, the mortgagee of a lease, where there is no counterpart, is bound to produce it at the request of the lessor (*Doe* d. *Morris* v. *Roe* (1836), 1 M. & W. 207; *Balls* v. *Margrave* (1841), 4 Beav. 119).

SECT. 3. **As regards Title Deeds.**

the property (*t*), and if they have been lost he is justified in instituting an action for redemption (*u*) in order that the fact of the loss may be ascertained for the satisfaction of future purchasers. In such action the mortgagee is directed to give an indemnity against the consequences of the loss of the deeds, and he is liable to pay the costs (*x*); and the rule is the same if the mortgagor redeems in the mortgagee's foreclosure action (*a*). Where the deeds are known to be in the possession of a third person, the mortgagor will be allowed to bring an action to recover them at the mortgagee's expense (*b*). The mortgagor may also be entitled to compensation for the loss of the deeds (*b*).

**Delay of redemption through loss.**

Interest will cease to run at the date when the mortgagor is ready to redeem if redemption is delayed through the loss of the deeds (*c*).

## SECT. 4.—*Right to Consolidate.*

### SUB-SECT. 1.—*Nature.*

**General principle.**

**381.** A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not under the right of redemption expressly reserved by the mortgage deeds, but only by virtue of the equity of redemption arising after default in payment at the fixed day (*d*), may, within certain limits, and against certain persons who are entitled to redeem all or some of the mortgages, consolidate the mortgages, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all (*e*). This is an application of the maxim that he who seeks equity must do equity (*f*). After

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(*t*) Including copies; the mortgagee is not entitled to keep fair copies made at the mortgagor's expense, nor, it seems, copies made at his own expense (*Re Wade and Thomas, Solicitors*, (1881), 17 Ch. D. 348, 352).

(*u*) As to such an action, see pp. 149 *et seq.*, *ante*.

(*x*) *Midleton* (*Lord*) v. *Eliot* (1847), 15 Sim. 531: *James* v. *Rumsey* (1879), 11 Ch. D. 398; *Caldwell* v. *Matthews* (1890), 62 L. T. 799. An inquiry as to the loss of the deeds will be directed (*Smith* v. *Bicknell* (1805), 3 Ves. & B. 51, n.; *Stokoe* v. *Robson* (1814), 3 Ves. & B. 51; *Shelmardine* v. *Harrop* (1821), Madd. & G. 39). For forms of indemnity, see *Shelmardine* v. *Harrop*, *supra*; *James* v. *Rumsey*, *supra*. The form, in case of difference, is settled in chambers; but unreasonable opposition by the mortgagor to the indemnity offered will, perhaps, make him liable for costs thereby occasioned; compare *Macartney* v. *Graham* (1831), 2 Russ. & M. 353. Where the mortgage deed itself has been destroyed, *e.g.*, by fire, the mortgage may be confirmed; see Encyclopædia of Forms and Precedents, Vol. V., p. 143.

(*a*) *Stokoe* v. *Robson* (1815), 19 Ves. 385; *Shelmardine* v. *Harrop*, *supra*.

(*b*) *Hornby* v. *Matcham* (1848), 16 Sim. 325; *Brown* v. *Sewell* (1853), 11 Hare, 49); but not until redemption (*Gilligan and Nugent* v. *National Bank*, [1901] 2 I. R. 513; compare *James* v. *Rumsey*, *supra*, where compensation was refused on special grounds.

(*c*) *Midleton* (*Lord*) v. *Eliot*, *supra*; *James* v. *Rumsey*, *supra*. The mortgagor cannot be sued for the debt if there is a danger of his not getting back his title deeds on payment (*Schoole* v. *Sall* (1803), 1 Sch. & Lef. 176); but it is otherwise if the deeds are in fact lost (*Baskett* v. *Skeel* (1863), 11 W. R. 1019).

(*d*) See p. 147, *ante*, p. 211, *post*.

(*e*) *Jennings* v. *Jordan* (1881), 6 App. Cas. 698, *per* Lord SELBORNE, L.C., at p. 700; see *Mills* v. *Jennings* (1880), 13 Ch. D. 639, 646, C. A.; *Griffith* v. *Pound* (1890), 45 Ch. D. 553, 560.

(*f*) *Chesworth* v. *Hunt* (1880), 5 C. P. D. 266, 271; see title EQUITY, Vol. XIII., pp. 70 71.

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the original day for redemption is past (*g*), the mortgagor can only redeem by the assistance of equity, and this assistance is given upon the terms that he shall pay the moneys due both in respect of the estate which he seeks to redeem and in respect of the other mortgaged estates (*h*).

Statutory exclusion of consolidation

**382.** It is, however, provided by statute (*i*) that a mortgagor seeking to redeem any one mortgage may 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. This applies where the mortgages, or one of them, are made after the 31st December, 1881 (*k*), but only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them (*l*). Hence the mortgagee's right of consolidation can only arise where both the mortgages are prior to the date mentioned, or where the parties have themselves excluded the application of the statute (*m*).

SUB-SECT. 2.—*When the Right Exists.*

Where mortgages made by same mortgagor.

**383.** The right of consolidation requires that the mortgages shall have been originally made by the same mortgagor (*n*). Consequently it does not exist where one mortgage is by a sole mortgagor,

(*g*) See p. 147, *ante*, and p. 272, *post*.

(*h*) *Willie* v. *Lugg* (1761), 2 Eden, 78, 80; *Jones* v. *Smith* (1794), 2 Ves. 372, 377; *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, 708, C. A.; *Mills* v. *Jennings* (1880), 13 Ch. D. 639, 646, C. A.; *Minter* v. *Carr*, [1894] 3 Ch. 498, 501, C. A. For early statements of the rule, see *Shuttleworth* v. *Laycock* (1684), 1 Vern. 245; *Margrave* v. *Le Hooke* (1691), 2 Vern. 207; *Pope* v. *Onslow* (1693), 2 Vern. 286; *Cator* v. *Charlton* (1775), cited 2 Ves. 377; *Collet* v. *Munden* (1786), cited 2 Ves. 377. The courts of law recognised the doctrine in proceedings where the equity of redemption incidentally fell within their jurisdiction (*Roe* d. *Kaye* v. *Soley* (1770), 2 Wm. Bl. 726; see *Marcon* v. *Bloxam* (1856), 11 Exch. 586). But where two estates are subject to distinct mortgages, and a second mortgage is granted of both estates, the second mortgagee is not bound to redeem both the first mortgages if he wishes to redeem one (*Pelly* v. *Wathen* (1849), 7 Hare, 351, 365).

(*i*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17 (1).

(*k*) *Ibid.*, s. 17 (3). For a form of authority to consolidate, see Encyclopædia of Forms and Precedents, Vol. II., p. 489.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17 (2). Where it is intended to exclude the statute, this is usually done by a clause expressly providing that the section shall not apply to the security; see Encyclopædia of Forms and Precedents, Vol. VIII., p. 506; although a clause providing for the preservation of the right of consolidation is equally effective (*Hughes* v. *Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607, 611); but a clause which refers to mortgages only will not give a right to consolidate a vendor's lien with a mortgage (*Re Pearce*, [1909] 2 Ch. 492, 495, C. A.). A clause excluding the statute contained in the first of several mortgages of different properties is effectual to preserve the right of consolidation under all, although it is not contained in the subsequent mortgages (*Re Salmon, Ex parte the Trustee*, [1903] 1 K. B. 147); and, similarly, a clause in a subsequent mortgage is effective as to previous mortgages (*Griffith* v. *Pound* (1890), 45 Ch. D. 553).

(*m*) As to such exclusion not being a "reasonable provision," see pp. 75, 76, *ante*.

(*n*) And the right can be asserted only to the extent of the mortgagor's own interest in the properties; see *Kensington* (*Lord*) v. *Bouverie* (1854), 19

SECT. 4. Right to Consolidate.

and the other mortgage is by the same mortgagor jointly with another (*o*): and since, for the purpose of ascertaining the right of consolidation, the mortgagee is not entitled to look into any transactions between the mortgagor and third parties, a mortgage by a trustee cannot be consolidated with a mortgage by the *cestui que trust* (*p*); nor can a mortgage by a surety be consolidated with a mortgage given by the principal debtor for another debt (*q*).

Although securities of different natures.

But it is immaterial that the securities comprise properties of different natures, or that one or both are equitable mortgages; hence a mortgage of real estate can be consolidated with a mortgage of personal estate (*r*), and a legal mortgage can be consolidated with an equitable mortgage (*s*), and an equitable mortgage with another equitable mortgage (*t*).

Where securities originally in favour of different mortgagees.

**384**. It is not necessary that the securities should have been originally created in favour of the same mortgagee. The right of consolidation exists where mortgages given to different mortgagees subsequently become vested in the same person (*a*). But there must be an actual union of the securities in one person. A mortgage to one mortgagee will not be treated as consolidated with a mortgage to the same person and another on a joint account

Securities must be in existence at time of consolidation.

**385**. Both the securities which the mortgagee claims to consolidate must be in existence at the time when the claim is made.

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Beav. 39. But, perhaps, the right exists where one mortgage is made by the mortgagor, and another by persons claiming by devolution from him on his death; see *White* v. *Hillacre* (1839), 3 Y. & C. (EX.) 597. As to the exercise of the right against an assignee of one of the equities of redemption, see pp. 212, 213, *post*.

(*o*) *Jones* v. *Smith* (1794), 2 Ves. 372, 376; see *Marcon* v. *Bloxam* (1856), 11 Exch. 586, 600. Hence a security given by a partner for his private debt cannot be consolidated with a security given by himself and the other partners for a partnership debt (*Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, C. A., *per* JAMES, L.J., at p. 710, disagreeing with *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L. R. 4 Eq. 537, 543). And a mortgage by a co-owner of his share of the estate cannot be consolidated with a mortgage of the entirety (*Thorneycroft* v. *Crockett* (1848), 2 H. L. Cas. 239, 245, 255).

(*p*) *Re Raggett, Ex parte Williams* (1880), 16 Ch. D. 117, C. A., *per* JAMES, L.J., at p. 119; *Sharp* v. *Rickards*, [1909] 1 Ch. 109, 113.

(*q*) *Aldworth* v. *Robinson* (1840), 2 Beav. 287; see *Bowker* v. *Bull* (1850), 1 Sim. (N. S.) 29.

(*r*) *Tassell* v. *Smith* (1858), 2 De G. & J. 713, C. A.; see *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, C. A., reversing judgment of SHADWELL, V.-C. (1849), 16 Sim. 640, 647; *Spalding* v. *Thompson* (1858), 26 Beav. 637; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.; but as to bills of sale, see title BILLS OF SALE, Vol. III., p. 72.

(*s*) See *Watts* v. *Symes*, *supra*. The right to consolidate does not, like the right to tack, depend upon the possession of the legal estate (*Neve* v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170, 183); but see *dicta* to the contrary in *Jones* v. *Smith*, *supra*, and *White* v. *Hillacre*, *supra*, at p. 609. As to tacking, see p. 330, *post*.

(*t*) *Tweedale* v. *Tweedale* (1857), 23 Beav. 341.

(*a*) *Tweedale* v. *Tweedale*, *supra*; *Vint* v. *Padget* (1858), 2 De G. & J. 611, C. A.; *Selby* v. *Pomfret* (1861), 3 De G. F. & J. 595; *Jennings* v. *Jordan* (1881), 6 App. Cas. 698, 700; *Pledge* v. *White*, [1896] A. C. 187. The contrary decision in *Fosbrooke* v. *Walker* (1832), 2 L. J. (CH.) 161, is clearly wrong. As to *Selby* v. *Pomfret*, *supra*, see *Cummins* v. *Fletcher*, *supra*, at p. 709.

(*b*) *Riley* v. *Hall* (1898), 79 L. T. 244.

SECT. 4. Right to Consolidate.

Hence there is no right to apply a surplus on an existing mortgage to make good a debt secured by a mortgage which has ceased to exist by reason of the determination of its subject-matter, such as a life estate (*c*) or a lease (*d*).

Consolidation after sale of one property.

But notwithstanding this rule, a mortgagee who has sold one of his securities and paid off the debt primarily charged on that security, is not thereby debarred from exercising the right of consolidation, and can apply the balance of the proceeds in payment of the debt owing on his other security (*e*); and where a mortgagee has given notice to pay off one mortgage with a view to acquiring the right to exercise his power of sale, he may nevertheless consolidate, and can refuse a tender of the money due under that mortgage alone (*f*).

Right arises only after default.

**386.** Since the right of consolidation is equitable, it only arises after there has been default on all the securities in respect of which it is claimed; that is, the days fixed for redemption must have passed, so that the mortgagor has lost his legal right, and is bound to come into equity to redeem

SUB-SECT. 3.—*Against Whom the Mortgagee may Consolidate.*

Right primarily exercisable against mortgagor.

**387.** The right of consolidation is exercisable primarily against the mortgagor, and can be asserted in any proceeding in which the right of redemption comes in question: for this purpose foreclosure and redemption actions are on the same footing (*h*).

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(*c*) *Re Gregson, Christison* v. *Bolam* (1887), 36 Ch. D. 223. In such a case the debt formerly secured by mortgage has ceased to be a secured debt, and a mortgagee who has in his hands a surplus from a realised security cannot, as against other creditors, apply it in payment of a debt which has become a simple contract debt (*Talbot* v. *Frere* (1878), 9 Ch. D. 568; *Re Gregson, Christison* v. *Bolam, supra*, disagreeing with *Spalding* v. *Thompson* (1858), 26 Beav. 637; *Re Haselfoot's Estate, Chauntler's Claim* (1872), L. R. 13 Eq. 327; and *Re General Provident Assurance Co., Ex parte National Bank* (1872), L. R. 14 Eq. 507; see p. 333, *post*).

(*d*) *Re Raggett, Ex parte Williams* (1880), 16 Ch. D. 117, C. A. Similarly the doctrine of tacking does not apply where the mortgage to which it is claimed to tack a subsequent debt has been paid off (*Brecon Corporation* v. *Seymour* (1859), 26 Beav. 548). As to tacking, see p. 330, *post*. Where a mortgagee has been redeemed as to one mortgage by an incumbrancer against whom he could not consolidate he loses any right of consolidation he had against subsequent incumbrancers (*Jennings* v. *Jordan* (1881), 6 App. Cas. 698, 707). As to the persons against whom the mortgagee may consolidate, see the text, *infra*.

(*e*) *Selby* v. *Pomfret* (1861), 1 John. & H. 336; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.

(*f*) *Griffith* v. *Pound* (1890), 45 Ch. D. 553.

(*g*) *Crickmore* v. *Freeston* (1870), 40 L. J. (CH.) 137, C. A.; *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, C. A.; see *Jones* v. *Smith* (1794), 2 Ves. 372, 376; *Jennings* v. *Jordan, supra*, at p. 717.

(*h*) *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, 246, C. A.; *Selby* v. *Pomfret* (1861), 1 John. & H. 336, 338, affirmed on appeal, 3 De G. F. & J. 595, 598; see *Tribourg* v. *Pomfret* (*Lord*) (1773), cited Amb. 733; *Re Loosemore, Ex parte Berridge* (1843), 3 Mont. D. & De G. 464; and see p. 145, *ante*. Formerly the view was held that consolidation was confined to redemption suits (*Holmes* v. *Turner* (1843), 7 Hare, 367, n.; *Smeathman* v. *Bray* (1851), 15 Jur. 1051). It is not true, however, that the relative rights of mortgagor mortgagee are, as stated in *Du Vigier* v. *Lee* (1843), 2 Hare, 326, 334,

SECT. 4. **Right to Consolidate.**

Right exercisable against successors to unsevered equities of redemption.

**388.** So long as the equities of redemption are not severed, the right of consolidation can be asserted against successors in title to the mortgagor (*i*). For this purpose it is immaterial whether the mortgages were originally made to the same mortgagee, or whether they have merely become united in the same person (*j*); and in the latter case the right can be asserted even though the union of the mortgages has taken place after the change in the title to the equities of redemption (*k*), and with notice of such change of title (*l*). But the mortgages must both be prior to the change of title (*m*).

Where right affected by severance of equities of redemption.

**389.** Where the equities of redemption have been severed, whether by sale or further mortgage, or by settlement, voluntary or otherwise (*n*), the existence of the right of consolidation against the assignee of one equity of redemption depends on whether it had attached before the severance. This may be either because both mortgages were prior to the severance and were made to the same mortgagee (*o*), or because, though made to different mortgagees, they had become vested in the same person before the severance (*p*). In these cases the assignee of one mortgaged property, even though

and *Sober* v. *Kemp* (1847), 6 Hare, 155, 160, for all purposes the same; and the period of limitation on arrears of interest varies according to the nature of the proceeding (*Dingle* v. *Coppen*, *Coppen* v. *Dingle*, [1899] 1 Ch. 726; see p. 145, *ante*, and title LIMITATION OF ACTIONS, Vol. XIX., p. 101).

(*i*) *Willie* v. *Lugg* (1761), 2 Eden, 78; *Jones* v. *Smith* (1794), 2 Ves. 372, 376. Thus it can be asserted against the heir of the mortgagor (*Margrave* v. *Le Hooke* (1691), 2 Vern. 207), or against his trustee in bankruptcy (*Pope* v. *Onslow* (1693), 2 Vern. 286; *Re Breeds*, *Ex parte Alsager* (1841), 2 Mont. D. & De G. 328; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.). And the authorities subsequently cited as to consolidation against the assignee of the equity of redemption in one of the mortgaged estates are clearly authorities that the mortgagee can consolidate against a purchaser on sale of, or an incumbrancer on, both the estates. As to consolidation against sureties, see title GUARANTEE, Vol. XV., p. 514.

(*j*) See p. 210, *ante*.

(*k*) Thus the right of consolidation exists where the mortgages become united after the bankruptcy of the mortgagor (*Selby* v. *Pomfret* (1861), 3 De G. F. & J. 595; *Re Salmon*, *Ex parte The Trustee*, [1903] 1 K. B. 147), or after the sale or further mortgage of both the estates to the same person (*Tweedale* v. *Tweedale* (1857), 23 Beav. 341; *Vint* v. *Padgett* (1858), 2 De G. & J. 611, C. A.; *Pledge* v. *White*, [1896] A. C. 187; and see *Bovey* v. *Skipworth* (1671), 1 Cas. in Ch. 201), provided that the sale or further mortgage of the two estates is effected as one transaction (*Pledge* v. *White*, *supra*).

(*l*) *Vint* v. *Padgett*, *supra*.

(*m*) See *Squire* v. *Pardoe* (1891), 40 W. R. 100, C. A.

(*n*) See *Re Walhampton Estate* (1884), 26 Ch. D. 391, where it was held that the avoidance by a mortgage of a prior voluntary settlement under stat. (1584-5) 27 Eliz. c. 4 did not let in the right to consolidate such mortgage with a subsequent mortgage of other property; see now the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), and title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 92.

(*o*) *Tribourg* v. *Pomfret* (*Lord*) (1773), cited Amb. 733; *Re* ——, *Ex parte Carter* (1773), Amb. 733; *Ireson* v. *Denn* (1796), 2 Cox, Eq. Cas. 425; see *Titley* v. *Davies* (1743), 2 Y. & C. Ch. Cas. 399, n.; *Jones* v. *Smith*, *supra*, at p. 377.

(*p*) *Jennings* v. *Jordan* (1881), 6 App. Cas. 698: *Hughes* v. *Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607.

he has given valuable consideration (*q*), and without notice of the mortgage on the other property (*r*), takes subject to the existing right of consolidation, and must submit to give effect to it (*s*). Hence he cannot redeem his own property without paying off the mortgage on the other property also (*t*); but if he does this, he is entitled to have both properties conveyed to him (*a*).

Right to be effective must have attached at date of severance.

Where, on the other hand, the right of consolidation has not attached at the date of severance, it does not attach subsequently. Thus the assignee of an equity of redemption does not become subject to consolidation by reason of a subsequent mortgage by the assignor of different property (*b*), or by reason of the subsequent union of mortgages which were created before the assignment in favour of different mortgagees (*c*). An express right of consolidation contained in the first mortgage does not enable the mortgagee to consolidate it with subsequent mortgages of other properties as against a second mortgagee of the first property, such subsequent mortgages being made after the date of the second mortgage of the first property and with notice of it (*d*).

Severance by devise.

Similar considerations apply where the equities of redemption are severed by devise to different devisees. If the mortgages are not united until after the death of the testator, the right of consolidation does not arise (*e*).

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(*q*) *Re* ——, *Ex parte Carter* (1773), Amb. 733 (purchase on sale); *Tribourg* v. *Pomfret* (*Lord*) (1773), cited Amb. 783 (subsequent mortgage).

(*r*) *Ireson* v. *Denn* (1796), 2 Cox, Eq. Cas. 425.

(*s*) See *Neve* v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170, 183.

(*t*) *Jennings* v. *Jordan* (1881), 6 App. Cas. 698, 701.

(*a*) *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, 466 C. A.

(*b*) *Jennings* v. *Jordan*, *supra*, at p. 702, overruling *Tassell* v. *Smith* (1858), 2 De G. & J. 713, C. A.; *a fortiori*, where the mortgagee of the second estate takes a transfer of the mortgage of the first estate with notice of the assignment of the equity of redemption of that estate (*Baker* v. *Gray* (1875), 1 Ch. D. 491). Where there is a mortgage of leasehold property, A, first to X, and secondly to Y; subsequently a mortgage of property, B, to X; and then substituted mortgages to X and Y successively of a renewed lease of A, the substituted mortgages to X and Y are not treated as new mortgages, so as to give to X a right of consolidation against Y, especially if the priority of X for his first mortgage, and for a further advance to enable the new lease to be taken, is expressly reserved (*Bird* v. *Wenn* (1886), 33 Ch. D. 215).

(*c*) *White* v. *Hillacre* (1839), 3 Y. & C. (EX.) 597, 609; *Harter* v. *Colman* (1882), 19 Ch. D. 630; *Minter* v. *Carr*, [1894] 3 Ch. 498, C. A.; *contra*, *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L. R. 4 Eq. 537, where it was considered that, if at the time of assignment of one equity of redemption a mortgage by the same mortgagor was existing on another estate, the assignee took subject to the possibility of the two mortgages uniting, and in that case would be subject to consolidation; but this was questioned in *Jennings* v. *Jordan*, *supra*, at pp. 701, 718, and must be taken to be overruled (*Pledge* v. *White*, [1896] A. C. 187, 195).

(*d*) *Hughes* v. *Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607. To allow this claim would be contrary to the principle of *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; see title EQUITY, Vol. XIII., p. 84; p. 333, *post*. In *Andrews* v. *City Permanent Benefit Building Society* (1881), 44 L. T. 641, the mortgagee was allowed to consolidate against a second mortgagee of one property taking with notice of an express covenant for consolidation; *sed quære*.

(*e*) *White* v. *Hillacre*, *supra*.

SECT. 4. Right to Consolidate.

Right affected by intervening incumbrancers' right to marshal.

**390.** Where the mortgagee of two properties is entitled to a further charge on one, and there are intervening incumbrances on that property, the mortgagee cannot, after his first mortgage has been paid off out of that property exclusively, exercise his right of consolidation so as to throw his further charge on the other property and defeat the intervening incumbrancers' right to marshal (*f*).

SUB-SECT. 4.—*Who may Exercise the Right.*

Person in whom mortgages are united.

**391.** Where mortgages over distinct properties have been granted by the same mortgagor, the right of consolidation may be exercised by the person in whom the mortgages are united, whether he is the original mortgagee, or whether the mortgages or one of them have come to him by assignment or devolution (*g*). It is immaterial whether he holds on his own account or as trustee (*h*). But though he may consolidate notwithstanding that such union has taken place after the bankruptcy of the mortgagor (*i*), he cannot, to the prejudice of other creditors, consolidate, with a prior security held by him, a security for an advance taken after notice of insolvency (*k*).

An incumbrancer on the equity of redemption in one of two mortgaged estates, who pays off a mortgage on the other estate, becomes thereby an equitable assignee of that mortgage, and is entitled to consolidate what he so pays with his own debt (*l*).

Assignee of right takes subject to equities.

**392.** Since the right of consolidation is an equitable right, the ordinary incidents of equitable rights attach to it. Consequently the assignee of the mortgages stands in no better position than his assignor, and if by arrangement between the assignor and a subsequent incumbrancer the assignor has waived his right of consolidation, the right is not exercisable by the assignee (*m*).

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(*f*) *Ford* v. *Tynte* (1872), 41 L. J. (CH.) 758. As to marshalling, see p. 303, *post*.

(*g*) *Jennings* v. *Jordan* (1881); 6 App. Cas. 698, 700.

(*h*) *Tassell* v. *Smith* (1858), 2 De G. & J. 713, C. A., overruled on another point (see note (*b*), p. 213, *ante*).

(*i*) See note (*k*), p. 212, *ante*.

(*k*) *Re Softley, Ex parte Hodgkin* (1875), L. R. 20 Eq. 746.

(*l*) *Titley* v. *Davies* (1743), 2 Y. & C. Ch. Cas. 399, n.; *Cracknall* v. *Janson* (1879), 11 Ch. D. 1, C. A.; see p. 180, *ante*. And if the first mortgagee has two debts, one secured on each property, and the puisne mortgagee of one property sells that property (the proceeds being insufficient to pay all the debts), and, in pursuance of the first mortgagee's claim to consolidate, pays off both the first mortgagee's debts out of the proceeds, the puisne mortgagee can treat the payment as made out of his own moneys and is entitled to consolidate the first mortgagee's debt on the unsold property with his own debt and recover it against a third property included in his security; inasmuch as, but for the first mortgagee's claim to consolidate, the puisne mortgagee would have received towards his own debt the proceeds which went to pay off the first mortgagee's debt on the unsold property; consequently he ranks as equitable assignee of the mortgage on the unsold property, and, thus having mortgages on two properties, he can consolidate (*Cracknall* v. *Janson*, *supra*).

(*m*) *Bird* v. *Wenn* (1886), 33 Ch. D. 215.

## SECT. 5.—*Accounts.*



### SUB-SECT. 1.—*General Accounts between Mortgagor and Mortgagee.*

Nature of general accounts, as between mortgagor and mortgagee.

**393.** The relation of mortgagor and mortgagee is terminated by redemption, foreclosure, or the accounting for the proceeds of realisation, and proceedings for any of these purposes involve the taking of an account between the mortgagor and mortgagee (*n*). In such account the mortgagor is debited with principal and interest (*o*), and also with the costs, charges and expenses incurred by the mortgagee in relation to the mortgage security (*p*). But he is not debited with rents and profits which he has received while allowed to continue in possession (*q*); nor, on the other hand, is he credited with any moneys which he has expended on the repair or improvement of the property (*r*). The mortgagor is credited with any sums which the mortgagee has received on account of the security (*s*), and the balance appearing to his debit is the

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(*n*) The ordinary form of judgment for foreclosure or redemption contains a direction that an account be taken of what is due to the mortgagee under his mortgage, and for the costs of the action (3 Seton, Judgments and Orders, 6th ed., p. 1895 (foreclosure); *ibid.*, p. 1926 (redemption); see p. 153, *ante*, and pp. 231, 287, *post*). A judgment in an action to recover surplus proceeds of sale requires the like account, and also an account of the proceeds of sale (*ibid.*, p. 1958). A suit involving an account against a mortgagee as such must be limited to the mortgage account (*Pearse* v. *Hewitt* (1835), 7 Sim. 471). Where an account is asked for, the mortgagee is not generally ordered to give particulars of his claim (see *Augustinus* v. *Nerinckx* (1880), 16 Ch D. 13, C. A.; *Blackie* v. *Osmaston* (1884), 28 Ch. D. 119, C. A.); but this may be done if he is in effect claiming a definite sum (*Kemp* v. *Goldberg* (1887), 36 Ch. D. 505). As to the mortgagor's right to administer interrogatories to the mortgagee, see p. 153, *ante*; title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. XI., pp. 98, 99. In each particular case it has to be considered whether any special inquiries or accounts are required (see p. 288, *post*), such as accounts of rents and profits against mortgagee in possession (see p. 219, *post*); as to costs, charges, and expenses (see pp. 231, 239, *post*); as to sums expended in lasting improvements (see pp. 154, 203, *ante*, and p. 240, *post*); as to deterioration of mortgaged property (see pp. 154, 202, *ante*); or as to sale at insufficient price (see p. 254, *post*). In foreclosure the prosecution of accounts and inquiries may be stayed until security is given if, owing to the sum due and the deficiency in the value of the property, they will be useless (*Exchange and Hop Warehouses, Ltd.* v. *Association of Land Financiers* (1886), 34 Ch. D. 195; see *Taylor* v. *Mostyn* (1883), 25 Ch. D. 48, C. A.). As to accounts of a mortgage of a partnership share, see p. 96, *ante*, and cases cited, *ibid.*, notes (*l*), (*m*); 3 Seton, Judgments and Orders, 6th ed., pp. 2043, 2173. As to the right of a mortgagee of a partner's share to an account of the partnership, see *Watts* v. *Driscoll*, [1901] 1 Ch. 294, C. A.; and, as to partnership generally, see title PARTNERSHIP. As to the jurisdiction to order an account, see title EQUITY, Vol. XIII., pp. 27, 28, 65, 66. As to the time for which an account will be granted, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 101 *et seq.*, 170 *et seq.*

(*o*) See p. 223, *post*.

(*p*) *Re Wallis, Ex parte Lickorish* (1890), 25 Q. B. D. 176, 181, C. A.; see pp. 231, 239, *post*.

(*q*) See pp. 158 *et seq.*, *ante*, and p. 219, *post*. But where the mortgagee is restrained from taking possession, and a receiver is appointed adversely to him, the receiver may be charged with an occupation rent (*Re Joyce, Ex parte Warren* (1875), 10 Ch. App. 222).

(*r*) *Norris* v. *Caledonian Insurance Co.* (1869), 17 W. R. 954.

(*s*) Although the direction to account does not in terms extend to future receipts, sums subsequently received must be brought into the account

SECT. 5. Accounts.

sum at which he is entitled to redeem in a redemption action (*t*), or to redeem, so as to prevent foreclosure, in a foreclosure action (*u*); and if the property has been realised, the balance, if any, appearing to his credit is the sum which the mortgagee must pay over to him.

Account taken by second mortgagee.

**394.** An account taken against a first mortgagee at the instance of a second mortgagee must be taken in all respects as though the mortgagor were taking it; and if the mortgagor would have an equity to exclude any item in the account, this equity can be asserted by the second mortgagee (*a*).

General principle as to application of moneys.

**395.** Where the mortgagor is indebted to the mortgagee on other accounts than the mortgage, the mortgagee is not at liberty to appropriate sums received by virtue of the mortgage to such other accounts. An incumbrancer is bound to apply what he receives by virtue of his security to that security (*b*). Moneys received by a mortgagee on a sale by the mortgagor in which he concurs are received by virtue of the security (*c*).

When taking of accounts in court is necessary.

**396.** In general, the taking of the accounts in court is only necessary where a dispute has arisen, or where the mortgagee is seeking to foreclose. Accounts are usually taken and settled out of court, and this may be done from time to time or on the discharge of the mortgage.

When settled accounts may be reopened.

**397.** A settled account (*d*) is *primâ facie* binding on the parties to it; but in certain circumstances it will be reopened and taken again from the beginning, or the less drastic remedy may be allowed of giving leave to surcharge and falsify; that is, to take exception to particular omissions or entries (*e*).

A settled account will be reopened for fraud affecting the account generally or one or more items (*f*); and, in the absence of fraud, it

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(*Bulstrode* v. *Bradley* (1747), 3 Atk. 582). Where a foreclosure is reopened the mortgagee is not necessarily bound to account for rents and profits received since the foreclosure (*Bird* v. *Gandy* (1715), 2 Eq. Cas. Abr. 251 (4); 7 Vin. Abr. 45 (20); see p. 298, *post*).

(*t*) See p. 145, *ante*.

(*u*) See pp. 272, 288, *post*.

(*a*) *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126, 136; see *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307, 311, P. C.

(*b*) *Knight* v. *Bowyer* (1859), 4 De G. & J. 619, 629, C. A.

(*c*) *Johnson* v. *Bourne* (1843), 2 Y. & C. Ch. Cas. 268; *Young* v. *English* (1843), 7 Beav. 10. But money received from a third party who is liable to make good a deficiency on the first mortgage is not retained for the benefit of subsequent incumbrancers if ultimately it appears that there is no deficiency, but will be repaid to the third party (*Sawyer* v. *Goodwin* (1875), 1 Ch. D. 351, 358).

(*d*) As to pleading a settled account, see R. S. C., Ord. 24, r. 8. As to a settlement of account constituting a payment so as to discharge a right of action for breach of contract, see title CONTRACT, Vol. VII., p. 444. As to the effect of an "account stated," see *ibid.*, pp. 489 *et seq.*

(*e*) "If any of the parties can show an omission for which credit ought to be given that is a surcharge; or if anything is inserted that is a wrong charge he is at liberty to show it, and that is falsification; but that must be by proof on his side" (*Pitt* v. *Cholmondeley* (1754), 2 Ves. Sen. 565, 566).

(*f*) *Vernon* v. *Vawdrey* (1741), 2 Atk. 119; *Wharton* v. *May* (1799), 5 Ves. 27; *Drew* v. *Power* (1803), 1 Sch. & Lef. 182, 192; *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 265; *Allfrey* v. *Allfrey* (1849), 1 Mac. & G. 87; so, too, if an agent's account is founded on untrue statements, although alleged to be beneficial to the principal (*Clarke* v. *Tipping* (1846), 9 Beav. 284).

will be reopened if errors to a considerable extent in amount and in the number of the items are shown (*g*); or if the account is shown to be erroneous, and from the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, it appears that the settlement ought not to be taken advantage of by the accounting party (*h*). Thus where there is a fiduciary relation between the parties (*i*), or the relation of solicitor and client (*j*), the account is reopened more readily and on proof of smaller errors (*k*) than in other cases (*l*).

When liberty to surcharge and falsify given.

Liberty to surcharge and falsify will be given if a single definite error is proved (*m*), since the discovery of one error implies that others may be found (*n*).

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(*g*) *Williamson* v. *Barbour* (1877), 9 Ch. D. 529.

(*h*) *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309; *Re Webb, Lambert* v. *Still*, [1894] 1 Ch. 73, 84, C. A.

(*i*) *Williamson* v. *Barbour, supra*; *Re Webb, Lambert* v. *Still, supra*.

(*j*) *Lewes* v. *Morgan* (1817), 5 Price, 42; *Morgan* v. *Evans* (1834), 3 Cl. & Fin. 159, H. L. An account settled between solicitor and client will not be reopened on a general allegation of error unless admitted by the solicitor (*Matthews* v. *Wallwyn* (1798), 4 Ves. 118, 125); there must either be special circumstances showing that the account ought to be opened, or allegation and proof of particular errors (*Waters* v. *Taylor* (1837), 2 My. & Cr. 526; *Lawless* v. *Mansfield* (1841), 1 Dr. & War. 557, 605, treated in *Blagrave* v. *Routh* (1856), 2 K. & J. 509, 517; 8 De G. M. & G. 620, 632, C. A., as going too far, but explained in *Morgan* v. *Higgins* (1859), 1 Giff. 270, 277; see *Matthews* v. *Wallwyn, supra*). But there will be liberty only to surcharge and falsify if this will meet the justice of the case (*Cheese* v. *Keen*, [1908] 1 Ch. 245). Where the relation of solicitor and client exists, the relief is not limited to six years; see title LIMITATION OF ACTIONS, Vol. XIX., p. 166. As to the relation of solicitor and client, see, generally, title SOLICITORS.

(*k*) As to the grant of relief in a suitable case notwithstanding the smallness of the error, see *Lewes* v. *Morgan, supra*; *Lawless* v. *Mansfield, supra*; *Cheese* v. *Keen, supra*.

(*l*) In foreclosure the mortgagor can raise his objection to a settled account by way of equitable defence (*Eyre* v. *Hughes* (1876), 2 Ch. D. 148); see p. 286, *post*.

(*m*) *Vernon* v. *Vawdrey* (1741), 2 Atk. 119; *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 265; *Davies* v. *Spurling* (1829), Taml. 199; *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1, 19; *Gething* v. *Keighley* (1878), 9 Ch. D. 547, 550. Where, for instance, a charge by the mortgagee for commission on consignments (*Chambers* v. *Goldwin* (1801), 5 Ves. 834, 837; (1804), 9 Ves. 254), or for personally collecting rents (*Langstaffe* v. *Fenwick, Fenwick* v. *Langstaffe* (1805), 10 Ves. 405), has been made, or compound interest has been charged without authority (*Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, P.C.); compare *Cheese* v. *Keen, supra*, at p. 251, where a solicitor-mortgagee's account contained overcharges of interest and also profit costs which he was not entitled to charge. In such cases it is immaterial whether the mistake is of fact or of law (*Roberts* v. *Kuffin* (1741), 2 Atk. 112; *Langstaffe* v. *Fenwick, Fenwick* v. *Langstaffe, supra*; *Daniell* v. *Sinclair, supra*, at p. 190). Where no settled account is proved, but it is suggested that one may exist, liberty will be given to surcharge and falsify, if such should be the case, without allegation of specific errors (*Kinsman* v. *Barker* (1808), 14 Ves. 579; *Lawless* v. *Mansfield, supra*, at p. 604). But if a settled account is proved and no error shown, the court will not interfere (*Endo* v. *Caleham* (1831), You. 306; *Lawless* v. *Mansfield, supra*, at p. 605). A reservation of "errors excepted" does not prevent the account being a settled account (*Johnson* v. *Curtis* (1791), 3 Bro. C. C. 266).

(*n*) *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309, 314.

SECT. 5. **Accounts.**

Claim must be distinctly alleged and proved.

**398.** Whether it is desired to reopen the account, or only to surcharge and falsify, the ground on which relief is claimed must be distinctly alleged and proved as alleged (*o*). Where there are several accounts, errors in some will render all liable to be reopened or surcharged and falsified, if the relation subsisting between the parties, the character of the errors, and the connection of the accounts, lead to the inference that the errors proved in some cases may be expected to appear in all (*p*).

Setting off and correcting errors.

The accounting party cannot avoid liability by setting off against each other errors in different accounts (*q*). He can escape an order to surcharge and falsify by correcting particular errors before action (*r*), but not in the course of the action (*a*).

Persons bound by the account.

**399.** An account taken, whether in court or out of court, between the mortgagee and the person immediately interested in the equity of redemption is *primâ facie* binding on other persons interested. Thus an account between mortgagee and mortgagor binds a second mortgagee (*b*); and an account between a mortgagee and the tenant for life of the equity of redemption binds both vested and contingent remaindermen (*c*).

Persons not bound.

But persons who are not parties to the account are not bound if fraud or collusion and also particular errors are alleged and proved (*d*); and apart from fraud or collusion, proof of particular errors will entitle the absent party to an order to surcharge and falsify (*e*). An account taken between the mortgagee and a transferee of the mortgage does not bind the mortgagor (*f*). An account taken in court at the instance of a plaintiff is not binding as between co-defendants, unless the plaintiff cannot obtain the object of the action without determining the rights of the defendants among themselves (*g*); but, in an action by a second mortgagee against the mortgagor and the first mortgagee, if the first mort-

(*o*) *Taylor* v. *Haylin* (1788), 2 Bro. C. C. 310; *Drew* v. *Power* (1803), 1 Sch. & Lef. 182, 192; *Davis* v. *Starling* (1829), 1 Coop. *temp.* Cott. 551; S. C., *Davies* v. *Spurling* (1829), Taml. 199; *Shepherd* v. *Morris* (1841), 4 Beav. 252; *Parkinson* v. *Hanbury* (1867), L. R. 2 H. L. 1, 19.

(*p*) *Cheese* v. *Keen*, [1908] 1 Ch. 245, 251; see *Lawless* v. *Mansfield* (1841), 1 Dr. & War. 557, 604.

(*q*) *Lawless* v. *Mansfield*, *supra*, at p. 615.

(*r*) *Davies* v. *Spurling*, *supra*, at p. 214.

(*a*) *Lawless* v. *Mansfield*, *supra*, at p. 623.

(*b*) *Needler* v. *Deeble* (1677), 1 Cas. in Ch. 299; *Williams* v. *Day* (1680), 2 Cas. in Ch. 32; *Knight* v. *Bampfeild* (1683), 1 Vern. 179. An account taken in the presence of a bankrupt will bind him if he afterwards procures a reassignment of the property, although his trustee was not a party (*Byrne* v. *Carew* (*Lord*) (1849), 13 I. Eq. R. 1).

(*c*) *Allen* v. *Papworth* (1748), 1 Ves. Sen. 163; *Wrixon* v. *Vize* (1842), 2 Dr. & War. 192; *contra*, *Dick* v. *Butler* (1827), 1 Mol. 42.

(*d*) *Needler* v. *Deeble*, *supra*; *Knight* v. *Bampfeild*, *supra*; *Hall* v. *Heward* (1886), 32 Ch. D. 430, 435, C. A.

(*e*) *Wrixon* v. *Vize*, *supra*, at p. 205; compare *Badham* v. *Odell* (1742), 4 Bro. Parl. Cas. 349.

(*f*) *Macclesfield* (*Earl*) v. *Fitton* (1683), 1 Vern. 168; *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702, 737; compare *Jamieson* v. *English* (1820), 2 Mol. 7; see p. 179, *ante*.

(*g*) *Cottingham* v. *Shrewsbury* (*Earl*) (1843), 3 Hare, 627, 638.

gagee's debt is established, the mortgagor is bound so long as the judgment remains unimpeached (*h*).

SUB-SECT. 2.—*Accounts by Mortgagee in Possession.*

Continuous account.

**400.** In the absence of special direction, the account taken against a mortgagee in possession is a continuous debtor and creditor account (*i*). The mortgagee is debited with all sums which he has received or which he is to be treated as having received (*k*) by virtue of the mortgage, whether rents and profits, or accidental payments, such as fines or heriots, or proceeds of sale; and he is credited with the principal moneys, with interest accruing due from time to time, and with costs, charges and expenses, including all expenditure upon the mortgaged property which he is entitled to charge against it (*l*). The nature of the account requires that it shall be taken without limit (*m*); that is, from the commencement of the possession, or if there has already been a settled account, from such account (*n*).

Period.

Effect of surplus receipts or deficiency in receipts as compared with interest.

**401.** If the rents and other receipts from time to time derived from the mortgaged property are more than the interest, the mortgagee, when the account is taken continuously, does not apply the excess in reduction of principal, and so at the same time reduce the subsequent interest; he keeps it in hand, paying no interest on it, and thereby gains an incidental advantage. If, on the other hand, the rents and other receipts are less than the interest, the

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(*h*) *Farquharson* v. *Seton* (1828), 5 Russ. 45, 62.

(*i*) *Wrigley* v. *Gill*, [1905] 1 Ch. 241, 253. Where under a Welsh mortgage the mortgagee is to have the rents and profits in lieu of interest, an account can be ordered if these greatly exceed the interest (*Talbot* v. *Braddil* (1686), 1 Vern. 394; *Fulthrope* v. *Foster* (1687), 1 Vern. 476; see *Alderson* v. *White* (1857), 3 Jur. (N. S.) 1316); and see p. 88, *ante*. For a form, see Encyclopædia of Forms and Precedents, Vol. I., pp. 152, 153.

(*k*) As to the account being on the footing of wilful default, see p. 198, *ante*.

(*l*) See *Thompson* v. *Hudson* (1870), L. R. 10 Eq. 497, 498; *Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53; *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, 456, C. A. In *Thompson* v. *Hudson*, *supra*, it was said that a third column was reserved for the principal debt, but if the whole account is presented as a debtor and creditor account, it is necessarily restricted to two columns. In fact, however, the order to account requires that the account shall be taken in a series of single column accounts:—(1) an account of what is due to the mortgagee for principal, interest and costs; (2) an account of moneys expended by the mortgagee in necessary repairs and lasting improvements, with, in the case of lasting improvements, interest from the date of outlay; (3) an account of rents and profits. The aggregate of accounts (1) and (2) are added together, and that of account (3) subtracted, and the balance is the amount due to the mortgagee (3 Seton, Judgments and Orders, 6th ed., p. 957; *Wrigley* v. *Gill*, *supra*). For form of affidavit verifying the account, see Daniell's Chancery Forms, 5th ed., p. 773; and see Encyclopædia of Forms and Precedents, Vol. I., p. 152. As to an account by a tenant by elegit, see title EXECUTION, Vol. XIV., p. 73.

(*m*) *Hood* v. *Easton* (1856), 2 Giff. 692; see title LIMITATION OF ACTIONS, Vol. XIX., p. 102.

(*n*) As to partnership accounts, see *Miller* v. *Miller* (1869), L. R. 8 Eq. 499; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474, C. A.; and title PARTNERSHIP.

SECT. 5. Accounts.

deficiency means an accumulation of interest overdue, and this is a further debt owing by the mortgagor on which he pays no interest. The rents and receipts are not appropriated to interest separately, but go generally in reduction of principal and interest, and this method favours either mortgagee or mortgagor according to the state of the account (*o*).

Taking account with rests.

**402.** So far as the continuous account favours the mortgagor, it is not interfered with. If the current excess of interest due over receipts were turned into capital and so made to bear interest, this would be to give compound interest against the mortgagor, which can only be done when the mortgage contract provides for compound interest (*p*). But so far as the continuous account favours the mortgagee, the court interferes in certain circumstances and deprives him of the advantage so gained by directing the account to be taken with rests (*q*); that is, when the receipts for the year or other period exceed the interest and current expenses, the surplus is credited in reduction of principal, and interest runs thenceforward only on the reduced amount (*r*).

Effect of rests after satisfaction of debts.

After the mortgage debt is thus satisfied, the effect of the rests is to make interest payable by the mortgagee. For each period in which there is an excess of receipts over expenses, there is a balance owing from the mortgagee to the mortgagor; and these balances carry compound interest, that is, the interest due for any period is added to the balance due at the end of the period, and the interest for the ensuing period is reckoned on the aggregate sum (*s*). The rate of

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(*o*) See *Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53.

(*p*) See p. 116, *ante*, and p. 227, *post*.

(*q*) For directions to account with rests, see 3 Seton, Judgments and Orders, 6th ed., p. 1956 (but Form 1 omits to state the period of the rests). Rests, it has been said, are only directed in the case of real estate (*Robinson* v. *Cumming* (1742), 2 Atk. 409, 410); but there seems no reason for this restriction. They may be directed where the mortgagee is charged with an occupation rent (*Donovan* v. *Fricker* (1821), Jac. 165; *Wilson* v. *Metcalfe* (1826), 1 Russ. 530; see p. 201, *ante*); but the mortgagee must be in possession as such, and not as tenant (*Page* v. *Linwood* (1837), 4 Cl. & Fin. 399, H. L.). Where rests have been directed in a redemption action (see p. 154, *ante*) which is abandoned, and a foreclosure action is subsequently brought, the accounts must be taken with rests, at any rate up to the date of the earlier order (*Morris* v. *Islip* (1855), 20 Beav. 654). Although rests are not directed, it may be necessary to find out from time to time whether the mortgagee has rents in hand sufficient to cover interest: where, for instance, this is required to avoid a claim for capitalisation of interest in arrear (*Wrigley* v. *Gill*, [1906] 1 Ch. 165, C. A.); and see p. 116, *ante*.

(*r*) This may be done either by taking a separate revenue account, and carrying the balance to the credit of principal, or by simply striking a balance in the ordinary account which includes principal (see note (*l*), p. 219, *ante*), the balance thus showing the reduced principal.

(*s*) As long as there is principal due, the rests may be made either from time to time, whenever the mortgagee has an excess of receipts over interest and expenses in hand, or at stated intervals. The former method is suitable if there are likely to be substantial sums in hand, and it has been ordered (*Binnington* v. *Harwood* (1825), Turn. & R. 477; see 3 Seton, Judgments and Orders, 6th ed., p. 1956); but more usually the account is directed to be taken with yearly or half-yearly rests, and then it is only the periodical balance in the hands of the mortgagee which is struck off principal (*Yates* v.

interest is usually 4 per cent. per annum (*t*). If a mortgagee, who has not been in possession, has surplus sale moneys in hand, he is charged simple interest at the same rate (*a*).

When rests ordered.

**403.** The account is not taken with rests unless a special direction to that effect is inserted in the order (*b*), and such a direction is not inserted as a matter of course (*c*). A mortgagee is not bound to accept payment of his money by driblets (*d*), and the direction is not given unless the mortgagee has impliedly elected to be paid in this manner, or has so acted as to forfeit his usual immunity. He impliedly elects to be paid by driblets if he enters into possession when no interest is in arrear (*e*), and there are no special circumstances to account for his taking this step (*f*).

Entry by mortgagee.

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*Hambly* (1742), 2 Atk. 360 (see the form of decree in this case, cited in *Webber* v. *Hunt* (1815), 1 Madd. 13, 14); see *Wilson* v. *Cluer* (1840), 3 Beav. 136; *Thorneycroft* v. *Crockett* (1848), 2 H. L. Cas. 239, 256). In *Binnington* v. *Harwood* (1825), Turn. & R. 477, the decree combined both these methods, but they appear to be incompatible. When there is no longer any principal due, the direction for annual rests is equivalent to a direction that the mortgagee shall be charged with compound interest, and operates in the same way as in other cases where an accounting party—*e.g.*, an executor—has money in hand (see *Raphael* v. *Boehm* (1805), 11 Ves. 92; (1807), 13 Ves. 407, 590; *Heighington* v. *Grant* (1840), 5 My. & Cr. 258; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 324); but this may be made more explicit by a direction that, in making the periodic rests (except the first), the interest of each preceding balance shall be included in the new balance, so as to charge the mortgagee with compound interest (*Cotham* v. *West* (1839), 1 Beav. 380, 381; 2 Seton, Judgments and Orders, 6th ed., p. 1160; *Ashworth* v. *Lord* (1887), 36 Ch. D. 545, 552; 2 Seton, Judgments and Orders, 6th ed., p. 1160; 3 *ibid.*, p. 1957). Under special circumstances the order may direct each receipt to carry interest from the time of receipt in addition to periodic rests (see *Raphael* v. *Boehm*, *supra*; *Lloyd* v. *Jones* (1842), 12 Sim. 491).

(*t*) *Ashworth* v. *Lord*, *supra*; see *Quarrell* v. *Beckford* (1816), 1 Madd. 269, 285; *Wilson* v. *Metcalfe* (1826), 1 Russ. 530, 537; *Lewes* v. *Morgan* (1829), 3 Y. & J. 394, 399; *Montgomery* v. *Calland* (1844). 14 Sim. 79, 82; *Horlock* v. *Smith* (1844), 1 Coll. 287, 297; and see title MONEY AND MONEY-LENDING, p. 42, *ante*.

(*a*) *Smith* v. *Pilkington* (1859), 1 De G. F. & J. 120, 136, C. A.; *Eley* v. *Read* (1897), 76 L. T. 39, C. A. A mortgagee, although not in possession, will be charged compound interest on money in his hands if he improperly resists redemption (*Smith* v. *Pilkington*, *supra*).

(*b*) *Webber* v. *Hunt* (1815), 1 Madd. 13; *Donovan* v. *Fricker* (1821), Jac. 165, 168. In Ireland the account is taken with yearly rests without special order, but rests are not made between the half-yearly days (*Graham* v. *Walker* (1847), 11 I. Eq. R. 415).

(*c*) *Davis* v. *May* (1815), 19 Ves. 383; *Donovan* v. *Fricker*, *supra*; *Scholefield* v. *Ingham* (1838), Coop. Pr. Cas. 477; see *Neesom* v. *Clarke* (1845), 4 Hare, 97, 105. It has been said that the account must be continuous if the mortgagee, as in a Welsh mortgage, is in possession under the terms of the contract (*Alderson* v. *White* (1857), 3 Jur. (N. S.) 1316, 1320). As to Welsh mortgages, see p. 87, *ante*.

(*d*) *Nelson* v. *Booth* (1858), 3 De G. & J. 119, 122; *Wrigley* v. *Gill*, [1905] 1 Ch. 241, 254.

(*e*) *Nelson* v. *Booth*, *supra*; *Ashworth* v. *Lord*, *supra*. As to the circumstances entitling the mortgagee to take possession, see pp. 189 *et seq.*, *ante*.

(*f*) The question of interest being in arrear is not conclusive; all the circumstances must be taken into consideration (*Horlock* v. *Smith* (1844), 1 Coll. 287, 297).

SECT. 5. Accounts.

Hence the account will usually be taken with rests if there was no interest in arrear when the mortgagee entered (*g*), but without rests if interest was in arrear (*h*). If, however, special burdens have been imposed upon him by the conduct of the mortgagor, rests will not be directed even though no interest was in arrear (*i*).

Effect of setting up adverse title.

The mortgagee forfeits the immunities of an ordinary mortgagee if he unsuccessfully sets up a title as owner adverse to the mortgagor and denies his right to redeem, and he will be ordered to account with rests, although interest was in arrear when he took possession (*k*).

Effect of subsequent payment of arrears of interest.

If interest was in arrear when the mortgagee took possession, so that he was not in the first instance liable to account with rests, he does not become liable so to account from the date when the arrears were paid off out of the rents (*l*). When, however, the mortgage has been satisfied, the mortgagee must thenceforward account with rests, and a direction to that effect may be given subsequently to the original order to account (*m*).

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(*g*) *Shephard* v. *Elliot* (1819), 4 Madd. 254; *Scholefield* v. *Ingham* (1883), Coop. Pr. Cas. 477; *Wilson* v. *Cluer* (1840), 3 Beav. 136.

(*h*) *Stephens* v. *Wellings* (1835), 4 L. J. (CH.) 281; *Wilson* v. *Cluer*, *supra*; *Finch* v. *Brown* (1840), 3 Beav. 70; *Nelson* v. *Booth* (1858), 3 De G. & J. 119, 122; *Scholefield* v. *Lockwood* (No. 3) (1863), 32 Beav. 439; and for this purpose a half-year's arrear of interest is sufficient (*Moore* v. *Painter* (1842), 6 Jur. 903). Where bills for arrears of interest are current when the mortgagee takes possession and are dishonoured at maturity, the interest is in arrear all the time, and no rests will be directed (*Dobson* v. *Land* (1851), 4 De G. & Sm. 575). Formerly it was considered that any considerable excess of receipts over interest was a ground for directing rests (*Gould* v. *Tancred* (1743), 2 Atk. 533; *Donovan* v. *Fricker* (1821), Jac. 165); and this was treated as correct in *Carter* v. *James* (1881), 29 W. R. 437; though rests were not directed where the excess was slight (*Gould* v. *Tancred*, *supra*; *Donovan* v. *Fricker*, *supra*; *Scholefield* v. *Ingham*, *supra*). But, apparently, mere excess of receipts is not sufficient to render the mortgagee liable to rests (*Baldwin* v. *Lewis* (1835), 4 L. J. (CH.) 113; see *Nelson* v. *Booth*, *supra*).

(*i*) *Horlock* v. *Smith* (1844), 1 Coll. 287, 297; and the mortgagee need not account with rests if he enters on leasehold premises to avoid a forfeiture (*Patch* v. *Wild* (1861), 30 Beav. 99).

(*k*) *Incorporated Society* v. *Richards* (1841), 1 Dr. & War. 258, 334; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, 409, P. C.; *Wrigley* v. *Gill*, [1905] 1 Ch. 241, 254; see *Montgomery* v. *Calland* (1844), 14 Sim. 79; *Douglas* v. *Culverwell* (1862), 4 De G. F. & J. 20, C. A.

(*l*) *Davis* v. *May* (1815), 19 Ves. 383; *Latter* v. *Dashwood* (1834), 6 Sim. 462; *Finch* v. *Brown* (1840), 3 Beav. 70; *Wilson* v. *Cluer*, *supra*, at p. 140; *Scholefield* v. *Lockwood* (No. 3), *supra*. But if, while the mortgagee is in possession under circumstances which do not subject him to account with rests an account is settled between the parties which shows that no interest is due, or that arrears of interest have been turned into principal, the mortgagee is thenceforward liable to account with rests (*Wilson* v. *Cluer*, *supra*). As to the arrears of interest recoverable by a mortgagee in possession, see p. 229, *post*.

(*m*) *Wilson* v. *Metcalfe* (1826), 1 Russ. 530; *Wilson* v. *Cluer*, *supra*; *Montgomery* v. *Calland*, *supra*; *Ashworth* v. *Lord* (1887), 36 Ch. D. 545; see *Quarrell* v. *Beckford* (1816), 1 Madd. 269. The direction is given at any time after the account shows that the mortgage is paid off, although not asked for originally (*Wilson* v. *Metcalfe*, *supra*); or the mortgagee may be charged with interest on moneys received from the times of receipt (*Lloyd* v. *Jones* (1842), 12 Sim. 491).

Application of proceeds of sale of part of property.

**404.** Where a sale of part of the property is effected, the net proceeds are applied first in payment of interest then due, and the surplus is carried to the credit of principal as at the date of receipt, so as to reduce the amount on which interest thenceforward runs; but no rest is made at the same time in the account of rents and profits. If the account is being taken without rests, the account of rents and profits will go on continuously as though there had been no special receipt of capital moneys; if the account is being taken with rests, the usual rest will be made at the next period (*n*).

When fresh account necessary.

**405.** Where the mortgagee receives rents after the account has been taken, he must render a fresh account verified by affidavit up to the time when the matter is finally settled (*o*).

SUB-SECT. 3.—*Accounts of Principal and Interest.*

Special matters must be pleaded or set out.

**406.** The first account to be taken under a mortgage is the account of principal and interest. If there is any special matter affecting the amount at which the mortgagor or a person claiming under him is entitled to redeem, such as a valuation of the security in bankruptcy, this must be pleaded or otherwise brought to the attention of the court before the judgment directing the account is given, in which case an appropriate direction can be inserted. If this is not done, the question cannot be subsequently raised on taking the account (*p*). If the account for interest is not taken owing to an expected deficiency, and payments are ordered to be made on account of principal, this does not prevent the subsequent calculation of interest in the event of a surplus (*q*).

Proof of principal debt.

**407.** Where a mortgage is given for a specific sum stated to be then advanced, the receipt of which is acknowledged by the mortgagor, the mortgage deed is *primâ facie* evidence of the amount of the advance (*r*), and, accordingly, the principal debt is proved by production of the deed, with the receipt contained in the deed or indorsed on it (*s*); but the receipt is not conclusive, and the mortgagor is entitled to show by parol evidence that the sum named was not in fact advanced (*t*); and the burden of proving the advance

(*n*) *Wrigley* v. *Gill*, [1905] 1 Ch. 241, 253; affirmed on another point, [1906] 1 Ch. 165, C. A.; *Ainsworth* v. *Wilding*, [1905] 1 Ch. 435, explaining *Thompson* v. *Hudson* (1870), L. R. 10 Eq. 497.

(*o*) *Oxenham* v. *Ellis* (1854), 18 Beav. 593, 595.

(*p*) *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502.

(*q*) *Re Calgary and Medicine Hat Land Co., Ltd., Pigeon* v. *The Co.*, [1908] 2 Ch. 652, C. A.

(*r*) As to the effect of the receipt, see, further, p. 178, *ante*; title ESTOPPEL, Vol. XIII., p. 371; *King* v. *Smith*, [1900] 2 Ch. 425.

(*s*) *Piddock* v. *Brown* (1734), 3 P. Wms. 288; see *Goddard* v. *Complin* (1669), 1 Cas. in Ch. 119; *Holt* v. *Mill* (1692), 2 Vern. 279. A transfer of a mortgage, reciting that a certain sum is due on the security, has been held to estop the transferee from subsequently having costs which were included taxed on an ordinary summons, although a contemporaneous receipt ended with "accounts hereafter to be adjusted" (*Re Forsyth* (1865), 11 Jur. (N. S.) 213, 615, C. A.); and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464; ESTOPPEL, Vol. XIII., p. 371, and as to account books of a deceased mortgagee being evidence of the state of the account, see *Hudson* v. "*Swiftsure*" (*Owners of*) (1900), 82 L. T. 389.

(*t*) *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126, 136; see title OTHER INSTRUMENTS, Vol. X., p. 464.

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strictly is on the mortgagee in certain cases, namely, where the mortgagee was at the time the mortgagor's solicitor or agent (*u*), where there is evidence of pressure (*v*) or fraud (*a*).

Bonus or commission.

**408.** The mortgagee may stipulate for a commission of an amount reasonable, having regard to the risk run (*b*); and if, on making the advance, he deducts this commission from the sum stated in the mortgage deed, and pays only the balance, the full sum so stated will be allowed as the principal debt in his account (*c*).

Future advances; current account.

**409.** The security may be given to cover future advances whether in addition to an immediate advance or not, or to cover a current account, or to cover present or future liabilities (*d*). In

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(*u*) *Lewes* v. *Morgan* (1817), 5 Price, 42, 83; *Lewes* v. *Morgan* (1829), 3 Y. & J. 230, 249, 398; *Lawless* v. *Mansfield* (1841), 1 Dr. & War. 557 608; *Gresley* v. *Mousley* (1862), 8 Jur. (N. S.) 320. And where a security is given for a bill of costs the court will inquire whether the charges were fair and reasonable (*Wragg* v. *Denham* (1836), 2 Y. & C. (EX.) 117, 121) As to entries in a solicitor's books being evidence in his favour of his debt see *Clark* v. *Wilmot* (1841), 1 Y. & C. Ch. Cas. 53; 2 Y. & C. Ch. Cas. 259, note (*h*); title EVIDENCE, Vol. XIII., p. 464. As to the relation of solicitor and client, see generally, title SOLICITORS.

(*v*) *E.g.*, in a *post obit* security (*Tottenham* v. *Green* (1863), 32 L. J. (CH.) 201).

(*a*) *Piddock* v. *Brown* (1734), 3 P. Wms. 288.

(*b*) See p. 144, *ante*.

(*c*) *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126; see *Potter* v. *Edwards* (1857), 26 L. J. (CH.) 468; *Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307, 322, C. A. The doctrine laid down in *Re Edwards' Estate* (1861) 11 I. Ch. R. 367, 369, that an onerous contract entered into as part of the mortgage transaction is presumed to be made under pressure, is not correct (*Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, *supra*); and see title EQUITY Vol. XIII., p. 91, note (*r*): If the commission is not deducted at the time of the advance, it will be allowed subsequently in the accounts under the head of just allowances, provided that it is stipulated for in the mortgage contract, and that the bargain is deliberately entered into while the parties are on equal terms (*Bucknell* v. *Vickery* (1891), 64 L. T. 701, P. C.; *The Benwell Tower* (1895), 72 L. T. 664, 670); see note (*c*), p. 144, *ante*. *Broad* v. *Selfe* (1863), 11 W. R. 1036, and *James* v. *Kerr* (1889), 40 Ch. D. 449, 459, so far as to the contrary, appear not to be now law. An agreement, in consideration of a present advance, to pay a larger sum in the future is valid (*Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685, 702).

(*d*) A security for advances will generally, if the surrounding circumstances favour the construction, include past as well as future advances (*Hibernian Bank* v. *Gilbert* (1889), 23 L. R. Ir. 321); and a charge on a policy of insurance for notes cashed may cover the balance due at the mortgagor' death (*Jones* v. *Consolidated Investment Assurance Co.* (1858), 26 Beav. 256); but a security to cover liabilities of the mortgagor to the mortgagee refers only to direct liabilities; it does not include liability on a bill which the mortgagee has purchased (*Calisher* v. *Forbes* (1871), 7 Ch. App. 109, 114). A mortgage to a bank to cover debts due or growing due from the mortgagor covers his liability on bills drawn by him and accepted by a third party, which are then under discount with the bank, and are sub sequently dishonoured (*Merchants' Bank of London* v. *Maud* (1870), 19 W. R. 657); and a mortgage of a public-house to brewers to cover debts due from the mortgagor or his assigns will cover the business debt of his devisee (*Re Watts*, *Smith* v. *Watts* (1882), 22 Ch. D. 5, C. A.). For forms of mortgages to secure further advances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 519, 650; and to secure current accounts, see *ibid.*, Vol. VIII., p. 608A. As to the right of a solicitor-mortgagee to add certain costs to his security, see p. 124, *ante*. As to further advances by an executor-mortgagee, see *Re Gannon*, *Gannon* v. *Gannon*, [1909] 1 I. R. 57, C. A.

these cases it is available up to the limit for which it is stamped (*e*), but sometimes an express limit on the amount recoverable under it is inserted, and, according to the construction of the deed, this may be a limit on principal only, leaving interest and outgoings to be recovered in addition (*f*), or it may be a limit on the aggregate sum recoverable, for principal, interest, and costs (*g*).

Proof as to amount secured.

A mortgage for a specific sum may, by the agreement between the parties, be in fact a mortgage to secure a current account up to the limit of such sum, but the burden of proof is on the party who seeks to establish that it is a running security (*h*). The actual amount due on a mortgage to secure a current account, or a mortgage covering further advances, may be proved by evidence outside the deed or by receipts on the deed (*i*).

Appropriation of payments in current account.

The rule in *Clayton's Case*.

**410.** *Primâ facie*, in the case of a mortgage to secure a current account, unless there has been express appropriation by either party (*k*), sums paid by the mortgagor are applied in satisfaction of the items on the debit side in order, beginning with the earliest in date (*l*). But inasmuch as the security does not, as against a second mortgagee, include advances made after notice of the second mortgage (*m*), the result is that the mortgage becomes a mortgage for the fixed amount of the balance then outstanding, and subsequent payments will go to satisfy it, while subsequent advances will, as against the second mortgagee, be unsecured (*n*). The above rule is, however, not applied if the circumstances show that it was the intention of the mortgagee to exclude it (*o*).

Interest by contract, express or implied.

**411.** Apart from express stipulation (*p*), a mortgage security

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(*e*) See p. 137, *ante*. As to the law affecting the priority of further advances, see pp. 332 *et seq.*

(*f*) See *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, C. A.

(*g*) *Blackford* v. *Davis* (1869), 4 Ch. App. 304, 309 (proviso "that the total moneys to be secured by and ultimately recoverable under these presents shall not exceed the sum of £1,200").

(*h*) *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467; see *Henniker* v. *Wigg* (1843), 4 Q. B. 792; *Melland* v. *Gray* (1843), 2 Y. & C. Ch. Cas. 199; and note (*p*), p. 228, *post*.

(*i*) See *Melland* v. *Gray*, *supra*.

(*k*) *Cory Brothers & Co.* v. *Turkish Steamship "Mecca" (Owners), The "Mecca,"* [1897] A. C. 286; see *Williams* v. *Rawlinson* (1825), 3 Bing. 71.

(*l*) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; see *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39. This rule is usually referred to as "the rule in *Clayton's Case*"; and see titles BANKERS AND BANKING, Vol. I., p. 586; CONTRACT, Vol. VII., pp. 449 *et seq.*

(*m*) *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; see *Gordon* v. *Graham* (1716), 7 Vin. Abr. 52 (3); and see title BANKERS AND BANKING, Vol. I., p. 632, and p. 332, *post*.

(*n*) See *London and County Banking Co.* v. *Ratcliffe* (1881), 6 App. Cas. 722.

(*o*) *Deeley* v. *Lloyds Bank*, [1910] 1 Ch. 648, C. A., now under appeal in H. L.; compare *Hipkins* v. *Amery* (1860), 2 Giff. 292.

(*p*) As to express stipulations for payment of interest, see pp. 114, 115, *ante*. As to deduction of income tax from interest, see title INCOME TAX, Vol. XVI., pp. 633, 661 *et seq.* The first mortgagee is not accountable to a second mortgagee for extra interest stipulated for and received after notice of the second mortgage (*Law* v. *Glenn* (1867), 2 Ch. App. 634, 639). As to a proviso for reduction of interest on punctual payment, see p. 115, *ante*. As to set-off of interest where the mortgagor takes a legacy from the mortgagee, see *Pettat* v. *Ellis* (1804), 9 Ves. 563; title SET-OFF AND

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implies an agreement to pay interest (*q*), and interest is allowed at the rate of 4 per cent. per annum (*r*). Where a security is given by way of indemnity, it will cover interest on sums paid by the guarantor (*a*).

Interest as damages for delay.

Where the mortgage provides for interest up to the day fixed for payment, but not beyond, a contract for the continuance of the same rate of interest until payment is not implied (*b*), but subsequent interest will be given by way of damages for breach of contract (*c*), and if the original rate of interest is a reasonable and usual rate, it is adopted as a proper measure of damages for the subsequent delay (*d*). This rule applies both to proceedings on the covenant, and to accounts taken in redemption or foreclosure. In taking such accounts interest cannot be ascertained as damages, but it will be awarded on the same footing as consideration for allowing the loan to remain unpaid (*e*).

Interest on covenant merges in judgment.

**412.** Where the mortgage deed provides for payment of interest on the principal debt after default, and judgment for the principal debt is obtained, the mortgage debt is merged in the judgment, and if the covenant to pay interest was merely incidental to the covenant to pay the principal debt, the interest will no longer be recoverable under the covenant to pay interest, but interest at 4 per cent. is recoverable on the judgment (*f*). Hence the covenant frequently

COUNTERCLAIM. In mortgage transactions "month" may mean calendar month (*Hutton* v. *Brown*, [1881] W. N. 116).

(*q*) See p. 115, *ante*; and see note (*t*), p. 113, *ante*.

(*r*) *Re Kerr's Policy* (1869), L. R. 8 Eq. 331; *Re Drax, Savile* v. *Drax* [1903] 1 Ch. 781, 795, C. A.; but in *Carey* v. *Doyne* (1856), 5 I. Ch. R. 104; *Ashwell* v. *Staunton* (1861), 30 Beav. 52; and *Re Every, Ex parte Hirtzel, Ex parte Hine* (1858), 3 De G. & J. 464, C. A., 5 per cent was allowed.

(*a*) *Fergus' Executors* v. *Gore* (1803), 1 Sch. & Lef. 107; *Wainman* v. *Bowker* (1845), 8 Beav. 363.

(*b*) See p. 116, *ante*. But a stipulation in the mortgage that the mortgagor will not transfer the property until payment in full of principal and interest implies an agreement for the continuance of the original interest till payment (*Mathura Das* v. *Raja Narindar Bahadur Pal* (1896), 12 T. L. R. 609, P. C.).

(*c*) See p. 116, *ante*; but, ordinarily, interest is not recoverable as damages for detention of a debt (*London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1893] A. C. 429; see title MONEY AND MONEY-LENDING, p. 40, *ante*); where, as in mortgages, the debt is payable by virtue of a written instrument at a certain time, interest can be recovered under the statute; see *ibid.*, p. 38.

(*d*) *Cook* v. *Fowler* (1874), L. R. 7 H. L. 27. On a mortgage of a ship the original interest of 10 per cent. has been allowed (*Morgan* v. *Jones* (1853), 8 Exch. 620); and in *Gordillo* v. *Weguelin* (1877), 5 Ch. D. 287, 303, C. A., it was said that the jury would be directed as a matter of law to find damages at the rate of the original interest, but this seems to be erroneous; see p. 116, *ante*.

(*e*) *Wallington* v. *Cook* (1878), 47 L. J. (CH.) 508 (where, in a 60 per cent. loan, interest at 5 per cent. was allowed subsequent to the day for payment). *Re Roberts, Goodchap* v. *Roberts* (1880), 14 Ch. D. 49, 52, C. A., *Mellersh* v. *Brown* (1890), 45 Ch. D. 225, 230, and, p rhaps, the judgment of Lord DAVEY in *Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147, 154, suggest that full interest at the original rate will be allowed, but the procedure in *Wallington* v. *Cook*, *supra*, seems correct.

(*f*) *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A. see

binds the mortgagor to pay interest at the agreed rate on the principal sum or any judgment recovered therefor (*g*).

Rate of interest recoverable in foreclosure or redemption.

**413.** The rule just stated applies only to claims for interest made against the mortgagor personally under his covenants for payment of principal and interest. The amount for the time being recoverable under such covenants is independent of the amount for which the mortgaged property is a security. The security stands for the amount of the principal and the full interest—that is, interest at the agreed rate—and in taking the accounts in redemption or foreclosure, or for purposes incident to the realisation of the security, it is immaterial that personal judgment has been obtained (*h*). Similarly, where the debt is secured by bond, the full interest can be recovered against the mortgaged property, though the principal and interest recoverable on the bond is limited to the amount of the penalty (*i*).

Compound interest.

**414.** The mortgagor can validly agree to pay compound interest; that is, he can agree that interest in arrear shall be capitalised and shall bear interest at the same rate as the original advance (*k*); but the mortgagee cannot charge compound interest save under an agreement to that effect (*l*). Such agreement may be either express,

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*per* FRY, L.J., at p. 355; *Arbuthnot* v. *Bunsilall* (1890), 62 L. T. 234; *Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147, 149. Similarly, where the mortgage does not provide for interest after default, only 4 per cent. is recoverable after judgment (*Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A.; see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209); but a county court judgment does not carry interest (*R.* v. *Essex* (*County Court Judge*) (1887), 18 Q. B. D. 704, C. A.). If the covenant is to pay interest on principal remaining unpaid, it ceases to be operative on the judgment being obtained, since the principal due under the covenant is merged in the judgment debt, and is no longer, so it has been said, unpaid (*Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, 353, C. A.); if the covenant is to pay interest on the principal moneys remaining due on the security of the mortgage, the effect is different, and the covenant remains operative notwithstanding the judgment (*Popple* v. *Sylvester* (1882), 22 Ch. D. 98, where the action was to obtain personal payment, and not, as suggested in *Re Sneyd, Ex parte Fewings, supra*, at p. 345, to realise the security; see *Economic Life Assurance Society* v. *Usborne, supra*, at p. 152). As to the rate of interest on costs ordered in a redemption or foreclosure action to be added to the security, see p. 233, *post*.

(*g*) See *Re Sneyd, Ex parte Fewings, supra*, at p. 355; and after judgment a new agreement can be made continuing the old rate of interest (*Re Agriculturist Cattle Insurance Co., Ex parte Hughes* (1872), 4 Ch. D. 34, n., C. A.).

(*h*) *Economic Life Assurance Society* v. *Usborne, supra*; see *Lowry* v. *Williams*, [1895] 1 I. R. 274, C. A.

(*i*) *Clarke* v. *Abingdon* (*Lord*) (1810), 17 Ves. 106; see title BONDS, Vol. III., p. 93. As to allowing interest on arrears of an annuity as against other incumbrancers, see *Re Salvin, Worseley* v. *Marshall*, [1912] 1 Ch. 332.

(*k*) *Clarkson* v. *Henderson* (1880), 14 Ch. D. 348. As to the position of a mortgagee in possession in this respect, see p. 116, *ante*; and as to compound interest, see, further, title MONEY AND MONEY-LENDING, p. 43, *ante*.

(*l*) *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, H. L.; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, P. C; see *Procter* v. *Cooper* (1700), Prec. Ch. 116; *Brown* v. *Barkham* (1720), 1 P. Wms. 652. Formerly an agreement in the mortgage for capitalising interest in arrear was void, as tending to usury

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Implied agreement.

or implied from the nature of the dealings (*m*); where, for instance, the advances are made in the course of a trade or business in which compound interest is allowed (*n*). Thus, if the relation of banker and customer exists between mortgagee and mortgagor, and the mortgage is to secure a current account, the mortgagee is entitled to make up the account with yearly or half-yearly rests, and charge future interest on the aggregate balance of principal and interest appearing at each rest (*o*). But under a mortgage to a banker for a fixed sum the accounts must be kept on the footing of simple interest (*p*), unless otherwise agreed. An agreement to pay interest on arrears existing at a certain date will be inferred where interest has for a length of time been paid on an aggregate sum made up of the principal and those arrears (*q*).

Commission or fines on default of repayment by instalments.

**415.** A loan secured by mortgage may be made repayable by instalments of specified amount covering both principal and interest (*r*), and this is frequently done in the case of building society mortgages (*s*), and may be done in bills of sale (*t*). Additional sums,

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(*Chambers* v. *Goldwin* (1804), 9 Ves. 254, 271; *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126, 136), though, upon interest falling due, the parties might agree to turn it into principal (*Ossulston* (*Lord*) v. *Yarmouth* (*Lord*) (1707), 2 Salk. 449; *Thornhill* v. *Evans* (1742), 2 Atk. 330, where interest charged on arrears at a higher rate than that reserved was not allowed); and, accordingly, accounts might be settled half-yearly on that principle (*Ex parte Bevan* (1803), 9 Ves. 223; *Blackburn* v. *Warwick* (1836), 2 Y. & C. (EX.) 92). But the mortgagee cannot turn interest into principal against a subsequent incumbrancer of whose incumbrance he has notice (*Digby* v. *Craggs* (1763), Amb. 612).

(*m*) A mere intimation by the mortgagee that he intends to charge compound interest is not enough; there must be assent by the mortgagor (*Tompson* v. *Leith* (1858), 4 Jur. (N. S.) 1091).

(*n*) *Morgan* v. *Mather* (1792), 2 Ves. 15, 20.

(*o*) *Clancarty* (*Lord*) v. *Latouche* (1810), 1 Ball & B. 420; *Rufford* v. *Bishop* (1829), 5 Russ. 346; *Thomas* v. *Cooper* (1854), 18 Jur. 688, 690; and see title BANKERS AND BANKING, Vol. I., p. 631. The ordinary rule that receipts are first to be appropriated to payment of interest does not apply to such an account (*Parr's Banking Co.* v. *Yates*, [1898] 2 Q. B. 460, C. A.). But when the account ceases to be a current account, and a final balance is struck, whether on the death of the customer, or the cessation of the bank's business, or otherwise, the balance carries only simple interest (*Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121, H. L.; *Crosskill* v. *Bower*, *Bower* v. *Turner* (1863), 32 Beav. 86; *Williamson* v. *Williamson* (1869), L. R. 7 Eq. 542). Similarly, where partnership accounts have been kept on the footing of yearly or half-yearly rests, this method ceases to be applicable on the dissolution of the partnership (*Barfield* v. *Loughborough* (1872), 8 Ch. App. 1, 7); see title PARTNERSHIP.

(*p*) *Mosse* v. *Salt* (1863), 32 Beav. 269; *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413, 424, P. C.; though where the customer has settled accounts on the footing of compound interest, his executors may not be entitled to reopen them (*Stewart* v. *Stewart* (1891), 27 L. R. Ir. 351, 363). But a mortgage for a fixed sum may be in fact intended to cover a current account, and will so operate (*Thomas* v. *Cooper*, *supra*; see p. 225, *ante*).

(*q*) *M'Carthy* v. *Llandaff* (*Lord*) (1810), 1 Ball & B. 375.

(*r*) See p. 114, *ante*; *Walsh* v. *Derrick* (1903), 19 T. L. R. 209, C. A.

(*s*) See title BUILDING SOCIETIES, Vol. III., p. 366.

(*t*) See title BILLS OF SALE, Vol. III., pp. 38, 39; *Linfoot* v. *Pockett*, [1895] 2 Ch. 835, C. A., 840, note (b).

whether under the name of commission (*u*), or fines (*a*), may be agreed to be paid in the event of instalments being in arrear, and these will be allowed against the mortgagor in the accounts (*b*). But interest on fines cannot be charged (*c*), unless, for instance, on the construction of the agreement, the fines are to be added to principal (*d*).

Interest ceasing to run after tender.

**416.** A tender of the amount due on the mortgage at a time when the mortgagee is bound to receive it stops interest from running if the mortgagor keeps the money ready to pay over to the mortgagee (*e*). But for this purpose there must be an actual tender (*f*).

Time limit.

**417.** The statutory limitations on proceedings for the recovery of arrears of interest by a mortgagee of land are dealt with elsewhere (*g*).

Interest on mortgage of settled property.

**418.** Where the mortgaged property is in settlement subject to the mortgage, it is the duty of the tenant for life to keep down the interest (*h*), but this is a duty only as between himself and the

(*u*) *General Credit and Discount Co.* v. *Glegg* (1883), 22 Ch. D. 549; *The Benwell Tower* (1895), 72 L. T. 664.

(*a*) *Parker* v. *Butcher* (1867), L. R. 3 Eq. 762.

(*b*) And since a second mortgagee is not in any better position than the mortgagor, commission will also be allowed against him (*The Benwell Tower, supra,* at p. 669).

(*c*) *Parker* v. *Butcher, supra; Ingoldby* v. *Riley* (1873), 28 L. T. 55.

(*d*) *Provident Permanent Building Society* v. *Greenhill* (1878), 9 Ch. D. 122.

(*e*) *Gyles* v. *Hall* (1726), 2 P. Wms. 378; *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, 284, P. C.; *Rourke* v. *Robinson*, [1911] 1 Ch. 480; see *Lutton* v. *Rodd* (1675), 2 Cas. in Ch. 206; *Cliff* v. *Wadsworth* (1843), 2 Y. & C. Ch. Cas. 598; p. 149, *ante*. The mortgagor should pay the money into court if there are any proceedings pending in which this can be done; if he makes profit—as by placing the money on deposit—he must account for this to the mortgagee (*Edmondson* v. *Copland*, [1911] 2 Ch. 301, 310; compare *Robarts* v. *Jefferys* (1830), 8 L. J. (O. S.) (CH.) 137; R. S. C., Ord. 22, r. 3). A mortgagee is not entitled to interest if by his own default he delays payment off (see *Thornton* v. *Court* (1854), 3 De G. M. & G. 293, 301, C. A.); but unavoidable delay in revesting the property in the mortgagor is not such default (*Webb* v. *Crosse*, [1912] 1 Ch. 323). As to payment of six months' interest in lieu of notice, and the cases where this is excused, see pp. 147, 148, *ante*. As to interest being stopped on loss of title deeds, see p. 208, *ante*.

(*f*) See p. 148, *ante;* an expression of willingness is not sufficient (*Bishop* v. *Church* (1751), 2 Ves. Sen. 371, 372; *Garforth* v. *Bradley* (1755), 2 Ves. Sen. 675, 678; *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610); and see *Webb* v. *Crosse, supra*. If the mortgagee fails to attend on the day fixed for payment in a redemption suit, a new day is appointed, and subsequent interest is not allowed (*Hughes* v. *Williams* (1853), Kay, Appendix, iv.); and see p. 153, *ante*.

(*g*) See title LIMITATION OF ACTIONS, Vol. XIX., pp. 101, 102. There is no such limit in the case of a mortgage of personalty; see *ibid.*, p. 173. But actions on the covenant are subject to the statutory bar; see *ibid.*, p. 76.

(*h*) *Revel* v. *Watkinson* (1748), 1 Ves. Sen. 93; *Burges* v. *Mawbey* (1823), Turn. & R. 167, 174; *Marshall* v. *Crowther* (1874), 2 Ch. D. 199; see title SETTLEMENTS. If he makes good a deficiency out of his own moneys, he has no charge for the amount on the inheritance, unless in some way he has intimated his intention to charge it (*Kensington (Lord)* v. *Bouverie*

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remainderman. The mortgagee is not affected, and, unless he has allowed interest to remain unpaid by collusion with the remainderman or other misconduct, he can recover against the inheritance arrears which have accumulated during the life tenancy (*i*).

Overpayments and underpayments.

**419.** Where interest has been paid on a sum greater than that ultimately held to be charged on the property, the overpayment is not treated as paid in reduction of principal (*k*); and under special circumstances an overpayment of interest may be refunded to the mortgagor (*l*), or an underpayment made good to the mortgagee (*m*).

Capitalisation of interest on transfer, or on redemption by puisne mortgagee.

**420.** Where at the time of the transfer of a mortgage there are arrears of interest due which the transferee pays to the transferor, he can add these to the principal so that thenceforth they will carry interest, if the transfer is made with the concurrence of the mortgagor, but not otherwise (*n*). But on redemption by a puisne incumbrancer, the aggregate amount which he pays for principal, interest and costs, carries interest against the persons subsequently entitled to redeem (*o*).

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(1859), 7 H. L. Cas. 557). Subsequent rents during the life of a tenant for life are applicable to liquidate arrears during the same life tenancy, but he is not liable to make good arrears of a previous life tenancy (*Caulfield* v. *Maguire* (1845), 2 Jo. & Lat. 141, 160; *Honywood* v. *Honywood*, [1902] 1 Ch. 347). Where several estates are included in the same settlement, the tenant for life is bound, out of the whole rents and profits, to keep down the interest on charges on all the estates (*Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Honywood* v. *Honywood*, *supra*).

(*i*) *Aston* v. *Aston* (1749), 1 Ves. Sen. 264; *Loftus* v. *Swift* (1806), 2 Sch. & Lef. 642, 654; *Roe* v. *Pogson* (1816), 2 Madd. 457; *Wrixon* v. *Vize* (1842), 2 Dr. & War. 192, 202; *Re Morley*, *Morley* v. *Saunders* (1869), L. R. 8 Eq. 594. The principle applies equally whether the mortgage is made before or after the estate is settled. The mortgagor cannot by putting the equity of redemption in settlement affect the rights of the mortgagee, and mere laches on the part of the mortgagee does not prejudice his claim against the remainderman (*Wrixon* v. *Vize*, *supra*; *Hill* v. *Browne* (1844), Drury *temp.* Sug. 426, 435). The remainderman has his remedy by proceedings to compel the tenant for life to keep down the interest (*Kensington* (*Lord*) v. *Bouverie* (1859), 7 H. L. Cas. 557, 596; *Makings* v. *Makings* (1860), 1 De G. F. & J. 355, 358; but see *Scholefield* v. *Lockwood* (1863), 4 De G. J. & Sm. 22, 31, where it was said that no right arises to the remainderman till the death of the tenant for life). Similarly, all arrears of interest are chargeable by the first mortgagee as against a second mortgagee (*Aston* v. *Aston*, *supra*), unless the first mortgagee has been in possession and has allowed the mortgagor to have the rents without paying interest (*Bentham* v. *Haincourt* (1691), Prec. Ch. 30; *Loftus* v. *Swift*, *supra*, at p. 655).

(*k*) *Blandy* v. *Kimber* (No. 2) (1858), 25 Beav. 537; *contra*, in Ireland (*Re Carroll's Estate*, [1901] 1 I. R. 78).

(*l*) *Tyler* v. *Manson*, *Manson* v. *Tyler* (1826), 5 L. J. (o. s.) (CH.) 34.

(*m*) *Gregory* v. *Pilkington* (1856), 8 De G. M. & G. 616, C. A.

(*n*) *Ashenhurst* v. *James* (1745), 3 Atk. 270; *Matthews* v. *Wallwyn* (1798), 4 Ves. 118, 128; *Agnew* v. *King*, [1902] 1 I. R. 471; see *Gladwyn* v. *Hitchman* (1690), 2 Vern. 135; *Macclesfield* (*Earl*) v. *Fitton* (1683), 1 Vern. 169. Originally the court appears to have allowed arrears of interest to be capitalised on a transfer whether the mortgagor concurred or not (*Anon.* (1675), 1 Cas. in Ch. 258; *Gladwyn* v. *Hitchman*, *supra*; see *Cottrell* v. *Finney* (1874), 9 Ch. App. 541, 548). In *Anon.* (1719), Bunb. 41, it was said that the mortgagor would be subject to capitalisation if the money had been called in, and he refused either to pay or to concur in the assignment.

(*o*) *Elton* v. *Curteis* (1881), 19 Ch. D. 49; see p. 289, *post*.

SUB-SECT. 4.—*Costs, Charges and Expenses.*

SECT. 5. Accounts.

(i.) *In General.*

Extent of mortgagee's right to indemnity.

**421.** The mortgagee is entitled to be indemnified against all expense so long as he acts reasonably as mortgagee (*p*). Accordingly the account taken in a foreclosure action includes his costs of the action (*q*), unless he is specially deprived of them for misconduct (*r*), and he is allowed also all proper costs, charges, and expenses incurred by him in relation to the mortgage debt or mortgage security, including the costs of litigation properly undertaken by him (*a*). But all these items are allowed only as a condition of redeeming (*b*). There is no implied contract by the mortgagor to pay them, and they are not, in the absence of express agreement, recoverable against him personally (*c*).

(ii.) *Costs of Foreclosure or Redemption Action.*

Forfeiture of right to costs.

**422.** The contract between mortgagor and mortgagee, as interpreted by the court, makes the mortgaged property a security for the costs properly incident to a suit for foreclosure or redemption; but the mortgagee will forfeit his right to costs if there is such inequitable conduct on his part as to amount to a violation or culpable neglect of duty under the mortgage contract, or if his conduct as mortgagee is otherwise improper (*d*). In such cases he may either be made to pay costs or be merely deprived of costs (*e*). An order for an account to be taken, including the mortgagee's taxed costs of the action, does not prevent an adverse order as to costs if reason for this subsequently appears (*f*).

(*p*) *Detillin* v. *Gale* (1802), 7 Ves. 583, 585; *Dryden* v. *Frost* (1838), 3 My. & Cr. 670, 675; *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, 592, C. A. As to the costs of the mortgage, see p. 123, *ante*.

(*q*) See 3 Seton, Judgments and Orders, 6th ed., pp. 1895, 1926.

(*r*) See the text, *infra*, and p. 235, *post*.

(*a*) *Re Wallis, Ex parte Lickorish* (1890), 25 Q. B. D. 176, 181, C. A.

(*b*) See pp. 145, 156, *ante*.

(*c*) *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, 352, C. A.

(*d*) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295, *per* Lord SELBORNE, L.C., at p. 302; *Cotterell* v. *Finney* (1874), 9 Ch. App. 541, 551; *Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610, 619; see *Dunstan* v. *Patterson* (1847), 2 Ph. 341. But the mortgagee's right is limited to costs incurred by him as mortgagee (*Wickenden* v. *Rayson* (1856), 25 L. J. (CH.) 641). As to the mortgagor's right to tax the mortgagee's solicitor's bill after payment in a foreclosure action of the sum claimed and a specified sum for costs, see *Re Griffiths, Jones & Co.* (1883), 50 L. T. 434, C. A.; and see, generally, *Re Longbotham & Sons*, [1904] 2 Ch. 152, C. A., and title SOLICITORS. As to the general liabilities of a mortgagee, see pp. 186 *et seq.*, *ante*.

(*e*) *Detillin* v. *Gale*, *supra*; *Harvey* v. *Tebbutt* (1820), 1 Jac. & W. 197, 202; *Kinnaird* v. *Trollope*, *supra*; see p. 235, *post*. If the mortgagee proceeds by writ when a summons is proper, the mortgagor will only have to pay the costs of an action by summons (*Johnson* v. *Evans* (1888), 60 L. T. 29; compare *Barr* v. *Harding* (1887), 36 W. R. 216; *Brooking* v. *Skewis* (1887), 58 L. T. 73; note (*t*), p. 152, *ante*).

(*f*) *Ashworth* v. *Lord* (1887), 36 Ch. D. 545, 551, disagreeing on this point with *Wilson* v. *Metcalfe* (1826), 1 Russ. 530; see *Quarrell* v. *Beckford* (1816), 1 Madd. 269, 285.

SECT. 5. Accounts.

When costs are in discretion of court.

**423.** The mortgagee's costs of suit are not, like ordinary costs, in the discretion of the court (*g*); and if a charge of misconduct is made against him and proved, and he is thereupon deprived of his costs or made to pay costs, he can appeal as of right (*h*); but if, notwithstanding the misconduct, he is allowed his costs, the mortgagor cannot appeal except by leave, since the costs are then in the discretion of the court (*i*).

Taxation.

**424.** Costs are taxed as between party and party (*k*), and are not in general payable by the mortgagor personally, but the mortgagee adds them to his security (*l*). Where a foreclosure action relates to two mortgages which the mortgagee is not entitled to consolidate, the costs are apportioned rateably between the two estates (*m*).

Costs of successive incumbrancers.

**425.** Where there are successive incumbrancers the same rule prevails, and each incumbrancer adds his costs to his security (*n*), save that where a subsequent incumbrancer institutes proceedings, not in his own interest only, but to secure or to realise and

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(*g*) R. S. C., Ord. 65, r. 1. As to the early practice, see *Owen* v. *Griffith* (1749), 1 Ves. Sen. 250. As to the costs of an action for account against a mortgagee who has realised his security, see p. 237, *post*.

(*h*) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295, 302; *Charles* v. *Jones* (1886), 33 Ch. D. 80, C. A.; *M'Donnell* v. *M'Mahon* (1889), 23 L. R. Ir. 283; and the mortgagee, if successful, will add the costs of the appeal to his security (*Cotterell* v. *Stratton, supra*; see *Norton* v. *Cooper* (1854), 5 De G. M. & G. 728, 734, C. A.).

(*i*) *Charles* v. *Jones, supra*; *Heath* v. *Chinn* (1908), 98 L. T. 855, 858. There can be no appeal as to costs which are in the discretion of the court, except by leave (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49); see title PRACTICE AND PROCEDURE.

(*k*) *The Kestrel* (1866), L. R. 1 A. & E. 78, 81; *Re Queen's Hotel Co., Cardiff, Ltd., Re Vernon Tin Plate Co., Ltd.*, [1900] 1 Ch. 792; see *Re New Zealand Midland Rail. Co., Smith* v. *Lubbock*, [1901] 2 Ch. 357, 365, C. A.; compare, *contra*, *Re Griffiths, Jones & Co.* (1883), 50 L. T. 434, C. A.; and the rule that the mortgagee is entitled to indemnity requires that he should have solicitor and client costs, and this was formerly allowed (*Lomax* v. *Hyde* (1690), 2 Vern. 185). Although foreclosure might be brought in the county court, the mortgagee will be entitled to the costs of an action in the High Court (*Brown* v. *Rye* (1874), L. R. 17 Eq. 343), unless the parties live near to each other (*Simons* v. *McAdam* (1868), L. R. 6 Eq. 324; *Crozier* v. *Dowsett* (1885), 31 Ch. D. 67).

(*l*) *Frazer* v. *Jones* (1846), 5 Hare, 475, 483.

(*m*) *De Caux* v. *Skipper, Tee* v. *De Caux* (1886), 31 Ch. D. 635, C. A., overruling *Clapham* v. *Andrews* (1884), 27 Ch. D. 679. As to consolidation, see pp. 208 *et seq.*, *ante*.

(*n*) *Ford* v. *Chesterfield* (*Earl*) (1856), 21 Beav. 426, 428; *Wright* v. *Kirby* (1857), 23 Beav. 463, 467; *Johnstone* v. *Cox* (1881), 19 Ch. D. 17, 19, C. A.; *Bird* v. *Wenn* (1886), 33 Ch. D. 215, 219; *Pollock* v. *Lands Improvement Co.* (1888), 37 Ch. D. 661, 668. Accordingly the costs are payable in the same priority as the debts (*Barnes* v. *Racster* (1842), 1 Y. & C. Ch. Cas. 401, 403); compare *Re Baldwin's Estate*, [1900] 1 I. R. 15. But while in a priority suit the costs usually follow the mortgages, the court has a discretion, and can order one or other of the claimants to pay the costs if a case is made for it (*Harpham* v. *Shacklock* (1881), 19 Ch. D. 207, 215, C. A.). If a second mortgagee makes an unsuccessful claim to priority in the first mortgagee's foreclosure action, the first mortgagee will add his ordinary foreclosure costs to his security, and the second mortgagee will pay the extra costs occasioned by the claim (*Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482, 496, C. A.).

distribute the mortgaged property (*o*), or to ascertain the priority of the incumbrancers (*p*), he is entitled to his costs, so far as incurred for these objects, as a first charge on the fund.

When costs payable personally.

But a mortgagor or subsequent incumbrancer, who raises an untenable defence, must pay personally any costs so occasioned for which the mortgagee's security is insufficient (*q*), and a redemption action, if the mortgagor fails to redeem, is dismissed with costs to be paid by him personally (*r*).

Costs of parties claiming under mortgagee.

**426.** After the mortgage has become absolute at law, the mortgagee is entitled to deal with the mortgaged property as owner, and if he settles or otherwise disposes of the mortgage, so that persons claiming under him become necessary parties to a redemption (*s*) or foreclosure (*t*) action, their costs also are payable out of the property (*a*). Where a sub-mortgagee is a necessary party, he has his costs against the mortgagee, and the mortgagee adds them to his own debt (*b*). But this rule only applies to costs due to persons claiming under the mortgagee. The mortgagee is not bound to pay, and add to his security, the costs of necessary parties claiming under the mortgagor, such as a trustee in bankruptcy (*c*) or an heir-at-law, even though an infant (*d*).

Interest on costs.

**427.** The mortgagee is not entitled to interest on costs of an ordinary redemption or foreclosure action; but if a special order is made whereby the costs are to be added to his security, they will then carry interest, and this will be at the rate of 4 per cent. per annum, notwithstanding that a higher rate is reserved by the mortgage (*e*).

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(*o*) *White* v. *Peterborough* (*Bishop*) (1821), Jac. 402; *Ford* v. *Chesterfield* (*Earl*) (1856), 21 Beav. 426; *Wright* v. *Kirby* (1857), 23 Beav. 463.

(*p*) *Batten, Proffitt and Scott* v. *Dartmouth Harbour Commissioners* (1890), 45 Ch. D. 612; *Carrick* v. *Wigan Tramways Co.*, [1893] W. N. 98; and cases cited in note (*n*), p. 232, *ante*. In *Re Barne, Lee* v. *Barne* (1890), 62 L. T. 922, this principle was applied to an administration action brought by a subsequent incumbrancer.

(*q*) *Liverpool Marine Credit Co.* v. *Wilson* (1872), 7 Ch. App. 507, 512; *Guardian Assurance Co.* v. *Avonmore* (*Lord*) (1873), 7 I. R. Eq. 496; see *Sharples* v. *Adams* (1863), 1 New Rep. 460.

(*r*) See *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460, C. A., where a first mortgagee was also third mortgagee; and see p. 153, *ante*. As to costs payable by a puisne mortgagee who fails to redeem, see p. 154, *ante*.

(*s*) *Wetherell* v. *Collins* (1818), 3 Madd. 255.

(*t*) *Bartle* v. *Wilkin* (1836), 8 Sim. 238.

(*a*) But not where the assignment is in the course of an action for redemption (*Barry* v. *Wrey* (1827), 3 Russ. 465), or foreclosure (*Coles* v. *Forrest* (1847), 10 Beav. 552); and as to transfer of rights *pendente lite*, see *Booth* v. *Creswicke* (1837), 8 Sim. 352.

(*b*) *Smith* v. *Chichester* (1842), 2 Dr. & War. 393, 404. Where possible, the sub-mortgagee should be joined as co-plaintiff (*ibid.*).

(*c*) *Hunter* v. *Pugh* (1840), 1 Hare, 307, n.; *Appleby* v. *Duke* (1842), 1 Hare, 303; (1843) 1 Ph. 272; *Clarke* v. *Wilmot* (1843), 1 Ph. 276. The earlier decisions *contra* are referred to in *Appleby* v. *Duke* (1843), 1 Ph. 272, 274. As to costs of disclaiming defendants, see p. 295, *post*.

(*d*) *Wade* v. *Ward* (1859), 4 Drew. 602.

(*e*) *Eardley* v. *Knight* (1889), 41 Ch. D. 537; see *Lippard* v. *Ricketts* (1872), L. R. 14 Eq. 291. Under the Judgments Act, 1838 (1 & 2 Vict.

SECT. 5. Accounts.

How far mortgagee's costs have priority over costs of other parties.

**428.** The mortgagee's right to costs extends to the costs of an action in which his security is realised by sale (*f*); but his priority for his debt and costs over the costs of other parties depends on the object of the action. If the action is designed to give the mortgagee no benefit beyond the realisation of his security, or if the matter within the jurisdiction of the court is in effect the equity of redemption only (*g*), the mortgagee is entitled to priority over the costs of other parties; and the proceeds of sale will be paid to him so far as required for satisfaction of his principal, interest and costs, without deduction except of the expenses of sale (*h*). This is so notwithstanding that he consents to (*i*) or asks for (*k*) a sale. Similarly, when the mortgagee comes in under an administration judgment, and submits to have his rights determined, he will be entitled to principal, interest and costs out of the net proceeds of the property in priority to the costs of other parties (*l*).

Effect of institution of administration proceedings by mortgagee.

**429.** But where the mortgagee, instead of relying on his security only, institutes a suit for the administration of the mortgagor's

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c. 110), ss. 17, 18, interest only runs on costs ordered to be paid by one party to the other, not on costs payable out of an estate (*A.-G.* v. *Nethercote* (1841), 11 Sim. 529); see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209.

(*f*) *Wade* v. *Ward* (1859), 4 Drew. 602. An equitable mortgagee by deposit is entitled to costs, whether there was an accompanying memorandum or not (*Connell* v. *Hardie* (1839), 3 Y. & C. (EX.) 582; *R.* v. *Chambers* (1840), 4 Y. & C. (EX.) 54); though formerly he was not allowed the costs of establishing his right to a sale where there was no memorandum (*Re Wells, Ex parte Brightens* (1818), 1 Swan. 3; *Ex parte Trew* (1818), 3 Madd. 372; *Re Evans, Ex parte Robinson* (1832), 1 Deac. & Ch. 119), unless it had been dispensed with under a trade custom (*Re Davies, Ex parte Moss* (1849) 3 De G. & Sm. 599); and the distinction may have been revived by *Re Gawan, Ex parte Barclay* (1855), 5 De G. M. & G. 403, 417, C. A., either generally or in bankruptcy only.

(*g*) See *Armstrong* v. *Storer* (1852), 14 Beav. 535, 538. This is so in an administration suit if it becomes necessary to sell the property, but the mortgagee is not otherwise interested in the suit (*Hepworth* v. *Heslop* (1844), 3 Hare, 485; *Wonham* v. *Machin* (1870), L. R. 10 Eq. 447; *Hilliard* v. *Moriarty*, [1894] 1 I. R. 316, C. A.).

(*h*) Since the mortgagee gets the benefit of the sale the expenses of sale are a first charge (*Dighton* v. *Withers* (1862), 31 Beav. 423; *Re Oriental Hotels Co., Perry* v. *Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Batten* v. *Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; *Lathom* v. *Greenwich Ferry Co.* (1895), 72 L. T. 790); but this has not always been recognised (*Upperton* v. *Harrison* (1835), 7 Sim. 444; *Millar* v. *Johnston* (1888), 23 L. R. Ir. 50; *Ross* v. *Ross* (1892), 29 L. R. Ir. 318); and see *Re Mackinlay, Ward* v. *Mackinlay* (1864), 2 De G. J. & Sm. 358, C. A. As to costs in debenture-holders' actions, see title COMPANIES, Vol. V., pp. 387, 388.

(*i*) *Wild* v. *Lockhart* (1847), 10 Beav. 320; *Cutfield* v. *Richards* (1858), 26 Beav. 241; *Wade* v. *Ward, supra*; *Cook* v. *Hart* (1871), L. R. 12 Eq. 459; see *Crosse* v. *General Reversionary and Investment Co.* (1853), 3 De G. M. & G. 698.

(*k*) *Wonham* v. *Machin, supra.*

(*l*) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601. A mortgagee does not adopt a suit, so as to let in the costs in priority to his mortgage, by allowing his rights to be ascertained in it (*Langton* v. *Langton* (1855), 7 De G. M. & G. 30, 37, C. A.); though, if he is a party to the proceedings, he must allow the costs of realisation to be first paid out of the proceeds of sale (*Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, 427, C. A.).

estate, he subjects himself to the ordinary rule in administration that the costs of all necessary and proper parties are a first charge upon the estate (*m*), and consequently these costs, including the expenses of sale, rank before the mortgage (*n*). But if the mortgagee institutes a suit to realise his security, and also for administration of the mortgagor's estate with a view to realising any deficiency out of the general estate, he is entitled, subject to the expenses of sale, to the entire produce of the mortgaged property towards payment of his debt and costs; and as regards the general assets, the costs of all parties will be paid in the first place as in an ordinary administration suit (*o*).

Where mortgagee ordered to pay or deprived of costs :—

**430.** In the following cases the mortgagee will be ordered to pay costs, or, if there has been default also on the side of the mortgagor, he will be only deprived of costs :—

(1) Refusal of tender ;

(1) If the mortgagor makes an unconditional tender of a sum sufficient to cover the amount secured by the mortgage, at a time when he is entitled to pay off the mortgage (*p*), and the mortgagee refuses to accept it, he must pay the costs of a redemption action thus made necessary (*q*). But, in the absence of a tender, he does not forfeit his right to costs merely by claiming more than is due to him (*r*), or by bringing before the court a question as to the amount due, even though he is unsuccessful in his contention (*s*): such a claim is not necessarily vexatious, so as to deprive the mortgagee of the benefit of the general rule (*t*).

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(*m*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 349.

(*n*) *Armstrong* v. *Storer* (1852), 14 Beav. 535, 538; *Walter* v. *Stanton* (1862), 10 W. R. 570; *Re Spensley's Estate, Spensley* v. *Harrison* (1872), L. R. 15 Eq. 16; *Leonard* v. *Kellett* (1891), 27 L. R. Ir. 418, 427. In a mortgagee's suit the expenses of sale are usually part of his own costs.

(*o*) *Tipping* v. *Power* (1842), 1 Hare, 405; *Tuckley* v. *Thompson* (1860), 1 John. & H. 126; *Pinchard* v. *Fellows* (1874), L. R. 17 Eq. 421; *Leonard* v. *Kellett, supra*; compare *White* v. *Gudgeon* (1862), 30 Beav. 545, where the costs of the administrator's suit were given priority on the ground of an overclaim by the mortgagee.

(*p*) *Edmondson* v. *Copland*, [1911] 2 Ch. 301.

(*q*) *Harmer* v. *Priestley* (1853), 16 Beav. 569; see *Wilson* v. *Cluer* (1841), 4 Beav. 214; *Smith* v. *Green* (1844), 1 Coll. 555; *Roberts* v. *Williams* (1844), 4 Hare, 129; *Morley* v. *Bridges* (1846), 2 Coll. 621; *Hoskin* v. *Sincock* (1865), 12 L. T. 262; *Cottrell* v. *Finney* (1874), 9 Ch. App. 541, 551. Or the mortgagee, if he fails on part of his case, may be disallowed the costs of that part (*Kinnaird* v. *Trollope* (1889), 42 Ch. D. 610, 621). In order to throw the costs on the mortgagee, the mortgagor must make an actual tender (*Gammon* v. *Stone* (1749), 1 Ves. Sen. 339), notwithstanding that there is a dispute on a question of law (*Hodges* v. *Croydon Canal Co* (1840), 3 Beav. 86); and, as to tender, see p. 149, *ante*.

(*r*) *Loftus* v. *Swift* (1806), 2 Sch. & Lef. 642, 657; *Cottercll* v. *Stratton* (1872), 8 Ch. App. 295; *Re Watts, Smith* v. *Watts* (1882), 22 Ch. D. 5, C. A.; *Kinnaird* v. *Trollope, supra*, at p. 619. The fact that the deed contains a receipt for more than the sum actually advanced is not a ground for depriving the mortgagee of costs (*Dunstan* v. *Patterson* (1847), 2 Ph. 341, 345).

(*s*) *Re Watts, Smith* v. *Watts, supra*, at p. 14; *Stone* v. *Lickorish*, [1891] 2 Ch. 363, 370.

(*t*) *Norton* v. *Cooper* (1854), 5 De G. M. & G. 728, C. A. As to the general rule, see p. 231, *ante*.

SECT. 5. Accounts.

and, if the claim is supported by proper evidence, an inquiry will be directed as to costs, charges and expenses properly incurred by the mortgagee in respect of his mortgage security, not being costs of the action (*e*).

Appeals.

The rules with respect to appeals as to costs of the action (*f*) do not apply to such costs, charges and expenses, and where they are allowed the mortgagor has a right of appeal (*g*).

Costs allowed :—

**433.** The costs of litigation which are allowed include the following :—

(1) of defending title ;

(1) Costs incurred in asserting or defending the mortgagor's title to the mortgaged property (*h*), and in defending the mortgagee's title against the mortgagor and his successors in title (*i*) ; but not costs incurred in defending the mortgagee's title to the mortgage against a third person (*j*). Where the mortgagee has already received party and party costs, he is entitled to charge the deficiency below solicitor and client costs (*k*). But the proceedings must be reasonably undertaken : an equitable mortgagee cannot have the costs of proceedings which are only suitable for a legal mortgagee (*l*) ; and the proceedings must not fail through the neglect of the mortgagee (*m*).

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when the account is to include more than principal, interest and costs of the action, a special case must be made (*Bolingbroke* v. *Hinde* (1884), 25 Ch. D. 795) ; save that costs, charges and expenses, which are expressly included in the security, are allowed without mention in the order as "just allowances" (*Blackford* v. *Davis* (1869), 4 Ch. App. 304) ; and also the expenses of recovering possession (see p. 239, *post*), and of necessary repairs and ordinary outgoings (see pp. 240 *et seq.*, *post*).

(*e*) *Merriman* v. *Bonney* (1864), 12 W. R. 461 ; 3 Seton, Judgments and Orders, 6th ed., p. 1964. This form gives the mortgagee all that he is entitled to, and additional words are not inserted (*Rees* v. *Metropolitan Board of Works* (1880), 14 Ch. D. 372 ; see *Clark* v. *Hoskins* (1868), 37 L. J. (CH.) 561, C. A.) ; and see p. 145, *ante*.

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

(*g*) *Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492, C. A. ; *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547, C. A. ; and compare p. 232, *ante*.

(*h*) *Godfrey* v. *Watson* (1747), 3 Atk. 517, 518 ; *Sandon* v. *Hooper* (1843), 6 Beav. 246 ; *Selater* v. *Cottam* (1857), 5 W. R. 744 ; and the costs of defending proceedings caused by the mortgagor claiming to dispose of the whole property when part did not belong to him, but not the costs of an appeal (*Re Hofmann, Ex parte Carr* (1879), 11 Ch. D. 62, C. A.) ; and see p. 186, *ante*. In a redemption action the costs of a pending foreclosure action must be provided for (*Ainsworth* v. *Roe* (1850), 14 Jur. 874).

(*i*) *Ramsden* v. *Langley* (1706), 2 Vern. 536 ; *Samuel* v. *Jones* (1862), 7 L. T. 760 ; see *Clark* v. *Hoskins, supra*, at p. 569 ; *Re Baldwin's Estate*, [1900] 1 I. R. 15.

(*j*) *Parker* v. *Watkins* (1859), John. 133 : "It is the ordinary case of anyone who has the misfortune to have dealings with a litigious person, who is unable to pay the costs occasioned by his conduct" (*ibid. per* WOOD, V.-C., at p. 137). Similarly the mortgagee cannot charge the costs of defending an action of trespass brought by a third person (*Owen* v. *Crouch* (1857), 5 W. R. 545) ; and see p. 187, *ante*.

(*k*) *Ramsden* v. *Langley, supra* ; see *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348, C. A.

(*l*) *Dryden* v. *Frost* (1838), 3 My. & Cr. 670. So a mortgagee, who has sold under a contract which is unenforceable for misdescription, cannot charge the costs of a suit for specific performance (*Peers* v. *Ceeley* (1852), 15 Beav. 209).

(*m*) *Burke* v. *O'Connor* (1855), 4 I. Ch. R. 418, where an action for failed through being brought in the name of the wrong person.

(2) Costs incurred in obtaining possession of the mortgaged property. Thus the mortgagee is allowed expenses of taking possession (*n*), and the costs of an action to recover possession (*o*), of the mortgaged property, and these may be included in his account as "just allowances" without special mention in the order (*p*).

(2) of obtaining possession;

(3) Costs of recovering the mortgage debt. The mortgagee is allowed the costs of an action to recover the mortgage debt, whether brought against the mortgagor (*q*) or a surety, and notwithstanding that the action is unproductive through the insolvency of the surety (*r*); the costs incident to the dishonour of a bill or note (*s*); and costs of administration to a deceased mortgagor, if this is required for recovering the debt (*t*).

(3) of recovering debt.

### (iv.) *Costs, Charges and Expenses Generally.*

**434.** The mortgagee's costs, charges and expenses which he can add to his security do not, in the absence of special stipulation (*a*), include the costs of negotiating the loan and preparing the mortgage; for these the mortgagor is personally liable (*b*). They include the following (*c*):—

Costs, charges and expenses which may be added to security:—

(1) Costs of completing the security, such as the costs of obtaining a legal mortgage in pursuance of an agreement accompanying a mortgage by deposit of deeds, but not the costs of investigating the mortgagor's title for the purpose of such legal mortgage (*d*); and where the security is on a fund in court, and

(1) costs of completing security;

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(*n*) *Wilkes* v. *Saunion* (1877), 7 Ch. D. 188.

(*o*) *Millar* v. *Major* (1818), Coop. *temp.* Cott. 550; *Lewis* v. *John* (1838), 9 Sim. 366; *Sandon* v. *Hooper* (1843), 6 Beav. 246, 250; *Owen* v. *Crouch* (1857), 5 W. R. 545; see *Horlock* v. *Smith* (1844), 1 Coll. 287.

(*p*) See *Wilkes* v. *Saunion*, *supra*, commenting on *Horlock* v. *Smith*, *supra*. Formerly the costs had to be expressly mentioned in the pleadings (*Millar* v. *Major*, *supra*; compare *Ward* v. *Barton* (1841), 11 Sim. 534).

(*q*) *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A. *Lewis* v. *John* (1838), 9 Sim. 366, *contra*, is overruled on this point, though it has been objected that such costs are not costs in relation to the mortgage security (*Merriman* v. *Bonney* (1864), 12 W. R. 461).

(*r*) *Ellison* v. *Wright* (1827), 3 Russ. 458. And it is the same where the contract of suretyship is subsequent to the mortgage (*Sachs* v. *Ashby & Co.* (1903), 88 L. T. 393).

(*s*) *Aberdeen* v. *Chitty* (1839), 3 Y. & C. (EX.) 379, 382.

(*t*) *Ramsden* v. *Langley* (1706), 2 Vern. 536; see *Ward* v. *Barton*, *supra*; and costs of administration necessary for enabling the mortgagee to enforce his rights against the property are allowed (*Hunt* v. *Fownes* (1803), 9 Ves. 70); but costs of administration incurred by the mortgagor's representative without the request of the mortgagee do not take priority to the mortgage (*Saunders* v. *Dunman* (1878), 7 Ch. D. 825).

(*a*) Where the mortgage is to cover "every sum advanced or paid by the mortgagee to, or to become owing to him by," the mortgagor, this does not cover costs (*Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A.).

(*b*) *Wales* v. *Carr*, [1902] 1 Ch. 860; see *Gregg* v. *Slater* (1856), 22 Beav. 314. But under special circumstances they may be allowed, and then they include fees to counsel for settling the draft mortgage (*Nicholson* v. *Jeyes* (1853), 22 L. J. (CH.) 833, C. A.). As to the costs of the mortgage, see p. 123, *ante*.

(*c*) As to costs of reconveyance, see p. 317, *post*.

(*d*) *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A., including costs of correspondence as to the legal mortgage. Similarly, the costs of a surrender of copyholds are allowed (*Pryce* v. *Bury* (1854),

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and, if the claim is supported by proper evidence, an inquiry will be directed as to costs, charges and expenses properly incurred by the mortgagee in respect of his mortgage security, not being costs of the action (*e*).

Appeals.

The rules with respect to appeals as to costs of the action (*f*) do not apply to such costs, charges and expenses, and where they are allowed the mortgagor has a right of appeal (*g*).

Costs allowed :—

**433.** The costs of litigation which are allowed include the following :—

(1) of defending title ;

(1) Costs incurred in asserting or defending the mortgagor's title to the mortgaged property (*h*), and in defending the mortgagee's title against the mortgagor and his successors in title (*i*) ; but not costs incurred in defending the mortgagee's title to the mortgage against a third person (*j*). Where the mortgagee has already received party and party costs, he is entitled to charge the deficiency below solicitor and client costs (*k*). But the proceedings must be reasonably undertaken : an equitable mortgagee cannot have the costs of proceedings which are only suitable for a legal mortgagee (*l*) ; and the proceedings must not fail through the neglect of the mortgagee (*m*).

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when the account is to include more than principal, interest and costs of the action, a special case must be made (*Bolingbroke* v. *Hinde* (1884), 25 Ch. D. 795) ; save that costs, charges and expenses, which are expressly included in the security, are allowed without mention in the order as "just allowances" (*Blackford* v. *Davis* (1869), 4 Ch. App. 304) ; and also the expenses of recovering possession (see p. 239, *post*), and of necessary repairs and ordinary outgoings (see pp. 240 *et seq.*, *post*).

(*e*) *Merriman* v. *Bonney* (1864), 12 W. R. 461 ; 3 Seton, Judgments and Orders, 6th ed., p. 1964. This form gives the mortgagee all that he is entitled to, and additional words are not inserted (*Rees* v. *Metropolitan Board of Works* (1880), 14 Ch. D. 372 ; see *Clark* v. *Hoskins* (1868), 37 L. J. (CH.) 561, C. A.) ; and see p. 145, *ante*.

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

(*g*) *Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492, C. A. ; *Re Beddoe, Downes* v. *Cottam*, [1893] 1 Ch. 547, C. A. ; and compare p. 232, *ante*.

(*h*) *Godfrey* v. *Watson* (1747), 3 Atk. 517, 518 ; *Sandon* v. *Hooper* (1843), 6 Beav. 246 ; *Selater* v. *Cottam* (1857), 5 W. R. 744 ; and the costs of defending proceedings caused by the mortgagor claiming to dispose of the whole property when part did not belong to him, but not the costs of an appeal (*Re Hofmann, Ex parte Carr* (1879), 11 Ch. D. 62, C. A.) ; and see p. 186, *ante*. In a redemption action the costs of a pending foreclosure action must be provided for (*Ainsworth* v. *Roe* (1850), 14 Jur. 874).

(*i*) *Ramsden* v. *Langley* (1706), 2 Vern. 536 ; *Samuel* v. *Jones* (1862), 7 L. T. 760 ; see *Clark* v. *Hoskins*, *supra*, at p. 569 ; *Re Baldwin's Estate*, [1900] 1 I. R. 15.

(*j*) *Parker* v. *Watkins* (1859), John. 133 : "It is the ordinary case of anyone who has the misfortune to have dealings with a litigious person, who is unable to pay the costs occasioned by his conduct" (*ibid. per* WOOD, V.-C., at p. 137). Similarly the mortgagee cannot charge the costs of defending an action of trespass brought by a third person (*Owen* v. *Crouch* (1857), 5 W. R. 545) ; and see p. 187, *ante*.

(*k*) *Ramsden* v. *Langley*, *supra* ; see *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348, C. A.

(*l*) *Dryden* v. *Frost* (1838), 3 My. & Cr. 670. So a mortgagee, who has sold under a contract which is unenforceable for misdescription, cannot charge the costs of a suit for specific performance (*Peers* v. *Ceeley* (1852), 15 Beav. 209).

(*m*) *Burke* v. *O'Connor* (1855), 4 I. Ch. R. 418, where an action for failed through being brought in the name of the wrong person.

(2) Costs incurred in obtaining possession of the mortgaged property. Thus the mortgagee is allowed expenses of taking possession (*n*), and the costs of an action to recover possession (*o*), of the mortgaged property, and these may be included in his account as "just allowances" without special mention in the order (*p*).

(2) of obtaining possession;

(3) Costs of recovering the mortgage debt. The mortgagee is allowed the costs of an action to recover the mortgage debt, whether brought against the mortgagor (*q*) or a surety, and notwithstanding that the action is unproductive through the insolvency of the surety (*r*); the costs incident to the dishonour of a bill or note (*s*); and costs of administration to a deceased mortgagor, if this is required for recovering the debt (*t*).

(3) of recovering debt.

(iv.) *Costs, Charges and Expenses Generally.*

**434.** The mortgagee's costs, charges and expenses which he can add to his security do not, in the absence of special stipulation (*a*), include the costs of negotiating the loan and preparing the mortgage; for these the mortgagor is personally liable (*b*). They include the following (*c*):—

Costs, charges and expenses which may be added to security:—

(1) Costs of completing the security, such as the costs of obtaining a legal mortgage in pursuance of an agreement accompanying a mortgage by deposit of deeds, but not the costs of investigating the mortgagor's title for the purpose of such legal mortgage (*d*); and where the security is on a fund in court, and

(1) costs of completing security;

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(*n*) *Wilkes* v. *Saunion* (1877), 7 Ch. D. 188.

(*o*) *Millar* v. *Major* (1818), Coop. *temp.* Cott. 550; *Lewis* v. *John* (1838), 9 Sim. 366; *Sandon* v. *Hooper* (1843), 6 Beav. 246, 250; *Owen* v. *Crouch* (1857), 5 W. R. 545; see *Horlock* v. *Smith* (1844), 1 Coll. 287.

(*p*) See *Wilkes* v. *Saunion*, *supra*, commenting on *Horlock* v. *Smith*, *supra*. Formerly the costs had to be expressly mentioned in the pleadings (*Millar* v. *Major*, *supra*; compare *Ward* v. *Barton* (1841), 11 Sim. 534).

(*q*) *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A. *Lewis* v. *John* (1838), 9 Sim. 366, *contra*, is overruled on this point, though it has been objected that such costs are not costs in relation to the mortgage security (*Merriman* v. *Bonney* (1864), 12 W. R. 461).

(*r*) *Ellison* v. *Wright* (1827), 3 Russ. 458. And it is the same where the contract of suretyship is subsequent to the mortgage (*Sachs* v. *Ashby & Co.* (1903), 88 L. T. 393).

(*s*) *Aberdeen* v. *Chitty* (1839), 3 Y. & C. (EX.) 379, 382.

(*t*) *Ramsden* v. *Langley* (1706), 2 Vern. 536; see *Ward* v. *Barton*, *supra*; and costs of administration necessary for enabling the mortgagee to enforce his rights against the property are allowed (*Hunt* v. *Fownes* (1803), 9 Ves. 70); but costs of administration incurred by the mortgagor's representative without the request of the mortgagee do not take priority to the mortgage (*Saunders* v. *Dunman* (1878), 7 Ch. D. 825)

(*a*) Where the mortgage is to cover "every sum advanced or paid by the mortgagee to, or to become owing to him by," the mortgagor, this does not cover costs (*Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A.).

(*b*) *Wales* v. *Carr*, [1902] 1 Ch. 860; see *Gregg* v. *Slater* (1856), 22 Beav. 314. But under special circumstances they may be allowed, and then they include fees to counsel for settling the draft mortgage (*Nicholson* v. *Jeyes* (1853), 22 L. J. (CH.) 833, C. A.). As to the costs of the mortgage, see p. 123, *ante*.

(*c*) As to costs of reconveyance, see p. 317, *post*.

(*d*) *National Provincial Bank of England* v. *Games* (1886), 31 Ch. D. 582, C. A., including costs of correspondence as to the legal mortgage. Similarly, the costs of a surrender of copyholds are allowed (*Pryce* v. *Bury* (1854),

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(2) expenses of maintenance and repair.

the mortgagee is empowered by the mortgage to apply for a stop order, the costs of the application (*e*).

(2) Expenses of maintenance and improvement of the mortgaged property (*f*), such as caretaker's wages (*g*), the expenses of necessary repairs (*h*), and of permanent improvements properly undertaken (*i*), and payments to agricultural tenants (*k*). Expenses of repairs are allowed as "just allowances" without express mention in the order (*l*); but to obtain expenses of permanent improvements the mortgagee must allege and prove some expenditure of this nature, and then an inquiry as to money properly (*m*) laid out in lasting improvements will be directed (*n*). The mortgagee is also allowed extraordinary expenses incurred for the protection of the property, but the mortgagor should be informed of the outlay as soon as possible (*o*). A second mortgagee in possession is not entitled as

23 L. J. (CH.) 676, 678, C. A.; see *Lane* v. *King* (1799), 3 Seton, Judgments and Orders, 6th ed., p. 1958); but not the costs of an order appointing trustees under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), for the purpose of leasing the property (*Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A.).

(*e*) *Waddilove* v. *Taylor* (1848), 6 Hare, 307; see *Hoole* v. *Roberts* (1848), 12 Jur. 108, where the costs of a needless application were disallowed.

(*f*) *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, 243, C. A.

(*g*) *Brandon* v. *Brandon* (1862), 10 W. R. 287.

(*h*) *Godfrey* v. *Watson* (1747), 3 Atk. 517; *Sandon* v. *Hooper* (1843), 6 Beav. 246.

(*i*) *Shepard* v. *Jones* (1882), 21 Ch. D. 469, 476, C. A.; see *Spurgeon* v. *Collier* (1758), 1 Eden, 55, 63; *Davey* v. *Durrant*, *Smith* v. *Durrant* (1857), 1 De G. & J. 535, 554, C. A.; pp. 154, 203, *ante*.

(*k*) See *Oxenham* v. *Ellis* (1854), 18 Beav. 593, where payments for which the mortgagee was liable to an outgoing tenant were allowed after certificate and payment of the amount due. But in *Barron* v. *Lancefield* (1853), 17 Beav. 208, further expenses were not allowed after certificate. As to the mortgagee's liability to tenants, see Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 12, replacing Tenants Compensation Act, 1890 (53 & 54 Vict. c. 57), s. 2; title AGRICULTURE, Vol. I., p. 263.

(*l*) *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.* (1877), 7 Ch. D. 192; and see p. 154, *ante*. But repairs done without the written authority of mortgagees by a receiver (see p. 266, *post*) appointed by them under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), cannot be included in their account (*White* v. *Metcalf*, [1903] 2 Ch. 567).

(*m*) *Houghton* v. *Sevenoaks Estate Co.* (1884), 33 W. R. 341.

(*n*) *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*, *supra*; 3 Seton, Judgments and Orders, 6th ed., p. 1957; see *Webb* v. *Rourke* (1806), 2 Sch. & Lef. 661, 676; *Quarrell* v. *Beckford* (1807), 14 Ves. 177; *Scholefield* v. *Lockwood* (1863), 11 W. R. 555; and as to objecting to the allowance, see *Powell* v. *Trotter* (1861), 1 Drew. & Sm. 388. To obtain an inquiry it is sufficient to give general proof of expenditure, and *primâ facie* proof that it has been laid out in lasting improvements; but if the proof establishes that the works are improvements proper to be allowed, an account of moneys so laid out will be directed (*Shepard* v. *Jones*, *supra*). A similar direction may be given where an adverse possessor has to yield up possession (*Pelley* v. *Bascombe* (1863), 11 W. R. 766). When the mortgagor is seeking, not redemption, but an account of proceeds of sale, the mortgagee's right to an inquiry as to improvements is stronger, since he is of course entitled to the expenses to the extent that they have increased the selling value of the property (*Shepard* v. *Jones*, *supra*, at p. 478; *Henderson* v. *Astwood*, *Astwood* v. *Cobbold*, *Cobbold* v. *Astwood*, [1894] A. C. 150, 163, P. C.).

(*o*) *Trimleston* (*Lord*) v. *Hamill* (1810), 1 Ball & B. 377, 385.

against the first mortgagee to a charge for moneys expended in preserving or permanently improving the property (*p*).

(3) Where a mortgagee has to account for profits, he is allowed all expenditure necessary for obtaining those profits (*q*); and if by the terms of the mortgage deed this expenditure is authorised and the mortgagor has covenanted to pay it, it can, in case of deficiency, be charged against the property (*r*), or allowed out of the proceeds of sale (*q*).

(3) Expenditure incurred in making profits.

(4) When the mortgagee has redeemed the land tax, the mortagor has the option of taking the benefit of the redemption and repaying the amount expended, or of letting the amount remain as a charge on the land (*s*). The mortgagee of copyholds can add to his mortgage any compensation or consideration money or expenses paid by him under the Copyhold Act, 1894 (*t*), in respect of enfranchisement.

(4) Land tax redemption price.

Enfranchisement money.

(5) Under the statutory power already referred to (*a*), and so far as no contrary intention is expressed in the mortgage deed, the mortgagee is allowed the premiums in respect of fire insurance, with interest at the same rate as that fixed by the mortgage (*a*). Apart from power conferred by the terms of the mortgage or statute, the mortgagee cannot charge such premiums in his accounts (*b*), except when he is mortgagee in possession, and then the premiums fall under "just allowances" (*c*).

(5) Insurance premiums and other salvage payments:

(a) fire insurance;

Where the security covers a life policy, the mortgagee is allowed premiums paid by him for keeping the policy on foot (*d*);

(b) life insurance;

(*p*) *Landowners West of England and South Wales Land Drainage and Inclosure Co.* v. *Ashford* (1880), 16 Ch. D. 411, 433; see p. 120, *ante*.

(*q*) *Bompas* v. *King* (1886), 33 Ch. D. 279, 288, C. A.; *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, 243, C. A.

(*r*) *Norton* v. *Cooper* (1854), 5 De G. M. & G, 728, C. A.

(*s*) *Knowles* v. *Chapman* (1815), 3 Seton, Judgments and Orders, 6th ed., p. 1960. As to land tax redemption, see title LAND TAX, Vol. XVIII., pp. 321 *et seq.*

(*t*) 57 & 58 Vict. c. 46, s. 39; see title COPYHOLDS, Vol. VIII., pp. 114 *et seq.*

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1) (ii.); see pp. 122, 123, *ante*. A more limited power was given by the repealed Trustees and Mortgagees Ac , 1860 (23 & 24 Vict. c. 145), s. 11. As to application of the insurance moneys, see p. 121, *ante*; and as to a joint insurance by mortgagor and mortgagee, see *Rogers* v. *Grazebrook* (1842), 12 Sim. 557. Where the mortgagor has covenanted to insure and has neglected to do so, the mortgagee cannot, apart from s a ute, insure and charg the premiums as against a second mortgagee (*Brook* v. *Stone* (1865), 34 L. J. (CH.) 251); and see, further, title INSURANCE, Vol. XVII., pp. 521 *et seq.*

(*b*) *Dobson* v. *Land* (1850), 8 Hare, 216; *Bellamy* v. *Brickenden* (1861), 2 John. & H. 137.

(*c*) *Scholefield* v. *Lockwood* (1863), 11 W. R. 555.

(*d*) *Bellamy* v. *Brickenden, supra*: *Gill* v. *Downing* (1874), L. R. 17 Eq. 316. Where the insurance office are the mortgagees, and the policy has been actually issued (*Grey* v. *Ellison* (1856), 1 Giff. 438), they can, if the mortgage gives them such power, debit the mortgagor with the premiums, and add them to the mortgage debt (*Fitzwilliam* (*Earl*) v. *Price* (1858), 4 Jur. (N. S.) 889; see also *Brown* v. *Price* (1858), 4 Jur. (N. S.) 882). For direction for account of premiums paid by the mortgagee, see 3 Seton, Judgments and Orders, 6th ed., p. 1958. In Ireland, where salvage payments are more readily recognised, a second mortgagee may have priority for premiums paid by him (*Re Power's Policies*, [1899] 1 I. R. 6, C. A.;

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(c) expenditure on preservation.

and, generally, he will be allowed sums which are properly expended for the preservation of the mortgaged property, such as fines for the renewal of leases (*e*) and ground rent (*f*). But such advances follow the principal debt, and if the right to recover this is postponed, the right to recover salvage payments out of the property is also postponed (*g*).

(6) Expenses of management.

(6) In the absence of special agreement a mortgagee is not entitled to any remuneration for his special trouble in relation to the mortgaged property, and hence, when he is in possession, he cannot charge for work done by himself in collection of rents and management (*h*); but he can employ a house or land agent or a bailiff at commission or a salary, where the work is so troublesome that in the ordinary course he would do this if the property were his own, and he is allowed the expense so incurred in his accounts (*i*). He can, however, stipulate for payment for his own work (*k*), and if the stipulation is free from any circumstances of oppression or unfair dealing, effect will be given to it (*l*). Where the mortgagee is a company, it may employ its own directors at remuneration to do work in connection with the property and charge this against the mortgagor in addition to its own agreed remuneration (*m*).

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and compare title LIEN, Vol. XIX., p. 21; and as to lien for premiums, see title INSURANCE, Vol. XVII., p. 563).

(*e*) *Manlove* v. *Bale and Bruton* (1688), 2 Vern. 84; *Lacon* v. *Mertins* (1743), 3 Atk. 1, 4; *Woolley* v. *Drage* (1795), 2 Anst. 551; *Bishop* v. *Mantell* (1807), 3 Seton, Judgments and Orders, 6th ed., p. 1958; *Hamilton* v. *Denny* (1809), 1 Ball & B. 199, 202.

(*f*) *Hill* v. *Browne* (1844), Drury *temp.* Sug. 426; *Brandon* v. *Brandon* (1862), 10 W. R. 287.

(*g*) *Burrowes* v. *Molloy* (1845), 2 Jo. & Lat. 521.

(*h*) *Langstaffe* v. *Fenwick*, *Fenwick* v. *Langstaffe* (1805), 10 Ves. 405; *Sclater* v. *Cottam* (1857), 5 W. R. 744; *Re Wallis*, *Ex parte Lickorish* (1890), 25 Q. B. D. 176, 182, C. A.; see *Nicholson* v. *Tutin* (No. 2) (1857), 3 K. & J. 159.

(*i*) *Bonithon* v. *Hockmore* (1685), 1 Vern. 316; *Godfrey* v. *Watson* (1747), 3 Atk. 517; *Davis* v. *Dendy* (1818), 3 Madd. 170; *Leith* v. *Irvine* (1833), 1 My. & K. 277, 295, 296; *Sclater* v. *Cottam*, *supra*; *Eyre* v. *Hughes* (1876), 2 Ch. D. 148, 161; *Re Wallis*, *Ex parte Lickorish*, *supra*. It is not a matter of course to allow the expense of a collector (*Union Bank of London* v. *Ingram* (1880), 16 Ch. D. 53, 56).

(*k*) Formerly such a stipulation was void as tending to oppression or usury, and as a collateral advantage (*French* v. *Baron* (1741), 2 Atk. 120; *Scott* v. *Brest* (1788), 2 Term Rep. 238; *Chambers* v. *Goldwin* (1804), 9 Ves. 254, 271; *Barrett* v. *Hartley* (1866), L. R. 2 Eq. 789, 795; *Comyns* v. *Comyns* (1871), 5 I. R. Eq. 583; *Eyre* v. *Hughes*, *supra*; *Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A., *per* KAY, J.), though the mortgagee might stipulate for the appointment of a receiver to be paid by the mortgagor (*Chambers* v. *Goldwin*, *supra*; see *Langstaffe* v. *Fenwick*, *Fenwick* v. *Langstaffe*, *supra*). In principle, however, there is now no objection to it (*Biggs* v. *Hoddinott*, *Hoddinott* v. *Biggs*, [1898] 2 Ch. 307, C. A.; see *Bath* v. *Standard Land Co., Ltd.*, [1911] 1 Ch. 618, C. A.), so far as the stipulation is confined to the continuance of the mortgage security (*Browne* v. *Ryan*, [1901] 2 I. R. 653, C. A.; *Noakes & Co., Ltd.* v. *Rice*, [1902] A. C. 24; *Bradley* v. *Carritt*, [1903] A. C. 253); compare *Maxwell* v. *Tipping*, [1903] 1 I. R. 499; and see pp. 143, 144, *ante*.

(*l*) See *Barrett* v. *Hartley*, *supra*. Such a provision is not allowed as between solicitor-mortgagee and mortgagor, where the mortgagor has had no independent advice (*Eyre* v. *Hughes*, *supra*); see title SOLICITORS.

(*m*) *Bath* v. *Standard Land Co., Ltd.*, *supra*, disapproving *Kavanagh* v. *Workingman's Benefit Building Society*, [1896] 1 I. R. 56, C.

(7) The mortgagee is entitled to charge the expenses of any actual (*n*) or attempted (*o*) sale; but, upon the principle already stated (*p*), he cannot charge remuneration for his personal services in connection with the sale (*q*), unless this is expressly agreed with the mortgagor (*r*). If the sale has been in effect conducted subject to the control of the court, the auctioneer's fees are allowed only on the court scale, though a higher scale might be reasonable on a sale out of court (*s*).

(7) Expenses of sale.

(8) A transferee of a mortgage can add to his security the costs of the transfer, if the mortgagor has been required to pay the debt or if interest was in arrear; otherwise he cannot (*t*).

(8) Costs of transfer of mortgage.

(9) Interest at the rate reserved by the mortgage (*a*) is usually

(9) Interest on expenses.

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(*n*) *White* v. *City of London Brewery Co.* (1889), 42 Ch. D. 237, 243, C. A.

(*o*) *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42, C. A.; see *Thompson* v. *Rumball* (1838), 3 Jur. 53; *Sutton* v. *Rawlings* (1849), 3 Exch. 407; *Batten* v. *Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317. Acceptance of a cheque for the deposit, which is dishonoured, is not negligence so as to deprive the mortgagee of his right to the expenses (*Farrer* v. *Lacy, Hartland & Co.*, *supra*).

(*p*) See p. 242, *ante*.

(*q*) Thus an auctioneer (*Matthison* v. *Clarke* (1854), 3 Drew. 3; *Furber* v. *Cobb* (1887), 18 Q. B. D. 494, 509, C. A.), or a broker-mortgagee (*Arnold* v. *Garner* (1847), 2 Ph. 231), cannot charge a commission for selling, though customary allowances to insurance brokers who were mortgagees have been sanctioned, if not objected to at the time by the mortgagor (*Baring* v. *Stanton* (1876), 3 Ch. D. 502, C. A.). Formerly, a solicitor-mortgagee could not charge profit costs for work done in connection with the mortgage, including the costs of a redemption or foreclosure action (*Sclater* v. *Cottam* (1857), 5 W. R. 744; *Re Roberts* (1889), 43 Ch. D. 52; *Re Wallis, Ex parte Lickorish* (1890), 25 Q. B. D. 176, C. A.; *Stone* v. *Lickorish*, [1891] 2 Ch. 363; *Re Doody, Fisher* v. *Doody, Hibbert* v. *Lloyd*, [1893] 1 Ch. 129, C. A.); nor could he charge for work done for himself and a co-mortgagee (*ibid.*, at p. 140). This rule has been abolished as to solicitors by the Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), with regard to costs under judgments subsequent to the Act (*Eyre* v. *Wynn-Mackenzie*, [1896] 1 Ch. 135, C. A.; *Day* v. *Kelland*, [1900] 2 Ch. 745, C. A.; see pp. 124, 145, *ante*); but it continues in force as to other persons, though it does not extend, as held in *Matthison* v. *Clarke*, *supra*, to sales by a firm of which the mortgagee is member, provided that the mortgagee is, by agreement, excluded from sharing in the profits of the transaction, or that, if there is no agreement, his partnership share is not allowed to his co-partner (*Re Doody, Fisher* v. *Doody, Hibbert* v. *Lloyd*, *supra*, *per* STIRLING, J., at pp. 136, 137); and where the mortgagee's solicitor, who is also agent for the insurance office, pays the premiums and receives a commission from the office, the mortgagee is entitled to charge the full premiums (*Leete* v. *Wallace* (1888), 58 L. T. 577).

(*r*) Formerly such an agreement was void, as giving the mortgagee a collateral advantage (*Leith* v. *Irvine* (1833), 1 My. & K. 277; *Broad* v. *Selfe* (1863), 11 W. R. 1036; *James* v. *Kerr* (1889), 40 Ch. D. 449, 459; *Field* v. *Hopkins* (1890), 44 Ch. D. 524, C. A., *per* KAY, J., at p. 530; *The Benwell Tower* (1895), 72 L. T. 664). This reason does not now exist, but the agreement will not be enforceable after the redemption of the mortgage (*Browne* v. *Ryan*, [1901] 2 I. R. 653, C. A.; see pp. 143, 144, *ante*).

(*s*) *Re Walford, Walford* v. *Walford*, [1889] W. N. 23, C. A.

(*t*) *Re Radcliffe* (1856), 22 Beav. 201; *Bolingbroke* v. *Hinde* (1884), 25 Ch. D. 795; and see title CUSTOM AND USAGES, Vol. X., p. 284.

(*a*) *Woolley* v. *Drage* (1795), 2 Anst. 551; *Stephenson* v. *Green* (1801), 3 Seton, Judgments and Orders, 6th ed., p. 2080; *Townley* v. *Moore* (1856), 3 Seton, Judgments and Orders, 6th ed., p. 1957; *Glencross* v. *Pulman* (1859), 3 Seton, Judgments and Orders, 6th ed., p. 1959.

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allowed on outlays of a permanent nature, such as renewal fines (*b*), or expenses of lasting improvements (*c*), or redemption of land tax (*d*), or where there is no income to meet them, such as premiums of life policies (*e*); but not on the expense of ordinary repairs, where the mortgagee is in receipt of the rents and profits (*f*), unless, perhaps, where the expense exceeds the balance of rents after payment of interest (*g*).

# Part VIII.—Remedies of Mortgagees.

## SECT. 1.—*General Right to Pursue Remedies Concurrently.*

Right to exercise remedies concurrently.

**435.** So soon as the mortgagor has made default (*h*) in payment of the mortgage debt, the mortgagee is entitled to pursue any or all of his remedies, subject, as regards the powers of sale and appointing a receiver, to the restrictions imposed by agreement or by statute, according as the powers are express or statutory. Hence the mortgagee can at the same time sue for payment on the covenant to pay principal and interest, for possession of the mortgaged estate, and for foreclosure (*i*), and can combine these claims in the same action (*k*); and until judgment *nisi* has been obtained in his foreclosure action he can exercise his power of sale (*l*).

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(*b*) *Manlove* v. *Bale and Bruton* (1688), 2 Vern. 84; *Lacon* v. *Mertins* (1743), 3 Atk. 1, 4.

(*c*) *Webb* v. *Rorke* (1806), 2 Sch. & Lef. 661, 676; *Quarrell* v. *Beckford* (1807), 14 Ves. 177, 179; (1816), 1 Madd. 269, 281; see *Procter* v. *Cooper* (1700), Prec. Ch. 116; and cases cited from Seton, Judgments and Orders, 6th ed., in note (*a*), p. 243, *ante*.

(*d*) *Knowles* v. *Chapman* (1815), 3 Seton, Judgments and Orders, 6th ed., p. 1960, where 5 per cent. was allowed.

(*e*) *Hodgson* v. *Hodgson* (1837), 2 Keen, 704; *Marshall* v. *Nunn* (1853), 3 Seton, Judgments and Orders, p. 1958; *Bates* v. *Johnson* (1859), 3 Seton, Judgments and Orders, 6th ed., p. 1958.

(*f*) In the cases cited in note (*a*), p. 243, *ante*, interest on expenses of repairs was not allowed; but sometimes it has been allowed (*Eyre* v. *Hughes* (1876), 2 Ch. D. 148, 164; *King* v. *Kitchener* (1871), 3 Seton, Judgments and Orders, p. 1958, C. A.; and see 3 Seton, Judgments and Orders, p. 1978).

(*g*) See 3 Seton, Judgments and Orders, p. 1978; see *Wrigley* v. *Gill*, [1906] 1 Ch. 165, 169, C. A., where the *dictum* that the allowance of interest on necessary repairs and lasting improvements was very unusual seems erroneous so far as it refers to lasting improvements.

(*h*) Where a day for payment is fixed by the mortgage deed, the default occurs when this day has elapsed without payment (see pp. 71, 147, *ante*); where no day is fixed, there is default when the money is not paid on demand (see Cases with Opinions of Counsel, Vol. II., p. 51).

(*i*) *Lockhart* v. *Hardy* (1846), 9 Beav. 349; *Cockell* v. *Bacon* (1852), 16 Beav. 158; *Palmer* v. *Hendrie* (1860), 27 Beav. 349, 351; see *Burnell* v. *Martin* (1780), 2 Doug. (K. B.) 417; *Rees* v. *Parkinson* (1795), 2 Anst. 497; *Barker* v. *Smark* (1840), 3 Beav. 64.

(*k*) *Dymond* v. *Croft* (1876), 3 Ch. D. 512, C. A.; *Greenough* v. *Littler* (1880), 15 Ch. D. 93; *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch D. 42, C. A. Formerly the mortgagee sued at law on the covenant, and in equity for foreclosure (*Farrer* v. *Lacy, Hartland & Co.*, *supra*, at p. 50). As to joining a claim for possession with the action for foreclosure, see p. 284, *post*.

(*l*) An order for foreclosure *nisi* only suspends the power of sale;

If the mortgagee realises part of the debt by his action on the covenant, or by sale of part of the property, he must give credit in the foreclosure action for the amount realised; and if, after foreclosure, he proceeds on the covenant, he reopens the foreclosure. A realisation of the whole debt gives the mortgagor an immediate right to reconveyance of the mortgaged property remaining unsold (*m*).

SECT. 1. General Right to Pursue Remedies Concurrently.

## SECT. 2.—*Sale.*

### SUB-SECT. 1.—*Express Power of Sale.*

**436.** So long as the equity of redemption remains vested in the mortgagor, the mortgagee cannot sell the property except under an express or implied power of sale, or under a statutory power, or with the concurrence of the mortgagor (*n*). It was usual to insert in mortgages executed before the 1st January, 1882 (*o*), an express power of sale, and this is still done where on account of special circumstances, or of the importance of the transaction, the intending mortgagee prefers not to rely on the statutory power. The ordinary express power (*p*) gives to the mortgagee, and every person for the time being entitled to give a discharge for the mortgage debt, power at any time after the day fixed for payment to sell either by public auction or private contract (*q*), and subject to special conditions as to title; and, if there are prior charges, to sell either subject to or free from such charges, and in the latter case to pay them off out of the purchase-money; and to execute assurances to the purchasers (*r*).

Terms of express power.

see p. 296, *post*. See as to remedies for local improvement charges, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 234; and land improvement charges, title LAND IMPROVEMENT, Vol. XVIII., p. 298.

(*m*) *Lockhart* v. *Hardy* (1846), 9 Beav. 349, 355; see p. 308, *post*. It follows that where there are collateral securities the mortgagee should realise these first, and then foreclose in respect of the balance of his debt (*Dyson* v. *Morris* (1842), 1 Hare, 413, 423).

(*n*) Where the mortgagor sells and obtains the concurrence of the mortgagee, a deposit paid to their common agent who absconds is well paid as between the mortgagee and the purchaser (*Rowe* v. *May* (1854), 18 Beav. 613); but the mortgagee cannot be charged with it by the mortgagor or by a subsequent incumbrancer (*Barrow* v. *White* (1862), 2 John. & H. 580). As to the appropriation of proceeds of sale received by the mortgagee, see p. 259, *ante*.

(*o*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 1 (2). It was not till recent times that the insertion of a power of sale became a matter of course. In 1857 it was said not to be a universal practice (*Clarke* v. *Royal Pantechnicon* (1857), 4 Drew. 26, 30). The insertion of the express power continued until 1882, notwithstanding the statutory power given by the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145) (Lord Cranworth's Act); see p. 247, *post*.

(*p*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 509. Formerly mortgages were frequently created by vesting the property in the mortgagee on trust for sale; see p. 118, *ante*.

(*q*) Where the power is to sell by public auction, a sale by private contract is invalid (*Brouard* v. *Dumaresque* (1841), 3 Moo. P. C. C. 457); but under a power to sell by public auction or private contract there is no need to offer the property at public auction first (*Davey* v. *Durrant*, *Smith* v. *Durrant* (1857), 1 De G. & J. 535, 560, C. A.).

Where the power, instead of expressly authorising the mortgagee to

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Usual supplementary provisions.

Provision is usually made that the power shall not be exercised until a notice to pay off the mortgage debt has been given and default has been made for a specified time, or until interest for a specified time is in arrear (*s*), or until default is made under some other stipulation in the mortgage; and purchasers are usually protected from liability to see that the power has become exercisable. There are also further provisions enabling the mortgagee to give a receipt for the purchase-money, and declaring trusts of the proceeds of sale. The inclusion of a power of sale does not prejudice the mortgagee's right of foreclosure (*t*).

Paramount effect of power of sale.

**437.** The power of sale is paramount to any subsequent arrangement between the mortgagee and mortgagor for the management of the premises (*a*). It is not extinguished by an ineffectual attempt to exercise it (*b*); and though the mortgagee believes himself to be absolute owner, and sells as such, the sale can be supported as a sale under the power (*c*). The power, when duly exercised, extinguishes the mortgagor's equity of redemption, and he is thenceforth only interested in the surplus proceeds of sale (*d*).

SUB-SECT. 2.—*Implied Power of Sale.*

In mortgages of chattels and choses in action.

**438.** A mortgagee of personal chattels, when possession has been delivered to him (*e*), and a mortgagee of stocks and shares, including a mortgagee by deposit of the share certificates with a

convey, contains a covenant by the mortgagor to execute the conveyance, this does not affect the purchaser, and he cannot insist on the mortgagor's concurrence (*Clay* v. *Sharpe* (1802), 18 Ves. 346, n.; *Corder* v. *Morgan* (1811), 18 Ves. 344).

(*s*) Previously to 1882 the periods were six months' default in payment of principal, or three months' interest in arrear (*Cockburn* v. *Edwards* (1881), 18 Ch. D. 449, 456, C. A.). In special cases the power is made exercisable at any time after default, but this is an unusual provision, and may be oppressive (*Miller* v. *Cook* (1870), L. R. 10 Eq. 641, 647), and it should not be inserted in a mortgage by a client to his solicitor without explanation, unless, perhaps, in the case of a second mortgage (*Cockburn* v. *Edwards*, *supra*; *Craddock* v. *Rogers* (1884), 53 L. J. (CH.) 968). This rule, however, does not apply where the mortgage is to secure an existing debt for which the solicitor is pressing, or where the subject-matter of the mortgage is hazardous (*Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 111, C. A.). Where the power is exercisable on default in payment of the debt on demand reasonable time must be allowed to the mortgagor to comply with the demand (*Rogers* v. *Mutton* (1862), 7 H. & N. 733; compare *Massey* v. *Sladen* (1868), L. R. 4 Exch. 13; and see p. 114, *ante*). Costs improperly obtained by a solicitor-mortgagee under a threat of selling can be recovered as paid under duress (*Close* v. *Phipps* (1844), 7 Man. & G. 586); and see title SOLICITORS.

(*t*) See *Slade* v. *Rigg* (1843), 3 Hare, 35.

(*a*) Thus a receiver appointed by a subsequent deed must join in a conveyance to a purchaser if this is necessary for the purchaser's title (*King* v. *Heenan* (1853), 3 De G. M. & G. 890, C. A.).

(*b*) *Henderson* v. *Astwood*, [1894] A. C. 150.

(*c*) *Henderson* v. *Astwood*, *supra*; *Deverges* v. *Sandeman*, *Clark & Co.*, [1902] 1 Ch. 579, 596, C. A.

(*d*) See p. 71, *ante*, and p. 259, *post*.

(*e*) See *Re Morritt*, *Ex parte Official Receiver* (1886), 18 Q. B. D. 222, 233, C. A.; and see title BILLS OF SALE, Vol. III., p. 41. As to the distinction between mortgages and pledges, see p. 73, *ante*.

blank transfer (*f*), has, in the absence of an express power of sale, an implied power to sell the mortgaged property, where a day for payment is fixed by the mortgage, at any time after default, and, where no day for payment is fixed, after reasonable notice has been given to the mortgagor, and default made in payment in pursuance of such notice (*g*). The notice, in addition to fixing a day for payment, should intimate that in default the mortgagee will sell (*h*). In the case of shares, a month's or perhaps a fortnight's notice is reasonable (*i*). The mortgagee does not prejudice his implied power of sale by claiming more than is due to him (*k*); but he refuses at his own risk a tender of the amount actually due (*l*).

### SUB-SECT. 3.—*Statutory Power of Sale.*

**Under Lord Cranworth's Act.**

**Deeds made between 28th August, 1860, and 1st January, 1882.**

**439.** Where any principal money is secured or charged by a deed made after the 28th August, 1860, and before the 1st January, 1882, on hereditaments of any tenure or on any interest therein, the mortgagee has (*m*) a statutory power to sell or concur in selling the whole or any part of the property by public auction or private contract (*n*). The power arises at the end of one year from the time when the principal money is payable acccording to the terms of the deed, or when interest is in arrear for six months, or on any omission to pay insurance premiums which the mortgagor ought to pay (*n*), but is not exercisable till after six months' notice in writing has been given to the mortgagor (*o*). The purchase-money is

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(*f*) *Stubbs* v. *Slater*, [1910] 1 Ch. 632, C. A. As to such transactions, see pp. 132, 133, *ante*; title COMPANIES, Vol. V., pp. 191, 197.

(*g*) *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A.; see *Wilson* v. *Tooker* (1714), 5 Bro. Parl. Cas. 193, reversing *Tucker* v. *Wilson* (1714), 1 P. Wms. 261; *Lockwood* v. *Ewer* (1742), 2 Atk. 303; *Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278; *France* v. *Clark* (1883), 22 Ch. D. 830; 26 Ch. D. 257, C. A.

(*h*) *Deverges* v. *Sandeman, Clark & Co.*, *supra*, at p. 593; but this is not essential (*ibid.*, at p. 596).

(*i*) *Deverges* v. *Sandeman, Clark & Co.*, *supra*, at p. 595. Probably notice for the next account day, if not nearer than a fortnight, is sufficient. As to the meaning of "account day," see title STOCK EXCHANGE.

(*k*) *Stubbs* v. *Slater*, *supra*.

(*l*) Though the mortgagee will not be restrained from selling unless the mortgagor pays into court, or tenders, the amount claimed to be due (*Stubbs* v. *Slater*, *supra*, at p. 640).

(*m*) Under the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145) (known as "Lord Cranworth's Act"), repealed as to Parts II. and III. (ss. 11—30) by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 71 (1). The remainder of this Act (Parts I. and IV.) was repealed by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 64; but the repeal effected by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), does not affect the "operation, effect, or conveyance" of any instrument executed before the 1st January, 1882 (but after the 28th August, 1860), and hence the statutory power of sale under the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), still applies to such instruments (*Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508). The power of sale is confined to mortgages or charges made to secure loans or debts (Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 24), and may be excluded or varied by the mortgage deed (*ibid.*, s. 32). See, further, Encyclopædia of Forms and Precedents, Vol. XII., p. 590.

(*n*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 11.

(*o*) *Ibid.*, s. 13. The purchaser is not liable to see to the application of

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applicable in the following order:—expenses of sale; interest and costs of the mortgagee; principal; residue to the mortgagor (*p*).

Scope of power.

The mortgagee has power to assure by deed, to the purchaser, the property sold for all the estate and interest therein which the mortgagor on creating the mortgage had power to dispose of, except that, as regards copyholds, the deed only passes the beneficial interest (*q*); and he has power to call for the title deeds, and if the legal estate is outstanding in a trustee for the mortgagor, either the mortgagee or the purchaser can call for a conveyance of it (*r*). By the terms of the statute the power is confined to mortgages of real or leasehold property (*s*).

Under the Conveyancing and Law of Property Act, 1881.

**440.** Where the mortgage is made since the 31st December, 1881, a statutory power of sale is also conferred (*t*). The mortgage must be made by deed, but, subject to this, the power applies to any mortgage or charge, whether legal or equitable, on real or personal property, or any estate or interest therein, or any chose in action (*u*), except certain bills of sale (*a*), and except debentures upon a public undertaking (*b*). The power authorises the mortgagee, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, by public auction or private contract, subject to such conditions of title as he thinks fit (*c*), and to convey the property for such estate and interest therein as is the subject of the mortgage (*d*), except that in the case of copyhold or customary

Deeds since 31st December, 1881.

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the purchase-money (Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 12). As to the protection of purchasers, see p. 258, *post*.

(*p*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 14.

(*q*) *Ibid.*, s. 15. Hence a mortgagee of leaseholds by sub-demise can convey the entire residue of the term (*Hiatt* v. *Hillman* (1871), 19 W. R. 694); and an equitable mortgagee in fee from a mortgagor who had the legal estate can convey the legal estate (*Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508).

(*r*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 16.

(*s*) *Ibid.*, s. 11.

(*t*) By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1).

(*u*) *Ibid.*, s. 2 (i.), (vi.); see Encyclopædia of Forms and Precedents, Vol. III., p. 554; XII., pp. 586, 588, 591.

(*a*) *I.e.*, those subject to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); see *Calvert* v. *Thomas* (1887), 19 Q. B. D. 204, C. A.; and see title BILLS OF SALE, Vol. III., p. 42.

(*b*) *Blaker* v. *Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399, 406, where debentures of all companies were thought to be excluded; see title COMPANIES, Vol. V., pp. 345, 731; but *Deyes* v. *Wood*, [1911] 1 K. B. 806, 818, C. A., suggests that the exclusion is limited as stated in the text.

(*c*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1). As to the restrictions on the exercise of the power, see p. 251, *post*.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (1). Thus the power to convey is not so wide as under the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145) (see note (*q*), *supra*), and an equitable mortgagee cannot convey the legal estate vested in the mortgagor (*Re Hodson and Howes' Contract* (1887), 35 Ch. D. 668, C. A.). This can be provided for by conferring on the mortgagee a power of attorney to convey the legal estate; and, as regards the nominal reversion upon a mortgage of leaseholds by sub-demise, it is frequently provided for, either by such a power, or by a declaration of trust by the mortgagor

land the legal right to admittance does not pass by the deed unless the deed is, by law or custom, otherwise sufficient for this purpose (*e*). The power of sale does not affect the right of foreclosure (*f*); it may be varied or extended by the mortgage deed, and it applies to the mortgage only so far as a contrary intention is not expressed therein (*g*).

Power of registered proprietor of registered charge.

**441.** When land is registered (*h*), the registered proprietor of a registered charge on it may, under the power of sale referred to in the preceding paragraph, sell and transfer the land, or any part of it, in the same manner as if he were the registered proprietor of the land (*i*).

Power of registered mortgagee of ship.

**442.** A registered mortgagee of a ship or a share therein has power absolutely to dispose of the ship or share and to give effectual receipts for the purchase-money; but a subsequent mortgagee cannot, except under the order of a court of competent jurisdiction, exercise this power without the concurrence of every prior mortgagee (*j*).

SUB-SECT. 4.—*Who may Exercise the Power.*

Persons who can exercise power.

**443.** An express power of sale is exercisable only by the persons who are designated for that purpose by the power (*k*). Formerly the power was conferred on the mortgagee, his heirs and assigns, and could be exercised by his transferees, or, after his death, by his heirs or devisees (*l*); and a power so given is now

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with a power for the mortgagee to appoint a new trustee of the reversion (*London and County Banking Co.* v. *Goddard*, [1897] 1 Ch. 642); see p. 127, *ante*. As to the protection of purchasers against irregularity in the sale, and as to the efficacy of the mortgagee's receipt, see pp. 258, 259, *post*.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (1). The effect is that the ordinary method of conveying copyholds must be followed (*Re Hodson and Howes' Contract* (1887), 35 Ch. D. 668, 674, C. A.).

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (5).

(*g*) *Ibid.*, s. 19 (2), (3). For forms of mortgage extending the statutory power, see Encyclopædia of Forms and Precedents, Vol. III., p. 45; Vol. VIII., pp. 546, 590, 642, 719; Vol. XI., p. 398.

(*h*) Under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65).

(*i*) Under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 27, this power existed only where the charge was with a power of sale. By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (2), the statutory power is applied to registered charges; but, apart from this, it would apply to them on the ground that they are now made by deed (Land Transfer Rules, 1903, r. 107). Under the Land Registry Act, 1862 (25 & 26 Vict. c. 53), s. 34, the purchaser might remove the land from the register without the consent of the mortgagor (*Re Winter* (1873), L. R. 15 Eq. 156); and see, further, p. 85, *ante*. As to removal from the register under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65), and as to registration of title generally, see title REAL PROPERTY AND

(*j*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 35. And as to mortgages on ships, see p. 133, *ante*; title SHIPPING AND NAVIGATION.

(*k*) See title POWERS. As to the case of trustees, see Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8; and see title TRUSTS AND TRUSTEES.

(*l*) *Titley* v. *Wolstenholme* (1844), 7 Beav. 425. Where the power was

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exercisable, where the mortgagee has died since the 31st December, 1881, by his personal representatives (*m*); but a power not referring to "assigns" was not exercisable by transferees (*n*) or devisees (*o*), and an express power conferred on a mortgagee without mention of "heirs" is not even now exercisable by his personal representatives (*p*).

Practice with regard to express power.

Since the 31st December, 1881, it has been the practice, if an express power of sale is inserted in a mortgage, to confer such power either on the executors, administrators and assigns of the mortgagee, or generally upon every person for the time being entitled to receive and give a discharge for the mortgage money (*q*), and then the power is exercisable, if the mortgagee transfers the mortgage, by the transferee, and otherwise by the mortgagee's personal representatives after his death. But if the word "assigns" is omitted and no words are inserted authorising the exercise of the power by the persons for the time being entitled to the mortgage money, the rule that the power is not exercisable by transferees still prevails (*r*).

Joint mortgagees.

A power of sale in a mortgage to two mortgagees, who are expressed to advance the money on a joint account (*s*), is exercisable by the survivor (*t*), but a power of sale in a mortgage to partners is not exercisable by one unless it is so expressed in the mortgage (*u*).

Devolution of statutory powers.

**444.** The statutory power of sale under Lord Cranworth's Act (*a*) is exercisable by the person to whom the principal money is for the time being payable (*b*). The power under the Conveyancing and Law of Property Act, 1881 (*c*), is exercisable by any person for the time being entitled to receive and give a discharge for the purchase-money (*d*); that is, by persons who are either

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conferred on the personal representatives, the concurrence of the heir-at-law to convey the legal estate was necessary; see *Saloway* v. *Strawbridge* (1855), 7 De G. M. & G. 594, C. A.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30; *Re Pixton and Tong's Contract* (1897), 46 W. R. 187; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 233, 234.

(*n*) *Bradford* v. *Belfield* (1828), 2 Sim. 264.

(*o*) *Cooke* v. *Crawford* (1842), 13 Sim. 91; *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A.; *contra, Osborne to Rowlett* (1880), 13 Ch. D. 774.

(*p*) *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690; see *Re Ingleby Boak and Norwich Union Insurance Co.* (1883), 13 L. R. Ir. 326.

(*q*) As to the assignment and devolution of the mortgagee's interest, see pp. 169 *et seq.*, *ante*.

(*r*) Hence a power in a building society's mortgage, conferred on the trustees of the society for the time being, is not exercisable by a transferee of the mortgage, even assuming the transfer to be otherwise effectual (*Re Rumney and Smith*, [1897] 2 Ch. 351, C. A.). As to the exercise of the power where a building society is being wound up, see *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, C. A.

(*s*) See p. 117, *ante*.

(*t*) *Hind* v. *Poole* (1855), 1 K. & J. 383.

(*u*) *Warr* v. *Jones* (1876), 24 W. R. 695.

(*a*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145); see p. 247, *ante*.

(*b*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 11. The statute adds "his executors, administrators, and assigns," but these persons seem to be included under the previous words.

(*c*) 44 & 45 Vict. c. 41; see p. 248, *ante*.

(*d*) *Ibid.*, s. 21 (4). Persons deriving title under the original mortgagee

mortgagees or have the mortgaged property vested in them, such as executors. An agent of the mortgagee under a power of attorney cannot sell by virtue of an authority to receive the money, though he can sell if the power of attorney expressly authorises him to exercise the power of sale (*e*).

SUB-SECT. 5.—*Conditions of Exercise of Power.*

Restrictions on exercise of statutory powers.

**445**. The time when the power arises is fixed in the manner already stated (*f*), but restrictions are placed on the time when it is exercisable. The power under Lord Cranworth's Act (*g*) is not exercisable till after six months' notice in writing (*h*). The power under the Conveyancing and Law of Property Act, 1881 (*i*), is not exercisable until either (i.) notice requiring payment of the mortgage money has been served on the mortgagor, and default has been made in payment thereof, or of part thereof, for three months after such service; or (ii.) some interest is in arrear for two months (*j*); or (iii.) there has been a breach of some provision in the mortgage deed or in the statute on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than the covenant for payment of principal or interest (*i*).

The restrictions in either case may, however, be negatived or varied (*k*). An express power of sale is usually subject to similar restrictions (*l*).

Notice under Conveyancing and Law of Property Act, 1881.

Sufficient address.

**446**. The notice under the Conveyancing and Law of Property Act, 1881 (*m*), requiring payment of the mortgage money, must be in writing.

It is sufficient although only addressed to the mortgagor by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected is absent, under disability, unborn, or unascertained (*n*).

can also exercise the power by virtue of the definition clause (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (vi.)); see p. 172, *ante*.

(*e*) *Re Dowson and Jenkins's Contract*, [1904] 2 Ch. 219, C. A.

(*f*) As to express powers, see p. 245, *ante*; as to implied powers, see p. 246, *ante*; as to statutory powers, see pp. 247, 248, *ante*.

(*g*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145).

(*h*) *Ibid.*, s. 13; see p. 247, *ante*.

(*i*) 44 & 45 Vict. c. 41, s. 20.

(*j*) It is sufficient if an instalment which includes interest is in arrear for two months (*Walsh* v. *Derrick* (1903), 19 T. L. R. 219, C. A.).

(*k*) See note (*m*), p. 247, *ante*, and p. 249, *ante*. The power under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), can be made immediate by providing that the mortgagee shall have the statutory power, but without the restrictions imposed by *ibid.*, s. 20, as to which see the text, *supra*. Where in a bank mortgage the power was to be exercisable on default in payment of the balance due on current account for one month after the closing of the account, and the account was closed by a notice of insolvency, the month ran from the receipt of the notice (*Berry* v. *Halifax Commercial Banking Co., Ltd.*, [1901] 1 Ch. 188).

(*l*) See p. 246, *ante*.

(*m*) 44 & 45 Vict. c. 41, s. 67.

(*n*) *Ibid.* And under an express power of sale, where the notice is to be given to the mortgagor, his heirs and assigns, without a proviso referring to disability, a notice to the infant heir of the mortgagor is good (*Tracey* v.

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the exercise of the power of sale (*m*). He has his own interest to consider as well as that of the mortgagor, and provided that he keeps within the terms of the power, exercises the power *bonâ fide* for the purpose of realising the security (*n*), and takes reasonable precautions to secure a proper price (*o*), the court will not interfere (*p*), nor will it inquire whether he was actuated by any further motive (*q*). A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed with due regard to the value of the property (*r*); and, if the sale is *bonâ fide*, and he charges himself with the whole of the purchase-money, he can sell on the terms that a substantial part, or even the whole, shall remain on mortgage (*s*).

Grounds for granting relief to mortgagor.

If the mortgagor seeks relief promptly (*a*), a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud (*b*); but not on the ground of undervalue alone (*c*); though if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss thereby resulting (*d*).

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330); but, ordinarily, want of notice, since it is a ground for setting aside a sale against a purchaser with knowledge (*Selwyn* v. *Garfit* (1888), 38 Ch. D. 273, C. A.), is, it seems, a ground for restraining a sale; and see title INJUNCTION, Vol. XVII., p. 251.

(*m*) He was so described by Lord ELDON, L.C., in *Downes* v. *Grazebrook* (1817), 3 Mer. 200, but this only means that he must exercise the power in a prudent way, with a due regard to the interest of the mortgagor in the surplus sale moneys (*Robertson* v. *Norris* (1858), 1 Giff. 421, 424; *Jenkins* v. *Jones* (1860), 2 Giff. 99, 108). As to the analogy between trusts and mortgages, see *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 182; and see p. 72, *ante*. As to sale under a building society mortgage, see title BUILDING SOCIETIES, Vol. III., p. 368.

(*n*) *Jenkins* v. *Jones*, *supra*.

(*o*) *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A.; see *Orme* v. *Wright* (1838), 3 Jur. 19, 972; *Marriott* v. *Anchor Reversionary Co.* (1860), 2 Giff. 457, 469.

(*p*) *Kennedy* v. *De Trafford*, [1897] A. C. 180, 185, 192; *Nutt* v. *Easton*, [1899] 1 Ch. 873; affirmed, [1900] 1 Ch. 29, C. A. (only on the question of laches).

(*q*) *Nash* v. *Eads* (1880), 25 Sol. Jo. 95, C. A., overruling, on this point, *Robertson* v. *Norris*, *supra*; *Colson* v. *Williams* (1889), 61 L. T. 71; see, however, *Pooley's Trustee* v. *Whetham* (1886), 33 Ch. D. 111, 123, C. A.

(*r*) *Kennedy* v. *De Trafford*, *supra*; and see *Flower & Sons* v. *Pritchard* (1908), 53 Sol. Jo. 178. It is sufficient if the mortgagee complies with the terms of the power and acts in good faith (*Kennedy* v. *De Trafford*, *supra*, *per* Lord MACNAGHTEN, at p. 192); but "good faith" requires that the property shall not be dealt with recklessly (*ibid.*, p. 185).

(*s*) *Davey* v. *Durrant*, *Smith* v. *Durrant* (1857), 1 De G. & J. 535, 553, C. A.; *Thurlow* v. *Mackeson* (1868), L. R. 4 Q. B. 97; *Bettyes* v. *Maynard* (1883), 31 W. R. 461, C. A.; *Farrar* v. *Farrars, Ltd.*, *supra*, at p. 413. In *Thurlow* v. *Mackeson*, *supra*, the whole purchase price, except the deposit, was left on mortgage.

(*a*) *Nutt* v. *Easton*, [1900] 1 Ch. 29, C. A. As to such relief, see title INJUNCTION, Vol. XVII., pp. 251, 252.

(*b*) *Warner* v. *Jacob* (1882), 20 Ch. D. 220, 224; *Haddington Island Quarry Co.* v. *Huson*, [1911] A. C. 722, P. C.; see *Jones* v. *Mathie* (1847), 11 Jur. 504; *Davey* v. *Durrant*, *Smith* v. *Durrant*, *supra*, at p. 538; *Adams* v. *Scott* (1859), 7 W. R. 213.

(*c*) See *Bettyes* v. *Maynard*, *supra*; *Field* v. *Debenture Corporation* (1896), 12 T. L. R. 469; and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale (*Ferrand* v. *Clay* (1837), 1 Jur. 165).

(*d*) *Wolff* v. *Vandersee* (1869), 17 W. R. 547; 3 Seton, Judgments and Orders, 6th ed., p. 1962.

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**451.** Where different properties are mortgaged by different mortgagors to the same mortgagee, and a sale of the two properties together is beneficial, both may be sold together, and the purchase-money apportioned (*e*).

Different securities held by one mortgagee.

**452.** A mortgagee is entitled to sell upon such conditions as he thinks suitable for securing a sale of the property, and the sale is not invalidated by the insertion of any condition in ordinary use, notwithstanding that in a sense it may be depreciatory (*f*); but express powers usually provide for the mortgagee selling subject to such conditions as he thinks fit (*g*), and like provision is made in regard to the statutory powers (*h*).

Conditions of sale.

**453.** The mortgagee is entitled to employ agents to effect the sale, and so long as he selects agents presumably competent, he is not liable for their errors of judgment, or errors in matters of detail not seriously affecting the success of the sale or the price realised; but if the agent is guilty of a serious blunder inducing a failure to sell, or a large diminution of the price realised, the mortgagee is responsible, though he may have a remedy against his agent (*i*).

Employment of agents.

**454.** Where there are successive mortgages, the first mortgagee can exercise his power of sale without the concurrence of the subsequent mortgagees, but he must account to them for the surplus sale moneys (*k*). If the second mortgagee exercises his power of sale, he can sell subject to the first mortgage (*l*); or he can sell

Right of sale as between successive incumbrancers.

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(*e*) *Hiatt* v. *Hillman* (1871), 19 W. R. 694; *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802. Where the properties are quite separate, evidence is required that a joint sale will produce a higher price; where they are united—*e.g.*, a house and a garden—or are undivided shares of the same property, this is not necessary. The apportionment must be made on the advice of a competent person (*Re Cooper and Allen's Contract for Sale to Harlech*, *supra*, at pp. 816, 818).

(*f*) Such as a condition entitling the vendor to rescind if he is unwilling or unable to answer any requisition (*Falkner* v. *Equitable Reversionary Society* (1858), 4 Drew. 352; see *Hobson* v. *Bell* (1839), 2 Beav. 17). A condition on sale of a reversionary interest, excluding evidence of the alleged age of the tenant for life, is improper (*Cragg* v. *Alexander*, [1867] W. N. 305); but the mortgagee is entitled to use stringent conditions if these are required by the state of the title (*Kershaw* v. *Kalow* (1855), 1 Jur. (N. S.) 974). As to conditions of sale, see, generally, title SALE OF LAND.

(*g*) See p. 245, *ante*.

(*h*) In the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145) (Lord Cranworth's Act), "subject to any reasonable conditions he may think fit to make" (*ibid.*, s. 11); in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), "subject to such conditions respecting title, or evidence of title, or other matter, as he thinks fit" (*ibid.*, s. 19 (1) (i.)). See, also, *ibid.*, s. 21 (6), extended by the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 5 (2), protecting mortgagees against involuntary losses, but the practical value of this protection is doubtful.

(*i*) *Tomlin* v. *Luce* (1889), 41 Ch. D. 573, 575. But the application of the principle there was erroneous, since the error produced an enhanced price; hence the compensation allowed by the vendor was not, as held by Kekewich, J., the measure of the loss sustained (*Tomlin* v. *Luce* (1889), 43 Ch. D. 191, C. A.; 3 Seton, Judgments and Orders, 6th ed., p. 1962). As to negligence of agents, see titles AGENCY, Vol. I., p. 196; AUCTION AND AUCTIONEERS, Vol. I., 514; NEGLIGENCE, pp. 357 *et seq.*, *post*.

(*k*) See pp. 259, 260, *post*. But a first mortgagee can buy up a subsequent incumbrance at a reduced price without communicating to the subsequent incumbrancer an anticipated advantageous sale, and the sale, if afterwards effected, will be valid (*Dolman* v. *Nokes* (1855), 22 Beav. 402).

(*l*) See *Manser* v. *Dix* (1857), 8 De G. M. & G. 703, C. A.

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free from it, either with the consent of the first mortgagee, who will be paid off out of the purchase-money, and will concur in the conveyance to the purchaser, or under the statutory power (*m*). In the latter case application (*n*) must be made to the court to allow payment into court of the amount of the mortgage debt and any interest due thereon, and of such additional amount as the court considers will be sufficient to meet the contingency of any further costs, expenses and interest (*o*). Thereupon the court may declare the land to be freed from the mortgage, and make any order for conveyance or vesting proper for giving effect to the sale (*p*).

Fixtures.

**455.** An express or statutory power to sell the mortgaged property or any part thereof does not authorise the sale of fixtures separately from the land, whether the fixtures are expressly mentioned in the mortgage (*q*) or not (*r*).

Minerals.

**456.** In the absence of express or statutory power the mortgagee is not entitled to sell the surface of land, with a reservation of minerals, or to sell the minerals separately from the surface (*s*); but such a sale may be made, in the case of mortgages executed before the 1st January, 1912, with the sanction of the court (*t*), and as regards mortgages executed after the 31st December, 1911, without such sanction (*u*).

Easements and restrictive covenants.

**457.** In the absence of statutory power the mortgagee cannot, on a sale of part of the property, grant easements over, or impose restrictive covenants upon, the part remaining unsold, or reserve

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(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5 (1).

(*n*) The court can dispense with service of notice of the application on the vendor or purchaser (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 1).

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5 (1). The further sum must not exceed one-tenth of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount; see *Milford Haven Railway and Estate Co.* v. *Mowatt, Re Lake and Taylor's Mortgage, Spain* v. *Mowatt* (1884). 28 Ch. D. 402.

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5 (2); see *Dickin* v. *Dickin* (1882), 30 W. R. 887.

(*q*) *Re Brooke, Brooke* v. *Brooke*, [1894] 2 Ch. 600.

(*r*) *Re Yates, Batcheldor* v. *Yates* (1888), 38 Ch. D. 112, C. A.; see *Re Joyce, Ex parte Barclay* (1874), 9 Ch. App. 576. Trade fixtures pass as part of the mortgaged property, whether the mortgage is by conveyance, or, in the case of leaseholds, by subdemise (*Southport and West Lancashire Banking Co.* v. *Thompson* (1887), 37 Ch. D. 64, C. A.); see pp. 119, 128, *ante*.

(*s*) *Buckley* v. *Howell* (1861), 29 Beav. 546; see *Re Gladstone, Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, 105, C. A.; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 525.

(*t*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, as amended by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 3, replacing the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108); *Re Beaumont's Mortgage Trusts* (1871), L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates* (1872), L. R. 13 Eq. 634. The application is made by petition (R. S. C., Ord. 54B, r. 2), and the petition must be served on the mortgagor (*Re Hirst's Mortgage* (1890), 45 Ch. D. 263).

(*u*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 4 (1), (3), (4). But this provision may be excluded by the mortgage deed (*ibid.*, s. 4 (2)). Where the provision is not excluded, the sale of the minerals may include powers of working, wayleaves, rights of way, water, and drainage, and other powers, easements, and privileges for mining purposes in relation to the property sold, or to any property remaining unsold (*ibid.*, s. 4 (1) (ii.) (b)).

easements or the benefit of covenants over the part sold (*a*), save that a conveyance made in pursuance of such a sale has its ordinary effect with regard to apparent continuous easements. Hence it will give to the purchaser such rights of light and other easements as he would take without express mention if the mortgagee were selling as absolute owner (*b*). But, where the mortgage is executed after the 31st December, 1911, the mortgagee may create restrictive covenants or conditions against either the part sold or the part remaining unsold (*c*), and may grant or reserve easements in relation to the part sold or the part remaining unsold (*d*).

SUB-SECT. 7.—*Who may Purchase.*

Mortgagee cannot sell to himself.

**458**. A mortgagee cannot sell to himself, either alone or with others, nor to a trustee for himself (*e*). Unless there are different persons filling the positions of vendor and purchaser the transaction is not a sale at all, and is not an exercise of the power. The interposition of a trustee does not affect the substance of the transaction (*f*). The same principle prevents a sale to an agent or solicitor acting for the mortgagee in the matter of the sale (*g*); consequently, on a sale by a building society as mortgagee, a purchase by the secretary (*h*), or other officer concerned with the conduct of the sale (*i*), is void. But the mortgagee may sell to a solicitor who has not the conduct of the sale (*k*).

There is no fiduciary relation between co-owners of the equity of

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(*a*) See *Dayrell* v. *Hoare* (1840), 12 Ad. & El. 356; *Born* v. *Turner*, [1900] 2 Ch. 211.

(*b*) *Born* v. *Turner*, *supra*; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 304.

(*c*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 4 (1) (i.). The covenants may be with respect to building on, or other use of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing.

(*d*) *Ibid.*, s. 4 (1) (ii.) (a). These powers may be excluded by the mortgage deed (*ibid.*, s. 4 (1), (2)).

(*e*) *Downes* v. *Grazebrook* (1817), 3 Mer. 200; *Robertson* v. *Norris* (1858), 1 Giff. 421; *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391, 404, P. C.; *Henderson* v. *Astwood*, *Astwood* v. *Cobbold*, *Cobbold* v. *Astwood*, [1894] A. C. 150, P. C.). Where a sale is being conducted by the court, the mortgagee may obtain leave to bid, if the mortgagor does not object; but otherwise he will not be allowed to become the purchaser, unless no purchaser at an adequate price can be found (*Tennant* v. *Trenchard* (1869), 4 Ch. App. 537, 547). But a creditor holding a security for his debt not completed by conveyance, containing a trust for sale under which he has never acted, is not debarred from purchasing from the agent of the debtor (*Chambers* v. *Waters* (1829), 3 Sim. 42; (1833) Coop. *temp.* Brough. 91; S. C., *Waters* v. *Groom* (1844), 11 Cl. & Fin. 684, H. L.).

(*f*) *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch. D. 395, 409, C. A.

(*g*) *Whitcomb* v. *Minchin* (1820), 5 Madd. 91; *Orme* v. *Wright* (1838), 3 Jur. 19; *Re Bloye's Trust* (1849), 1 Mac. & G. 488, 494; *Martinson* v. *Clowes* (1882), 21 Ch. D. 857, 860.

(*h*) *Martinson* v. *Clowes*, *supra*.

(*i*) *Hodson* v. *Deans*, [1903] 2 Ch. 647.

(*k*) *Guest* v. *Smythe* (1870), 5 Ch. App. 551 (where the solicitor's name appeared on the conditions of sale, but he was only solicitor to a creditor of the mortgagee); *Nutt* v. *Easton*, [1899] 1 Ch. 873 (where the solicitor had acted for the mortgagee, but was not employed to effect a sale affirmed (on question of laches), [1900] 1 Ch. 29, C. A.). But a sale where

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Puisne mortgagee may purchase.

redemption so as to prevent one from purchasing the property on his own account from the mortgagee (*l*); and for this purpose a second mortgagee is in the same position as a stranger, and obtains under the purchase a title free from any equity of redemption (*m*); it makes no difference that the second mortgage is in the form of a trust for sale, or that the second mortgagee is in possession (*n*).

SUB-SECT. 8.—*Protection of Purchasers.*

Purchasers' protection from irregularity in sale.

**459.** In the absence of any provision for the protection of purchasers, evidence must be furnished that the event on which the power of sale is to arise has happened (*o*). But express powers (if in the usual form) and also statutory powers provide that, where a sale is made in professed exercise of the power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by the unauthorised, or improper, or irregular exercise of the power has his remedy in damages against the person exercising the power (*p*).

Of notice of irregularity.

Under the above provisions the purchaser is exempted from any duty to make inquiries, and, provided that he has no notice of any irregularity, he is protected notwithstanding that an event giving rise to the power of sale has not occurred, and even though at the time of the sale the mortgage has been paid off (*q*). But he is not protected if he has notice, actual (*r*) or constructive (*s*), of the

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the purchaser employed the mortgagee's clerk to bid was set aside (*Parnell* v. *Tyler* (1833), 2 L. J. (CH.) 195); and see *Orme* v. *Wright* (1838), 3 Jur. 19, questioning the validity of a purchase by an agent who had acted in effecting the mortgage and receiving interest.

(*l*) *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*m*) *Parkinson* v. *Hanbury* (1860), 1 Drew. & Sm. 143, 146 (on appeal, (1865), 2 De G. J. & Sm. 450, 455, C. A.; (1867), L. R. 2 H. L. 1, this point was not decided); *Shaw* v. *Bunny* (1864), 33 Beav. 494; (1865) 2 De G. J. & Sm. 468, C. A.; *Kirkwood* v. *Thompson* (1865), 2 De G. J. & Sm. 613, 618; see *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (1879), L. R. 6 Ind. App. 145, 160; *Flower & Sons* v. *Pritchard* (1908), 53 Sol. Jo. 178.

(*n*) *Kirkwood* v. *Thompson*, *supra*, at p. 619.

(*o*) *Hobson* v. *Bell* (1839), 2 Beav. 17, 22, where the unsupported statutory declaration of the mortgagee was held insufficient.

(*p*) The text follows the provision of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21, as amended by the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 5 (1). The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21, only applied where the conveyance to the purchaser had been executed, so that before conveyance a purchaser was entitled to inquire whether a case for exercising the power had arisen (*Life Interest and Reversionary Securities Corporation* v. *Hand-in-Hand Fire and Life Insurance Society*, [1898] 2 Ch. 230); but the amending provision, which is retrospective, excludes such inquiry. The ordinary express power and the power under Lord Cranworth's Act (Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145)) have the same effect, since they extend to sales made in professed exercise of the power (*ibid.*, s. 13); Encyclopædia of Forms and Precedents, Vol. VIII., p. 509); and see *Haddington Island Quarry Co., Ltd.* v. *Huson*, [1911] A. C. 722, P. C.

(*q*) *Dicker* v. *Angerstein* (1876), 3 Ch. D. 600.

(*r*) *Jenkins* v. *Jones* (1860), 2 Giff. 99, 108.

(*s*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 30, 34, C. A.; see title EQUITY, Vol. XIII., pp. 84 *et seq.*

irregularity; consequently he is not protected if the exercise of the power depends on a notice being given which in the circumstances cannot have been given (*t*), though he is, perhaps, protected if the want of notice could have been waived by the mortgagor (*a*); and he is protected if the want of notice has been in fact waived by the persons to whom it should have been given (*b*).

### SUB-SECT. 9.—*Application of Proceeds of Sale.*

Effect of sale.

**460.** The effect of a sale under a power of sale is to destroy the equity of redemption in the land (*c*), and to constitute the mortgagee exercising the power of sale a trustee of the surplus proceeds (if any) after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor (*d*). In the absence of provision in the power of sale, this principle determines the application of the proceeds, but provision is contained in the statutory powers, and usually in express powers.

Application of money from sale under statutory powers.

**461.** The receipt in writing of the mortgagee is a sufficient discharge for any money arising from the exercise of his power of sale under the Conveyancing and Law of Property Act, 1881 (*e*), and such money is applicable in the first instance to the discharge of any prior incumbrances to which the sale is not made subject (*f*); the balance or the whole, as the case may be, is held by him in trust to be applied, first, in payment of the costs, charges, and expenses properly incurred by him, as incident to the sale, or any attempted sale, or otherwise; secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue is to be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of sale (*g*).

Variations as to persons ultimately entitled.

Similar provision is made by express powers (*h*) and by the

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(*t*) *Parkinson* v. *Hanbury* (1860), 1 Drew. & Sm. 143 (where the mortgagor, to whom a three months' notice was to be given, was dead, and no representative had been appointed; the point was not dealt with on appeal, (1865) 2 De G. J. & Sm. 450, C. A.; (1867), L. R. 2 H. L. 1); *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273, C. A. (where the notice could only be given after default, and the necessary period had not elapsed).

(*a*) *Selwyn* v. *Garfit*, *supra*, *per* BOWEN, L.J., at p. 285.

(*b*) *Re Thompson and Holt* (1890), 44 Ch. D. 492. If the persons concerned propose to join in the conveyance in order to show the waiver, the purchaser cannot refuse to complete on the ground that the title offered is different from that which he contracted to take (*ibid.*). But in *Forster* v. *Hoggart* (1850), 15 Q. B. 155, it was held that the purchaser was not bound to take a title depending on waiver.

(*c*) See pp. 71, 156, *ante*. Consequently it defeats the rights of all subsequent incumbrancers, whose remedy then is only against the proceeds of sale (*South Eastern Rail. Co.* (*Directors etc.*) v. *Jortin* (1857), 6 H. L. Cas. 425, 435).

(*d*) *Rajah Kishendatt Ram* v. *Rajah Mumtaz Ali Khan* (1879), L. R. 6 Ind. App. 145, 160; see *Harrison* v. *Hart* (1726), 2 Eq. Cas. Abr. 6. As to payment off of prior incumbrances, see pp. 170, 180, 256, *ante*.

(*e*) 44 & 45 Vict. c. 41, s. 22 (1).

(*f*) Or the money may be paid into court to meet the prior incumbrances (*ibid.*, s. 5; see p. 256, *ante*).

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 21 (3).

(*h*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 511.

SECT. 2. Sale.

power of sale under Lord Cranworth's Act (*i*), with variations in the description of the persons entitled to the residue. Thus, payment may be directed to the mortgagor, his heirs and assigns, or the personal representatives may be substituted for heirs, or, as in Lord Cranworth's Act (*i*), both heirs and personal representatives may be mentioned. But notwithstanding a limitation to heirs, the right to the surplus on the death of the mortgagor depends on the state of the property at his death (*k*). The proceeds of sale of personal property, in any case, go to the personal representatives, and where real and personal property are sold together after the mortgagor's death the proceeds are apportioned (*l*). The direction in the Conveyancing and Law of Property Act, 1881 (*m*), for payment to the person entitled has the like effect (*n*).

Satisfaction of claims of puisne mortgagees.

**462.** Where there are subsequent incumbrancers, their claim to receive the surplus proceeds is prior to that of the mortgagor, and if the first mortgagee has notice (*o*), he is liable to them if he pays the proceeds to the mortgagor (*p*). If the entire equity of redemption has been conveyed to a second mortgagee, the whole of the proceeds can be paid to him, and his receipt is a good discharge (*q*); but the first mortgagee may refuse to pay him more than the amount due on his mortgage (*r*), and if there is any doubt as to the persons entitled to the surplus proceeds the first mortgagee can pay such surplus into court (*s*).

When mortgagee express or constructive trustee.

**463.** Where the power of sale, whether express or statutory, provides that the surplus proceeds shall be held in trust for the mortgagor, the mortgagee becomes an express trustee of the surplus proceeds in his hands (*t*); otherwise he is not a trustee until it is

(*i*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 14, omitting the provision for the discharge of prior incumbrances.

(*k*) See, further, title EQUITY, Vol. XIII., p. 112. As to payment under a building society mortgage where the mortgagor has died intestate leaving an infant heir, see title BUILDING SOCIETIES, Vol. III., p. 369.

(*l*) Compare p. 255, *ante*; title EQUITY, Vol. XIII., p. 109, note (*e*).

(*m*) 44 & 45 Vict. c. 41, s. 21 (3).

(*n*) Persons claiming under a voluntary settlement were, in spite of stat. (1584-5) 27 Eliz. 4, and before the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), entitled to the surplus proceeds as against the settlor (*Re Walhampton Estate* (1884), 26 Ch. D. 391).

(*o*) Constructive notice is not sufficient, unless it is of such a nature that it ought to be imputed as notice to the first mortgagee (*Thorne* v. *Heard and Marsh*, [1895] A. C. 495, 501, 505); and, as to notice, see title EQUITY, Vol. XIII., pp. 84 *et seq.*

(*p*) *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954, 962, C. A.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22.

(*r*) *Re Bell, Jeffery* v. *Sayles*, [1896] 1 Ch. 1, C. A.; *Hockey* v. *Western*, [1898] 1 Ch. 350, C. A.; see *Re Lloyd, Lloyd* v. *Lloyd*, [1903] 1 Ch. 385, 403, C. A.

(*s*) See *Re Walhampton Estate* (1884), 26 Ch. D. 391.

(*t*) *Locking* v. *Parker* (1872), 8 Ch. App. 30, 40; *Banner* v. *Berridge* (1881), 18 Ch. D. 254, 269; *Re Bell, Lake* v. *Bell* (1886), 35 W. R. 212; see *Thorne* v *Heard and Marsh, supra*; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 165.

shown that there is a surplus, and then he becomes only a constructive trustee (*a*). Upon the sale being completed, interest ceases to run against the mortgagor (*b*), and the mortgagee is charged simple (*c*) interest at the rate of 4 per cent. per annum on the balance in his hands (*d*), unless, owing to disputes between the persons entitled, the money has remained unproductive (*e*).

## SECT. 3.—*Appointment of Receiver.*

### SUB-SECT. 1.—*By the Court.*

Object of appointment.

**464.** Where there has been a breach of the mortgagor's obligations (*f*), or where, without such actual breach, the security is in jeopardy (*g*), the mortgagee can obtain the appointment of a receiver by the court. The appointment is made with a view to preserve the property if it is in danger, or, by intercepting the income, to provide a fund for payment of the mortgage; and it is made either as a step in an action brought to enforce the security, or in an action having the appointment of a receiver as its sole object (*h*). The receiver, when appointed, is entitled to receive rents in arrear (*i*).

By whose application appointed.

It is the practice of the court to appoint a receiver on the

(*a*) *Banner* v. *Berridge* (1881), 18 Ch. D. 254, 269; see *Gouthwaite* v. *Rippon* (1839), 8 L. J. (CH.) 139; *Tanner* v. *Heard* (1857), 23 Beav. 555; *Charles* v. *Jones* (1887), 35 Ch. D. 544. As to such a trust being sufficient to prevent time running, see title LIMITATION OF ACTIONS, Vol. XIX., p. 165.

(*b*) *West* v. *Diprose*, [1900] 1 Ch. 337, 340.

(*c*) *Eley* v. *Read* (1897), 76 L. T. 39, C. A.

(*d*) *Banner* v. *Berridge*, *supra*, at p. 280; *Charles* v. *Jones*, *supra*, at p. 550; *Heath* v. *Chinn* (1908), 98 L. T. 855. As to interest on money generally, see title MONEY AND MONEY-LENDING, pp. 37 *et seq.*, *ante*.

(*e*) *Mathison* v. *Clark* (1856), 25 L. J. (CH.) 29.

(*f*) It is sufficient that interest is in arrear (*Strong* v. *Carlyle Press*, [1893] 1 Ch. 268, C. A.), although the principal is not yet payable (*Burrowes* v. *Molloy* (1845), 2 Jo. & Lat. 521; *Bissill* v. *Bradford Tramways Co.*, [1891] W. N. 51); and, in the case of a floating security, where the breach relied on is non-payment of principal, it is sufficient if it is due before the application, although it was not due when the writ was issued (*Re Carshalton Park Estate, Ltd.*, *Graham* v. *The Co.*, *Turnell* v. *The Co.*, [1908] 2 Ch. 62).

(*g*) *Re Victoria Steamboats, Ltd.*, *Smith* v. *Wilkinson*, [1897] 1 Ch. 158; *Edwards* v. *Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Re London Pressed Hinge Co., Ltd.*, *Campbell* v. *London Pressed Hinge Co., Ltd.*, [1905] 1 Ch. 576; see title COMPANIES, Vol. V., p. 376.

(*h*) The security may in effect consist only in the appointment of a receiver; see *Taylor* v. *Emerson* (1843), 4 Dr. & War. 117. As to the circumstances under which a receiver will be appointed, the stage of the action at which the application may be made, and generally as to receivers appointed by the court and their duties and liabilities, see title RECEIVERS. As to the appointment of receivers on behalf of mortgagees and debenture stock holders of companies established for public purposes, see title COMPANIES, Vol. V., pp. 737, 743. In mortgages of tolls and rates, where the various mortgagees rank rateably, a receiver is the proper remedy (*Crewe* (*Lord*) v. *Edleston* (1857), 1 De G. & J. 93, 109, C. A.; *De Winton* v. *Brecon Corporation* (1859), 26 Beav. 533; see *Fripp* v. *Chard Rail. Co.* (1853), 11 Hare, 241, 250, and cases there referred to).

(*i*) *Codrington* v. *Johnstone* (1838), 1 Beav. 520, 524; and see note (*g*), p. 157, *ante*, and pp. 196, 201, note (*q*), *ante*.

SECT. 3. Appointment of Receiver.

application of a legal as well as of an equitable mortgagee (*k*). Where an action is pending this is the proper procedure, notwithstanding that the mortgagee has power to appoint a receiver himself (*l*). The appointment will not be made after judgment for foreclosure absolute (*m*).

Functions of receiver or receiver and manager.

**465.** A receiver's functions are limited to receipt of income and payment of ascertained outgoings (*n*). He has no general powers of management (*o*), but where the mortgage, expressly or by implication, includes a business, a receiver and manager may be appointed (*p*), though only with a view to the sale of the business as a going concern (*q*); and a receiver and manager will, if necessary, be appointed of land (*r*).

Appointment on behalf of puisne mortgagee or other equitable interests.

**466.** The appointment of a receiver at the instance of a puisne incumbrancer is without prejudice to the rights of prior incumbrancers (*s*). Hence if a prior mortgagee is not in possession, the appointment is made subject to his right to take possession (*a*), and

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(*k*) *Re Pope* (1886), 17 Q. B. D. 743, 749, C. A.; compare *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275, 286, C. A. *A fortiori*, where the mortgage includes both legal and equitable estates (*Pease* v. *Fletcher* (1875), 1 Ch. D. 273). An equitable mortgagee by deposit of deeds is entitled to a receiver (*Aberdeen* v. *Chitty* (1838), 3 Y. & C. (EX.) 379). But the relief is discretionary, and will not usually be granted where the mortgagee is in possession (*Re Prytherch, Prytherch* v. *Williams* (1889), 42 Ch. D. 590, 600); see, further, titles EQUITY, Vol. XIII., p. 55; RECEIVERS.

(*l*) *Tillett* v. *Nixon* (1883), 25 Ch. D. 238. In a partition action, a mortgagee of a share can obtain the appointment of a receiver over the whole property (*Sumsion* v. *Crutwell* (1883), 31 W. R. 399); compare *Fall* v. *Elkins* (1861), 9 W. R. 861, where the appointment was limited to the mortgaged share; and see, generally, title PARTITION, pp. 834 *et seq.*, *post*.

(*m*) *Wills* v. *Luff* (1888), 38 Ch. D. 197 (on the ground that the action is at an end, although a conveyance of the property has still to be settled).

(*n*) For a form of receiver's account, see Encyclopædia of Forms and Precedents, Vol. I., pp. 154, 155.

(*o*) *Re Manchester and Milford Rail. Co., Ex parte Cambrian Rail. Co.* (1880), 14 Ch. D. 645, 653, C. A.

(*p*) *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; see p. 120, *ante*; titles COMPANIES, Vol. V., p. 380; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 555. In a debenture, "property" includes the business of the company (*Re Leas Hotel Co., Salter* v. *Leas Hotel Co.*, [1902] 1 Ch. 332).

(*q*) *Gardner* v. *London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge* v. *Same, Gardner* v. *Same* (No. 2), *Imperial Mercantile Credit Association* v. *Same* (1867), 2 Ch. App. 201, 212; *Whitley* v. *Challis*, [1892] 1 Ch. 64, 69, 70, C. A.; *Re Victoria Steamboats, Ltd., Smith* v. *Wilkinson*, [1897] 1 Ch. 158, 162; *Re Newdigate Colliery Co., Ltd., Newdegate* v. *The Co.*, [1912] 1 Ch. 468, 472, C. A.; and see p. 197, *ante*. Consequently, if the security is a public undertaking which the receiver has no power to sell, a manager will not be appointed (*Marshall* v. *South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A.). As to the appointment of a receiver and manager of a railway under the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, see title RAILWAYS AND CANALS; and of a receiver under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 53, see title COMPANIES, Vol. V., pp. 737, 738.

(*r*) *Grafton (Duke)* v. *Taylor, Manvers (Earl)* v. *Taylor* (1891), 7 T. L. R. 588.

(*s*) *Davis* v. *Marlborough (Duke)* (1819), 2 Swan. 108, 137, 165; *Berney* v. *Sewell* (1820), 1 Jac. & W. 647.

(*a*) 1 Seton, Judgments and Orders, 6th ed., p. 759; *Bryan* v. *Cormick* (1788), 1 Cox, Eq. Cas. 422; *Dalmer* v. *Dashwood* (1793), 2 Cox, Eq. Cas. 378, 383; *Davis* v. *Marlborough (Duke)*, *supra*; *Berney* v. *Sewell*, *supra*;

if a prior mortgagee is in possession, it will not be made, so long as anything remains due to him, unless he refuses to accept a tender of what he alleges to be due (*b*). To avoid the appointment being made he must swear that something is due, though he need not swear to a specific sum (*c*). If a receiver has been appointed in the absence of a prior incumbrancer, he will be discharged and the prior incumbrancer, although only equitable, let into possession (*d*); and where other incumbrances are known to exist, the appointment may be accompanied by an inquiry as to the priorities of the several incumbrancers (*e*). A receiver will be appointed against the owner of the legal estate who refuses to satisfy equitable interests (*f*), or if there is a strong *primâ facie* case for setting the conveyance to him aside (*g*); but not otherwise, unless the rents and profits are in danger (*h*).

Appointment in aid of vendor's lien.

A receiver will be appointed in aid of a vendor's lien (*i*); but since the lien depends on the declaration of the court, he will not be appointed till after judgment (*k*). If the property sold includes a business—such as a colliery—a receiver and manager may be appointed, as in other cases (*l*).

Position of tenants and mortgagor in possession.

**467.** Upon a receiver of real or leasehold property being appointed, the tenants are directed to attorn and pay their rents in

*Tanfield* v. *Irvine* (1826), 2 Russ. 149, 151; *Liverpool Marine Credit Co.* v. *Wilson* (1872), 7 Ch. App. 507, 511; *Cadogan* v. *Lyric Theatre, Ltd.*, [1894] 3 Ch. 338, C. A.; see S. C., 2 Bro. C. C. 92, n. Accordingly the first mortgagee can take possession without the leave of the court (*Underhay* v. *Read* (1887), 20 Q. B. D. 209, 219, C. A.; *Engel* v. *South Metropolitan Brewing and Bottling Co.*, [1891] W. N. 31; see p. 192, *ante*); though formerly it was considered that leave was required (see 2 Swan. 138, n.); and application for leave is usually made (*Preston* v. *Tunbridge Wells Opera House, Ltd.*, [1903] 2 Ch. 323); and such leave is necessary where there has been no express reservation of the mortgagee's rights in the order (*Re Henry Pound, Son and Hutchins* (1889), 42 Ch. D. 402, 422, C. A.). The first mortgagee is entitled to back rents paid to the receiver after service of notice of motion for his discharge (*Preston* v. *Tunbridge Wells Opera House, Ltd.*, *supra*).

(*b*) *Berney* v. *Sewell*, *supra*.

(*c*) *Chambers* v. *Goldwin* (1804), cited 13 Ves. 378; *Quarrell* v. *Beckford* (1807), 13 Ves. 377; *Rowe* v. *Wood* (1822), 2 Jac. & W. 553, 557. If the mortgagee's accounts are in such a state that he cannot swear that anything is due, a receiver will be appointed (*Codrington* v. *Parker* (1810), 16 Ves. 469; *Hiles* v. *Moore* (1852), 15 Beav. 175).

(*d*) *Langton* v. *Langton* (1855), 7 De G. M. & G. 30, C. A.

(*e*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 138; *Metcalfe* v. *York* (*Archbishop*) (1836), 1 My. & Cr. 547; *Hiles* v. *Moore*, *supra*, at p. 179.

(*f*) *Pritchard* v. *Fleetwood* (1815), 1 Mer. 54.

(*g*) *Huguenin* v. *Baseley* (1806), 13 Ves. 105; *Stilwell* v. *Wilkins* (1821), Jac. 280; *George* v. *Evans* (1840), 4 Y. & C. (EX.) 211. According to *Lloyd* v. *Passingham* (1809), 16 Ves. 59, 70, fraud must be clearly proved.

(*h*) *Lancashire* v. *Lancashire* (1845), 9 Beav. 120, 129.

(*i*) *Munns* v. *Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414.

(*k*) *Latimer* v. *Aylesbury and Buckingham Rail. Co.* (1878), 9 Ch. D. 385, C. A.

(*l*) *Boyle* v. *Bettws Llantwit Colliery Co.* (1876), 2 Ch. D. 726. As to the appointment, on behalf of mortgagees or debenture-holders, of a receiver of the assets of a company, see title COMPANIES, Vol. V., pp. 376 *et seq.*

SECT. 3. Appointment of Receiver.

arrear and growing due to him (*m*); and if the mortgagor is in possession, he must attorn tenant at an occupation rent, or in the alternative deliver up possession to the receiver (*n*); but an order for delivery of possession will not be made before judgment in the action (*o*).

SUB-SECT. 2.—*Out of Court.*

Receiver appointed by mortgagee under express power.

**468.** In order to give the mortgagee the advantages, without the liabilities, of being in possession (*p*), a receiver may be appointed at the time of the mortgage, and as part of the security, or subsequently under an express power in the mortgage deed. In the former case the appointment is made by the mortgagor with the concurrence of the mortgagee, either by a separate deed (*q*), which can be given to the receiver as evidence of his authority, or in the mortgage deed (*r*). In the latter case the appointment is made by the mortgagee, either by writing under hand (*s*) or by deed, according to the terms of the power, and in either case it is provided that the receiver shall be the agent of the mortgagor (*a*). The deed of appointment, or the power and appointment under the power, authorise the receiver to receive the rents of the property and provide for their application (*b*). Where successive incumbrancers join in a deed appointing a receiver and declaring trusts of the receipts, with an ultimate trust for the mortgagor, an incumbrancer subsequent to the deed is entitled to the benefit of it, but in proceedings for an account or for the execution of the trusts he must make all the prior incumbrancers parties (*c*).

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(*m*) *Davis* v. *Marlborough* (*Duke*) (1819), 2 Swan. 108, 116; *Hawkes* v. *Holland*, [1881] W. N. 128, C. A.; and if it does not appear in what right possession is held, application should be made that the person in possession should attorn, and then he must explain his possession to the court (*Reid* v. *Middleton* (1823), Turn. & R. 455); compare *Randfield* v. *Randfield* (1859), 7 W. R. 651.

(*n*) *Re Burchnall, Walker* v. *Burchnall*, [1893] W. N. 171. The liability to payment commences from the date of the order (*Lloyd* v. *Mason* (1837), 2 My. & Cr. 487; *Re Burchnall, Walker* v. *Burchnall, supra*). If there is no order for the mortgagor to attorn, he must pay rent from the date of demand by the receiver (*Yorkshire Banking Co.* v. *Mullan* (1887), 35 Ch. D. 125). In *Hawkes* v. *Holland, supra*, it was said that the order should be for delivery of possession, but the alternative of attornment was probably overlooked.

(*o*) *Taylor* v. *Soper* (1890), 62 L. T. 828.

(*p*) See 2 Davidson, Precedents in Conveyancing, 4th ed., Part II., p. 99.

(*q*) See Encyclopædia of Forms and Precedents, Vol. VIII., p. 910.

(*r*) *Ibid.*, Vol. XVI., p. 387.

(*s*) *Ibid.*, Vol. VIII., p. 908.

(*a*) *Jefferys* v. *Dickson* (1866), 1 Ch. App. 183, 190; *Law* v. *Glenn* (1867), 2 Ch. App. 634, 641; see *Jones* v. *Smith* (1841), 1 Hare, 43, 71; *Kensington* (*Lord*) v. *Bouverie* (1855), 7 De G. M. & G. 134, 157. As to the practice of making the receiver the agent of the mortgagor, see, generally, *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, C. A., *per* RIGBY, L.J., at p. 692. As to the agency of a receiver appointed by debenture-holders, see *Deyes* v. *Wood*, [1911] 1 K. B. 806; title COMPANIES, Vol. V., pp. 373, 374; and as to the position of a receiver appointed by the court, see titles COMPANIES, Vol. V., p. 379; RECEIVERS.

(*b*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 29, 642 662; *ibid.*, Vol. XI., p. 396.

(*c*) *Ford* v. *Rackham* (1853), 17 Beav. 485; *Jefferys* v. *Dickson, supra.*

SECT. 3. Appointment of Receiver.

**469.** The insertion in an ordinary mortgage of an express power to appoint a receiver is unusual, and where the mortgage deed has been executed since the 31st December, 1881, reliance is placed on the power given by statute to mortgagees for the purpose, whereby a mortgagee has power, when the mortgage money has become due, to appoint a receiver of the mortgaged property, or of any part thereof (*d*); but the power is not to be exercised until the mortgagee has become entitled to exercise the statutory power of sale (*e*). The appointment may be made by writing under the hand of the mortgagee (*f*), and the receiver may be removed and a new receiver appointed from time to time in like manner (*g*).

General statutory powers :

(1) Conveyancing and Law of Property Act, 1881.

Where the mortgage was executed between the 28th August, 1860, and the 1st January, 1882, the power under Lord Cranworth's Act (*h*) is applicable, if not excluded. This power authorises the appointment of a receiver of the rents and profits of real and leasehold property, and not of income generally ; it is exercisable in the same events as the power of sale under that Act (*i*), but without the restriction as to six months' notice, and a new receiver may be appointed from time to time (*k*).

(2) Lord Cranworth's Act.

Under both statutes the receiver is deemed to be the agent of the mortgagor, and the mortgagor is solely responsible for his acts or defaults, unless the mortgage deed otherwise provides (*l*).

Position of receiver.

The death of the mortgagor does not operate as a revocation of the power to appoint a receiver (*m*).

Effect of mortgagor's death.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19 (1) (iii.). The statutory power may be excluded or varied by the mortgage deed (*ibid.*, s. 19 (3) ). The appointment of a receiver of book debts does not take the book debts out of the order and disposition of the mortgagor, unless notice of the appointment is given to the debtors ; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 179, note (*e*).

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (1). As to when the power of sale is exercisable, see p. 251, *ante*.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (1).

(*g*) *Ibid.*, s. 24 (5).

(*h*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145).

(*i*) See p. 251, *ante*.

(*k*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), ss. 11, 17, 20. But the mortgagee does not appoint in the first instance, unless some person has been named as receiver in the deed ; he must require the mortgagor to appoint, and only makes the appointment on his default (*ibid.*, s. 17).

(*l*) *Ibid.*, s. 18 ; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (2). But the agency may be modified by the terms of the mortgage deed (*Richards* v. *Kidderminster Overseers*, *Richards* v. *Kidderminster Corporation*, [1896] 2 Ch. 212, 220). and a receiver who, though originally appointed by the mortgagee under the statutory power, is subsequently appointed by the court, ceases to be the agent of the mortgagor (*Hand* v. *Blow*, [1901] 2 Ch. 721, 732, C. A.). As to the effect of payment of interest out of rent by the receiver, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 72, 94.

(*m*) *Re Hale*, *Lilley* v. *Foad*, [1899] 2 Ch. 107, 117, C. A. The receiver may be permitted to sue in the name of the mortgagor's heir on givng an indemnity (*Fairholme and Palliser* v. *Kennedy* (1889), 24 L. R. Ir. 498).

SECT. 3. Appointment of Receiver.

Powers as to recovery of income of property.

**470.** Under the Conveyancing and Law of Property Act, 1881 (*n*), the receiver has power to demand and recover all the income of the property over which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts; and a person paying money to him is not concerned to inquire whether any case has happened to authorise the receiver to act (*o*). He has the same powers under Lord Cranworth's Act (*p*) in respect of rents and profits of real and leasehold property. A receiver appointed otherwise than under statute has only the powers conferred on him by his appointment, and, unless specially empowered to do so, cannot sue or distrain in the name of the person entitled to sue or distrain, that is, either the mortgagor or mortgagee according to the circumstances (*q*). A receiver appointed by debenture-holders, who, under the terms of the debentures, is entitled to take possession, will be put into possession by the court as against the liquidator, though if the court were asked to appoint a receiver it would appoint the liquidator (*r*).

Powers as to insurance and application of income.

**471.** The receiver, if appointed under the Conveyancing and Law of Property Act, 1881 (*s*), is empowered to insure the mortgaged property against fire, and to execute necessary or proper repairs, but in each case only if so directed in writing by the mortgagee (*s*). He must apply moneys received by him (1) in discharge of all rents, taxes, rates, and outgoings affecting the mortgaged property; (2) in keeping down annual sums and interest having priority to the mortgage under which he is receiver; (3) in payment of his commission, and of premiums on fire, life and other insurances, payable under the mortgage deed or the statute, and the cost of necessary repairs directed in writing by the mortgagee (*t*); and (4) in payment of interest under the mortgage (*u*). The residue he pays to the person who, but for his possession, would be entitled to receive the income (*v*).

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(*n*) 44 & 45 Vict. c. 41, s. 24 (3); and, after the appointment of a receiver, the mortgagor cannot distrain, even though he alleges negligence on the part of the receiver (*Bayly* v. *Went* (1884), 51 L. T. 764); and a distress by him is illegal (*Woolston* v. *Ross*, [1900] 1 Ch. 788). As to estoppel by payment of rent by a tenant to a receiver, see *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304, C. A.; and title ESTOPPEL, Vol. XIII., pp. 402 *et seq.*

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (4).

(*p*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 19. As to the application of this provision to certain mortgages only, see p. 247, *ante*.

(*q*) As to distress, see title DISTRESS, Vol. XI., p. 131.

(*r*) *Re Henry Pound, Son and Hutchins* (1889), 42 Ch. D. 402, C. A.; *Re Joshua Stubbs, Ltd., Barney* v. *Joshua Stubbs, Ltd.*, [1891] 1 Ch. 475, C. A.

(*s*) 44 & 45 Vict. c. 41, s. 24 (7), (8) (iii.).

(*t*) *White* v. *Metcalf*, [1903] 2 Ch. 507; and see note (*l*), p. 240, *ante*.

(*u*) The receiver must pay arrears of interest due at the time of his appointment, as well as interest accruing subsequently (*National Bank* v. *Kenney*, [1898] 1 I. R. 197).

(*v*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (8).

SECT. 3. Appointment of Receiver.

Like provision as to insurance and application of rents is made by Lord Cranworth's Act (*x*), but without power for the mortgagee to direct repairs; and appointments of receivers under receivership deeds or express powers contain similar provisions. The statutory application of income may be extended by the mortgage deed, so as, for instance, to authorise a receiver and manager of a business to pay unsecured debts (*a*).

Remuneration.

**472.** A receiver appointed under the Conveyancing and Law of Property Act, 1881 (*b*), is entitled to retain out of any money received by him a commission at such rate, not exceeding 5 per cent. on the gross amount of all money received, as is specified in his appointment, and, if no rate is specified, then at the rate of 5 per cent. on that gross amount; but the court may, on the receiver's application, allow him a higher rate. The rate thus determined covers the receiver's remuneration, and all costs, charges and expenses incurred by him as receiver (*b*). Lord Cranworth's Act contains a similar provision, but without power for the court to increase the rate (*c*). Appointments made otherwise than under the statutes usually provide specially as to remuneration, and if they do not, the receiver will be entitled to a proper remuneration as a *quantum meruit* (*d*).

## SECT. 4.—*Action on Covenant for Payment.*

### SUB-SECT. 1.—*Who may Sue.*

Action by mortgagee and those claiming under him.

**473.** An action on the covenant for payment (*e*) contained in the mortgage deed can be brought by the mortgagee (*f*), and those claiming the mortgage security under him, whether by devolution on death or by alienation *inter vivos*. Accordingly if the mortgagee has not assigned the mortgage, the right to sue passes on his death to his personal representatives (*g*); but if he has specifically bequeathed the mortgage, the mortgage debt and the right to sue for it will vest in the legatee upon the executors' assent to the bequest being given (*h*), though since freehold mortgaged property

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(*x*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), ss. 22, 23. As to the application of this provision to certain mortgages only, see p. 247, *ante*.

(*a*) *Re Hale, Lilley* v. *Ford*, [1899] 2 Ch. 107, 118, C. A.

(*b*) 44 & 45 Vict. c. 41, s. 24 (6).

(*c*) Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), s. 21.

(*d*) *Re Vimbos, Ltd.*, [1900] 1 Ch. 470.

(*e*) As to the implied personal obligation on the mortgagor in the absence of express covenant, see p. 70, *ante*. Formerly the action was either in debt or covenant (see *Evans* v. *Jones* (1839), 5 M. & W. 295; *Barber* v. *Butcher* (1846), 8 Q. B. 863); or in covenant alone (see *Randall* v. *Rigby* (1838), 4 M. & W. 130; *Harrison* v. *Matthews* (1842), 10 M. & W. 768), according to the nature of the liability. The form of action is not now material; see titles ACTION, Vol. I., pp. 37, 45, 47; PRACTICE AND PROCEDURE.

(*f*) For a form of appointment of agent for this purpose, see Encyclopædia of Forms and Precedents, Vol. I., p. 372.

(*g*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 224. As to the executors' duty to get in money secured on mortgage, see *ibid.*; pp. 242, 243.

(*h*) See *ibid.*, p. 265.

SECT. 4. Action on Covenant for Payment.

vests on the death of a mortgagee in his executors by statute and not under the will (*i*), it is usual for the executors to transfer the mortgage security to the legatee, and this is necessary in order to vest the property in him. If the mortgagee or his personal representatives transfer the mortgage, the right to sue on the covenant vests in the transferee on his giving notice in writing of such transfer to the mortgagor (*k*).

Action by mortgagees as trustees.

Where the mortgagees are trustees the beneficiaries are not entitled to sue on the covenant (*l*); they must call upon the trustees either to sue or to allow the beneficiaries to sue in their name (*m*). Similarly, where debentures or debenture stock are secured by a trust deed, the right of action is in the trustees and not in the debenture-holders or debenture stockholders (*n*), unless there is a direct covenant with the latter (*o*).

SUB-SECT. 2.—*When Right of Action Arises.*

Covenant to pay on, or on or after, a certain day.

**474.** When a day for payment is fixed by the covenant (*p*), the right of action arises upon non-payment on that day (*q*). A covenant

(*i*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30; see p. 182, *ante*.

(*k*) See title CHOSES IN ACTION, Vol. IV., pp. 372, 373.

(*l*) The beneficiary is not mentioned in the mortgage, and no benefit to him arises under it directly. Where the contract shows that a beneficiary is to have the benefit of it, he may sue on it (*Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A.; *Kelly* v. *Larkin*, [1910] 2 I. R. 550; see title CONTRACT Vol. VII., p. 344).

(*m*) See title TRUSTS AND TRUSTEES.

(*n*) *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video* (1879), 11 Ch. D. 372, 383; *Re Dunderland Iron Ore Co., Ltd.*, [1909] 1 Ch. 446.

(*o*) *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278, 283; see title COMPANIES, Vol. V., p. 399.

(*p*) As to the effect of a covenant to repay the principal by instalments, see p. 114, *ante*.

(*q*) The affirmative covenant implies that the lender will not sue before that day (*Bolton* v. *Buckenham*, [1891] 1 Q. B. 278, 281, C. A.); and consequently a substituted covenant taken by the mortgagee for payment at a date subsequent to that originally fixed is a binding arrangement to give time, and ordinarily discharges a surety; see title GUARANTEE, Vol. XV., p. 552. If the covenant also fixes a place for payment, the creditor must attend there to receive payment, and there is no default unless he does so (*Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357; see title CONTRACT, Vol. VII., pp. 415, 416). The action on the covenant is only for principal and interest, and any other sums which the mortgagor has covenanted to pay, not for expenses incurred by the mortgagee outside the covenant, though he may be entitled to these in a redemption or foreclosure action (*Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A.; see pp. 227, 231, *ante*). As to the right of action of mortgagees or debenture stock-holders of statutory companies, see title COMPANIES, Vol. V., pp. 735, 743. If a bond has been given for the mortgage debt, the amount recoverable for principal and interest is, in general, limited to the amount of the penalty, and no more is recoverable against the mortgaged property if the mortgage is to secure the bond debt (*Hughes* v. *Wynne* (1832), 1 My. & K. 20); but *contra*, if the mortgage is for the principal sum and interest without reference to the bond (*Clarke* v. *Abingdon* (*Lord*) (1810), 17 Ves. 106; *Mathews* v. *Keble* (1867), L. R. 4 Eq. 467; (1868), 3 Ch. App. 691; see title BONDS, Vol. III., p. 93). As to bonds given as collateral security, see *ibid.*, pp. 99, 100.

to pay on or after a certain date gives the covenantee the right to payment at any time after that date, though possibly demand must first be made (*r*).

Principal payable on demand.

When the principal sum is payable on demand, and there is no provision, express or implied, for notice to be given, the necessity for notice depends on whether the covenant is direct or collateral. If it is direct, that is, if it secures the covenantor's own debt, no actual demand is required: the right of action accrues immediately on the money being advanced (*s*). But if the covenant is collateral —where, for instance, it is to secure the debt of another—the action cannot be brought till after actual demand (*a*).

Principal payable on demand in writing.

Where the principal sum is payable on demand in writing, actual demand must be made before the right of action arises (*b*), and any other condition prescribed as a preliminary to suing on the covenant must be observed (*c*). A provision that the demand must be served on the premises or in some particular manner renders such service sufficient but not essential. Any mode of service is also sufficient which brings home to the mortgagor the fact that the demand has been made (*d*).

Sufficient service of demand.

Effect of adopting concurrent remedies.

If the mortgagee has realised his security or part of it by sale, he must credit the mortgagor with the amount realised, less the expenses of realisation, and can bring an action on the covenant for any balance remaining due (*e*); but, if instead of realising, he has foreclosed, he cannot sue on the covenant without reopening the foreclosure (*f*). A separate action on the covenant should not be brought while a foreclosure action is pending, if the mortgagee can get an order for personal payment in the foreclosure action (*g*). The appointment of a receiver by the mortgagee does not prevent

(*r*) *Re Tewkesbury Gas Co., Tysoe* v. *The Co.*, [1911] 2 Ch. 279; affirmed, [1912] 1 Ch. 1, C. A.

(*s*) *Norton* v. *Ellam* (1837), 2 M. & W. 461; *Jackson* v. *Ogg* (1859), John. 397; *Re Brown's (J.) Estate, Brown* v. *Brown*, [1893] 2 Ch. 300, 304; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 43.

(*a*) *Birks* v. *Trippet* (1666), 1 Wms. Saund. (ed. 1871), 33; *Re Brown's (J.) Estate, Brown* v. *Brown, supra*; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 46, 78. It has been held that a bond to secure money payable on demand is not forfeited till after demand (*Carter* v. *Ring* (1813), 3 Camp. 459; see title BONDS, Vol. III., p. 92); but the distinction is doubtful (see *Re Brown's (J.) Estate, Brown* v. *Brown, supra*).

(*b*) See *Norton* v. *Ellam, supra*. In *Re Brown's (J.) Estate, Brown* v. *Brown, supra*, it was suggested that a provision for the principal to be payable on demand, with interest in the meantime, implied a postponement of payment, so as, in effect, to make a demand necessary; but the decision seems to be really based on the fact that the covenant was by a surety.

(*c*) See *Rogers & Co.* v. *British and Colonial Colliery Supply Association* (1898), 68 L. J. (Q. B.) 14, where a debenture stock holder's right of action depended on previous notice to the debenture stock trustees and default by them in suing. As to the allowance of a reasonable time for obtaining the money from the debtor's bankers, see p. 114, *ante*.

(*d*) *Worthington & Co., Ltd.* v. *Abbott*, [1910] 1 Ch. 588; see *Belding* v. *Read* (1865), 3 H. & C. 955, 963; *Massey* v. *Sladen* (1868), L. R. 4 Exch. 13 (demand either personally or by service at place of business).

(*e*) See *Barker's Claim*, [1894] 3 Ch. 290, C. A.

(*f*) See p. 245, *ante*, and p. 299, *post*.

(*g*) *Poulett (Earl)* v. *Hill (Viscount)*, [1893] 1 Ch. 277, C. A.; *Williams* v. *Hunt*, [1905] 1 K. B. 512, C. A.

SECT. 4. Action on Covenant for Payment.

his bringing an action on the covenant by specially indorsed writ, but if there is a question as to the true state of the accounts leave to defend will be given (*h*).

SUB-SECT. 3.—*Who may be Sued.*

Mortgagor and his surety.

**475.** The action on the covenant can be brought against the mortgagor and against any person who has joined with him in the covenant or has given a separate covenant as surety. Words added to a covenant excluding personal liability may be repugnant, and the full liability remain (*i*); but it is permissible to qualify the covenant; thus a covenant by a trustee may in terms limit his liability to the time while he is a trustee (*k*).

Assignee of equity of redemption.

**476.** The covenant for payment of the mortgage debt does not run with the land, and hence the assignee of the equity of redemption is not liable to be sued thereon by the mortgagee (*l*); but if he is a purchaser on sale, he usually enters into a covenant to indemnify the mortgagor against the debt, and, in the absence of express covenant, such a covenant of indemnity is implied (*m*). The assignee may make himself directly liable by entering into a fresh covenant with the mortgagee (*n*), but such liability is not implied from the mere payment of interest (*o*).

Personal representatives and beneficiaries.

**477.** On the death of the mortgagor an action on the covenant lies against his personal representatives, and the judgment can be enforced against them to the extent of the assets remaining unadministered (*p*). The mortgagee also has the remedies of a specialty creditor against the heir or devisee of the mortgagor's real estate not comprised in the mortgage (*q*), and the remedy, common to

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(*h*) *Lynde* v. *Waithman*, [1895] 2 Q. B. 180, C. A., explaining *Poulett* (*Earl*) v. *Hill* (*Viscount*), [1893] 1 Ch. 277, C. A.; and, as to obtaining leave to defend, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 192.

(*i*) *Furnivall* v. *Coombes* (1843), 5 Man. & G. 736; but see note (*f*), p. 70, *ante*, and p. 107, *ante*.

(*k*) *Williams* v. *Hathaway* (1877), 6 Ch. D. 544; and see note (*f*), p. 70, *ante*.

(*l*) *Re Errington, Ex parte Mason*, [1894] 1 Q. B. 11. This is in accordance with the rules that, save as between lessor and lessee, the burden of a covenant does not run with the land at law, and that the burden of a positive covenant does not run with the land in equity; see titles LANDLORD AND TENANT, Vol. XVIII., p. 584, note (*g*); SALE OF LAND. The bringing of an action against the mortgagor gives him a new right to redeem; see p. 139, *ante*; see *Re Richardson, Ex parte Governors of St. Thomas's Hospital*, [1911] 2 K. B. 705, where an action was brought in the joint names of a lessor and a lessee to enforce a covenant of indemnity.

(*m*) *Waring* v. *Ward* (1802), 7 Ves. 332, 337; *Bridgman* v. *Daw* (1891), 40 W. R. 253; *Dodson* v. *Downey*, [1901] 2 Ch. 620. But the implied indemnity is excluded by an express covenant for indemnity (*Mills* v. *United Counties Bank, Ltd.*, [1912] 1 Ch. 231, C. A.). If the mortgaged property is a contingent reversionary interest there may, perhaps, be an action on the implied covenant before it vests in possession (*ibid.*, doubting the decision of EVE, J., on this point, [1912] 1 Ch. 669).

(*n*) See *Shore* v. *Shore* (1847), 2 Ph. 378.

(*o*) *Re Errington, Ex parte Mason, supra*. As to the assignee making the debt his own as between his real and personal estate, see *Woods* v. *Huntingford* (1796), 3 Ves. 128, 132.

(*p*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 305; and as to liability for *devastavit*, *ibid.*, p. 316.

(*q*) Under the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47);

specialty and simple contract creditors, of having the mortgagor's real and personal estate administered by the court and applied rateably in satisfaction of debts of both classes (*r*); and if personal estate of the mortgagor has been paid to legatees the mortgagee can follow it in their hands and make them refund (*s*).

SECT. 4. Action on Covenant for Payment.

SUB-SECT. 4.—*Loss of Right of Action.*

**478.** On payment of the mortgage debt the mortgagor is entitled to a reconveyance of the mortgaged property (*t*); hence a mortgagee who has foreclosed and subsequently sold the property, so that he cannot reconvey, is precluded from suing on the covenant for payment (*u*); but this principle does not apply to a sale under the mortgagee's power of sale (*v*), and if it does not realise enough to pay off the mortgage, he may sue for the deficiency (*a*). Nor is the mortgagee prevented from suing if his inability to restore the property is due to the intervention of a third person, as in the case of a forfeiture of leasehold property by the lessor, not due to the mortgagee's default (*b*).

By foreclosure and sale.

But not by sale under power nor by intervention of third party.

If the mortgagee holds bills of exchange as collateral security and retains them on transferring the mortgage, he cannot sue on them pending an action for redemption (*c*).

Collateral security.

**479.** The right of action for principal money is liable to be barred by lapse of time (*d*).

Time limit.

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see *Re Lacey, Howard* v. *Lightfoot*, [1907] 1 Ch. 330, 347, C. A.; *Worthington & Co., Ltd.* v. *Abbott*, [1910] 1 Ch. 588, 598, where the terms of the order are set out; titles EQUITY, Vol. XIII., p. 34; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246. As to the effect of an acknowledgment given by the devisee, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 74 *et seq.*, 79 *et seq.*

(*r*) Under the Administration of Estates Acts, 1833 (3 & 4 Will. 4, c. 104) and 1869 (32 & 33 Vict. c. 46); see titles EQUITY, Vol. XIII., p. 35; EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 246, 249. The mortgagee may sue in his own name alone for administration of the personal estate, and also for administration of the real estate where the mortgagor has died after the commencement of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (*Re James, James* v. *Jones*, [1911] 2 Ch. 348); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 336; and, as to proof by the mortgagee against an insolvent estate, see *ibid.*, p. 346.

(*s*) See titles EQUITY, Vol. XIII., p. 160; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 279; *Re Brogden, Billing* v. *Brogden* (1888), 38 Ch. D. 546, 569, C. A.; *Re Eustace, Lee* v. *McMillan*, [1912] W. N. 80; and as to the mortgagee being barred by acquiescence in the distribution of the assets, see cases cited title EQUITY, Vol. XIII., p. 173, note (*i*).

(*t*) See p. 308, *post*.

(*u*) *Lockhart* v. *Hardy* (1846), 9 Beav. 349, 357; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; *Palmer* v. *Hendrie* (No. 2) (1860), 28 Beav. 341; see *Tooke* v. *Hartley* (1786), 2 Bro. C. C. 125; *Perry* v. *Barker* (1803), 8 Ves. 527; (1806), 13 Ves. 198. It is pointed out in *Lockhart* v. *Hardy*, *supra*, that *Tooke* v. *Hartley*, *supra*, and *Perry* v. *Barker*, *supra*, left the matter in great obscurity. Similarly the mortgagee may be restrained from suing if he cannot hand back the title deeds (*Schoole* v. *Sall* (1803), 1 Sch. & Lef. 176).

(*v*) See pp. 245 *et seq.*, *ante*.

(*a*) *Rudge* v. *Richens* (1873), L. R. 8 C. P. 358; *Barker's Claim*, [1894] 3 Ch. 290, C. A.; see p. 269, *ante*.

(*b*) *Re Burrell, Burrell* v. *Smith* (1869), L. R. 7 Eq. 399.

(*c*) *Walker* v. *Jones* (1866), L. R. 1 P. C. 50.

(*d*) As to actions on the covenant, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 82 *et seq.* As to acknowledgments and part payment, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 92 *et seq.* As to actions

SECT. 5.
**Foreclosure or Sale.**

## SECT. 5.—*Foreclosure or Sale.*

### SUB-SECT. 1.—*Nature of Right to Foreclosure.*

Effect of foreclosure order on legal mortgage.

**480.** Under a legal mortgage the mortgagee becomes absolute owner at law so soon as the day fixed for redemption is past, and the equity of redemption arises by virtue of the interference of equity to allow the mortgagor to redeem, notwithstanding that his legal right of redemption is gone (*e*). But equity does not continue the interference when the mortgagee desires to make his absolute ownership effectual. Upon his bringing an action for foreclosure a further day is appointed for payment, and if the money is not then paid the court refuses again to interfere and leaves the parties to their legal rights (*f*). The court removes the stop it has itself put on (*g*), and the property belongs to the mortgagee absolutely (*h*).

The effect of the order for foreclosure is to vest a new title in the mortgagee. Previously he was, in the view of equity, a mere incumbrancer. Under the order the beneficial ownership for the first time vests in him (*i*).

### SUB-SECT. 2.—*Right to Foreclosure or Sale.*

Foreclosure of equitable mortgagee.

**481.** The right of foreclosure exists in the case of an equitable mortgagee who has taken a conveyance by way of mortgage (*k*) of the equity of redemption—in which case he has, on paying off prior incumbrances, a right to call for the legal estate—or who has taken an agreement, express or implied, for example,

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where the security is not under seal, see *ibid.*, p. 84. As to recovery of arrears of interest, see *ibid.*, pp. 97 *et seq.*

(*e*) See pp. 71, 138, *ante.*

(*f*) *Sampson* v. *Pattison* (1842), 1 Hare, 533, 536. But there is no foreclosure against the Crown. Formerly the order was that the mortgagee should hold and enjoy the mortgaged property till the Crown thought fit to redeem (*Lutwich's Case* (1724-34), cited 2 Atk. 223; *Hodge* v. *A.-G.* (1838), 3 Y. & C. (EX.) 342). A sale might be ordered if the Crown had only an equitable interest, but not where the legal estate was vested in the Crown, since the court could not compel the Crown to convey (*Hodge* v. *A.-G.*, *supra*). But the present practice is to direct a sale and rely on the Crown conveying (*Hancock* v. *A.-G.* (1864), 10 Jur. (N. S.) 557; *Bartlett* v. *Rees* (1871), L. R. 12 Eq. 395; see *Rogers* v. *Maule* (1841), 1 Y. & C. Ch. Cas. 4; *Scott* v. *Robarts* (1856), 4 W. R. 499; compare *Prescott* v. *Tyler* (1837), 1 Jur. 470; *Prescott* v. *Tyler* (1838), 2 Jur. 870, where the Crown had no legal estate, and declined either to claim or disclaim). The question has usually arisen where the mortgagor's estate has been forfeited for felony; but under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), the estate now vests in an administrator (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429), who, it is believed, is subject to the ordinary procedure by foreclosure. Where it appears that the Crown has no interest, the Attorney-General is dismissed from the action (*Prescott* v. *Tyler* (1837), 1 Jur. 470). As to foreclosure of copyholds, see title COPYHOLDS, Vol. VIII., p. 94; as to foreclosure under building society mortgage, see title BUILDING SOCIETIES, Vol. III., p. 369; as to land abroad, see title CONFLICT OF LAWS, Vol. VI., p. 205.

(*g*) *Carter* v. *Wake* (1877), 4 Ch. D. 605.

(*h*) *Silberschildt* v. *Schiott* (1814), 3 Ves. & B. 45, 49; *Le Gros* v. *Cockerell* (1832), 5 Sim. 384, 389.

(*i*) *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, C. A., *per* Lord SELBORNE, L.C., at p. 360. As to his liability in respect of leaseholds, see p. 169, *ante*, and compare *Re Loom, Fulford* v. *Reversionary Interest Society*, [1910] 2 Ch. 230.

(*k*) See p. 76, *ante.* As to foreclosure or sale by a trustee under a charge in his own favour, see *Darke* v. *Williamson* (1858), 25 Beav. 622; and compare *Tennant* v. *Trenchard* (1869), 4 Ch. App. 537.

by deposit of deeds (*l*), for a legal mortgage (*m*): hence the remedy on such a charge is foreclosure (*n*). The judgment in such case is prefaced by a declaration of charge, and, in order to complete the mortgagee's title, it directs a conveyance to him of the legal estate (*a*).

The remedy of foreclosure is available in respect of personal as well as real property (*b*); of reversionary as well as present interests (*c*); of a partnership share (*d*); and of an advowson (*e*).

Where foreclosure is not the remedy.

**482.** Where there is a mere charge, without an express or implied agreement for a legal mortgage (*f*), or where the circumstances give rise to an equitable lien, such as a vendor's lien (*g*), the remedy

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(*l*) See p. 78, *ante*.

(*m*) *Perry* v. *Keane, Perry* v. *Partridge* (1836), 6 L. J. (CH.) 67; *Cox* v. *Toole* (1855), 20 Beav. 145. As to the effect of dismissal of an action for redemption, see p. 155, *ante*.

(*n*) As to land, see *Tylee* v. *Webb* (1843), 6 Beav. 552; *Pryce* v. *Bury* (1854), L. R. 16 Eq. 153, n., C. A.; *James* v. *James* (1873), L. R. 16 Eq. 153; *Re Owen*, [1894] 3 Ch. 220, 227. As to personal estate, see *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; *Harrold* v. *Plenty*, [1901] 2 Ch. 314 (shares); *Re Kerr's Policy* (1869), L. R. 8 Eq. 331, 336 (policy of insurance); and see *Sadler* v. *Worley*, [1894] 2 Ch. 170, 176.

(*a*) *Marshall* v. *Shrewsbury* (1875), 10 Ch. App. 250, 254; or, if necessary in the case of a chose in action, a power of attorney (*James* v. *Ellis* (1870), 19 W. R. 319, power of attorney to receive pension).

(*b*) *E.g.*, stocks and shares (*Booking* v. *Rendell* (1852), 3 Seton, Judgments and Orders, 6th ed., p. 1997; *General Credit and Discount Co.* v. *Glegg* (1883), 22 Ch. D. 549, 553); chattels (see *Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278); pensions (*James* v. *Ellis, supra*; 3 Seton, Judgments and Orders, 6th ed., p. 1999).

(*c*) *Slade* v. *Rigg* (1843), 3 Hare, 35; *Wayne* v. *Hanham* (1851), 9 Hare, 62. But the terms of the mortgage may show that the mortgagee is not entitled to either foreclosure or sale, but only to repayment out of the fund when it falls into possession (*Stamford, Spalding and Boston Banking Co.* v. *Ball* (1862), 4 De G. F. & J. 310).

(*d*) *Redmayne* v. *Forster* (1866), L. R. 2 Eq. 467; see titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 268; PARTNERSHIP.

(*e*) *Gardiner* v. *Griffith* (1727), 2 P. Wms. 404; *Mackensie* v. *Robinson* (1747), 3 Atk. 559; see *Long* v. *Storie* (1849), 3 De G. & Sm. 308; see title ECCLESIASTICAL LAW, Vol. XI., p. 574.

(*f*) *Tennant* v. *Trenchard* (1869), 4 Ch. App. 537, 542; *Re Owen, supra*, at p. 227; *Shea* v. *Moore*, [1894] 1 I. R. 158, C. A.; see p. 83, *ante*. Foreclosure was, however, treated as the remedy for the charge in *Hugill* v. *Wilkinson* (1888), 38 Ch. D. 480, perhaps because the security was more than a mere charge and operated as an equitable conveyance. A judgment may become a charge on land under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 13—though not till a writ or order for executing it has been registered; see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 220—as if the judgment debtor had by writing under his hand agreed to charge the land; and the execution creditor can obtain a sale in respect thereof; see titles EXECUTION, Vol. XIV., p. 71; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220. If this were a mere charge, the remedy would be by sale alone (*Footner* v. *Sturgis* (1852), 5 De G. & Sm. 736); but it has been treated as equivalent to an agreement to execute a legal mortgage, so as to give a right of foreclosure (*Rolleston* v. *Morton* (1842), 1 Dr. & War. 171, 195; *Jones* v. *Bailey* (1853), 17 Beav. 582; *Messer* v. *Boyle* (1856), 21 Beav. 559; *D'Auvergne* v. *Cooper*, [1899] W. N. 256; *contra, Shea* v. *Moore, supra*, on the Debtors (Ireland) Act, 1840 (3 & 4 Vict. c. 105), s. 22 (Pigot's Act)). As to foreclosure of debentures of a limited company, see title COMPANIES, Vol. V., pp. 382 *et seq.*

(*g*) *Neate* v. *Marlborough* (*Duke*) (1838), 3 My. & Cr. 407, 417; *Munns* v.

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is not by foreclosure, but by sale (*h*); and a sale is the proper remedy where the mortgage is made by way of trust for sale (*i*).

Where there is no alternative remedy by sale.

**483.** Apart from statute, a mortgagee who has a remedy by foreclosure is not entitled alternatively to an order for sale (*k*), unless there are special circumstances which make a sale the appropriate remedy (*l*), or unless he has, or is entitled to have, a mortgage containing a power of sale (*m*). It seems that even an equitable mortgagee by deposit was restricted to foreclosure (*n*) if there was no written memorandum entitling him to a mortgage with a power of sale (*o*); but in Ireland the usual judgment in a foreclosure action is for sale (*p*), though the jurisdiction to order foreclosure exists there as well as in England (*q*).

Registered proprietor of registered charge.

**484.** Where land is registered the registered proprietor of a registered charge on it has the same remedy by foreclosure or sale as if the land had been transferred to him by way of mortgage; subject, however, to any entry to the contrary on the register (*r*).

Statutory jurisdiction to order sale in foreclosure proceedings.

**485.** There is statutory jurisdiction to order a sale in a foreclosure action on the request of the mortgagee or of any person interested either in the mortgage money or the equity of redemption, notwithstanding the dissent of any other person, and notwithstanding that any person so interested does not appear in the action. It is not essential that any time should be allowed for

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*Isle of Wight Rail. Co.* (1870), 5 Ch. App. 414; *Marshall* v. *South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, 50, C. A.

(*h*) But the lien must first be judicially declared; see title LIEN, Vol. XIX., p. 27.

(*i*) See p. 72, *ante*.

(*k*) See *Tipping* v. *Power* (1842), 1 Hare, 405; *Jones* v. *Bailey* (1853), 17 Beav. 582; *Cox* v. *Toole* (1855), 20 Beav. 145. But apparently, where there was an agreement for a mortgage, the mortgagee might elect to dispense with the mortgage and rely only on his charge, so as to have a sale (*Kennard* v. *Futvoye* (1860), 2 Giff. 81; *Matthews* v. *Goodday* (1861), 8 Jur. (N. S.) 90).

(*l*) Where, for instance, the security is unproductive, as an advowson (*Mackensie* v. *Robinson* (1747), 3 Atk. 559), or a reversion (*How* v. *Vigures* (1628), 1 Rep. Ch. 18 [32]); or is deficient (see *Kinnoul (Earl)* v. *Money* (1767), 3 Swan. 202, n., 208, n.; *Dashwood* v. *Bithazey* (1729), Mos. 196; compare *Daniel* v. *Skipwith* (1787), 2 Bro. C. C. 155). Where the owner of the equity of redemption was an infant, and a sale would be beneficial to him, this was directed (*Redshaw* v. *Newbold* (1848), 12 Jur. 833; *Hutton* v. *Sealy* (1858), 4 Jur. (N. S.) 450; see title INFANTS AND CHILDREN, Vol. XVII., p. 82); or where the mortgagee was also trustee of the equity of redemption (*Tennant* v. *Trenchard* (1869) 4 Ch. App. 537, 544; see *Lucas* v. *Seale* (1740), 2 Atk. 56).

(*m*) *Lister* v. *Turner* (1846), 5 Hare, 281, 293; *Woof* v. *Barron*, [1873] W. N. 71; see *York Union Banking Co.* v. *Artley* (1879), 11 Ch. D. 205. This would now include all cases where the mortgage or charge is under seal; see p. 248, *ante*.

(*n*) *Pryce* v. *Bury* (1853), 2 Drew. 41. Though before this decision the right to a sale was sometimes recognised; see *Parker* v. *Housefield* (1834), 2 My. & K. 419, 422; *King* v. *Leach* (1842), 2 Hare, 57.

(*o*) *Backhouse* v. *Charlton* (1878), 8 Ch. D. 444.

(*p*) *Hutton* v. *Mayne* (1846), 3 Jo. & Lat. 586; see *Wayne* v. *Hanham* (1851), 9 Hare, 62, 64; *Hutton* v. *Sealy* (1858), 4 Jur. (N. S.) 450.

(*q*) *Shea* v. *Moore*, [1894] 1 I. R. 158, *per* PORTER, M.R., at p. 163, n.

(*r*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 26.

redemption or for payment of any mortgage money, and the sale may be directed on such terms as the court thinks fit, including the deposit in court of a reasonable sum, fixed by the court, to meet the expenses of the sale and the performance of the terms (*s*).

When sale may be directed.

**486.** A sale may be directed at any time before the foreclosure has become absolute (*t*). The only condition is that request shall be made by one of the persons specified. This gives rise to the discretionary power of the court, and hence the order may be made on an interlocutory application (*a*). But if the writ or summons claims foreclosure only and the mortgagor does not appear, an order for sale will not be made unless he has had notice (*b*).

When sale is not directed.

**487.** An order for sale will not be made in the absence of any evidence as to value (*c*), nor against the wish of the plaintiff if the property is situated in several places and cannot be advantageously sold in one lot (*d*), nor where the order would necessarily include property not subject to the mortgage (*e*); and it will be refused if the security is deficient, and the mortgagor's application is based only on a speculative rise in value (*f*); or a sale may be ordered on the terms of the puisne mortgagee or the mortgagor requesting a sale paying a sum into court to guarantee the plaintiff against loss (*g*).

Terms upon which sale ordered.

**488.** An immediate sale will not usually be directed, but the sale will be postponed till after three months from the date of the certificate of the result of accounts and inquiries, and the order will be for

(*s*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25, replacing the Chancery Procedure Amendment Act, 1852 (15 & 16 Vict. c. 86), s. 48. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25, applies to actions brought either before or after the commencement of the Act, but it does not apply to Ireland (*ibid.*, s. 25 (5), (7)), the jurisdiction to direct a sale being there already established (see p. 274, *ante*). It also extends to equitable mortgages by deposit, whether accompanied by an agreement to execute a legal mortgage or not (*Oldham* v. *Stringer* (1884), 33 W. R. 251); but a mortgage on a public statutory undertaking is not enforceable by sale; see title COMPANIES, Vol. V., p. 738.

(*t*) *Union Bank of London* v. *Ingram* (1882), 20 Ch. D. 463, C. A. As to the order absolute, see p. 293, *post*. Where an application to enlarge the time for payment is pending, the sale may be ordered on motion for foreclosure absolute (*Weston* v. *Davidson*, [1882] W. N. 28). Similarly an order for foreclosure absolute may be made after an order for sale (*Lloyds Bank, Ltd.* v. *Colston*, [1912] W. N. 26).

(*a*) *Woolley* v. *Colman* (1881), 22 Ch. D. 169; compare *London and County Banking Co.* v. *Dover* (1879), 11 Ch. D. 204, on the Chancery Procedure Amendment Act, 1852 (15 & 16 Vict. c. 86).

(*b*) *South-Western District Bank* v. *Turner* (1881), 31 W. R. 113.

(*c*) *Smithett* v. *Hesketh* (1890), 44 Ch. D. 161, 163.

(*d*) *Provident Clerks' Mutual etc. Association* v. *Lewis* (1892), 62 L. J. (CH.) 89.

(*e*) *Gibbs* v. *Haydon* (1882), 30 W. R. 725.

(*f*) *Merchant Banking Co. of London* v. *London and Hanseatic Bank* (1886), 55 L. J. (CH.) 479; see *Hurst* v. *Hurst* (1852), 16 Beav. 372, 375. As to ordering foreclosure in lieu of sale, where, owing to the value of the property, it would be a useless expense to direct a sale, see *Lloyds Bank, Ltd.* v. *Colston*, *supra*.

(*g*) *Norman* v. *Beaumont*, [1893] W. N. 45; see *Cripps* v. *Wood* (1882), 51 L. J. (CH.) 584.

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sale, in default of redemption, of the property, or of so much as is required to satisfy the amount found due to the plaintiff (*h*).

Conduct of sale.

The conduct of the sale will usually be given to the mortgagor, since it is his interest to secure the best price for the property; and since he will be liable for the expenses of the sale, it is in this case not necessary to require him to give security for them (*i*). The sale may be made out of court, the reserve price being fixed in chambers and the money paid into court (*k*).

SUB-SECT. 3.—*When the Right Arises.*

Time when right arises depends on proviso for redemption.

**489.** So long as the mortgagor has a legal right of redemption there can be no foreclosure; but so soon as the estate in law has become forfeited, the right to commence a foreclosure action arises, unless the mortgagee has by special stipulation postponed the right (*l*). Consequently, the time when the right arises depends on the form of the proviso for redemption. If a day is fixed for redemption, the right arises on default in payment on that day; if the proviso is for redemption on payment of the principal on demand, the right arises after demand and a reasonable time to comply with it (*m*).

Effect where proviso conditional on payment of interest.

**490.** Unless the proviso for redemption refers to the covenant for payment it is independent of the covenant, and if there is a proviso for redemption on payment of the principal at a distant date with

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(*h*) *Green* v. *Biggs* (1885), 52 L. T. 680; *Jones* v. *Harris*, [1887] W. N. 10; see *Wade* v. *Wilson* (1882), 22 Ch. D. 235; 3 Seton, Judgments and Orders, 6th ed., p. 1919. An immediate sale may be ordered where the property is small and the security deficient (*Oldham* v. *Stringer* (1884), 33 W. R. 251; *Williams* v. *Owen* (1883), 27 Sol. Jo. 256), or a short interval may be fixed (see *Charlewood* v. *Hammer* (1884), 28 Sol. Jo. 710), though not where these elements are not present, and the mortgagor expects to pay off the mortgages (*Hopkinson* v. *Miers* (1889), 34 Sol. Jo. 128).

(*i*) *Davies* v. *Wright* (1886), 32 Ch. D. 220; see *Manchester and Salford Bank* v. *Scowcroft* (1883), 27 Sol. Jo. 517; *Woolley* v. *Colman* (1881), 21 Ch. D. 169; but there is no general rule that the conduct of the sale will be given to a subsequent incumbrancer or the mortgagor (*Christy* v. *Van Tromp*, [1886] W. N. 111). The parties having the conduct of the sale are not chargeable with any impropriety in connection with the sale on the part of other persons, in which they are not implicated (*Union Bank* v. *Munster* (1887), 37 Ch. D. 51).

(*k*) *Woolley* v. *Colman*, *supra*; *Davies* v. *Wright*, *supra*. If the mortgagee opposes the sale, the reserve price will be fixed at a price sufficient, if practicable, to cover his mortgage, but not so great as to make the sale abortive (*Woolley* v. *Colman*, *supra*; compare *Whitbread* v. *Roberts* (1859), 28 L. J. (CH.) 431); and as to the terms on which the mortgagor will be allowed the conduct of the sale, see *Brewer* v. *Square*, [1892] 2 Ch. 111. As to sales out of court, see R. S. C., Ord. 51, r. 1A; *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 92. For a form of conveyance on such a sale, see Encyclopædia of Forms and Precedents, Vol. XII., p. 591.

(*l*) See *Bonham* v. *Newcomb* (1684), 1 Vern. 232 (proviso for redemption at any time during the life of the mortgagor); and see *ibid.*, pp. 7, 214.

(*m*) See *Balfe* v. *Lord* (1842), 2 Dr. & War. 480; and see pp. 121, 122, *ante*. A proviso allowing redemption on payment at any time, if accompanied by an express provision for the mortgagee going into receipt of rents and profits, may make the security a Welsh mortgage, and then there is no right of foreclosure (*Teulon* v. *Curtis* (1832), You. 610; *O'Connell* v. *Cummins* (1840), 2 I. Eq. R. 251); see pp. 87, 88, *ante*.

interest in the meantime, there can be no foreclosure before the day fixed, notwithstanding that there is a covenant for periodical payment of interest, and that the mortgagor is in default as to such payment (*n*). But if the proviso for redemption is conditional on payment of intermediate interest, where, for instance, it is a proviso for redemption on payment of principal on a fixed date with interest half-yearly in the meantime, or on payment of principal and interest in accordance with the covenant, the right to foreclosure arises upon default in payment of interest (*o*).

Loan for a term conditional on payment of interim interest.

**491.** Instead of fixing a distant date for redemption, it is usual, when the loan is to continue for a term certain, to fix the usual period of six months, and then to provide for the money not being called in or steps taken to enforce the mortgage for the agreed term or until after a specified notice has been given (*p*). But this is made conditional on payment of interest and observance of the mortgagor's covenants, and the right to foreclosure arises on default in such payment or observance (*q*). The default is not waived merely by subsequent acceptance of interest (*r*), but may be waived otherwise (*a*). In the absence of such a condition, however, default in payment of interest does not accelerate the time for foreclosure (*b*).

Equitable mortgages and charges.

**492.** The above rules apply to foreclosure under a mortgage of an equity of redemption or other equitable interest effected by conveyance subject to redemption. Where there is no actual mortgage, but only an agreement to execute a mortgage, or a charge by deposit of title deeds which implies such an agreement, the right of foreclosure arises on non-payment of the money at the time agreed upon, or if no time is agreed upon, then on non-payment within a reasonable time after demand (*c*).

Effect of bankruptcy of mortgagor etc.

**493.** The bankruptcy of the mortgagor does not prevent the bringing of the action (*d*). The action may be brought although

(*n*) *Re Turner, Turner* v. *Spencer* (1894), 43 W. R. 153; *Williams* v. *Morgan*, [1906] 1 Ch. 804; and see pp. 114, 115, *ante*.

(*o*) *Burrowes* v. *Molloy* (1845), 2 Jo. & Lat. 521, 526; *Edwards* v. *Martin* (1856), 25 L. J. (CH.) 284; see *Gladwyn* v. *Hitchman* (1690), 2 Vern. 135.

(*p*) But the benefit of such a provision is lost if the mortgagor gives charges for further advances without the provision, and agrees that the further charges shall not be redeemed except on payment of all the advances (*Haywood* v. *Gregg* (1874), 24 W. R. 157).

(*q*) *Stanhope* v. *Manners* (1763), 2 Eden, 197; *Seaton* v. *Twyford* (1870), L. R. 11 Eq. 591. As to non-payment of premiums in a mortgage policy of insurance, see *Sapio* v. *Hockey* (1907), 51 Sol. Jo. 428.

(*r*) *Keene* v. *Biscoe* (1878), 8 Ch. D. 201; see *Stanhope* v. *Manners*, *supra*; and see p. 117, *ante*.

(*a*) *Re Taaffe's Estate* (1864), 14 I. Ch. R. 347; see *Langridge* v. *Payne* (1862), 2 John. & H. 423.

(*b*) *Burrowes* v. *Molloy*, *supra*.

(*c*) See *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385, 390; compare as to sale, *France* v. *Clark* (1883), 22 Ch. D. 830; 26 Ch. D. 257, C. A.; *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A.; see p. 247, *ante*.

(*d*) *White* v. *Simmons* (1871), 6 Ch. App. 555. But the action will be against his trustee (see p. 279, *post*). As to the remedies of debenture-holders, see title COMPANIES, Vol. V., pp. 375 *et seq.*; and as to the necessity of the leave of the court to bring an action against a company in liquidation, see *ibid.*, pp. 375, 376, 539.

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the mortgagor has given notice to pay off the mortgage (*e*), and notwithstanding a pending action by a puisne incumbrancer (*f*).

SUB-SECT. 4.—*Who may Institute Foreclosure Proceedings.*

Mortgagee or his assignee.

**494.** The mortgagee (*g*) can institute foreclosure proceedings so long as he remains entitled to the mortgage (*h*). After the mortgagee has assigned the mortgage security the assignee is entitled to bring the action (*i*), but he is subject to the state of the accounts between the mortgagor and the mortgagee at the date of the transfer, and also to any equities then existing in favour of the mortgagor (*k*).

Personal representatives.

On the death of the mortgagee, without having transferred the mortgage, the debt and security devolve upon his personal representatives, who can institute foreclosure proceedings until they have transferred the mortgage to a beneficiary or a transferee for value (*l*).

Co-mortgagees.

Where there are co-mortgagees they may institute proceedings jointly; or, if some are unwilling to be joined as plaintiffs, or have done some act precluding them from suing in that capacity, one can sue by himself, provided he makes all the others defendants (*m*); but a mortgagee entitled to part only of the mortgage money cannot sue alone and obtain foreclosure of a corresponding part of the mortgaged estate (*n*). Unless the advance is made on a joint account, the mortgagees are tenants in common of the mortgage money, and, on the death of one, his representatives are necessary parties (*o*).

Trustees.

Trustees sufficiently represent their *cestuis que trust* for the purpose of suing for foreclosure (*p*).

mortgagee.

A puisne mortgagee can sue to foreclose the mortgagor and incumbrancers subsequent to himself (*q*).

(*e*) *Grugeon* v. *Gerrard* (1840), 4 Y. & C. (EX.) 119.

(*f*) *Arnold* v. *Bainbrigge* (1860), 2 De G. F. & J. 92, C. A. But a mortgagee instituting proceedings needlessly might be penalised in costs.

(*g*) Where the legal estate is in a trustee for the mortgagee he must be a party (*Wood* v. *Williams* (1819), 4 Madd. 186; see *Bartle* v. *Wilkin* (1836), 8 Sim. 238); though he should, if possible, be joined as plaintiff (*Smith* v. *Chichester* (1842), 2 Dr. & War. 393, 404; see *Browne* v. *Lockhart* (1840), 10 Sim. 420, 426); and usually now he would be sole plaintiff.

(*h*) As to the effect of an assignment of the debt apart from the security, see p. 171, *ante*.

(*i*) *Platt* v. *Mendel* (1884), 27 Ch. D. 246, 247.

(*k*) See *Withington* v. *Tate* (1869), 4 Ch. App. 288; *Turner* v. *Smith*, [1901] 1 Ch. 213; see p. 177, *ante*.

(*l*) See pp. 182, 185, 268, *ante*.

(*m*) *Davenport* v. *James* (1847), 7 Hare, 249; *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121, C. A.; see *Remer* v. *Stokes* (1856), 4 W. R. 730. As to mortgages of tolls or rates, see *Mellish* v. *Brooks* (1840), 3 Beav. 22; *Watts* v. *Eglinton* (*Lord*) (1846), 15 L. J. (CH.) 412.

(*n*) *Palmer* v. *Carlisle* (*Earl*) (1823), 1 Sim. & St. 423; see *Lowe* v. *Morgan* (1784), 1 Bro. C. C. 368.

(*o*) *Vickers* v. *Cowell* (1839), 1 Beav. 529. As to advances on joint account, see p. 117, *ante*. As to foreclosure or sale by debenture-holders, see title COMPANIES, Vol. V., pp. 382 *et seq.*

(*p*) See R. S. C., Ord. 16, r. 8; title TRUSTS AND TRUSTEES,.

(*q*) *Rose* v. *Page* (1829), 2 Sim. 471; *Slade* v. *Rigg* (1843), 3 Hare, 35, 38.

SUB-SECT. 5.—*Parties to Proceedings.*

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**Foreclosure or Sale.**

**495.** The judgment in a foreclosure action gives to all persons interested in the equity of redemption the opportunity of redeeming. In default of their doing so they are foreclosed. Hence all such persons must be parties, or be sufficiently represented by persons who are parties (*r*).

All persons interested in equity of redemption.

The mortgagor is a necessary party so long as he remains owner of the equity of redemption in the whole, or any part, of the mortgaged estate (*a*). On the bankruptcy of the mortgagor he is not a necessary party (*b*), and his trustee in bankruptcy should be joined in his place (*c*).

Mortgagor and trustee in bankruptcy.

On the death of the mortgagor, the persons to be made parties in his place depend on the nature of the property and whether the death took place before the 1st January, 1898, or not (*d*).

Persons interested on mortgagor's death.

If the death took place before that date and the property is real estate, the heir or devisee must be a party (*e*), but not the personal representative (*f*); if, in the like case, the property is personal

Death before 1st January, 1898.

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(*r*) *Tylee* v. *Webb* (1843), 6 Beav. 552, 557; *Caddick* v. *Cook* (1863), 32 Beav. 70; *Griffith* v. *Pound* (1890), 45 Ch. D. 553, 567; see *Audsley* v. *Horn* (1858), 26 Beav. 195, 197 ("the parties to the mortgage deed, and those claiming under them should alone be parties to the cause"). A married woman is not entitled to enforce an equity to a settlement against a legal mortgagee, but if the equity of redemption is reserved to her and her husband, she must be a party (*Hill* v. *Edmonds* (1852), 5 De G. & Sm. 603); see title HUSBAND AND WIFE, Vol. XVI., p. 335.

(*a*) *Moore* v. *Morton*, [1886] W. N. 196. Similarly, where a second mortgagee sues to redeem the first mortgagee, the mortgagor is a necessary party, since on redemption the suit will become a foreclosure suit against him (*Fell* v. *Brown* (1787), 2 Bro. C. C. 276; *Farmer* v. *Curtis* (1829), 2 Sim. 466; *Ramsbottom* v. *Wallis* (1835), 5 L. J. (CH.) 92); and so where he retains the equity of redemption in part of the mortgaged estate, and the owner of the other part is seeking to redeem the first mortgagee, for such redemption must be of the whole (*Palk* v. *Clinton (Lord)* (1805), 12 Ves. 48, 59). In an action by a sub-mortgagee to foreclose the mortgagor, the original mortgagee, or his representatives, must be joined (*Hobart* v. *Abbot* (1731), 2 P. Wms. 643); but the original mortgagor is not a necessary party to a suit only between the mortgagee and sub-mortgagee (see 3 Seton, Judgments and Orders, 6th ed., p. 2082). As to sub-mortgages, see pp. 132, 180, *ante*.

(*b*) Since his estate vests in the trustee (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54; *Lloyd* v. *Lander* (1821), 5 Madd. 282; *Kerrick* v. *Saffery* (1835), 7 Sim. 317; see *Hanson* v. *Preston* (1838), 3 Y. & C. (EX.) 229).

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57. The trustee is sued by the official name of "the trustee of the property of —— a bankrupt" (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 83). As to bankruptcy *pendente lite*, see p. 282, *post*. The bankrupt is not a necessary party, even though the trustee has disclaimed (*Collins* v. *Shirley* (1830), 1 Russ. & M. 638). As to costs of a disclaiming trustee, see *ibid.*; *Thompson* v. *Kendall* (1840), 9 Sim. 397). The trustee can now disclaim (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 191), or release the equity of redemption to the mortgagee (*Melbourne Banking Corporation* v. *Brougham* (1879), 4 App. Cas. 156, P. C.).

(*d*) The date when the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), came into operation (*ibid.*, s. 25).

(*e*) *Fell* v. *Brown*, *supra*; *Farmer* v. *Curtis*, *supra*; and, where the equity of redemption is devised to tenants in common, each must be a party. The estate cannot be foreclosed piecemeal (*Caddick* v. *Cook*, *supra*).

(*f*) *Fell* v. *Brown*, *supra*; *Bradshaw* v. *Outram* (1806), 13 Ves. 234; see 3 P. Wms. 333, note [A]. Where exoneration is claimed out of

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estate, or is to be treated as converted into personal estate (*g*), the personal representative must be a party (*h*), unless by assent or conveyance the property has become vested in a person claiming beneficially under the deceased, who will then be a party in the place of the personal representative (*i*).

Death on or after 1st January, 1898.

If the death has taken place on or after the 1st January, 1898 (*j*), the personal representatives are necessary parties unless the property has by assent or conveyance become vested, according to its nature, in the heir or devisee, or other person beneficially interested (*k*), or the mortgaged property is of copyhold or customary tenure and the legal estate was vested in the mortgagor at his death (*l*). And apparently the personal representatives must be a party if the mortgagee is asking for a sale of the premises and the security is deficient (*m*).

Trustees.

**496.** Trustees, and executors and administrators, sufficiently represent the trust estate, or the estate under administration, and if this includes the equity of redemption it is unnecessary to join any of the beneficiaries as defendants to the action (*n*).

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the personal estate, the presence of the executors may be necessary (*Faulkner* v. *Daniel* (1843), 3 Hare, 199, 213), but this would now be unusual (see p. 302, *post*).

(*g*) *Griffith* v. *Ricketts*, *Griffith* v. *Lunell* (1849), 7 Hare, 299, 305.

(*h*) *Wilton* v. *Jones* (1843), 2 Y. & C. Ch. Cas. 244; *Aylward* v. *Lewis*, [1891] 2 Ch. 81; compare *Christophers* v. *Sparke* (1820), 2 Jac. & W. 223, 229, as to mortgage by way of trust for sale, though the right of exoneration of the real estate by the personal estate, which was the ground of the decision, does not now exist. Where the personal representative is tenant for life, and is not protecting the interests of remaindermen, they must be joined (*Watts* v. *Lane* (1901), 84 L. T. 144). As to the jurisdiction of the court to appoint a person to represent the estate, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 205.

(*i*) As to assent, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 265.

(*j*) See note (*d*), p. 279, *ante*.

(*k*) Formerly legatees whose legacies were charged on the equity of redemption were necessary parties (*Batchelor* v. *Middleton* (1847), 6 Hare, 75, 78); but this is not now necessary if the personal representatives are parties.

(*l*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4); see *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*m*) See *Daniel* v. *Skipwith* (1787), 2 Bro. C. C. 155.

(*n*) R. S. C., Ord. 16, r. 8, under which such persons represent the trust property, or the estate of the deceased. The proviso to the rule (which was introduced in 1893) expressly applies it to trustees, executors, and administrators who are sued in proceedings to enforce a security by foreclosure or otherwise. Formerly trustees did not represent their beneficiaries in a defence to a foreclosure action (*Coles* v. *Forrest* (1847), 10 Beav. 552, 557; *Goldsmid* v. *Stonehewer* (1852), 9 Hare, Appendix, xxxviii.; *Francis* v. *Harrison* (1889), 43 Ch. D. 183; *Wavell* v. *Mitchell* (1891), 64 L. T. 560), unless they were also executors, so as to have control of the funds required for redemption (*Hanman* v. *Riley* (1852), 9 Hare, Appendix, xl.; *Sale* v. *Kitson* (1853), 3 De G. M. & G. 119, C. A.; *Mills* v. *Jennings* (1880), 13 Ch. D. 639, 649, C. A.; affirmed *sub nom.* *Jennings* v. *Jordan* (1881), 6 App. Cas. 698; *Re Mitchell*, *Wavell* v. *Mitchell* (1892), 65 L. T. 851; *Re Booth and Kettlewell's Contract* (1892), 62 L. J. (CH.) 40). And formerly creditors of the mortgagor who had assented to a creditors' trust deed were necessary parties (see *Newton* v. *Egmont* (*Earl*) (1831), 4 Sim. 574; (1832), 5 Sim. 130; *Cocker* v. *Egmont* (*Lord*) (1833), 6 Sim. 311; *Thomas* v. *Dunning* (1852), 5 De G. & Sm. 618); but now the trustee would represent them.

Settled property.

**497.** Where the equity of redemption is settled, the first and any succeeding tenants for life in being must be made defendants, and also the first tenant in tail in being, or, if there is none, the first person entitled to the inheritance. If there is no person to represent the inheritance, it is sufficient to bring the tenant or tenants for life before the court (*o*).

Glebe.

**498.** Where a vicar has mortgaged the glebe under statutory powers, the patron of the living is not a necessary party to foreclosure

Puisne incumbrancers.

**499.** In an action by the first mortgagee all subsequent incumbrancers are necessary parties (*q*), otherwise they will not be bound (*r*). A puisne mortgagee can bring an action to foreclose those behind him and the mortgagor, and to such an action the subsequent incumbrancers are necessary parties, but not the prior incumbrancers (*s*).

Persons having a direct charge on the property.

**500.** Generally all persons having a direct charge on the equity of redemption are necessary parties (*t*). Thus debenture-holders (*a*), or, if there is a debenture trust deed, the trustees (*b*), are necessary

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(*o*) *Gore* v. *Stacpoole* (1813), 1 Dow, 18, 31, H. L.; see *Roscarrick* v. *Barton* (1672), 1 Cas. in Ch. 217; *Lloyd* v. *Johnes* (1804), 9 Ves. 37, 55; *Giffard* v. *Hort* (1804), 1 Sch. & Lef. 386, 408; *Cockburn* v. *Thompson* (1809), 16 Ves. 321, 326; *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1, 133; compare *Chappell* v. *Rees* (1852), 1 De G. M. & G. 393. But the inheritance is not sufficiently represented by a person with a defeasible estate (*Goodess* v. *Williams* (1843), 2 Y. & C. Ch. Cas. 595). The executors of a tenant for life against whom the remainderman has a claim in respect of arrears of interest accrued during the tenancy for life are not necessary parties (*Wynne* v. *Styan* (1847), 2 Ph. 303). As to limitations in settlements generally, see titles REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

(*p*) *Goodden* v. *Coles* (1888), 59 L. T. 309; see *Scottish Widows' Fund* v. *Craig* (1882), 20 Ch. D. 208. As to authorised charges on ecclesiastical property, see title ECCLESIASTICAL LAW, Vol. XI., pp. 756 *et seq.*

(*q*) If they are discovered pending the action they must be added as parties (*Keith* v. *Butcher* (1884), 25 Ch. D. 750; see *Burgess* v. *Sturges* (1851), 14 Beav. 440). If the plaintiff mortgagee is himself interested in a subsequent incumbrance he must not be made a defendant. The same person cannot be plaintiff and defendant (*Wavell* v. *Mitchell* (1891), 64 L. T. 560).

(*r*) *Ormsby* v. *Thorpe* (1808), 2 Mol. 503.

(*s*) *Rose* v. *Page* (1829), 2 Sim. 471; *Brisco* v. *Kenrick* (1832), 1 Coop. *temp.* Cott. 371; *Richards* v. *Cooper* (1842), 5 Beav. 304; *Slade* v. *Rigg* (1843), 3 Hare, 35, 38; *Johnson* v. *Holdsworth* (1850), 1 Sim. (N. S.) 106. As to the necessary parties in an action to redeem prior incumbrancers, see p. 151, *ante*.

(*t*) As to the position of sureties who have mortgaged their property by way of collateral security, see title GUARANTEE, Vol. XV., pp. 443, 513, 522; compare *ibid.*, p. 515, note (*g*); and see *Payne* v. *Compton* (1837), 2 Y. & C. (EX.) 457; *Newton* v. *Egmont* (*Earl*) (1831), 4 Sim. 574, 584.

(*a*) *Wallace* v. *Evershed*, [1899] 1 Ch. 891.

(*b*) R. S. C., Ord. 16, rr. 8, 9, provides for representation where parties are numerous, but in *Griffith* v. *Pound* (1890), 45 Ch. D. 553, it was held that all the debenture-holders must be parties. It seems, however, that representation orders will be made in such a case (*Fairfield Shipbuilding and Engineering Co.* v. *London and East Coast Steamship Co.*, [1895] W. N. 64); and in an action on behalf of first debenture-holders, a representative of subsequent debenture-holders will be appointed (*Wilcox & Co.* (*late*

SECT. 5. Foreclosure or Sale.

parties to foreclosure by a prior mortgagee. A judgment creditor of the mortgagor must be joined if he has registered a writ or order affecting the equity of redemption (*c*). Where a partnership share is mortgaged, and by the articles of partnership the partners have a right of pre-emption over each other's shares, the other partners are necessary parties to foreclosure of the share (*d*).

Persons interested in several properties in one mortgage.

**501.** The mortgagee cannot in general foreclose part only of the mortgaged property; hence if several properties are mortgaged together, and are afterwards incumbered or disposed of separately, the incumbrancers on and persons interested in the equity of redemption of each property are necessary parties to the first mortgagee's foreclosure action (*e*). But a puisne mortgagee of one property can foreclose those behind him on that property without making the persons, who are interested in the equity of redemption of the other property, parties to his action (*f*).

Alienation or charge *pendente lite*.

**502.** Where by bankruptcy (*g*) or judgment (*h*) there is an involuntary alienation of, or charge upon, the equity of redemption *pendente lite*, the trustee in bankruptcy or judgment creditor must be joined; but under a voluntary alienation the assignee is bound without being made a party (*i*), though if the plaintiff wishes him to be before the court he cannot object (*k*); and, if he has taken a legal interest, he should be a party so as to enable the court to direct a conveyance (*l*).

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*W. H. Fox & Co.*), *Hilder* v. *Same Co.*, [1903] W. N. 64); see title COMPANIES, Vol. V., pp. 385, 386.

(*c*) *Re Parbola, Ltd.*, *Blackburn* v. *Parbola, Ltd.*, [1909] 2 Ch. 437; see *Cork* (*Earl*) v. *Russell* (1871), L. R. 13 Eq. 210, disapproving *Mildred* v. *Austin* (1869), L. R. 8 Eq. 220, and holding that a judgment creditor is not a necessary party until he has an actual charge on the land; for this purpose he must now have registered a writ or order; see titles EXECUTION, Vol. XIV., p. 72; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220. If the judgment creditor registers his writ or order after judgment, he may be joined before foreclosure absolute (*Re Parbola, Ltd.*, *Blackburn* v. *Parbola, Ltd.*, *supra*). As to register counties, see *Johnson* v. *Holdsworth* (1850), 1 Sim. (N. S.) 106, and title REAL PROPERTY AND CHATTELS REAL.

(*d*) *Redmayne* v. *Forster* (1866), L. R. 2 Eq. 467. As to partnership generally, see title PARTNERSHIP.

(*e*) But if the two properties are subject to separate prior mortgages, the puisne mortgagee of both can redeem one by itself, and then he may foreclose the mortgagor as to that only (see p. 155, *ante*), unless there is a right of consolidation in respect of the prior mortgages (*Ireson* v. *Denn* (1796), 2 Cox, Eq. Cas. 425; and see p. 151, *ante*).

(*f*) See p. 281, *ante*.

(*g*) *Wood* v. *Surr* (1854), 19 Beav. 551.

(*h*) *Re Parbola, Ltd.*, *Blackburn* v. *Parbola, Ltd.*, *supra*.

(*i*) *Eades* v. *Harris* (1842), 1 Y. & C. Ch. Cas. 230, 234; see *Garth* v. *Ward* (1741), 2 Atk. 174, 175; *Patch* v. *Ward* (1867), 3 Ch. App. 203, 208.

(*k*) *Campbell* v. *Holyland* (1877), 7 Ch. D. 166. But if, pending an action for redemption, the plaintiff transfers his equity, the transferee is a necessary party (*Johnson* v. *Thomas* (1849), 11 Beav. 501). As to assignment by the mortgagee, see *Barry* v. *Wrey* (1827), 3 Russ. 465; *Coles* v. *Forrest* 1847), 10 Beav. 552; pp. 169 *et seq.*, *ante*.

(*l*) See *Winchester* (*Bishop*) v. *Paine* (1805), 11 Ves. 194, 199. As to change of parties rendered necessary by death or otherwise, see R. S. C., Ord. 17, rr. 1—4; Yearly Practice of the Supreme Court, 1912, pp. 199

SUB-SECT. 6.—*Procedure.*

SECT. 5.

**Foreclosure or Sale.**

Form of proceedings.

**503.** A foreclosure action is commenced either by writ or by originating summons (*m*). A writ is the proper procedure where the facts are so complicated that it would be difficult to try the action satisfactorily without pleadings; or where disputes as to matters of fact or as to questions of priority are likely to arise, so that pleadings are required to ascertain the issues between the parties (*n*). Moreover, if a claim for payment under the covenant is joined with the claim for foreclosure, it is necessary to proceed by writ (*o*). Where none of the foregoing considerations is present the action should be commenced by summons (*a*), and on a summons the mortgagee can obtain foreclosure or sale, and, if necessary, delivery of possession by the mortgagor (*b*).

Court.

**504.** Actions for foreclosure in the High Court are assigned to the Chancery Division (*c*). If the mortgage does not exceed £500, the action can be brought in the county court of the district where the mortgaged property is situate (*d*).

Claims in foreclosure:—

**505.** Where the mortgagee is suing for foreclosure only, the claim is that an account may be taken of what is due to him on the mortgage (which must be specifically described) for principal, interest and costs, and that the mortgage may be enforced by

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(*m*) The jurisdiction to order foreclosure or sale on summons is conferred by R. S. C., Ord. 55, r. 5A, and applies to any mortgage, legal or equitable, including a charging order (*Cohen* v. *Beadell* (1891), 91 L. T. Jo. 250). This makes it unnecessary to apply for accounts under R. S. C., Ord. 15, r. 1. As to such applications, see *Smith* v. *Davies* (1884), 28 Ch. D. 650; *Horton* v. *Bosson* (1899), 80 L. T. 438. But apparently foreclosure *nisi* cannot be ordered under the latter rule (*Blake* v. *Harvey* (1885), 29 Ch. D. 827, C. A.; *Bissett* v. *Jones* (1886), 32 Ch. D. 635); though, if ordered, the order is final, and not interlocutory for the purpose of appealing (*Smith* v. *Davies* (1886), 31 Ch. D. 595, C. A.). Actions for foreclosure in respect of different mortgages by the same mortgagor can be consolidated (R. S. C., Ord. 49, r. 8; see *Holden* v. *Silkstone and Dodworth Coal and Iron Co.* (1881), 30 W. R. 98).

(*n*) It has been questioned whether there is jurisdiction to decide disputed questions of fact (*Beamish* v. *Whiteney*, [1908] 1 I. R. 38) on summons; but the matter seems to be one of convenience rather than of jurisdiction. As to priorities, see note (*t*), p. 152, *ante*.

(*o*) R. S. C., Ord. 55, r. 5A, gives no jurisdiction to order payment on summons. As to proceedings on the covenant, see pp. 267 *et seq.*, *ante*.

(*a*) If a summons is the proper procedure the mortgagee will not be allowed the extra costs of an action by writ (*O'Kelly* v. *Culverhouse*, [1887] W. N. 36). A claim for personal payment justifies proceeding by writ, even though immediate payment is refused (*Brooking* v. *Skewis* (1887), 58 L. T. 73; and see *Johnson* v. *Evans* (1888), 60 L. T. 29).

(*b*) R. S. C., Ord. 55, r. 5A. As to claiming possession only, see p. 151, *ante*. It is no ground for proceeding by writ that a receiver is claimed, since the appointment can be made on summons (*Gee* v. *Bell* (1887), 35 Ch. D. 160; *Barr* v. *Harding* (1887), 36 W. R. 216; *O'Kelly* v. *Culverhouse*, *supra*; *Weston* v. *Levy*, [1887] W. N. 76).

(*c*) R. S. C., Ord. 55, r. 5A. Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34. As to jurisdiction, see title EQUITY, Vol. XIII., pp. 65, 66.

(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67; see note (*k*), p. 232, *ante*; title COUNTY COURTS, Vol. VIII., p. 444; and see *ibid.*, p. 432, as to the application of the Judicature Act, 1873 (36 & 37 Vict. c. 66); and see title MAYOR'S COURT, LONDON, Vol. XX., p. 286.

SECT. 5. **Foreclosure or Sale.**

Foreclosure or sale.

Account.

Possession.

foreclosure (*e*). If the mortgagee is willing to have a sale by the court, he will claim foreclosure or sale; but though foreclosure only is claimed, the court may direct a sale (*f*). If the mortgagee is in possession, he will ask for an account of rents and profits received and for the allowance of any special expenses (*g*). If the mortgagee is not in possession, and there is likely to be any difficulty as to obtaining possession, he may claim also delivery of possession (*h*), but this is not necessary (*i*). An action for foreclosure and for delivery of possession is not an action for recovery of land within the meaning of the Rules of the Supreme Court, and is therefore not subject to the special procedure prescribed for such actions (*k*).

Payment on covenant.

The mortgagee may also include in the writ a claim for payment under the covenant in the mortgage deed (*l*); and if he has commenced an action of foreclosure in the Chancery Division he should not at the same time sue in the King's Bench Division on the covenant, since this relief can be obtained in the foreclosure action, and if he does so the latter action will be stayed (*m*).

Declaration of title.

If the mortgagee is suing to enforce by foreclosure or sale a charge created by deposit of title deeds, whether accompanied by a memorandum or not, or to enforce by sale a charge or equitable lien, he will claim in the first instance a declaration that he is to

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(*e*) The mortgagee should sue on all the mortgages and further charges he may have; if one is overlooked, the action cannot be extended to it after order for foreclosure *nisi*, but a fresh action on all the mortgages and charges can be brought (*Bake* v. *French*, [1907] 1 Ch. 428).

(*f*) See R. S. C., Appendix A, Part III., ss. 1, 4. And as to jurisdiction to order a sale, see p. 274, *ante*.

(*g*) As to what expenses must be asked for, see pp. 237, 239, *ante*. It is not necessary to ask for all that is required on a writ, since the claim can be amplified in the statement of claim; but a summons should ask for relief as comprehensively as a statement of claim.

(*h*) But if possession only is claimed, the procedure is by action for recovery of land; see R. S. C., Ord. 18, r. 2; see title LANDLORD AND TENANT, Vol. XVIII.; p. 558; and p. 151, *ante*.

(*i*) An action for foreclosure includes a claim for possession, and delivery of possession may be ordered as against the mortgagor though not asked for by the writ or summons (*Manchester and Liverpool Bank* v. *Parkinson* (1889), 60 L. T. 258), notwithstanding that the mortgagor does not appear (*Salt* v. *Edgar* (1886), 54 L. T. 374; *Lacon* v. *Tyrrell* (1887), 56 L. T. 483; *Best* v. *Applegate* (1887), 37 Ch. D. 42). The order may be made after foreclosure absolute (*Keith* v. *Day* (1888), 39 Ch. D. 452, C. A.), although not asked for by the summons (*Jenkins* v. *Ridgley* (1893), 41 W. R. 585). But delivery of possession will not be ordered *ex parte* where not asked for by the writ or summons (*Le Bas* v. *Grant* (1895), 64 L. J. (CH.) 368).

(*k*) R. S. C., Ord. 18, r. 2.

(*l*) *Dymond* v. *Croft* (1876), 3 Ch. D. 512; *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42, C. A. But this claim cannot be specially indorsed under R. S. C., Ord. 3, r. 6, so as to enable summary judgment to be obtained under R. S. C., Ord. 14, r. 1 (a) (*Hill* v. *Sidebottom* (1882), 47 L. T. 224; *Imbert-Terry* v. *Carver* (1887), 34 Ch. D. 506); though if the defendant does not appear judgment may be signed under R. S. C., Ord. 13, r. 3 (*Bissett* v. *Jones* (1886), 32 Ch. D. 635). As to judgment under R. S. C., Ord. 13, r. 3, or Ord. 14, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 184, 185, 190—194.

(*m*) *Poulett* (*Earl*) v. *Hill* (*Viscount*), [1893] 1 Ch. 277, C. A.; *Williams* v. *Hunt*, [1905] 1 K. B. 512, C. A.; *contra*, it seems, if the foreclosure action is by summons; see note (*o*), p. 283, *ante*.

be considered as a mortgagee, or that he is entitled to a charge or lien, and will then go on to claim an account and the enforcement of the security (*n*).

Action by writ; statement claim.

**506**. When the action is commenced by writ, a summons for directions is taken out, and on this pleadings are ordered (*o*). The statement of claim should allege the following matters:—

(1) The mortgage deed (*p*), setting out (i.) if personal payment is claimed, the covenant for payment (*q*), or, if there is no covenant, the circumstances giving rise to the liability; (ii.) the nature of the security, whether for a single advance then made, or also for further advances, or to cover a current account, or otherwise; (iii.) the property mortgaged, taking care, if delivery of possession is claimed or will be required, to describe the property in accordance with the mortgage deed, since the description will be repeated in the judgment and will be the basis for a writ of possession (*r*); (iv.) the proviso for redemption; (v.) any stipulation for leaving the loan for a term, and any special stipulations as to expenses which may affect the taking of the accounts; and (vi.) the mortgagor's covenants, if default consists in the breach of any of them.

(2) Where there has been a transfer or devolution of a mortgage, the plaintiff's title to the mortgage; and similarly, any dealings with or devolution of the equity of redemption, so as to show in what capacities the various defendants are joined (*s*).

(3) The default under the proviso for redemption which gives rise to the right of foreclosure (*t*); generally, this will be a statement that the debt is still owing at a date subsequent to the day fixed for redemption.

(4) If the loan is for a term, and the action is brought within the term, the breach of covenant or other default which accelerates the right to bring the action (*u*).

(5) Any matters which affect the amount due to the mortgagee for the purpose of foreclosure, such as, where the mortgagor is bankrupt, the fact that the mortgagee has valued the security in the bankruptcy (*a*).

(*n*) See *Marshall* v. *Shrewsbury* (1875), 10 Ch. App. 250, 254; see p. 291, *post*.

(*o*) R. S. C., Ord. 30. If foreclosure is ordered in chambers on the summons for directions in the presence of the defendant and he does not object, he cannot object afterwards (*Horton* v. *Bosson* (1899), 80 L. T. 435, C. A.), though the jurisdiction to do so is doubtful. As to pleadings in a debenture-holder's action, see title COMPANIES, Vol. V., p. 386. As to filing of statement of claim where defendant does not appear, see R. S. C., Ord. 13, r. 12. As to pleading generally, see title PLEADING.

(*p*) Where the security is by registered charge on registered land, the registered charge and the contemporaneous deed of mortgage (if any) should both be stated; but if foreclosure is ordered on the unregistered mortgage alone the register can be rectified by cancelling the charge (*Weymouth* v. *Davis*, [1908] 2 Ch. 169).

(*q*) *Law* v. *Philby* (1887), 56 L. T. 230; *Wethered* v. *Cox*, [1888] W. N. 165.

(*r*) *Thynne* v. *Sarle*, [1891] 2 Ch. 79; see p. 289, *post*.

(*s*) See pp. 145 *et seq.*, *ante*.

(*t*) See pp. 71; 114, 121, 122, *ante*.

(*u*) See p. 114, *ante*.

(*a*) *Sanguinetti* v. *Stuckey's Banking Co.* (No. 2), [1896] 1 Ch. 502.

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(6) Any matters which affect the taking of the accounts; such as, whether the mortgagee is in possession (*b*), and whether he has incurred any special expenditure for improvements, costs, or otherwise, which cannot be allowed without special direction. Whenever, for the mortgagee's protection, it is necessary to ask for the insertion in the order of special directions as to inquiries and allowances, a case for these should appear on the pleadings (*c*).

(7) If the action is brought to enforce a charge by deposit or an equitable lien, the circumstances giving rise to the charge or lien must be stated (*d*), and such of the foregoing matters as are relevant.

Defence.

**507.** The defence is subject to the general rules of pleading. So far as it is intended to contest any of the allegations in the statement of claim, the defendant must specifically either deny or refuse to admit them (*e*), and the success of his defence will depend on whether the plaintiff is able to prove such of the allegations denied or not admitted as are essential to his cause of action. If any question of priority arises as between the plaintiff and other incumbrancers, or as between defendants, these also should appear in the defences.

Evidence.

**508.** Where the action is commenced by writ, the evidence at the trial is usually by affidavit; if there is any serious dispute as to facts, it is either entirely oral, or the deponents are cross-examined on their affidavits (*f*). Strict proof of the execution of documents is usually rendered unnecessary by admissions in the pleadings, or under notice to admit, and the issues raised by the pleadings show what documents and facts must be proved. The originals of the mortgage deed and other relevant documents must be produced in court, and, in the case of registered land, an official certificate that there is no entry preventing an order for foreclosure

Action commenced by summons.

**509.** Where the action is commenced by summons the evidence is by affidavit, and at the first hearing of the summons before the master the plaintiff proves such of the matters as it would be

Evidence.

necessary to allege in a statement of claim. The mortgage deed and other relevant documents should be made exhibits, but their execution need not be strictly proved (*h*). The defendants then have the opportunity of filing evidence in reply, and if any of the plaintiff's documents are contested he must prove them strictly.

(*b*) The omission to state this may affect the mortgagee's right to costs (*Binnington* v. *Harwood* (1825), Turn. & R. 477, 485).

(*c*) See pp. 237, 240, *ante*.

(*d*) See p. 78, *ante*.

(*e*) R. S. C., Ord. 19, r. 17; and generally, as to motion for judgment in default of defence, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 186 *et seq.*; or on other grounds, see *ibid*, p. 194. As to pleading generally, see title PLEADING.

(*f*) See title EVIDENCE, Vol. XIII., pp. 484, 569, 620.

(*g*) See p. 274, *ante*.

(*h*) As to proof of the amount advanced, see p. 223, *ante*.

SECT. 5. Foreclosure or Sale.

**510.** If the defendant does not appear (*i*), the plaintiff must prove the execution of the mortgage deed and the default of the mortgagor, and also the amount due to him under the security, including any sums other than principal and interest, such as expenses of repairs and costs of litigation outside the foreclosure action, and, if he is in possession, he will have to account for rents and profits received (*k*).

Evidence required in default of appearance.

### SUB-SECT. 7.—*The Order.*

#### (i.) *Accounts and Inquiries.*

**511.** The order made in a foreclosure action directs, in the first instance, that the necessary accounts shall be taken, and any inquiries made which are essential to taking the accounts or required for ascertaining the rights of the parties. If the action is by writ and claims personal payment, two accounts have to be taken, since the sum recoverable on the covenant for payment and the sum which must be paid as the price of redemption are different. The former sum is limited to principal and interest, and to so much of the costs of the action as would have been incurred if it had been brought for payment only (*l*); accordingly the covenant account is of principal and interest, and there follows judgment for the amount certified to be due and for the apportioned taxed costs (*m*). The latter sum does not include expenses which the mortgagee is entitled to charge against the mortgaged property but which are not payable by the mortgagor personally (*n*). The mortgage account is an account of what is due to the plaintiff under and by virtue of his mortgage, and for his taxed costs of the action. In taking this account, anything which has been recovered under the order for payment is deducted and the balance due to the plaintiff is certified (*o*). If there is no claim for personal payment, only the mortgage account is directed to be taken (*p*).

Covenant account and mortgage account.

(*i*) If the defendant appears to the writ and delivers a defence, but does not appear at the trial, it is not necessary to produce an affidavit of service of notice of trial (*Baird* v. *East Riding Club and Racecourse Co.*, [1891] W. N. 144).

(*k*) See pp. 198, 219, *ante*.

(*l*) *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42, C. A.

(*m*) If the amount of debt and interest is proved, admitted, or agreed to at the trial, the mortgagee is entitled to judgment for immediate payment; otherwise an account is taken, and he is entitled to judgment for payment immediately the amount is certified; but the judge has a discretion to allow time for special reasons shown (*Instone* v. *Elmslie* (1886), 54 L. T. 730), and a month is a reasonable allowance (*Farrer* v. *Lacy, Hartland & Co.*, *supra*; see form of judgment, *ibid.*, p. 51). On motion for judgment in default of pleading, immediate payment will not be directed if the statement of claim asks for an account (*Faithfull* v. *Woodley* (1889), 43 Ch. D. 287). As to form of judgment where the debt is payable by instalments, see *Greenough* v. *Littler* (1880), 15 Ch. D. 93. As to arrears of interest recoverable, see title LIMITATION OF ACTIONS, Vol. XIX., p. 101.

(*n*) See p. 231, *ante*.

(*o*) *Lee* v. *Dunsford* (1884), 54 L. J. (CH.) 108; 3 Seton, Judgments and Orders, 6th ed., p. 1898. For form of certificate, see Daniell's Chancery Forms, 5th ed., p. 771.

(*p*) 3 Seton, Judgments and Orders, 6th ed., p. 1895.

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Special allowances.

The order contains no direction with respect to "just allowances." These are made in taking the account without express direction (*q*). But any matters of special expenditure which would not be included under this head must be specially allowed, and if the amount is not proved an inquiry as to them will be directed (*r*). The amounts so allowed are added to the mortgage account.

Account of rents and profits.

If the mortgagee is in possession, the order directs an account of rents and profits received by him or by any other persons by his order or for his use, or which without his wilful default might have been so received (*s*). The amount due from him on this account is directed to be deducted from the aggregate amount due on the mortgage account and the balance certified (*t*). The order also contains a direction for any further accounts and inquiries which the circumstances require, such as an account of proceeds of sale of part of the property; an inquiry as to deterioration in value, or loss through an improper sale; and an inquiry as to priority of incumbrancers (*u*).

Order.

Where the account is agreed, or is so simple that the sum can be ascertained in court, an order may be made without directing the amount to be ascertained by certificate of a master (*a*).

(ii.) *Foreclosure Nisi.*

Form of order *nisi*.

**512.** In a foreclosure action by the mortgagee against the mortgagor alone, the order usually allows six months from the date of the master's certificate as the period within which the defendant may redeem (*b*). The certificate calculates further interest for six months from its date and fixes a time on the day at the expiration of the six months, and a place—usually a room at the Royal Courts of Justice—when the aggregate sum made up of the certified balance and the further interest shall be paid (*c*). The order directs that upon payment of this sum at the time and place appointed, the plaintiff shall reconvey the mortgaged property free from incumbrances created by him or persons claiming under him, and deliver up the title deeds to the defendant or as he appoints; but that in default of payment the defendant is to be foreclosed (*d*). Thus the order is not an absolute order for foreclosure, but only for foreclosure *nisi*, that is, unless the defendant redeems. If the mortgagee applies for possession (*e*) the order will

(*q*) R. S. C., Ord. 33, r. 8.

(*r*) As to when this is necessary, see p. 240, *ante*.

(*s*) As to wilful default, see p. 198, *ante*. As to taking the account with rests, see p. 220, *ante*.

(*t*) 3 Seton, Judgments and Orders, 6th ed., p. 1957. For form of certificate, see Daniell's Chancery Forms, 5th ed., p. 774.

(*u*) For special accounts and inquiries, see 3 Seton, Judgments and Orders, 6th ed., pp. 1957—1965.

(*a*) *Ibid.*, pp. 1897, 1899.

(*b*) The mortgagor is not entitled to redeem before the appointed day on payment of principal, and interest till payment and costs (*Hill* v. *Rowlands*, [1897] 2 Ch. 361, C. A.). As to the case of an infant mortgagor, see title INFANTS AND CHILDREN, Vol. XVII., p. 143; p. 294, *post*.

(*c*) See form of certificate, Daniell's Chancery Forms, 5th ed., p. 771.

(*d*) 3 Seton, Judgments and Orders, 6th ed., p. 1895.

(*e*) As to when an order for possession can be made, see p. 284, *ante*.

direct the mortgagor to deliver up possession to him, and there will be a schedule describing the property as in the parcels in the mortgage deeds (*f*). Application for possession can also be made subsequently (*g*).

Order against second mortgagee and mortgagor.

**513.** Where the action is brought by a first mortgagee against a second mortgagee and the mortgagor, successive periods may be allowed for redemption, and in that case the first right of redemption is given to the second mortgagee, and in default he is foreclosed (*h*). The plaintiff's subsequent interest and costs are then computed and taxed, and a further three months may be allowed for the mortgagor to pay the original and additional amount, and in default he also is foreclosed (*i*). This completes the foreclosure contemplated by the action. But if the second mortgagee redeems, the action becomes one of foreclosure between him and the mortgagor; subsequent interest is computed on the amount paid to the plaintiff, and the ordinary account is taken of the second mortgage. The amount paid to the plaintiff, with subsequent interest, and the amount certified to be due to the second mortgagee under his mortgage and his costs, give the aggregate sum at which the mortgagor can redeem within three months, and in default he is foreclosed (*k*). Thus the result of the action is to clear the property of all incumbrances in favour of one of the parties to it, either the first mortgagee, the second mortgagee, or the mortgagor, according as the rights of redemption are exercised or not. The successive rights were formerly worked out on the same principle where there were third and subsequent mortgages, and the property was in the same manner cleared of all incumbrances (*l*), but now the excessive complication of such an order, and the delay consequent on successive redemptions, is usually avoided by giving only one time for redemption to all the puisne incumbrancers with liberty, on any of them redeeming, to apply to determine their rights *inter se* (*m*).

Successive redemptions.

Effect of third and subsequent incumbrances.

Foreclosure limited to puisne incumbrances.

**514.** A puisne incumbrancer may limit his action to foreclosure against incumbrancers subsequent to himself and against the mortgagor, and, in this case, the prior incumbrancers are not affected by the order; it operates only on the equity of redemption subsequent

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(*f*) 3 Seton, Judgments and Orders, 6th ed., pp. 1895, 1896. As to enforcing the order by writ of possession, see title EXECUTION, Vol. XIV., p. 76.

(*g*) *Keith* v. *Day* (1888), 39 Ch. D. 452, C. A.

(*h*) If the mortgagor is bankrupt, and the mortgagee has valued his security, the trustee in bankruptcy is entitled to redeem at that value, and the order must show this (*Knowles* v. *Dibbs* (1889), 37 W. R. 378).

(*i*) But the second mortgagee must be foreclosed absolutely before proceedings are taken to foreclose the mortgagor (*Whitbread* v. *Lyall* (1856), 8 De G. M. & G. 383, C. A.; *Webster* v. *Patteson* (1884), 25 Ch. D. 626).

(*k*) 3 Seton, Judgments and Orders, 6th ed., p. 1979.

(*l*) See *Ingoldsby* v. *Riley* (1873), 3 Seton, Judgments and Orders, 6th ed., p. 1980. As to the order of redemption where the plaintiff is a mortgagee who has consolidated his mortgages, and the equities of redemption of the properties are in the hands of different assignees, see *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L. R. 4 Eq. 537; *Loveday* v. *Chapman* (1875), 32 L. T. 689.

(*m*) See p. 290, *post*. A puisne mortgagee by voluntarily submitting to foreclosure does not necessarily lose his remedy on the covenant against the mortgagor (*Worthington & Co.* v. *Abbott*, [1910] 1 Ch. 588).

SECT. 5. Foreclosure or Sale.

to such prior incumbrancers, and as regards this it is framed in the foregoing manner (*n*). Each incumbrancer subsequent to the plaintiff, and also the mortgagor, must redeem or be foreclosed; so that in the result the property is clear of the plaintiff's, and all the subsequent, incumbrances (*o*).

Redemption action by mesne incumbrancers.

An action by the second mortgagee to redeem the first is in effect an action of foreclosure against the incumbrancers subsequent to himself and against the mortgagor. As regards the first mortgagee, the order is the same as that made in a redemption action (*p*). The account under the first mortgage is taken, and, if the plaintiff redeems, the order then proceeds, as in a foreclosure action, to give the subsequent incumbrancers, and ultimately the mortgagor, the chance of redeeming, and in default they are successively foreclosed (*q*). Thus, if the plaintiff redeems, and is not in his turn redeemed, he obtains the property free from incumbrances, at the price of the aggregate of the first mortgage and his own. If the plaintiff does not redeem, the action is dismissed with costs, and this means that he has to pay also the costs of the mortgagor (*r*). In an action by a mesne incumbrancer against prior incumbrancers, the right of redemption is given to the mortgagees subsequent to the first in succession, and thus all mortgagees prior to the plaintiff must redeem or be foreclosed; after redemption by any one of them those subsequent to him must likewise redeem or be foreclosed. But if the plaintiff fails to redeem, the action is dismissed. If he redeems, then the successive rights of redemption, with foreclosure in default, are continued as in a foreclosure action (*s*).

When one period of redemption fixed.

**515**. But the rights of redemption are not always preserved in the foregoing manner. The mortgagor himself is not entitled to any further period for redemption beyond the ordinary six months because he has incumbered the equity of redemption (*t*); and when questions of priority arise between incumbrancers which do not affect the plaintiff, these need not be determined in his presence, and hence, to avoid doing so, only one period of redemption is fixed for all the incumbrancers and the mortgagor, and the order is made without prejudice to the priority of the incumbrancers *inter se* (*u*). Similarly, where they, or some of them, do not appear, or do not put in a defence, only one period is allowed, since to do otherwise would be to fix their priorities in their absence (*a*).

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(*n*) *Rose* v. *Page* (1829), 2 Sim. 471; see p. 289, *ante*.
(*o*) See p. 289, *ante*.
(*p*) See pp. 153, 154, *ante*.
(*q*) *Jackson* v. *Brettall* (1795), 3 Seton, Judgments and Orders, 6th ed., p. 1982.
(*r*) *Pelly* v. *Wathen* (1849), 7 Hare, 351; *Hallett* v. *Furze* (1885), 31 Ch. D. 312; and see p. 154, *ante*.
(*s*) *Duberley* v. *Waring* (1776), 3 Seton, Judgments and Orders, 6th ed., p. 1982. If the action is dismissed, the plaintiff is foreclosed; *quære* whether the foreclosure of the prior mesne incumbrances remains operative.
(*t*) *Platt* v. *Mendel* (1884), 27 Ch. D. 246, 248.
(*u*) *Bartlett* v. *Rees* (1871), L. R. 12 Eq. 395; *General Credit and Discount Co.* v. *Glegg* (1883), 22 Ch. D. 549; *Lewis* v. *Aberdare and Plymouth Co.* (1884), 53 L. J. (CH.) 741; *Tufdnell* v. *Nicholls* (1887), 56 L. T. 152.
(*a*) *Doble* v. *Manley* (1885), 28 Ch. D. 664. It is the same whether the

And generally the practice now is to fix only one period of redemption (*b*); but subsequent incumbrancers, if their priorities are proved or admitted (though not the mortgagor), can obtain successive periods on showing a case for this indulgence (*c*). If any of the defendants redeem there is liberty to apply, and their respective rights will be worked out without notice to the plaintiff (*d*).

Foreclosure of equitable securities.

**516.** In an action for foreclosure of an equitable mortgage by deposit, the order is prefaced by a declaration that the plaintiff is entitled to be considered as a mortgagee of the premises comprised in the deeds (*e*); the usual accounts are directed, and in default of payment the mortgagor is foreclosed; and there is a direction for conveyance of the property to the plaintiff (*f*).

Stamp duty.

**517.** An order for foreclosure requires to be stamped as though it were a conveyance on sale (*g*), and the value for that purpose is the amount of the mortgage debt or the value of the property, whichever is less (*h*).

(iii.) *Sale.*

Order for sale in lieu of foreclosure.

**518.** Where the primary remedy on a security is foreclosure, a sale may be ordered under the statutory jurisdiction; in other cases it is ordered under the general jurisdiction of the court as the appropriate way of enforcing the security (*i*). An order for sale in lieu of foreclosure follows the form of a foreclosure order in providing opportunity of redemption to the mortgagor. There is the usual order for accounts, and the direction for reconveyance to the

statement of claim alleges that the defendants are "entitled," or only that they "claim to be entitled" to incumbrances (*Doble* v. *Mundey* (1885), 28 Ch. D. 664); *Smithett* v. *Hesketh* (1890), 44 Ch. D. 161, 164). Where a sale is ordered, only one time is allowed for redemption if the margin for subsequent incumbrancers will be small (*Cripps* v. *Wood* (1882), 51 L. J. (CH.) 584).

(*b*) *Smith* v. *Olding* (1884), 25 Ch. D. 462; *Platt* v. *Mendel* (1884), 27 Ch. D. 246, 248; *Smithett* v. *Hesketh*, *supra*. For forms of order giving one period for redemption, see 3 Seton, Judgments and Orders, 6th ed., pp. 1896, 1964, 1965. Formerly the allowance of successive periods was usual (*Lewis* v. *Aberdare and Plymouth Co.* (1884), 53 L. J. (CH.) 741), except in the case of judgment creditors (*Stead* v. *Banks* (1852), 5 De G. & Sm. 560; *Bates* v. *Hillcoat* (1852), 16 Beav. 139).

(*c*) *Platt* v. *Mendel*, *supra*, at p. 249; see *Mutual Life Assurance Society* v. *Langley* (1884), 26 Ch. D. 686 (one additional period of three months allowed); *Bertlin* v. *Gordon*, [1886] W. N. 31 (one additional period of one month; the mortgage was of a reversionary interest likely to fall in soon); *Smithett* v. *Hesketh*, *supra* (two additional periods of three months).

(*d*) *Young* v. *Jarvis* (1892), 3 Seton, Judgments and Orders, 6th ed., p. 1897.

(*e*) *Parker* v. *Sidney*, [1879] W. N. 135.

(*f*) *Lees* v. *Fisher* (1882), 22 Ch. D. 283, C. A.; 3 Seton, Judgments and Orders, 6th ed., p. 2042.

(*g*) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6, which is declaratory, and foreclosure orders made before the Act must bear the conveyance on sale stamp in force at the time of the order (*Re Lovell and Collard's Contract*, [1907] 1 Ch. 249; compare *Inland Revenue Commissioners* v. *Tod*, [1898] A. C. 399). As to stamp duty on conveyances on sale, see title SALE OF LAND. As to stamp duties generally, see title REVENUE.

(*h*) See *Huntington* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 422.

(*i*) See pp. 272 *et seq.*, *ante*.

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mortgagor if he pays the sum certified to be due; but then, instead of directing foreclosure, the order directs a sale, payment of the proceeds into court, and application thereof in satisfaction of the plaintiff's debt. Unless a sale of the whole is necessary, or is desired by the parties, the direction is to sell the property or a competent part thereof; if, after sale of the whole, there is a deficiency, the right of the mortgagee to sue for the balance is preserved (*k*). The order directs whether the sale is to be made with the approbation of the judge—that is, in court—or out of court, and, in the latter case, to what extent it is to be subject to the control of the court; for example, in fixing the reserve price and the auctioneer's remuneration (*l*); it may direct who is to have the conduct of the sale, or this may be left to be determined in chambers (*m*); and where the sale is being ordered against the wish of the first mortgagee, the order will usually direct payment into court by the mortgagor or subsequent incumbrancers of a sum sufficient to protect the first mortgagee against loss, either in respect of costs or of insufficiency of price (*n*), and in the like case the reserve price may be fixed so as to cover the mortgage debt and costs (*o*). If the sale is not effected, then foreclosure will follow (*p*).

Inquiries.

If there are several incumbrancers and an immediate sale is desired by the parties, or is necessary, the order will direct an inquiry as to incumbrances, an account of the amounts due, and an inquiry as to priorities. There is then an order for sale, and direction for the proceeds to be paid into court and applied in payment of the incumbrances according to their priorities (*q*).

Equitable charges or liens.

**519.** Where the security is an equitable charge entitling the mortgagee to foreclosure—such as a mortgage by deposit of title deeds—and sale is directed in lieu of foreclosure, the order follows the form of a foreclosure order under such a security (*r*) in declaring the charge, directing an account, and giving the mortgagor opportunity of redeeming. If he redeems, the deeds are to be handed back to him; in default, the direction for sale follows (*s*).

Where the security is an equitable charge conferring no right to foreclosure (*t*), or an equitable lien, such as a vendor's lien (*u*), the order declares the lien, and directs, where necessary, accounts and inquiries, and sale on non-payment of the amount due (*a*).

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(*k*) See 3 Seton, Judgments and Orders, 6th ed., p. 1911.

(*l*) *Ibid.*, p. 1915; see p. 276, *ante*.

(*m*) 3 Seton, Judgments and Orders, 6th ed., pp. 1914—1916; see p. 276, *ante*. As to sale of land generally, see title SALE OF LAND.

(*n*) 3 Seton, Judgments and Orders, 6th ed., pp. 1912—1915; see p. 276, *ante*.

(*o*) 3 Seton, Judgments and Orders, 6th ed., p. 1915.

(*p*) *Ibid.*, pp. 1913, 1914.

(*q*) *Ibid.*, p. 1912.

(*r*) See p. 291, *ante*.

(*s*) 3 Seton, Judgments and Orders, 6th ed., pp. 2045, 2047, 2049. As to the premises comprised in the sale, see *Simmons* v. *Montague*, [1907] 1 I. R. 87; as to vesting the mortgagor's estate in the purchaser, see the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 30; title SALE OF LAND.

(*t*) See 3 Seton, Judgments and Orders, 6th ed., p. 2049; p. 272, *ante*. As to the order for sale in a debenture-holder's action, see title COMPANIES, Vol. V., p. 384.

(*u*) 3 Seton, Judgments and Orders, 6th ed., p. 2290.

(*a*) Or the amount required is ordered to be raised by sale or mortgage

SUB-SECT. 8.—*Foreclosure Absolute.*

SECT. 5. **Foreclosure or Sale.**

Procedure to obtain order.

**520.** Upon non-payment of the amount certified to be due at the time and place prescribed, the mortgagee is entitled to an order for foreclosure absolute as against the person or persons in default. The order is obtained upon motion or summons (*b*), and there must be an affidavit made by the mortgagee, or, if he attended by an agent, by such agent, of attendance at the prescribed time and place and non-payment of the money (*c*), and also an affidavit by the mortgagee, or by all the joint mortgagees, of non-payment since the appointed time (*d*).

Form of order.

**521.** The order for foreclosure absolute recites the order for an account in the order *nisi*, the certificate showing the sum found due, the time and place appointed for payment, and the evidence of attendance by the plaintiff or his agent and of non-payment; and orders that the mortgagor, or other defendant against whom it is made, shall thenceforth stand absolutely debarred and foreclosed of and from all equity of redemption in the mortgaged premises (*e*).

(3 Seton, Judgments and Orders, 6th ed., p. 2054). If the charge is on the estate of a tenant in tail, he may be ordered to execute a disentailing deed (*Lewis* v. *Duncombe* (1855), 20 Beav. 398); and see note (*h*), p. 99, *ante*.

(*b*) If the order is made on motion, the matter is not mentioned to the court unless there has been some irregularity preventing the motion from being treated as of course; counsel hands his brief duly indorsed to the registrar. But usually it is made on summons in chambers (see Daniell's Chancery Forms, 5th ed., p. 778), whether the proceedings are by writ or summons (Yearly Practice of the Supreme Court, 1912, p. 833).

(*c*) See *Docksey* v. *Else* (1891), 64 L. T. 256. The affidavit should prove attendance by the mortgagee or his agent during the whole of the appointed time, and an agent should be authorised by power of attorney to receive the money (see form in Daniell's Chancery Forms, 5th ed., p. 777); but a want of strict compliance with these formalities is not necessarily a ground for refusing the order. The order has been granted although the mortgagee has attended during only part of the appointed time (*Anon.* (1844), 1 Coll. 273; *Bernard* v. *Norton* (1864), 10 L. T. 183), and although, where the attendance is by agent, the agent had not a power of attorney to receive the money, provided the mortgagor did not attend (*Lechmere* v. *Clamp* (No. 3) (1862), 31 Beav. 578; *London Monetary Advance and Assurance Society* v. *Brown* (1868), 16 W. R. 782; *Macrae* v. *Evans* (1875), 24 W. R. 55; *Cox* v. *Watson* (1877), 7 Ch. D. 196); and, *a fortiori*, where the agent has a power of attorney, but has omitted to bring it with him (*Hart* v. *Hawthorne* (1880), 42 L. T. 79; *Crawley* v. *Fuller*, [1890] W. N. 35). But such irregularities prevent the order being of course, and the matter must be mentioned to the judge (*King* v. *Hough*, [1895] W. N. 69). As to form of order under such circumstances, see *Moore and Robinson's Nottinghamshire Banking Co.* v. *Horsfield*, [1882] W. N. 43. And, as to an infant mortgagor, see title INFANTS AND CHILDREN, Vol. XVII., p. 143.

(*d*) *Barrow* v. *Smith* (1885), 52 L. T. 798; *Docksey* v. *Else*, *supra*. But where the defendant had never appeared in the action, an affidavit by the solicitor's clerk who attended to receive the money was accepted as sufficient (*Frith* v. *Cooke* (1885), 52 L. T. 798). If one joint mortgagee is abroad, it is sufficient for the rest to make the affidavit (*Kinnaird* v. *Yorke* (1889), 60 L. T. 380). Where the mortgagee has received rents after default, the usual form of affidavit must be altered; see *National Permanent Mutual Benefit Building Society* v. *Raper*, [1892] 1 Ch. 54; and see p. 223, *ante*.

(*e*) 3 Seton, Judgments and Orders, 6th ed., p. 1989.

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If necessary an order for delivery of possession will be added, or this may be obtained subsequently (*f*); and, in the case of an equitable mortgage, where a conveyance cannot be obtained from the mortgagor, he will be declared to be a trustee, and a vesting order will be made under the Trustee Act, 1893 (*g*). If the defendant has in his possession any deeds affecting the title to the plaintiff's mortgage, these will be ordered to be given up, but a puisne mortgagee will not be ordered to deliver up deeds, subsequent to the plaintiff's mortgage, which affect only the equity of redemption (*h*).

Order against infants.

**522.** An infant defendant is usually allowed a day to show cause against the order on his attaining majority, and accordingly in such a case the order contains a declaration that the order is not to be binding on him unless, on being served, after he has attained majority, with a subpœna to show cause against the order, he fails, within six months from service, to show good cause to the contrary (*i*). But if it appears that the security is deficient, and if the plaintiff offers to pay the infant's solicitor and client costs, a day to show cause is not given (*k*); and it is not given where the order directs a sale (*l*).

Effect of order absolute.

**523.** The effect of the order for foreclosure absolute is to transfer the equitable estate of the mortgagor to the mortgagee (*m*), and the mortgagor has thenceforth no interest in the property. The mortgagee holds the mortgaged property as absolute owner in lieu of the mortgage money, and, if it is real estate, he holds it as such, and not as personalty (*n*).

(*f*) *Keith* v. *Day* (1888), 39 Ch. D. 452, C. A.; *Manchester and Liverpool Bank* v. *Parkinson* (1889), 60 L. T. 258; *Jenkins* v. *Ridgley* (1893), 41 W. R. 585; see p. 284, *ante*. The order for foreclosure absolute does not by itself entitle the mortgagee to a writ of possession (*Wood* v. *Wheater* (1882), 22 Ch. D. 281).

(*g*) 56 & 57 Vict. c. 53, s. 31; see *Lechmere* v. *Clamp* (No. 2) (1861), 30 Beav. 218; *Lechmere* v. *Clamp* (No. 3) (1862), 31 Beav. 578; *Foster* v. *Parker* (1878), 8 Ch. D. 147; and as to such vesting orders, see, further, title TRUSTS AND TRUSTEES. An outstanding nominal reversion on a mortgage by sub-demise can be got in by vesting order (*British Empire Mutual Life Assurance Co.* v. *Sugden* (1878), 47 L. J. (CH.) 691). As to mortgages by sub-demise, see p. 127, *ante*.

(*h*) *Greene* v. *Foster* (1882), 22 Ch. D. 566.

(*i*) 3 Seton, Judgments and Orders, 6th ed., p. 1903. The declaration is repeated from the order *nisi* (*Williamson* v. *Gordon* (1812), 19 Ves. 114). This indulgence is allowed whether the mortgage is legal (*Gray* v. *Bell* (1882), 30 W. R. 606; see *Newbury* v. *Marten* (1851), 15 Jur. 166), or equitable (*Price* v. *Carver* (1837), 3 My. & Cr. 157; *Mellor* v. *Porter* (1883), 25 Ch. D. 158).

(*k*) On the ground that the order in this form is for the infant's benefit; see cases cited title INFANTS AND CHILDREN, Vol. XVII., p. 143, note (*p*).

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 30, as amended by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 1; see *Scholefield* v. *Heafield* (1838), 8 Sim. 470; *Clinton* v. *Bernard* (1844), Drury *temp.* Sug. 287; *Hutton* v. *Mayne* (1846), 3 Jo. & Lat. 586.

(*m*) *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, 360, C. A.; affirmed, *Pugh* v. *Heath* (1882), 7 App. Cas. 235; see pp. 71, 156, *ante*.

(*n*) *Thompson* v. *Grant* (1819), 4 Madd. 438; *Re Loveridge, Pearce* v. *Marsh*, [1904] 1 Ch. 518, 523. But trustees who have foreclosed mortgaged lands hold them on trust for sale (Conveyancing Act, 1911 (1 & 2 Geo. 5,

A release of the equity of redemption after default under the order *nisi* is equivalent to final foreclosure, and if made by a tenant in tail binds those entitled in remainder (*o*).

Registered charge.

**524.** Where the order is obtained on a registered charge on registered land, the order or an office copy is delivered to the registrar, and the proprietor of the charge is thereupon registered, subject to prior charges, as proprietor of the land (*p*).

SUB-SECT. 9.—*Costs.*

Costs added to mortgage debt.

Liability of mortgagee.

**525.** In a foreclosure action the costs of the mortgagee are not, in the absence of special circumstances, payable by the mortgagor personally; the mortgagee adds them to his debt, and the mortgagor only pays them if he redeems (*q*). And the mortgagee is not liable in general to pay the costs of any other party to the action (*r*). But a defendant who disclaims interest is entitled to his costs if he has been needlessly made a party to the action, or to costs subsequent to disclaimer if the action is needlessly continued against him. On this question the following rules are recognised:—

Rules as to defendant's costs.

(1) If a defendant has no interest (*s*), and claims no interest, at the commencement of the action or afterwards, he is not properly made a party (*t*), and if he disclaims either before or after (*a*) the commencement of the action in terms which shows this to be the case, he is entitled to his costs against the plaintiff (*b*);

(2) If a person has an interest he is *primâ facie* a necessary party, but if he disclaims or offers to disclaim before action, and such disclaimer is known to the mortgagee, or would have been known had he used ordinary care and prudence (*c*), such person ceases to be a necessary party, and, if made a defendant, is entitled to his costs against the plaintiff (*d*);

(3) If a person has an interest, and does not disclaim or offer to

c. 37), s. 9 (1)); and see note (*l*), p. 156, *ante*. As to opening foreclosure, see p. 296, *post*.

(*o*) *Reynoldson* v. *Perkins* (1769), Amb. 564.

(*p*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 26; Land Transfer Rules, 1903, r. 164; and see p. 85, *ante*.

(*q*) See pp. 156, 231, *ante*.

(*r*) See p. 233, *ante*.

(*s*) This includes the case where he has had an interest, but has assigned it before action (*Glover* v. *Rogers* (1847), 11 Jur. 1000; *Hurst* v. *Hurst* (1852), 22 L. J. (CH.) 546); but not where he has only agreed to assign his interest (*Roberts* v. *Hughes* (1868), L. R. 6 Eq. 20). As to disclaimer by a trustee who has never acted, see *Benbow* v. *Davies* (1848), 11 Beav. 369.

(*t*) *Furber* v. *Furber* (1862), 30 Beav. 523, 524.

(*a*) *Bellamy* v. *Brickenden* (1858), 4 K. & J. 670; *Day* v. *Gudgen* (1876), 2 Ch. D. 209.

(*b*) *Ford* v. *Chesterfield* (*Earl*) (1853), 16 Beav. 516 (where rules substantially the same as those in the text, *supra*, were first enunciated); *Ridgway* v. *Kynnersley* (1856), 2 Hem. & M. 565; *Ward* v. *Shakeshaft* (1860), 1 Drew. & Sm. 269; *Cork* (*Earl*) v. *Russell* (1871), L. R. 13 Eq. 210; see *Tipping* v. *Power* (1842), 1 Hare, 405, 408; *Gabriel* v. *Sturgis* (1846), 5 Hare, 97, 101; *Hiorns* v. *Holtom*, *Fortnam* v. *Holtom* (1852), 16 Jur. 1077.

(*c*) See *Ridgway* v. *Kynnersley*, *supra*.

(*d*) *Ford* v. *Chesterfield* (*Earl*), *supra*; see *Thompson* v. *Kendall* (1840), 9 Sim. 397; *Lock* v. *Lomas* (1851), 15 Jur. 162.

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disclaim before action, he is properly made a defendant and is not entitled to be paid his costs (*e*); but if he disclaims during the action and does not ask for costs, and is yet brought to the trial for some special purpose of the plaintiff, he is entitled to be paid his costs subsequent to the disclaimer (*f*), though not if he appears of his own accord without being required for such special purpose (*g*).

SUB-SECT. 10.—*Exercise of Other Remedies while Foreclosure Proceedings Pending.*

Proceedings on the covenant.

**526.** Since the mortgagee is entitled to pursue all his remedies concurrently (*h*), the pendency of a foreclosure action does not prevent him from suing on the covenant, though, if such a proceeding is intended, the claim should be joined with the claim for foreclosure in one action (*i*). The order will then provide for any sums recovered being credited to the mortgagor in taking the foreclosure account (*k*). If a separate action is brought, the sums recovered must also be brought into account (*l*).

Exercise of power of sale.

**527.** The mortgagee can also exercise his power of sale, but after judgment for foreclosure *nisi* and before foreclosure absolute, he cannot sell without the leave of the court (*m*).

SUB-SECT. 11.—*Opening Foreclosure.*

General principle as to enlargement of time.

**528.** Neither the order for foreclosure *nisi*, which directs foreclosure in the event of non-payment at a prescribed date, nor the order for foreclosure absolute, is conclusive as regards the mortgagor's right to redeem. After the order for foreclosure *nisi*, whether followed by an order for foreclosure absolute or not, the mortgagor

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(*e*) *Ford* v. *Chesterfield* (*Earl*) (1853), 16 Beav. 516; *Land* v. *Wood* (1823), 1 L. J. (O. S.) (CH.) 89; *Griggs* v. *Sturgis* (1846), 5 Hare, 93; *Ohrly* v. *Jenkins* (1847), 1 De G. & Sm. 543; *Buchanan* v. *Greenway* (1848), 11 Beav. 58; *Staffurth* v. *Pott* (1848), 2 De G. & Sm. 571; *Furber* v. *Furber* (1862), 30 Beav. 523, 524; see *Gibson* v. *Nicol* (1846), 9 Beav. 403. Where the action is by summons, the affidavit in reply takes the place of a defence. A statement by the defendant that if he had been applied to before action he would have released or disclaimed his right does not entitle him to costs (*Collins* v. *Shirley* (1830), 1 Russ. & M. 638; *Ford* v. *White* (1852), 16 Beav. 120; compare *Gurney* v. *Jackson* (1852), 1 Sm. & G. 97).

(*f*) *Talbot* v. *Kemshead* (1858), 4 K. & J. 93; *Dillon* v. *Ashwin* (1864), 10 Jur. (N. S.) 119; *Jones* v. *Rhind*, *Rhind* v. *Jones* (1869), 17 W. R. 1091; *Greene* v. *Foster* (1882), 22 Ch. D. 566, 569; see *Lewin* v. *Jones* (1884), 53 L. J. (CH.) 1011. The disclaimer should be made immediately on notice of the action (*Bradley* v. *Borlase* (1858), 7 W. R. 125). The defendant must not plead and appear at the hearing to claim costs (*Maxwell* v. *Wightwick* (1866), L. R. 3 Eq. 210).

(*g*) *Gowing* v. *Mowberry* (1863), 11 W. R. 851; *Lewin* v. *Jones*, *supra*; even though served with notice of subsequent proceedings (*Clarke* v. *Toleman* (1872), 42 L. J. (CH.) 23, disapproving *Davis* v. *Whitmore* (1860), 28 Beav. 617).

(*h*) See p. 244, *ante*.

(*i*) See p. 284, *ante*.

(*k*) See p. 287, *ante*.

(*l*) If this is not done the certificate will be erroneous, and a fresh account will have to be taken.

(*m*) *Stevens* v. *Theatres*, *Ltd.*, [1903] 1 Ch. 857.

can apply for, and, in suitable circumstances and on certain conditions, obtain, an order enlarging the time for redemption (*n*), and, if there has been foreclosure absolute, opening the foreclosure and giving a new right of redemption (*o*); and the same results may follow from acts of the mortgagee. Enlargement of the time is not a matter of course (*p*). There must be some reason for it, such as that the security is ample, and that the mortgagor has a reasonable probability of obtaining the money to pay the mortgage debt (*q*); though on a first application before the day fixed for payment (*r*) the reason need not be a strong one (*s*).

Successive enlargements.

Successive enlargements can, however, be obtained, and if there is really a strong case the application may be granted three or four times, and a further enlargement has been allowed notwithstanding that the last preceding order purported to be peremptory (*a*). In such circumstances there should be evidence of unexpected delay in getting the money, and a strong probability that it will be got (*b*). But as to an ordinary application for enlargement of time no general rule has been laid down. The matters to be taken into consideration include the nature of the estate, whether in reversion or in possession; whether the mortgaged property shows a sufficient margin to protect the mortgagee against loss; and whether the mortgagor's reasonable expectations have been disappointed (*c*).

Conditions of enlargement.

As a condition of the enlargement of time the mortgagor must forthwith or within a prescribed time, usually a month (*d*), pay arrears of interest and costs (*e*), though if the arrears amount to a large sum, payment of a substantial part may be accepted (*f*). If the condition is not complied with, foreclosure follows (*g*).

Effect of other concurrent proceedings.

**529.** If the mortgagor is seeking to vary the master's certificate, he should apply for an enlargement till after his application has been heard (*h*). If his right to redeem is in dispute, and he is appealing,

(*n*) As to enlarging time for redemption in a redemption action, see p. 155, *ante*.

(*o*) See *Campbell* v. *Holyland* (1877), 7 Ch. D. 166; *Re Power and Carton's Contract* (1890), 25 L. R. Ir. 459.

(*p*) *Quarles* v. *Knight* (1820), 8 Price, 630. It will not be granted in favour of an assignee added as a defendant after judgment *nisi* (*Re Parbola, Ltd., Blackburn* v. *Parbola, Ltd.*, [1909] 2 Ch. 437).

(*q*) *Forrest* v. *Shore* (1884), 32 W. R. 356.

(*r*) *Patch* v. *Ward* (1867), 3 Ch. App. 203, 212.

(*s*) *Nanny* v. *Edwards* (1827), 4 Russ. 124; *Eyre* v. *Hanson* (1840), 2 Beav. 478.

(*a*) *Anon.* (1740), Barn. (CH.) 221; *Edwards* v. *Cunliffe* (1816), 1 Madd. 287.

(*b*) *Edwards* v. *Cunliffe, supra.*

(*c*) *Thornhill* v. *Manning* (1851), 1 Sim. (N. S.) 451, 454; *Campbell* v. *Holyland, supra.*

(*d*) *Eyre* v. *Hanson* (1840), 2 Beav. 478; *Geldard* v. *Hornby* (1841), 1 Hare, 251.

(*e*) *Edwards* v. *Cunliffe, supra*; *Brewin* v. *Austin* (1838), 2 Keen, 211; see *Whatton* v. *Cradock* (1836), 1 Keen, 267. The rule applies also where infants are interested in the equity of redemption (*Combe* v. *Stewart* (1851), 13 Beav. 111).

(*f*) *Eyre* v. *Hanson, supra*; *Holford* v. *Yate* (1855), 1 K. & J. 677; *Forrest* v. *Shore, supra.*

(*g*) *Jones* v. *Robert* (1825), M'Cle. & Yo. 567; *Eyre* v. *Hanson, supra*; *Holford* v. *Yate, supra.*

(*h*) *Renvoize* v. *Cooper* (1823), 1 Sim. & St. 364.

SECT. 5. Foreclosure or Sale.

the enlargement will be granted on the terms of his bringing the principal into court and paying the mortgage interest, or bringing that also into court and paying costs to the mortgagee on the latter undertaking to refund such costs if the appeal is successful (*i*).

Enlargement after entry of order absolute.

**530.** Enlargement of time for redemption can be obtained even after the order for foreclosure absolute has been passed and entered (*k*); but for this a strong case must be made out, such as that the value of the estate greatly exceeds the debt, and that the delay in getting the money has been accidental (*l*).

Effect of death of joint mortgagee.

**531.** Where under the order and certificate the debt is payable to mortgagees on a joint account, and one of them dies before the day fixed for payment, this operates as a postponement of the time for redemption, and a new day must be appointed (*m*).

Effect of receipt of rents by mortgagee in possession or by receiver.

**532.** The time for redemption will be enlarged if the mortgagee is in possession and receives rents between the date of the master's certificate and the day appointed for payment. Such receipt opens the account, and a fresh certificate must be made and a further day appointed (*n*); but after default on the day appointed for payment, the mortgagee receives the rents on his own account and the time is not thereby enlarged (*o*).

Receipt of rents by a receiver in the action has the same effect as receipt by the mortgagee if the mortgagee claims them, that is, the certificate is reopened if the rents are received before the day of payment, but not if they are received after (*p*). This is on the ground

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(*i*) *Monkhouse* v. *Bedford Corporation* (1810), 17 Ves. 380; *Finch* v. *Shaw, Colyer* v. *Finch* (1855), 20 Beav. 555. The appeal does not in itself operate as a stay of execution or of proceedings (R. S. C., Ord. 58, r. 16); see title PRACTICE AND PROCEDURE.

(*k*) *Ford* v. *Wastell* (1847), 6 Hare, 229; 2 Ph. 591; *Thornhill* v. *Manning* (1851), 1 Sim. (N. S.) 451; see *Cocker* v. *Bevis* (1665), 1 Cas. in Ch. 61; *Ismoord* v. *Claypool* (1666), 9 Sim. 317, n.; *Abney* v. *Wordsworth* (1702), 9 Sim. 317, n.; and, as to the former procedure, *Booth* v. *Creswicke* (1841), Cr. & Ph. 361.

(*l*) *Nanfan* v. *Perkins* (1766), 9 Sim. 308, n.; *Crompton* v. *Effingham (Earl)* (1782), 9 Sim. 311, n.; *Joachim* v. *M'Douall* (1798), 9 Sim. 314, n.; *Jones* v. *Creswicke* (1839), 9 Sim. 304.

(*m*) *Blackburn* v. *Caine* (1856), 22 Beav. 614; *Kingsford* v. *Poile* (1859), 8 W. R. 110; but see *Browell* v. *Pledge*, [1888] W. N. 166.

(*n*) *Geldard* v. *Hornby* (1841), 1 Hare, 251; *Garlick* v. *Johnson* (1841), 4 Beav. 154; *Alden* v. *Foster* (1842), 5 Beav. 592; *Ellis* v. *Griffiths* (1844), 7 Beav. 83; *Holford* v. *Yate* (1855), 1 K. & J. 677; *Allen* v. *Edwards* (1873), 42 L. J. (CH.) 455; *Patch* v. *Ward* (1867), 3 Ch. App. 203, 209; *Prees* v. *Coke* (1871), 6 Ch. App. 645. In this case the mortgagor is not put upon terms of paying interest and costs (*Buchanan* v. *Greenway* (1849), 12 Beav. 355). The mortgagee is not allowed to open the account for the purpose of letting in the costs of other proceedings on the ground of consolidation (*Barron* v. *Lancefield* (1853), 17 Beav. 208). As to foreclosure of a mortgage of mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 556.

(*o*) *Constable* v. *Howick* (1858), 5 Jur. (N. S.) 331; *Prees* v. *Coke, supra*; *National Permanent Mutual Benefit Building Society* v. *Raper*, [1892] 1 Ch. 54; see *Webster* v. *Patteson* (1885), 25 Ch. D. 626. For the effect of the rule where successive periods are fixed for redemption, see *Bird* v. *Gandy* (1715), 7 Vin. Abr. 45 (20).

(*p*) *Jenner-Fust* v. *Needham* (1886), 32 Ch. D. 582, C. A.; *Peat* v. *Nicholson* (1886), 54 L. T. 569. *Hoare* v. *Stephens* (1886), 32 Ch. D. 194,

*that till default the rents belong to the* mortgagor and must be credited to him. It is otherwise where receipts represent capital. In such a case they belong to the party redeeming, or, if no person redeems, to the mortgagee foreclosing, and the account is not reopened (*q*).

Effect of proceedings on covenant or sale under power or fraud.

**533.** An order for foreclosure absolute will be reopened if, after foreclosure, the mortgagee sues the mortgagor on his covenant for payment (*r*). It will be reopened also if the mortgagee sells under his power of sale and not as absolute owner, though the effect is only to make him liable to account for the surplus proceeds of sale and the purchaser's title is not disturbed (*s*). Further, like any other judgment, the order can be set aside if it has been obtained by fraud (*t*), where, for instance, the mortgagee has misled the court as to the persons interested in the equity of redemption (*a*); but mere constructive fraud is not sufficient (*b*). The foreclosure may be reopened as against a purchaser (*c*), but it is not reopened

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and *Ross Improvement Commissioners* v. *Usborne*, [1890] W. N. 92, *contra* are overruled; see *National Permanent Mutual Benefit Building Society* v. *Raper*, [1892] 1 Ch. 54; the further time allowed in these cases was one month. But the expense of a further account can be saved by the mortgagee filing an affidavit of the amount due for principal, interest, and costs, after allowing for receipts, down to the day for which notice of motion is given to fix another day for redemption (*Jenner-Fust* v. *Needham* (1886), 32 Ch. D. 582, C. A.); and the account is not reopened if in the order *nisi* the mortgagee submits to be charged with a certain sum in respect of rents in the receiver's hands or which may come to his hands prior to the order absolute, and if the amount received does not exceed such sum (*Barber* v. *Jeckells*, [1893] W. N. 91; *Christy* v. *Godwin* (1893), 38 Sol. Jo. 10; *Simmons* v. *Blandy*, [1897] 1 Ch. 19; compare *Lusk* v. *Sebright*, [1894] W. N. 134); or if the amount received is not sufficient to cover the receiver's expenses and remuneration (*Ellenor* v. *Ugle*, [1895] W. N. 161).

(*q*) *Welch* v. *National Cycle Works Co.* (1886), 55 L. T. 673. Accordingly, the judgment should give liberty to apply in chambers as to payment of the money (*Coleman* v. *Llewellin* (1886), 34 Ch. D. 143, C. A.; *Smith* v. *Pearman* (1888), 58 L. T. 720); but the direction implies that the account is not to be reopened, and will not be inserted unless the nature of the receipts justifies it (*Cheston* v. *Wells*, [1893] 2 Ch. 151). As to takings in the hands of a receiver and manager, see *Holt & Co.* v. *Beagle* (1886), 55 L. T. 592. When a receiver, not appointed on behalf of the mortgagee only, omits from his accounts certain rents received, this does not reopen the foreclosure (*Ingham* v. *Sutherland* (1890), 63 L. T. 614). As to the appointment of a receiver, see pp. 261 *et seq.*, *ante*.

(*r*) *Lockhart* v. *Hardy* (1846), 9 Beav. 349; *Re Power and Carton's Contract* (1890), 25 L. R. Ir. 459, 469; see *Dashwood* v. *Blythway* (1729), 1 Eq. Cas. Abr. 317; see pp. 245, 269, *ante*. Where a second mortgagee has been foreclosed, and the mortgagor acquires the estate by devise from the first mortgagee, this may revive the second mortgage (*Cook* v. *Sadler* (1691), 2 Vern. 235).

(*s*) See *Watson* v. *Marston* (1853), 4 De G. M. & G. 230, C. A.; *Stevens* v. *Theatres, Ltd.*, [1903] 1 Ch. 857; compare *Re Alison*, *Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, C. A.

(*t*) *Loyd* v. *Mansell* (1722), 2 P. Wms. 73.

(*a*) *Gore* v. *Stacpoole* (1813), 1 Dow, 18, H. L.; *Harvey* v. *Tebbutt* (1820), 1 Jac. & W. 197. As to setting aside judgments obtained by fraud, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 216, 217.

(*b*) *Patch* v. *Ward* (1867), 3 Ch. App. 203.

(*c*) *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, 172.

SECT. 5. Foreclosure or Sale.

by sale to a party to the action (*d*) or by the mortgagee bequeathing the security as a debt (*e*).

Effect of acquiescence or delay.

**534.** An application to reopen a foreclosure absolute must be made promptly (*f*), and the mortgagor loses his right by acquiescing in the mortgagee's ownership (*g*), especially if there have been dealings with or expenditure on the estate (*h*).

SUB-SECT. 12.—*Loss of Right to Sue for Foreclosure.*

By lapse of time.

**535.** A foreclosure action in respect of a mortgage of land is an action to recover land (*i*); hence it is liable to be barred and the mortgagee's title extinguished in twelve years after the last payment of any part of the principal money or interest (*j*); if there has been no payment of principal or interest, the statute runs from the day fixed for payment by the proviso for redemption, since that is the time when the right to bring the action accrues (*k*). When the mortgaged property is an interest in reversion, the statute does not run until the interest falls into possession (*l*). A foreclosure action in respect of a mortgage of personalty is not subject to any statutory limitation (*m*).

SECT. 6.—*Rights in Mortgagor's Bankruptcy.*

Bankruptcy does not affect security.

**536.** The bankruptcy of the debtor does not affect the power of any secured creditor to realise or otherwise deal with his security (*n*). and for this purpose any person holding a mortgage, charge or lien on the property of the debtor, as a security for a debt due to him from the debtor, is a secured creditor (*o*).

(*d*) *Re Power and Carton's Contract* (1890), 25 L. R. Ir. 459.

(*e*) *Tooke* v. *Ely* (*Bishop*) (1706), 5 Bro. Parl. Cas. 181; *Re Power and Carton's Contract, supra*, at p. 470. As to reopening foreclosure when it is contrary to agreement between the parties, see *Cox* v. *Peele* (1788), 2 Bro. C. C. 334.

(*f*) *Thornhill* v. *Manning* (1851), 1 Sim. (N. S.) 451, 454; *Campbell* v. *Holyland* (1877), 7 Ch. D. 166.

(*g*) See *Fleetwood* v. *Jansen* (1742), 2 Atk. 467.

(*h*) See 15 Vin. Abr., Mortgage (Z), p. 476, pl. 1, citing *Stuckville* v. *Dolben* (undated), for which, see *Ord* v. *Smith* (1725), Cas. *temp.* King, 9; and see title EQUITY, Vol. XIII., p. 167.

(*i*) *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Heath* v. *Pugh* (1881), 6 Q. B. D. 345, 364, C. A.; *Harlock* v. *Ashberry* (1882), 19 Ch. D. 539, C. A. Formerly it was regarded as an action for the recovery of money (*Dearman* v. *Wyche* (1839), 9 Sim. 570; *Du Vigier* v. *Lee* (1843), 2 Hare, 326).

(*j*) Real Property Limitation Act, 1837 (7 Will. 4 & 1 Vict. c. 28); Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 9; see *Heath* v. *Pugh, supra*, at p. 362; and see title LIMITATION OF ACTIONS, Vol. XIX., pp. 137, 138.

(*k*) See *ibid.*, p. 145. As to time running afresh from the date of the foreclosure order, see *ibid.*, p. 147.

(*l*) *Hugill* v. *Wilkinson* (1888), 38 Ch. D. 480; *Re Conlan's Estate* (1892), 29 L. R. Ir. 199; and, as to the effect of the Statutes of Limitation on the mortgagee's right to foreclosure, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 145, 146; and as to payment of interest, see *ibid.*, pp. 94—96.

(*m*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 173.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9 (2). See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 64, 155. As to goods remaining in the possession of the mortgagor, *ibid.*, p. 177. As to proceedings for an account or sale, or for foreclosure or sale, see *ibid.*, p. 227. As to mortgaged shares, see title COMPANIES, Vol. V., p. 197. As to debenture-holders, see *ibid.*, p. 372.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (1); see title

The mortgagee may allocate his security to that part of his debt in respect of which he has no right of proof (*p*), save that he cannot, as against the trustee in bankruptcy, apply any part of the proceeds of sale to interest accruing due (*q*) after the date of the receiving order, though he may so apply subsequent income (*r*).

SECT. 6. **Rights in Mortgagor's Bankruptcy.**

Application of proceeds.

## SECT. 7.—*Rights against Insolvent Estate of Deceased Mortgagor.*

**537.** In the administration of the assets of a person who has died since the 1st November, 1875, and whose estate may prove to be insufficient (*s*) for the payment in full of his debts and liabilities, the same rules prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as are in force for the time being in regard to bankrupts' estates (*t*). The judgment for administration is equivalent to the adjudication in bankruptcy (*a*).

Bankruptcy rules apply.

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BANKRUPTCY AND INSOLVENCY, Vol. II., p. 44; and see *ibid.*, as to petition by a secured creditor. As to the steps open to the mortgagee to surrender, realise, or assess the value of his security, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 226—228; and as to handing back the security against payment after notice of an act of bankruptcy, see *ibid.*, p. 227, note (*d*). As to the trus ees' right to redeem, see *ibid.*. pp. 227, 228. As to proof for interest, see *ibid.*, p. 232; *Ex parte Badger* (1798), 4 Ves. 165. The same rules prevail in winding up (Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10; see *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A.; title COMPANIES, Vol. V., p. 512); and as to enforcing the security in winding up, see *ibid.*, pp. 372, 375, 376, 588, 589.

(*p*) *Ex parte Hunter* (1801), 6 Ves. 94; *Re Medley, Ex parte Glyn* (1840), 1 Mont. D. & De G. 25; *Re Bulmer, Ex parte Johnson* (1853), 3 De G. M. & G. 218, 235; *Re Fox and Jacobs, Ex parte Discount Banking Co. of England and Wales*, [1894] 1 Q. B. 438.

(*q*) *Quartermaine's Case*, [1892] 1 Ch. 639, where the earlier cases were discussed, and *Re Talbott, King* v. *Chick* (1888), 39 Ch. D. 567, were not followed; see, as to administration, *Ross* v. *Ross* (1890), 25 L. R. Ir. 362.

(*r*) *Quartermaine's Case, supra*; see *Re Barker, Ex parte Penfold* (1851), 4 De G. & Sm. 282.

(*s*) *I.e.*, may reasonably be supposed to be insufficient (*Re Hopkins, Williams* v. *Hopkins* (1881), 18 Ch. D. 370, 377, C. A.; *Cooper* v. *Teahan* (1889), 23 L. R. Ir. 203, 207, V.-C.).

(*t*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10; see notes (*n*), (*o*), p. 300, *ante*. Formerly a secured creditor could first prove in the administration for his whole debt and receive a dividend, and could then realise his security, and retain so much as was required to give him his full 20*s*. in the pound (*Mason* v. *Bogg* (1837), 2 My. & Cr. 443). A leading object of the statutory provision was to abolish this rule (*Lee* v. *Nuttall* (1879), 12 Ch. D. 61, 65, C. A.). As to the construction and effect of the statutory provision, see *Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9, C. A.; *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684, C. A.; and see, further, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 344 *et seq.* As to the time when the security must be valued, see *Cooper* v. *Teahan* (1889), 23 L. R. Ir. 203, C. A. As to the procedure where a mortgagor has made a composition to which the mortgagees were not parties and then died insolvent, see *Re Hardy, Hardy* v. *Farmer*, [1896] 1 Ch. 904. A secured creditor can prove against a fund in court, though the appointed time for coming in has long elapsed, subject to such conditions and terms as the court sees fit to impose (*Harrison* v. *Kirk*, [1904] A. C. 1).

(*a*) *Ross* v. *Ross, supra.* Dividends received in an administration action on a first mortgage cannot be appropriated to subsequent mortgagees of the same mortgagee (*Re Browne's Estate*, [1903] 1 I. R. 245).

# Part IX.—Discharge of Mortgages.

SECT. 1. By Redemption.

## SECT. 1.—*By Redemption.*

### SUB-SECT. 1.—*Who may Redeem.*

Who may redeem.

**538.** Any person may redeem who is beneficially interested in the equity of redemption, or is liable to pay the mortgage debt (*b*).

### SUB-SECT. 2.—*Property Available for Redemption.*

#### (i.) *On Death of Mortgagor.*

Mortgaged property primarily liable.

**539.** On the death of the mortgagor the mortgagee can pursue his remedies both against the mortgaged property (*c*) and on the covenant for payment (*d*). As between the persons interested in the mortgaged property and those interested in the general personal estate, the mortgaged property is liable to bear the debt (*e*), save that the specific legatee of pure personal property subject to a charge is entitled to have the charge paid off, or to be compensated, out of the general personal estate of the testator (*f*), whether the testator was personally liable for the amount or not

#### (ii.) *Where Several Mortgagors are Liable.*

Liability of mortgagors *inter se.*

**540.** Where several mortgagors are liable under the covenants in a mortgage, they are usually bound jointly and severally, and it is provided that, as regards the mortgagee, they shall all be treated as principal debtors (*h*); but between themselves they may have had the benefit of the money in specific shares, or for the purpose of a joint adventure; or one may have had the exclusive benefit of it, so as to be the principal debtor, while the others are sureties (*i*). In the former case they must contribute to the repayment of the debt in the proportions of their shares in the mortgage money (*j*), or in the joint adventure (*k*); in the latter case the sureties are entitled to be exonerated by the principal debtor, and,

(*b*) See pp. 139, 140, *ante*.

(*c*) See p. 272, *ante*.

(*d*) See p. 267, *ante*; subject to the rule that after foreclosure he cannot sue on the covenant without reopening the foreclosure; see p. 299, *ante*.

(*e*) By virtue of the Real Estate Charges Acts, 1854 (17 & 18 Vict. c. 113), 1867 (30 & 31 Vict. c. 69), and 1877 (40 & 41 Vict. c. 34); see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 288.

(*f*) *Knight* v. *Davis* (1833), 3 My. & K. 358; see *Stewart* v. *Denton* (1785), 4 Doug. (K. B.) 219; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 288.

(*g*) *Bothamley* v. *Sherson* (1875), L. R. 20 Eq. 304. As to the effect of the payment of a mortgage on real estate of an infant or lunatic out of personal estate, see titles INFANTS AND CHILDREN, Vol. XVII., p. 84; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 450; and compare *Webb* v. *Shaftesbury* (*Lord*) (1821), Madd. & G. 100.

(*h*) See Encyclopædia of Forms and Precedents, Vol. XVI., p. 387.

(*i*) See p. 89, *ante*.

(*j*) Parol evidence is admissible to show for whose benefit the money was advanced (*Gray* v. *Dowman* (1858), 27 L. J. (CH.) 702).

(*k*) See title PARTNERSHIP.

as between themselves, they must contribute equally to the debt unless it has been otherwise agreed (*l*).

(iii.) *Where Several Properties are Liable.*

Rateable liability.

**541.** Where several properties of the same mortgagor, which have been charged with a single debt, become severed in title, they must bear the mortgage debt rateably in proportion to their respective values (*m*), unless, by special agreement in the mortgage itself or by declaration on the part of the mortgagor, one property has been made liable to bear the whole debt in exoneration of the others (*n*). The rule does not apply where one property is subject to a specific charge and the other to a general lien for the debt (*o*); but it applies as between real and personal property charged with the same debt (*p*), and it applies where additional properties are brought into the security on the occasion of further advances (*q*). Property which is only charged in aid of the property in the primary security is entitled to exoneration (*b*), but property described in a mortgage as a collateral security is not necessarily a secondary security so as to be entitled to be exonerated (*c*).

(iv.) *Marshalling of Assets.*

(a) *Nature of Marshalling.*

Application of principle to mortgages.

**542.** The doctrine of marshalling (*d*) applies to the case of securities, w[illegible] liens (*e*). Hence, if one incumbrancer l[illegible] of the same mortgagor (*f*), and [illegible] on one property

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(*l*) As to conti[illegible] ARANTEE, Vol. XV., pp. 526 *et seq.*; a[illegible]rities into hotchpot, see *ibid.*, p. 535 [illegible]er of the mortgage on payment, see *ibid.* [illegible]gaged by a surety, see *ibid.* p. 518 [illegible]operty to secure the husband's debt [illegible]nd see title HUSBAND AND WIFE, Vol. [illegible].

(*m*) See *Ker* [illegible]; *Re Darby's Estate*, *Rendall* v. *Dar*[illegible]on v. *Hancock* (1742), 2 Atk. 424, 426.

(*n*) *Bute* (*M* [illegible] 275, 299; *Leonino* v. *Leonino* (1879), [illegible]p, *Dunlop* v. *Dunlop* (1882), 21 Ch [illegible]tion, see p. 306, *post*.

(*o*) *Re Dund*[illegible].

(*p*) *Lipscomb* [illegible]501 (and see on this, *Leonino* v. *Le*[illegible]8), 7 Ch. D. 655.

(*q*) *Leonino* [illegible].

(*b*) *Stringer* [illegible].

(*c*) *Early* v. [illegible] *Athill*, *Athill* v. *Athill* (1880), 16 Ch [illegible]NEE, Vol. XV., p. 439, note (*f*).

(*d*) See title [illegible] the general principle of marshalling [illegible]*e*); and see *Galton* v. *Hancock* (1741), [illegible]*dall* (1764), Amb. 614, 615; *Averall* [illegible]252, 255.

(*e*) But th[illegible] or lien on both funds; if he has mer[illegible]nd fund, he cannot be required to [illegible]n favour of the second [illegible] set-off (*Webb* v. *Smith* (1885), 30 [illegible] the same time; they may be succes[illegible] v. *Edwards* (1825), 2 Russ. 289, [illegible]

SECT. 1. By Redemption.

only, the two properties will be marshalled, so as to throw the first incumbrance as far as possible on the property not included in the second security (*g*). But there must be two funds or securities, both originally the property of the same owner (*h*) ; a fund and a right of action are not marshalled (*i*) ; and the debts must be the debts of the same person (*k*).

Limitation.

The single creditor is confined to his substituted remedy against the other security ; he cannot interfere with the double creditor in the exercise of his rights (*l*).

When applied.

The doctrine of marshalling will be applied if at any time during the action the court sees occasion for it, although marshalling has not been claimed by the pleadings (*m*).

(b) *In Whose Favour the Doctrine Applies.*

Persons claiming by assignment for value or volunteers.

**543.** The doctrine of marshalling applies in favour of persons claiming one of the properties subject to the double creditor's charge, whether by assignment or charge by the mortgagor for value (*n*), or as volunteers under a settlement made by him (*o*) ; but it does not apply in favour of the mortgagor himself, and persons claiming under him otherwise than by assignment or charge, that is, his trustee in bankruptcy, his judgment creditors (*p*), or unsecured creditors (*q*), or his real and personal representatives.

Surety.

A surety who has given his property as security for a debt can require the creditor to resort to other property of the debtor comprised in the security in order to exonerate the surety's property (*r*) ;

(*g*) *Lanoy* v. *Athol* (*Duke and Duchess*) (1742), 2 Atk. 444, 446 ; *Gibson* v. *Seagrim* (1855), 20 Beav. 614 ; and see title EQUITY, Vol. XIII., pp. 143, 144.

(*h*) *Douglas* v. *Cooksey* (1868), 2 I. R. Eq. 311 ; *The Chioggia*, [1898] P. 1. Possibly there may be cases where the two securities have not been actually subject to the same ownership, but at least the owners of the security against which the claim is made must not be entitled to throw the paramount liability on the claimant's security (see *Douglas* v. *Cooksey*, *supra*).

(*i*) *The Arab* (1859), 5 Jur. (N. S.) 417.

(*k*) *Ex parte Kendall* (1811), 17 Ves. 514, 520 ; *M'Carthy* v. *M'Cartie* (No. 2), [1904] 1 I. R. 100, 115, C. A. ; compare *Re Jones, a Minor* (1853), 2 I. Ch. R. 544.

(*l*) *Noyes* v. *Pollock* (1886), 32 Ch. D. 53, 70, C. A. ; *Manks* v. *Whiteley*, [1911] 2 Ch. 448, 466 ; the contrary *dictum* in *Laurence* v. *Galsworthy* (1857), 3 Jur. (N. S.) 1049, is erroneous.

(*m*) *Gibbs* v. *Ougier* (1806), 12 Ves. 413, 416 ; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (4).

(*n*) Such as a mortgagee (*Aldrich* v. *Cooper* (1803), 8 Ves. 382).

(*o*) Hence where the settled and also unsettled estates are comprised in the mortgage, the mortgage will be thrown as far as possible on the unsettled estate (*Hales* v. *Cox* (1863), 32 Beav. 118 ; *Anstey* v. *Newman* (1870), 39 L. J. (CH.) 769 ; *Mallott* v. *Wilson*, [1903] 2 Ch. 494) ; though not as against a subsequent mortgagee, unless the settlement contains a covenant against incumbrances, or the mortgage is made subject to it so that the settled property is entitled to be exonerated (*Re Roche's Estate* (1890), 25 L. R. Ir. 271 ; *Re Lysaght's Estate*, [1903] 1 I. R. 235) ; see note (*i*), p. 305, and pp. 306, 307, *post*, and title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 101.

(*p*) See *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252, 262 ; unless they have by the judgment a charge on the estate (*Re Fox* (1856), 5 I. Ch. R. 541, P. C.).

(*q*) *Anstey* v. *Newman* (1870), 39 L. J. (CH.) 769.

(*r*) *Re Westzinthus* (1833), 5 B. & Ad. 817 ; see *Spalding* v. *Ruding* (1843), 6 Beav. 376 ; *Kemp* v. *Falk* (1882), 7 App. Cas. 573 ; title GUARANTEE, Vol. XV., p. 518 ; and as to marshalling securities in favour of a surety, see *ibid.*, pp. 509, 511.

and where an agent has pledged property, on which his principal has a lien, with property of his own as security for his own debt, the principal is entitled to have the debt thrown on the agent's property (*a*).

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Principal and agent.

(c) *Against Whom the Doctrine Applies.*

Persons claiming otherwise than by assignment for value or volunteers.

**544.** The doctrine of marshalling applies against the owner of the two properties, if the mortgage or charge on both was created by himself; and it applies against persons claiming the property, or part of it, under him otherwise than by actual assignment or charge; that is, it applies against the mortgagor's trustee in bankruptcy (*b*), against his judgment creditors (*c*), and against his real and personal representatives (*d*); and it applies against the wife of the mortgagor who has charged her own property for the prior debt (*e*). But otherwise the doctrine does not apply to the prejudice of the rights of third persons (*f*), and it does not apply, therefore, against persons claiming part of the property by assignment or charge, whether for value (*g*) or as volunteers (*h*), unless the assignment or charge was made at a time when the other part had already been disposed of with a right of exoneration against the double creditor's mortgage (*i*).

Illustration of application.

Hence where two estates are mortgaged to A., and then one estate

(*a*) *Broadbent* v. *Barlow* (1861), 3 De G. F. & J. 570; *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168; as to marshalling securities given by a partnership firm, and also by one of the partners separately, see *Re Stratton, Ex parte* 25 . D. 148, C. A.; and see *Re Burge, Woodhall & Co.*, L. . K. B. 393 (where relief analogous to marshalli

(*b*) *Re Cornwall, E* . . . 173; *Re Tristram, Ex parte Hart* . . . *Ex parte Alston* (1868), 4 Ch. App. 1 . . 3 Eq. 158.

(*c*) *Gray* v. *Stone*, [ title JUDGMENTS AND ORDERS, Vol.

(*d*) The right to r . v. *Athol* (*Duke and Duchess*) (174 . sonal representatives (*Flint* v. *How* exists notwithstanding that the t . by devolution in different persons . *supra*). Compare the position of a su . Rem. & M. 457; title EQUITY, Vol. . see, further, title GUARANTEE, Vol.

(*e*) *Tidd* v. *Li* . Where part of a married woman's pro . pation, securities will be marshalled . gage not affected by the restraint, an . editors affected by it (*Re Loder* (188 . BAND AND WIFE, Vol. XVI., p. 363.

(*f*) *Webb* v. *Smi* . *Aldrich* v. *Cooper* (1803), 8 Ves. 382, . . *temp.* Sugd. 252, 258; *Flint* v. *How* . 1898] P. 1, 6; compare *Douglas* v. . d see title EQUITY, Vol. XIII., p. 142, .

(*g*) *Barnes* v. *Ra* . , *Flint* v. *Howard*, *supra*, at p. 73.

(*h*) *Dolphin* v. .

(*i*) Where, for . ast part contained a covenant agai . in notes (*q*)—(*s*), pp. 306, 307, *post* . 1854), 19 Beav. 500 (affirmed *sub nom.* . Cas. 905, 922), and *Haynes* v. *Forshaw* . bsequent

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is mortgaged to B., and afterwards the other to C., there is no right of marshalling in favour of B. against C., so as to throw the whole of the first mortgage on C.'s security, notwithstanding that C. took with notice of the prior mortgages; but as between B. and C., the first mortgage is apportioned between the two estates according to their value (*k*), unless C.'s mortgage is expressed to be subject to and after satisfaction of both the previous mortgages, in which case B. can marshal against him (*l*); or unless the mortgage to B. was made on the footing that it was a first mortgage, and the mortgage to C. is subsequent in date. In the last case C. takes subject to the right of B. to exoneration out of the property retained by the mortgagor (*m*).

(d) *Effect of Application of Doctrine.*

Exoneration.

**545.** The application of the doctrine of marshalling usually has the effect of giving an incumbrancer a claim against a fund not comprised in his security in substitution for his claim against a fund comprised therein, but of the benefit of which he is deprived by the overriding claim of an incumbrancer on both funds (*n*). But the same principle is applied in cases where the person entitled to one fund or property claims, against the person entitled to the other fund or property, either complete exoneration or indemnity from or against the overriding charge, or contribution towards the charge. Whether such a claim will be allowed depends on whether the owner of the two properties prior to their severance was himself the creator of the first charge on both, or whether that charge was paramount to his title; and also on whether, upon the severance of title, he gave the part alienated or charged a right of exoneration by the part retained.

Assignment of part of property by mortgagor.

If the owner of both properties was himself the mortgagor and assigned one of the properties, whether for value or not, without reference to the mortgage on both (*o*), and he or his representatives pay it off, there is no right of contribution in his or their favour against the assignee (*p*); and where the assignment contains a covenant against incumbrances or for further assurance (*q*), or

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of another part is necessarily subject to the right of marshalling, but this is inconsistent with *Barnes* v. *Racster* (1842), 1 Y. & C. Ch. Cas. 401, and other cases cited in note (*k*), *infra*.

(*k*) *Barnes* v. *Racster*, *supra*; *Bugden* v. *Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Moxon* v. *Berkeley Mutual Benefit Building Society* (1890), 59 L. J. (CH.) 524; *Flint* v. *Howard*, [1893] 2 Ch. 54, 73, C. A.; *Baglioni* v. *Cavalli* (1900), 83 L. T. 500; see title EQUITY, Vol. XIII., p. 144, note (*s*).

(*l*) *Re Mower's Trusts* (1869), L. R. 8 Eq. 110; see *Aldridge* v. *Forbes* (1839), 4 Jur. 20; compare *Re Lysaght's Estate*, [1903] 1 I. R. 235.

(*m*) *Tighe* v. *Dolphin*, [1906] 1 I. R. 305.

(*n*) See p. 304, *ante*.

(*o*) *Re Repington*, *Wodehouse* v. *Scobell*, [1904] 1 Ch. 811.

(*p*) *Re Darby's Estate*, *Rendall* v. *Darby*, [1907] 2 Ch. 465; see *Ker* v. *Ker* (1869), 4 I. R. Eq. 15, C. A.

(*q*) *Averall* v. *Wade* (1835), L. & G. *temp.* Sugd. 252; *Hughes* v. *Williams* (1852), 3 Mac. & G. 683; *Chappell* v. *Rees* (1852), 1 De G. M. & G. 393; *Re Roddy's Estate*, *Ex parte Fitzgerald* (1861), 11 I. Ch. R. 369; *Re Roche's Estate* (1890), 25 L. R. Ir. 271; *Re Jones*, *Farrington* v. *Forrester*, [1893] 2 Ch. 461, 470. But in a voluntary settlement a covenant for further assurance has not this effect (*Ker* v. *Ker*, *supra*).

where it is taken upon a representation, though only verbal, that the estate is free from incumbrances (*r*), this gives the assignee an equity to exoneration or marshalling which will prevail against a subsequent purchaser of the other property who does not take the legal estate for value and without notice (*s*).

SECT. 1. By Redemption.

If the owner of the two properties at the time of severance was not the creator of the prior charge, but such charge is paramount to his title, then he can claim the benefit of the rule of equality as between himself and his assignee, whether for value or not, and if he or his representatives pay off the first mortgage the assignee must contribute (*a*); but it is otherwise if the assignor has on the assignment attached to the property assigned a right of exoneration, and the assignee is then entitled to the benefit of marshalling against the property retained until it comes to a purchaser for value without notice who obtains the legal estate (*b*).

Assignment of part of property subject to paramount charge.

## SECT. 2.—*By Discharge of Debt.*

**546.** The mortgage debt may be discharged by payment to the mortgagee (*c*), or to a person authorised to receive it (*d*). But there must be actual payment; the giving of a cheque is not conditional payment of a secured debt so as to release the security (*e*). Where the advance is expressed to be made by several persons out of moneys belonging to them on a joint account, or the mortgage is made to more than one person jointly, the receipt in writing of the survivors or the last survivor of them, or the personal representatives of the last survivor, is a complete discharge for the mortgage money, notwithstanding any notice to the payer of a

By payment.

(*r*) *Tighe* v. *Dolphin*, [1906] 1 I. R. 305. As to an erroneous recital that the prior incumbrance has been paid, see *Stronge* v. *Hawkes* (1859), 4 De G. & J. 632, C. A.

(*s*) *M'Carthy* v. *M'Cartie* (No. 2), [1904] 1 I. R. 100, 115, C. A.; see *Finch* v. *Shaw*, *Colyer* v. *Finch* (1854), 19 Beav. 500.

(*a*) *Ker* v. *Ker* (1869), 4 I. R. Eq. 15, C. A., as explained in *Re Darby's Estate*, *Rendall* v. *Darby*, [1907] 2 Ch. 465.

(*b*) See note (*q*), p. 306, *ante*.

(*c*) Although the claim for the debt may be barred in the circumstances referred to at p. 271, *ante*, the creditor may still, subject to certain time limits, proceed against the security; see title LIMITATION OF ACTIONS, Vol. XIX., pp. 41, 42, 83, 84. As to mortgages to which the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57), do not apply, see p. 300, *ante*.

(*d*) The authority of an agent to receive the debt may be express or implied. If the mortgagee receives interest through a solicitor acting for both parties, an authority for the solicitor to take payment of interest will be implied; but neither this, nor the possession of the mortgage deed by the solicitor, makes him an agent to receive the principal (*Wilkinson* v. *Candlish* (1850), 5 Exch. 91, 98; *Kent* v. *Thomas* (1856), 1 H. & N. 473; *Jared* v. *Walke* (1902), 18 T. L. R. 569). As to receipts in deeds produced by solicitors, see note (*k*), p. 171, *ante*, and titles SALE OF LAND; SOLICITORS. But the receipt of the mortgagee's solicitor in an action to recover the debt is a good discharge (*Bourton* v. *Williams* (1870), 5 Ch. App. 655). For forms of notice of intention to repay, see Encyclopædia of Forms and Precedents, Vol. III., p. 55; Vol. VIII., p. 903.

(*e*) *Re Defries (J.) & Sons, Ltd.*, *Eichholtz* v. *Defries (J.) & Sons, Ltd.*, [1909] 2 Ch. 423; see *Henderson* v. *Arthur*, [1907] 1 K. B. 10, C. A., *per* FARWELL, L.J., at pp. 13, 14.

SECT. 2. By Discharge of Debt.

severance of the joint account (*f*). While the joint mortgagees are living, payment to one is a discharge of the debt at law (*g*), but is not a discharge of the security, save to the extent (if any) of the payee's beneficial interest (*h*).

By accord and satisfaction.

The debt may be discharged by accord and satisfaction (*i*); where, for example, the creditor accepts some consideration in full discharge, not being payment after the debt has become due of a smaller sum than the debt (*k*), or where creditors mutually agree to accept a composition (*l*); and upon payment of such consideration or composition the security must be given up, unless, in the case of a composition, the creditor stipulates for its retention and does this with the knowledge of the other creditors (*m*).

By release.

A release of a debt is binding without consideration if made under seal, but otherwise must be made for consideration (*n*).

## SECT. 3.—*By Release of Security.*

### SUB-SECT. 1.—*Right to Reconveyance and Delivery of Deeds.*

Persons entitled to reconveyance.

**547.** Upon payment of all moneys secured by the mortgage, the mortgagee is bound to reconvey the mortgaged property and deliver up the title deeds, either to the mortgagor, if he is the person making the payment (*o*), or to any person interested

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 61, which only applies to mortgages made after the 31st December, 1881, and so far as a contrary intention is not expressed (*ibid.*); and see pp. 110, 117, *ante*.

(*g*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264; *Powell* v. *Brodhurst*, [1901] 2 Ch. 160; see title EQUITY, Vol. XIII., p. 64. But not if, under the circumstances, the mortgagees are to be treated as tenants in common (*Steeds* v. *Steeds* (1889), 22 Q. B. D. 537); and a payment to one of two trustee-mortgagees is bad in equity if the mortgagor has notice of the trust (*Re Carew* (1854), 4 I. Ch. R. 112, P. C.); and see title TRUSTS AND TRUSTEES.

(*h*) *Matson* v. *Dennis* (1864), 4 De G. J. & Sm. 345, C. A.; *Powell* v. *Brodhurst*, *supra*.

(*i*) See title CONTRACT, Vol. VII., pp. 441 *et seq*. If the mortgagee accepts worthless debentures in a company formed by the mortgagor in substitution for his mortgage he cannot subsequently rely on the mortgage (*Re Goldberg, Ex parte Silverstone*, [1912] 1 K. B. 384).

(*k*) *Foakes* v. *Beer* (1884), 9 App. Cas. 605.

(*l*) *Couldery* v. *Bartrum* (1881), 19 Ch. D. 394, C. A.

(*m*) *Cullingworth* v. *Loyd* (1840), 2 Beav. 385.

(*n*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 417. As to the effect of delivery of the mortgage deed with the intention of releasing the debt, see *ibid.*, pp. 374, 376, note (*i*), 410.

(*o*) *Tasker* v. *Small* (1837), 3 My. & Cr. 63, 70; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; *Palmer* v. *Hendrie* (No. 2) (1860), 28 Beav. 341; *Walker* v. *Jones* (1866), L. R. 1 P. C. 50, 61; *Rourke* v. *Robinson*, [1911] 1 Ch. 480; *Webb* v. *Crosse*, [1912] 1 Ch. 323. As to tender, see, further, pp. 148, 149, *ante*. As to the estoppel binding the mortgagee, see note (*p*), p. 139, *ante*. The reconveyance must restore to the mortgagor the benefit of any covenant contained in the original conveyance to himself, and hence a covenant for quiet enjoyment cannot be released by the mortgagee (*Thornton* v. *Court* (1854), 3 De G. M. & G. 293, C. A.). If the mortgagee cannot reconvey, he cannot sue for the debt (*Worthington & Co., Ltd.* v. *Abbott*, [1910] 1 Ch. 588, 595; see p. 271, *ante*), unless he has been evicted by title paramount (*Re Burrell, Burrell* v. *Smith* (1869), L. R. 7 Eq. 399), or has sold the property under his power of sale, for less than the amount due on the security (*Rudge* v. *Richens* (1873), L. R. 8 C. P. 358).

in the equity of redemption by whom the payment is made (*p*).

Thus a second mortgagee who redeems is entitled to a reconveyance (*q*); and so is the mortgagor himself, after he has assigned the equity of redemption, if he is sued on his covenant for payment and pays the debt (*r*), but in this case the conveyance is made subject to such equity of redemption as may be vested in any person other than himself (*s*). The person claiming to redeem must at his own expense prove his title to do so (*t*). Where there has been a sub-mortgage, both the mortgagee and the sub-mortgagee must convey (*u*).

Delivery of title deeds.

**548.** In general all deeds relating to the title to the mortgaged property, including the mortgage deed and transfers of the mortgage, must be given up (*a*); but if the mortgage deed comprises other property, the mortgagor is entitled to a reconveyance of the mortgaged property, but not to delivery of the mortgage deed (*b*). The mortgagee cannot retain the deeds till payment of a sum not covered by the mortgage (*c*), where at the time of payment no right to tack the further sum has arisen (*d*).

A trustee for the mortgagee is bound to convey to the mortgagor, or to a purchaser under the power of sale, at the direction of the mortgagee, and will be liable for costs occasioned by his refusal (*Hampshire* v. *Bradley* (1845), 2 Coll. 34). As to the right of the mortgagor to call for a transfer to a third person instead of a conveyance to himself, see p. 170, *ante*.

(*p*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227; and see p. 142, *ante*.

(*q*) *Smith* v. *Green* (1844), 1 Coll. 555, 563.

(*r*) *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636.

(*s*) *Ibid.*, at p. 645. This expression would include the assignee of the equity of redemption, and any persons to whom the assignee has mortgaged the property subsequently to the assignment to him.

(*t*) *James* v. *Biou* (1819), 3 Swan. 234, 237.

(*u*) *Lysaght* v. *Westmacott* (1864), 33 Beav. 417. If the accounts between the mortgagee and sub-mortgagee have not been settled, the mortgagor can require a reconveyance from them on payment into court of the amount due from him (*ibid.*). As to sub-mortgages, see pp. 132 *et seq.*, 180 *et seq.*, *ante*.

(*a*) *Re Wade and Thomas* (1881), 17 Ch. D. 348; and including also a settlement of the mortgage moneys which has been allowed to get on the title. If by consent the trustees of the settlement retain it, the mortgagor is entitled to an attested copy and a covenant for production at their expense (*Dobson* v. *Land* (1851), 4 De G. & Sm. 575, 581). But on a transfer to trustees the trust should not be disclosed; see p. 173, *ante*. Where there has been a former mortgage to the same mortgagee, followed by reconveyance, these deeds form part of the mortgagor's title and must be given up (*Hudson* v. *Malcolm* (1862), 10 W. R. 720). As to the custody of deeds during the continuance of the security, see pp. 204 *et seq.*, *ante*.

(*b*) See *Young* v. *Whitchurch and Ellesmere Banking Co.* (1867), 37 L. J. (CH.) 186, where, however, the report is not clear as to the retention of the original conveyance; but the mortgagor would seem to have no right to get back the deed, though he would be entitled to a covenant for production (*Yates* v. *Plumbe* (1854), 2 Sm. & G. 174). Where several trust mortgages have been transferred to trustees by one deed, the mortgagor first redeeming is entitled to have the transfer deed delivered to him on giving the trustees a covenant or acknowledgment for production (*Capper* v. *Terrington* (1844), 13 L. J. (CH.) 239).

(*c*) *Chilton* v. *Carrington* (1854), 15 C. B. 95.

(*d*) *Brecon Corporation* v. *Seymour* (1859), 5 Jur. (N. S.) 1069.

SECT. 3. By Release of Security.

Effect of tender.

Tender of the mortgage money, though improperly refused, does not entitle the mortgagor to delivery of the deeds (*e*); but an order can be obtained giving him liberty to pay into court a stated sum sufficient to cover principal, interest, and the probable costs of action, and upon such payment the mortgagee will be ordered to deliver up the deeds (*f*).

Effect of subsequent incumbrances.

**549.** If the mortgagee has notice of subsequent equitable incumbrancers, he is not bound to redeliver the deeds to the mortgagor without being satisfied that the subsequent incumbrancers have been paid off (*g*); nor should he reconvey without the consent of the incumbrancers, unless he makes the reconveyance subject to their rights (*h*).

Payment out of lunatic's money.

**550.** If the payment is made out of money belonging to a lunatic the property should not be conveyed to the lunatic, but the mortgage should be transferred to his committee to be disposed of as the court may direct (*i*).

Effect of payment off.

**551.** Upon the mortgage debt being paid off, the mortgagee becomes constructively a trustee for the mortgagor; the Statute of Limitations thereupon runs in favour of the mortgagor, provided he is in possession, and in thirteen years the mortgagee's title is extinguished and the legal estate vested in the mortgagor (*k*).

Statutory jurisdiction to stay proceedings on payment in discharge.

**552.** Where the mortgagee is suing on a bond given for the mortgage debt, or is suing to recover possession of the mortgaged premises, there is statutory jurisdiction to stay the proceedings on payment to the mortgagee, or, if he refuses to receive it, by payment into court, of principal, interest and costs. Such payment is in full discharge of the mortgage, and the mortgagee may be ordered to reconvey and deliver up the deeds (*l*). The jurisdiction does not apply where the right of redemption is disputed by the mortgagee, or where the mortgagee claims that the premises are chargeable with other principal sums than those which appear on the face of the mortgage or are admitted by the mortgagor to be

(*e*) *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, 283, P. C.; see *Johnson* v. *Diprose*, [1893] 1 Q. B. 512, C. A.; and see p. 205, *ante*.

(*f*) *Bank of New South Wales* v. *O'Connor*, *supra*; as to tender, see p. 148, *ante*.

(*g*) *Corbett* v. *National Provident Institution* (1900), 17 T. L. R. 5.

(*h*) *Banks* v. *Whittall* (1847), 1 De G. & Sm. 536; *Corbett* v. *National Provident Institution*, *supra*; and see p. 309, *ante*.

(*i*) *Re Leeming* (1861), 3 De G. F. & J. 43; *Re Melly* (1883), 49 L. T. 429, C. A. The court will determine at the appropriate time by what part of the lunatic's property the debt shall be ultimately borne; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 450.

(*k*) *Sands to Thompson* (1883), 22 Ch. D. 614. The mortgagor becomes tenant at will to the mortgagee, and, the trust not being express, the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 7, applies; see title LIMITATION OF ACTIONS, Vol. XIX., p. 147.

(*l*) Mortgage Act, 1733 (7 Geo. 2, c. 20), s. 1. The provisions as to recovery of possession are repeated in the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 219; see *Bourton* v. *Williams* (1870), 5 Ch. App. 655.

due; or where the right to redemption is in dispute between different defendants in the same action (*m*).

SUB-SECT. 2.—*Mode of Reconveyance.*

(i.) *Freeholds.*

General form.

**553.** If the legal estate in freehold property is vested in the mortgagee, the reconveyance must be by deed (*n*), and will contain a covenant—usually implied from the mortgagee conveying "as mortgagee" (*o*)—that he has not incumbered. If the mortgagor is redeeming, it will be made to him for such estate as was the subject of the mortgage, and will be expressed to convey the property discharged from the mortgage debt and from all claims under the mortgage (*p*). If the equity of redemption is in settlement and the tenant for life redeems, he is entitled to have the legal estate conveyed to himself, and he can keep the mortgage debt alive in his own favour (*q*), but he will hold the equity of redemption subject to the trusts of the settlement (*r*); and, generally, when a person having a partial interest in the equity of redemption redeems, he holds subject to the rights of redemption of all the persons having other interests, and the reconveyance to him should show this (*s*).

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(*m*) Mortgage Act, 1733 (7 Geo. 2, c. 20), s. 3; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 220. Thus the jurisdiction is confined to cases where the mortgagor is entitled to redeem on payment of principal, interest and costs; or where any further sums claimed by the mortgagee are admitted by the mortgagor (*Dowle* v. *Neale* (1862), 10 W. R. 627). It does not apply where the mortgagee is in possession so that accounts must be taken, or where he has incurred expenses—such as the costs of an abortive sale—which are not admitted (*Sutton* v. *Rawlings* (1849), 3 Exch. 407). A claim by the mortgagee disputing the right to redeem, or to additional sums, must be made by notice in writing under the hand of himself, or his agent or solicitor; it must be delivered before the money is brought into court to the mortgagor's solicitor (see Mortgage Act, 1733 (7 Geo. 2, c. 20), s. 3; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 220); and must show clearly the nature of the claim, and in the case of additional sums must so state them as to give the mortgagor a chance of admitting them (*Goodtitle* d. *Leon* v. *Lonsdown* (1797), 3 Anst. 937; *Doe* d. *Harrison* v. *Louch* (1849), 6 Dow. & L. 270).

(*n*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 367. For a series of forms of reconveyances applicable to various circumstances, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 878 *et seq.*

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7

(*p*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 879, 882. For a reconveyance where the mortgage was of a contingent remainder, see *ibid.*, p. 882. Where practicable the reconveyance should be indorsed on the mortgage; see *ibid.*, pp. 879, 882. For a form of release of part of the security only, see *ibid.*, p. 893; *ibid.*, Vol. XI., p. 491.

(*q*) See pp. 320, 321, *post.* This can be done either by taking a transfer of the mortgage debt to the tenant for life, or by inserting in the reconveyance a declaration that the mortgage is to be kept on foot for his benefit. As to transfer of mortgage, see p. 171, *ante.*

(*r*) *Wicks* v. *Scrivens* (1860), 1 John. & H. 215, compare *Re Oxenden, Oxenden* v. *Chapman* (1904), 74 L. J. (CH.) 234. For form of reconveyance where the trustees of the settlement pay off the mortgage out of capital moneys by the direction of the tenant for life, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 890.

(*s*) *Pearce* v. *Morris* (1869), 5 Ch. App. 227; see 3 Seton, Judgments

SECT. 3. By Release of Security.

Change in title to debt or equity of redemption.

**554.** Where the mortgagee has died, the reconveyance will be by the person on whom the security has devolved (*t*).

If there has been a change in the title to the equity of redemption, the mortgagee can refuse to execute the reconveyance tendered to him if it contains incorrect recitals as to the change; but, provided all the persons entitled to the equity of redemption concur, he can be required to execute a conveyance with no recitals at all (*a*).

Equitable mortgage.

**555.** If the mortgage is equitable, whether because it is a puisne mortgage created by conveyance of the equity of redemption, or because it has been created by charge only, it is sufficiently discharged by an indorsed receipt. This is evidence that no money is owing on the security, and there is thereafter no interest in the property remaining in the mortgagee. But where the mortgage has been created by conveyance, a reconveyance is usually taken (*b*).

Statutory mortgage.

If the mortgage has been created in the statutory form (*c*) a reconveyance can be made in the statutory form of reconveyance (*d*).

(ii.) *Copyholds.*

Receipt, warrant to vacate, or surrender.

**556.** If a mortgage of copyholds (*e*) has been made by covenant to surrender not followed by surrender (*f*), the mortgagee obtains only an equitable interest in the lands, and the mortgage is effectually discharged by receipt for the amount due, though the lands are frequently released by deed (*g*). If there has been a conditional surrender (*h*) the mortgagee signs a warrant to the steward to enter satisfaction of the surrender on the court rolls, and this vacates the

and Orders, 6th ed., p. 2077; *Corbett* v. *National Provident Institution* (1900), 17 T. L. R. 5. Where the right of redemption is in dispute it may be practicable to take the conveyance to a trustee for the various parties; see *Smithett* v. *Heskett* (1890), 44 Ch. D. 161. If a purchaser from the mortgagor redeems, he will be entitled to have transferred to him any securities held by the mortgagee for the debt, including a personal judgment which the latter has obtained against the mortgagor (*Greenough* v. *Littler* (1880), 15 Ch. D. 93).

(*t*) See pp. 182, 185, *ante*. For a form, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 887.

(*a*) *Hartley* v. *Burton* (1868), 3 Ch. App. 365. For a form of reconveyance to the personal representatives of a deceased mortgagor, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 889.

(*b*) See 2 Davidson's Precedents in Conveyancing, 4th ed., p. 277; and p. 76, *ante*. For form of receipt, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 899.

(*c*) See p. 118, *ante*.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 29, Sched. III., Part III.; Encyclopædia of Forms and Precedents, Vol. VIII., p. 878. For modes of vacating mortgages in the case of building, friendly, and industrial societies, see titles BUILDING SOCIETIES, Vol. III., p. 370; FRIENDLY SOCIETIES, Vol. XV., p. 166; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 22. For forms, see Encyclopædia of Forms and Precedents, Vol. III., p. 56.

(*e*) See title COPYHOLDS, Vol. VIII., p. 93; and see pp. 124 *et seq.*, *ante*.

(*f*) See p. 124, *ante*.

(*g*) In the case of building, friendly, and industrial society mortgages which have been entered on the court rolls, the steward, on production of the receipt, verified by oath, makes an entry of satisfaction; see titles cited note (*d*), *supra*.

(*h*) See p. 125, *ante*.

surrender (*i*). If there has been a surrender followed by admittance of the mortgagee (*j*), the mortgagee must surrender to the person redeeming, and such person will thereupon be admitted; unless the mortgagor pays the money on the day fixed by the condition, in which case he is restored to his old estate, and can re-enter without new admittance or new fine (*k*).

(iii.) *Leaseholds.*

**557**. If the mortgage has been created by assignment of the term, the term will be reassigned to the person redeeming in manner corresponding to a reconveyance of freeholds (*l*). If it has been created by subdemise, the mortgage sub-term will be surrendered for the purpose of merging in the term (*m*). A second mortgage by subdemise can only be got rid of by a surrender by deed; it does not become a satisfied term under the Satisfied Terms Act, 1845 (*n*).

Reassignment. Surrender.

(iv.) *Other Property.*

**558**. Other property, such as a reversionary interest in personal property, is usually mortgaged by assignment, and on payment off is reassigned by deed or instrument under hand (*o*). Where stock has been mortgaged by joint mortgagors, the reassignment must be to, or at the direction of, all; otherwise the mortagee will be liable for any loss thereby arising (*p*).

Reversionary interests. Stocks and shares.

**559**. A statutory mortgage of a ship or share in a ship is discharged by signature and attestation of the indorsed form of receipt,

Ships.

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(*i*) See Encyclopædia of Forms and Precedents, Vol. V., pp. 209, 213; Vol. VIII., p. 880. As to conditional surrenders, compare *Simonds* v. *Lawnd* (1591), Cro. Eliz. 239.

(*j*) See p. 125, *ante*.

(*k*) Gilbert, Law of Tenures, p. 356 [276]. Till the admittance of the mortgagee, the mortgagor remains tenant to the lord, though the mortgagee can at any time complete his title by admittance (*Fawcet* v. *Lowther* (1751), 2 Ves. Sen. 300, 302).

(*l*) See p. 311, *ante*; and see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 881, 890. As to mortgages of leaseholds by assignment, see pp. 127, 128, *ante*.

(*m*) See Encyclopædia of Forms and Precedents, Vol. VIII., pp. 881, 884, 887, 889; and p. 126, *ante*. Some mortgages, instead of a proviso for reassignment, or surrender of the mortgage term, contain a proviso that on payment of the debt on the appointed day the term shall cease; in such a case it is proper to execute a deed evidencing the cesser of the term (see 2 Davidson, Precedents in Conveyancing, Part II., p. 822).

(*n*) 8 & 9 Vict. c. 112, s. 2; *Re Moore and Hulme's Contract* (1911), 56 Sol. Jo. 89; see note (*n*), p. 127, *ante*; and see articles in 56 Sol. Jo. 220, 249, in the latter of which it is pointed out that where the first mortgage is by assignment, the second, though by subdemise, is equitable only; hence it can be discharged by receipt. Where the mortgage is to a building society, whether by assignment or subdemise, an indorsed receipt is sufficient to revest the premises in the mortgagor (see title BUILDING SOCIETIES, Vol. III., p. 370; 56 Sol. Jo. 250).

(*o*) Compare Encyclopædia of Forms and Precedents, Vol. VIII., p. 882. As to entering satisfaction of a bill of sale, see title BILLS OF SALE, Vol. III., p. 73; and for forms, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 898. Reassignment of the chattels is not necessary.

(*p*) *Magnus* v. *Queensland National Bank* (1887), 36 Ch. D. 25. As to mortgages of stocks and shares, see p. 132, *ante*.

SECT. 3. By Release of Security.

and the mortgage deed, with the indorsed receipt, is produced to the Registrar of Shipping, who enters the discharge in the register (*q*). Thereupon whatever estate passed to the mortgagee vests in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made (*r*). The entry of discharge destroys the original mortgage, notwithstanding that the receipt has been given by mistake, and all subsequent entries relating to it are void (*s*).

(v.) *Satisfaction of Registered Charges.*

In the case of registered land.

**560.** In the case of a registered (*t*) charge, the registrar, on the requisition of the registered proprietor of the charge, or on due proof of the satisfaction thereof, notifies the cessation of the charge on the register by cancelling the original entry or otherwise, and thereupon the charge is deemed to have ceased (*u*). A similar procedure applies to the satisfaction of incumbrances existing at the time of first registration of which notice has been entered on the register (*v*), and in each case notification of part discharge of the debt can be made (*x*). Where there has been a conveyance of the legal estate to the mortgagee, this should be reconveyed.

In Middlesex.

**561.** Where a mortgage or charge has been registered in Middlesex (*a*), its discharge is noted by the registration of a memorial of the instrument of discharge (*b*); where it has been registered in Yorkshire (*c*), the entry of discharge is made in accordance with the rules for the time being made by the county authority (*d*).

In Yorkshire.

(*q*) The registrar has no authority to erase the entry of the mortgage (*Chasteauneuf* v. *Capeyron* (1882), 7 App. Cas. 127, 135, P. C.). As to such mortgages, see pp. 133, 134, *ante*.

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 32; see title SHIPPING AND NAVIGATION. As to indorsement of discharge of the mortgage on a certificate of mortgage, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 43 (7).

(*s*) *Bell* v. *Blyth* (1868), 4 Ch. App. 136, C. A.

(*t*) As to such charges, see p. 84, *ante*. As to the vacating of registered charges in favour of building, friendly, and industrial societies, see, respectively, titles BUILDING SOCIETIES, Vol. III., p. 372; FRIENDLY SOCIETIES, Vol. XV., p. 166; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 22.

(*u*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 28; see Land Transfer Rules, 1903, r. 166. The certificate of charge must be delivered to the registrar, and by him retained and cancelled (*ibid.*, r. 266).

(*v*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 19.

(*x*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I., applying the above two sections to "part discharges," presumably of the debt, though the expression may refer to the land, or to both; see Land Transfer Rules, 1903, Form 48.

(*a*) See p. 86, *ante*.

(*b*) Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 5. Under the Middlesex Registry Act, 1708 (7 Anne, c. 20), s. 17, an entry of satisfaction could be made on production of a certificate of payment signed by the mortgagee, his signature being proved by the oaths of two attesting witnesses.

(*c*) See p. 87, *ante*.

(*d*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 35 (4).

(vi.) *Stamps.*

SECT. 3.

**By Release of Security.**

On reconveyances or discharge.

**562.** There is chargeable (*e*) on the reconveyance or discharge a stamp duty of 6*d.* for every £100, and any fractional part of £100 of the total amount or value of the money at any time secured (*f*); but this is chargeable only when the reconveyance or discharge wholly frees the subject of the security therefrom (*g*). Where there is a reconveyance of part only of the property, whether on payment off of part of the mortgage debt or not, the *ad valorem* duty does not apply, and the deed must be stamped with 10*s.*, but if the total amount is less than £2,000 a stamp *ad valorem* on the whole amount secured is accepted on the partial reconveyance (*h*). Subsequently, upon discharge or reconveyance on payment of the balance, the *ad valorem* duty on the whole amount at any time secured is payable (*g*).

Partial reconveyance.

Receipt.

**563.** The *ad valorem* duty is only chargeable on instruments which operate directly to discharge or put an end to the security. A mere receipt for principal, interest and costs has this effect, but only indirectly, as furnishing evidence that the mortgage debt has been paid. Hence it is sufficiently charged with 1*d.*, and if it does not extend to costs and is indorsed on the mortgage, it is exempt from stamp duty altogether (*i*).

SUB-SECT. 3.— *Vesting Order instead of Reconveyance* (*j*).

Lunatics

**564.** Where a lunatic, solely or jointly, is seised or possessed of land, or is entitled to a contingent right in land, by way of mortgage, the judge in lunacy may, by order, vest or release the land in or to such person or persons as the judge directs; or a person may be appointed to convey the land or to release the right (*k*). A vesting order as to copyhold land, if made with the lord's consent, vests the land without surrender or admittance; if the lord does not consent, an order for conveyance will be made, and will be carried out by surrender and admittance (*l*).

(*e*) As to stamp duty on mortgages, see pp. 134 *et seq.*, *ante*. As to stamp duties generally, see title REVENUE.

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Mortgage etc." This head covers "Reconveyance, Release, Discharge, Surrender, Resurrender, Warrant to Vacate, or Renunciation."

(*g*) *Munro* (*M'Kimmie's Trustees*) v. *Inland Revenue Commissioners* (1895), 23 R. (Ct. of Sess.) 232.

(*h*) *Ibid.*, at p. 233, n.

(*i*) *Firth & Sons, Ltd.* v. *Inland Revenue Commissioners*, [1904] 2 K. B. 205; Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Receipt, Exemptions" (11). As to the exemptions from duty of receipts and reconveyances by building and friendly societies, see, respectively, titles BUILDING SOCIETIES, Vol. III., p. 372; FRIENDLY SOCIETIES, VOL. XV., p. 161; compare title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., p. 23.

(*j*) As to vesting by deed poll in cases of compulsory purchase, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 143.

(*k*) See, further, title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 454. The Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), which transfers to the High Court the lunacy jurisdiction as to vesting orders, excepts the case of lunatic mortgagees not being also trustees; see, further, title TRUSTS AND TRUSTEES.

(*l*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 (5), (6).

SECT. 3. By Release of Security.

Where a lunatic is solely entitled to any stock or chose in action by way of mortgage, an order may be made vesting in any person or persons the right to transfer the stock or to sue for the chose in action (*m*).

Infants.

**565.** Where the mortgagee is an infant, an order vesting the land, or releasing or disposing of his contingent right in the land, can be made in like manner as in the case of an infant trustee (*n*).

Vesting orders under the Trustee Act, 1893.

**566.** Where a mortgagee of land has died, a vesting order in favour of such person or persons, and for such estate as the court may direct, can be made (*o*): (1) where an heir or personal representative or devisee of the mortgagee is out of the jurisdiction and cannot be found; (2) where any such person, on demand made by a person entitled to a reconveyance, refuses to convey; (3) where it is uncertain which of several devisees was the survivor; (4) where it is uncertain as to the survivor of the devisees, or as to the heir or personal representative of the mortgagee, whether he is living or dead; and (5) where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or it is uncertain who is his heir or personal representative or devisee (*p*). For the order to be made it is necessary that the mortgagee shall have died without having gone into possession, and that the mortgage money shall have been paid to a person entitled to receive it, or that such person consents to an order for the reconveyance of the land (*q*).

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(*m*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 136 (1).

(*n*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 28. This jurisdiction applies where a lunatic mortgagee is an infant (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 143). The same provision for infants is made as to copyhold land as where the mortgagee is a lunatic (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 34). The order may be made subject to legacies charged by the mortgagor's will on the equity of redemption (*Re Ellerthorpe* (1854), 18 Jur. 669); and see title INFANTS AND CHILDREN, Vol. XVII., pp. 83, 84. The necessity for vesting orders in the case of infants has almost disappeared now that mortgaged freehold property devolves on the mortgagee's personal representatives; see note (*q*), p. 182, *ante*, and p. 185, *ante*. A vesting order as to stocks and choses in action vested in an infant mortgagee can hardly, in practice, be required, and is not provided for.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 29, replacing the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 19. The provisions in respect to "heirs or devisees" can now rarely be required (see p. 182, *ante*), except in the case of copyhold land (see pp. 184, 185, *ante*), and the reference to personal representatives was introduced to meet the usual case of the mortgaged property devolving upon them. The powers of the Act can be exercised, subject to any special limits as to jurisdiction, by a palatine court or a county court (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 46; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67). As to when proceedings in the county court must be taken, see *ibid.*, s. 75; and title COUNTY COURTS, Vol. VIII., pp. 444, 452. The jurisdiction extends to all land and personal estate in the British dominions except Scotland (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 41; extended to the High Court in Ireland by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 2).

(*p*) The uncertainty may arise from delay in probate owing to the will being disputed (*Re Cook's Mortgage*, [1895] 1 Ch. 700).

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 29. But where the mortgagee has been in possession, the order can be made under *ibid.*, s. 26, since on his being paid off he and his representatives are trustees for the mortgagor (*Re Skitter's Mortgage Trust* (1856), 4 W. R. 791). Where a mortgage

Instead of making a vesting order the court may appoint a person to convey (*r*).

Generally, where a mortgage has been paid off, the mortgagee is a trustee for the mortgagor, so that a vesting order can be made under the appropriate statutory provision or a person may be appointed to convey (*s*).

Effect of payment off.

A vesting order can be made on the application of any person interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage (*a*).

Applicants.

SUB-SECT. 4.—*Costs of Reconveyance.*

**567.** The costs of reconveyance are borne by the mortgagor (*b*), including not only the ordinary costs where the mortgage title has not been changed by assignment (*c*), or devolution, but also any extraordinary costs rendered necessary by a change of title or other event, such as the costs of obtaining a vesting order where the person who should reconvey cannot be found, or is under disability (*d*), or where the legal estate is in a trustee-mortgagee who has absconded (*e*); but not the costs of a vesting order where the mortgagee himself has become lunatic, these, whether the vesting order is obtained on the application of the mortgagor or the committee, being paid out of the lunatic's estate (*f*); nor costs

By whom borne.

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of freeholds is by way of trust for sale, and the trusts of the surplus proceeds are for the mortgagor and his personal representatives, it is not a mere security for money, but changes the devolution, and the mortgagee is a trustee for the purpose of making a vesting order (*Re Underwood* (1857), 3 K. & J. 745; compare *Re Keeler's Mortgage Trust* (1862), 32 L. J. (CH.) 101). But payment to two out of three joint mortgagees does not make the third a trustee so as to enable a vesting order to be made (*Re Osborn's Mortgage Trusts* (1871), L. R. 12 Eq. 392), unless he is already a trustee and a new trustee has been appointed (*Re Walker's Mortgage Trusts* (1876), 3 Ch. D. 209). See, further, as to vesting orders, title TRUSTS AND TRUSTEES; and, as to the practice, R. S. C., Ord. 54B. As to forms of order, see 2 Seton, Judgments and Orders, 6th ed., pp. 1230 *et seq.*

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 33. As to such vesting orders, see p. 316, *ante*.

(*s*) Thus, on one of two joint mortgagees wilfully refusing or neglecting to reconvey, a person can be appointed to convey under the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26 (vi.), 33 (*Holme* v. *Fieldsend* (1911), 55 Sol. Jo. 552). As to such vesting orders, see p. 316, *ante*, and *ibid.*, note (*q*).

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36 (2). The court may order the costs to be paid in such manner and by such persons as may seem just (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 142). The words "by such persons" overrule *Re Sparks* (*a Person of Unsound Mind*) (1877), 6 Ch. D. 361, C. A., where it was held that the costs could not be thrown on the mortgage debt; see note (*f*), *infra*.

(*b*) *King* v. *Smith* (1848), 6 Hare, 473, 475.

(*c*) See *Wetherell* v. *Collins* (1818), 3 Madd. 255.

(*d*) *Ex parte Ommaney* (1841), 10 Sim. 298; *King* v. *Smith*, *supra*; see *Re Stewart, Ex parte Marshall* (1859), 4 De G. & J. 317.

(*e*) *Webb* v. *Crosse*, [1912] 1 Ch. 323.

(*f*) *Re Lewis, Ex parte Richards* (1820), 1 Jac. & W. 264; *Re Townsend* (1847), 2 Ph. 348; *contra, Re Marrow* (1841), Cr. & Ph. 142. The exception has been admitted with difficulty (see *Re Stuart, Ex parte Marshall* (1859), 4 De G. & J. 317, 319), but is now settled (*Re Biddle* (1853), 23 L. J. (CH.) 23, C. A.; *Hawkins* v. *Perry, Re Viall, Ex parte Sargeant* (1856), 25 L. J. (CH.) 656, C. A.). The mortgagor, however, pays the stamp duty on the order (*Re Thomas* (1853), 22 L. J. (CH.) 858); and the exception does

SECT. 3. **By Release of Security.**

Costs of getting deeds out of court.

occasioned by the mortgagee mixing the title to the mortgaged estate with other property (*g*).

Where the deeds have come into the custody of the court in the course of the reasonable and proper administration of the mortgagee's estate, the costs of getting them out must be paid by the mortgagor (*h*), but not if the advance was made by the executors and the mortgagor had no notice of their character or of the action (*i*).

## SECT. 4.—*By Merger.*

### SUB-SECT. 1.—*When Merger takes Place.*

#### (i.) *In General.*

Nature of principle.

**568.** When a charge on land and the ownership of the land become united in the same person the charge is at law merged in the ownership (*k*), but in equity merger does not necessarily follow upon the union of these two interests, and the equitable rule now prevails (*l*).

With one exception (*m*), merger is in equity a question of intention, and this intention may be actual or presumed (*n*). Even

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not extend to the case of a lunatic heir-at-law of the mortgagee (*Re Stuart, Ex parte Marshall* (1859), 4 De G. & J. 317, 319; *Re Jones* (1860), 7 Jur. (N. S.) 115, C. A.). The application for a vesting order should be made by the committee (*Re Wheeler* (1852), 1 De G. M. & G. 434), and should not be served on the mortgagor (*Re Rowley* (1863), 1 De G. J. & Sm. 417, C. A.), and even if served the mortgagor will not be allowed his costs of appearing out of the lunatic's estate (*Re Phillips* (1869), 4 Ch. App. 629). Where the mortgagee is a trustee, but the mortgagor has no notice of the trust, the exception applies, and the costs of a vesting order are paid, as between the lunatic's estate and the trust estate, out of the latter (*Re Townsend* (1850), 1 Mac. & G. 686; *Re Jones* (1876), 2 Ch. D. 70, C. A.). It was held in *Re Lewes* (1849), 1 Mac. & G. 23, that where the mortgage disclosed the trust, the costs were payable by the mortgagor, but there is no ground for this distinction.

(*g*) *King* v. *Smith* (1848), 6 Hare, 473, 475; see *Capper* v. *Terrington* (1844), 13 L. J. (CH.) 239; 1 Coll. 103.

(*h*) *Burden* v. *Oldaker* (1844), 1 Coll. 105.

(*i*) *Reed* v. *Freer* (1844), 13 L. J. (CH.) 417. As to release of the property of a surety, see title GUARANTEE, Vol. XV., p. 547. As to the rights of insurers under a mortgage insurance policy, see title INSURANCE, Vol. XVII., p. 573.

(*k*) Either by analogy to the merger of a less estate in a greater, or because a man cannot be his own debtor.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); see title EQUITY, Vol. XIII., p. 64, note (*f*). The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (4), which deals expressly with merger, only refers to the merger of estates; see, further, title EQUITY, Vol. XIII., p. 64.

(*m*) The excepted case is where the owner of land pays off a charge which he is personally liable to pay, as he is not allowed to set up the charge against subsequent incumbrancers to whom he is liable; see title EQUITY, Vol. XIII., p. 148; *Otter* v. *Vaux* (*Lord*) (1856), 6 De G. M. & G. 638, 642; *Platt* v. *Mendel* (1884), 27 Ch. D. 246, 251. But he may do so when he has been discharged by bankruptcy from personal liability (*Re Howard's Estate* (1892), 29 L. R. Ir. 266, C. A.); and where the first mortgage is also secured on property other than that of the person redeeming, it may be kept alive as to such other property (*Taws* v. *Knowles*, [1891] 2 Q. B. 564, 572, C. A.).

(*n*) As to such actual or presumed intention, see title EQUITY, Vol. XIII., pp. 147, 148; *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244, 249; *Thorne* v. *Cann*, [1895] A. C. 11, *per* Lord MACNAGHTEN, at pp. 18, 19; *Re Gibbon, Moore* v.

though a charge is expressed to be extinguished, it may be treated as still in existence for the protection of the person finding the money to pay it off (*o*); and where it has been extinguished under a misapprehension of title it may be treated as in existence if this will be more in accordance with the general intention of the owner (*p*).

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Applied in accordance with intention.

Further, since merger depends on intention, and not on the mere legal union of the charge and the estate, it may take place although the charge is supported by an outstanding legal estate (*q*). For merger to take place it is sufficient that the beneficial interest in the charge and the beneficial estate in the land meet in the same person, whether in either case they are accompanied by the legal interest or estate or not (*r*).

Union of beneficial interests sufficient.

(ii.) *In Particular Cases.*

**569.** The presumption in favour of merger arises when the absolute interest in the charge is united with the estate in fee simple in the land, whether the owner of the land acquired the charge before (*s*), or at the same time as (*t*), or after (*a*) he became entitled to the land, unless such estate is subject to an executory devise or is otherwise defeasible (*b*), or the title is in dispute (*c*). There is no advantage in keeping the charge alive (*d*), and its extinguishment simplifies the title to the land (*e*). It is the same when the charge

Where charge united with fee simple or estate tail in possession.

*Gibbon*, [1909] 1 Ch. 367, 373; and see *Forbes* v. *Moffatt* (1811), 18 Ves. 384, *per* GRANT, M.R., at p. 390: "The question is upon the intention, actual or presumed, of the person in whom the interests are united"; and, at p. 392: "Where no intention is expressed, or the party is incapable of expressing any, the court considers what is most advantageous to him." See, further, pp. 321, 323, *post*.

(*o*) *Irby* v. *Irby* (No. 3) (1858), 25 Beav. 632; *Gifford* (*Lord*) v. *Fitzhardinge* (*Lord*), [1899] 2 Ch. 32.

(*p*) *Buckinghamshire* (*Earl*) v. *Hobart* (1818), 3 Swan. 186, 202; but see *Manks* v. *Whiteley*, [1912] W. N. 87, C. A., reversing *Manks* v. *Whiteley*, [1911] 2 Ch. 448.

(*q*) *Astley* v. *Milles* (1827), 1 Sim. 298, 344; *Pitt* v. *Pitt* (1856), 22 Beav. 294.

(*r*) *Forbes* v. *Moffatt*, *supra*. "Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it, where at law it would be merged" (*ibid.*, *per* GRANT, M.R., at p. 390). "Where the owner has an absolute interest in the estate and the charge, the charge is annihilated for the benefit of the estate and heir. The Court does not consider the subtleties of mergers, but discharges the estate from the incumbrance; it would otherwise burden estates to no purpose" (*Donisthorpe* v. *Porter* (1762), 2 Eden, 162, *per* Lord HENLEY, L.C., at p. 164).

(*s*) *Forbes* v. *Moffatt*, *supra*; *Swinfen* v. *Swinfen* (No. 3) (1860), 29 Beav. 199, 203.

(*t*) *Grice* v. *Shaw* (1852), 10 Hare, 76, 79.

(*a*) *Price* v. *Gibson* (1762), 2 Eden, 115; *Hood* v. *Phillips* (1841), 3 Beav. 513; *Pitt* v. *Pitt*, *supra*; *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244, 249. In *Swabey* v. *Swabey* (1848), 15 Sim. 106, 502, the mortgage was treated as existing for the purpose of probate and legacy duty, though merged as between heir and next of kin.

(*b*) *Drinkwater* v. *Combe* (1825), 2 Sim. & St. 340.

(*c*) *Re Pride*, *Shackell* v. *Colnett*, [1891] 2 Ch. 135.

(*d*) *Forbes* v. *Moffatt*, *supra*.

(*e*) See *Donisthorpe* v. *Porter*, *supra*, at p. 163. The merger takes place, notwithstanding that the owner of the land is entitled to the charge—a portion—as next of kin to the portioner, and has not taken out

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is vested in a tenant in tail in possession (*f*), unless he is by statute forbidden to bar the entail (*g*). He has an immediate estate of inheritance (*h*), and has it in his power to become tenant in fee simple (*i*), and if he does not do so it is presumed that he intended the heir in tail or remainderman to take free from the charge (*j*).

Where charge acquired by owner of estate in remainder.

The presumption in favour of merger arises in the foregoing cases not only where the charge and estate devolve upon the same person, but also where the owner of the estate purchases (*k*), or pays off (*l*), the charge. But where a charge becomes vested in an owner whose estate is in remainder, and may, having regard to the prior limitations, never fall into possession, a distinction exists according as he acquires the charge by actual payment or otherwise. This may happen where the owner is tenant in tail in remainder after a tenancy in tail. There is in neither case any merger so long as the estate continues in remainder, but when it falls into possession reference is made to the intention, expressed or presumed, at the time of acquiring the charge. In the absence of any indication to the contrary, this is presumed to continue at the moment when merger might take place. If the charge was acquired by actual payment the presumption is against merger, since an owner in remainder, whose estate may never fall into possession, cannot be supposed to intend to benefit the inheritance (*m*); but if the charge was acquired otherwise, the usual presumption arises, and when the estate falls into possession the charge is merged (*n*).

Intention presumed to continue.

Where limited owner acquires charge, or charge is not absolute.

**570.** The presumption is against merger when a tenant for life or other limited owner (not being tenant in tail (*o*)), acquires or pays off a charge, since the merger would operate as a gift to those in remainder (*p*); and also when the charge is subject to limitations which prevent the full union of the charge and the estate in the lifetime of the owner; where, for example, the charge is subject to a prior life interest which does not terminate during the life of the

administration to him (*Re French-Brewster's Settlements, Walters* v. *French-Brewster*, [1904] 1 Ch. 713).

(*f*) *Horton* v. *Smith* (1858), 4 K. & J. 624, 627.

(*g*) *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (1790), 1 Ves. 227; 3 Bro. C. C. 120.

(*h*) *Contra*, if he has an estate for life with a general power of appointment by deed or will (*Smith* v. *Smith* (1887), 19 L. R. Ir. 514).

(*i*) See title REAL PROPERTY AND CHATTELS REAL.

(*j*) *Jones* v. *Morgan* (1783), 1 Bro. C. C. 206; *Ware* v. *Polhill* (1805), 11 Ves. 257, 277; *Buckinghamshire* (*Earl*) v. *Hobart* (1818), 3 Swan. 186, 199; *Drinkwater* v. *Combe* (1825), 2 Sim. & St. 340, 345; *Grice* v. *Shaw* (1852), 10 Hare, 76, 79.

(*k*) *Astley* v. *Milles* (1827), 1 Sim. 298.

(*l*) *Buckinghamshire* (*Earl*) v. *Hobart*, *supra*.

(*m*) *Wigsell* v. *Wigsell* (1825), 2 Sim. & St. 364, 369; *Horton* v. *Smith* (1858), 4 K. & J. 627. The same principle would apply to an estate in fee in remainder which may never fall into possession.

(*n*) *Horton* v. *Smith*, *supra*.

(*o*) *Morley* v. *Morley* (1855), 5 De G. M. & G. 610, 620.

(*p*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205, 232; *Pitt* v. *Pitt* (1856), 22 Beav. 294; *Lindsay* v. *Wicklow* (*Earl*) (1873), 7 I. R. Eq. 192, 204. This presumption against merger has been held to exist notwithstanding that the reconveyance to the tenant for life was expressed to be "absolutely discharged from the mortgage debt" (*Gifford* (*Lord*) v. *Fitzhardinge* (*Lord*), [1899] 2 Ch. 32).

owner in fee simple (*q*), or is subject to a charge for succession duty, so that the right to the charge is not absolute or co-extensive with the right to the land (*r*). Hence, in such cases it is not necessary to take an assignment of the charge (*s*), or to prove any intention on the part of the tenant for life to keep the charge alive (*t*).

Where the tenant for life has had an ultimate remainder in fee simple, which, by the failure of intermediate estates, falls into possession on his death, there is no merger. The presumption against merger raised by his tenancy for life continues in the absence of any proof to the contrary (*a*).

(iii.) *Sufficient Rebuttal of Presumption in favour of or against Merger.*

Rules as to presumption yield to intention.

**571.** The foregoing rules as to the presumption in favour of or against merger yield to the intention, which, with the exception presently noticed, may be actual or presumed (*b*). The actual intention is to be gathered either from express declaration or the acts of the party; the presumed intention by considering what is most for his benefit (*c*).

Express declaration against merger.

**572.** The clearest way of causing or preventing merger is by express declaration in the instrument which effects the union of the charge and the estate (*d*). Where there is such a declaration against merger, it is not necessary, as is sometimes done (*e*), to take a conveyance either of the charge or of the estate to a trustee so as to prevent a merger at law (*f*). But even an express declaration against merger will not keep the charge alive if there are circumstances pointing conclusively to merger (*g*).

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(*q*) *Jones* v. *Morgan* (1783), 1 Bro. C. C. 206; *Wilkes* v. *Collin* (1869), L. R. 8 Eq. 338.

(*r*) *Re Simmons, Dennison* v. *Orman* (1902), 87 L. T. 594.

(*s*) *Morley* v. *Morley* (1855), 5 De G. M. & G. 610, 626; see *Redington* v. *Redington* (1809), 1 Ball & B. 131.

(*t*) *Lindsay* v. *Wicklow* (*Earl*) (1873), 7 I. R. Eq. 192, 204.

(*a*) *Wyndham* v. *Egremont* (*Earl*) (1775), Amb. 753; *Trevor* v. *Trevor* (1833), 2 My. & K. 675.

(*b*) *Forbes* v. *Moffatt* (1811), 18 Ves. 384, 390; *Grice* v. *Shaw* (1852), 10 Hare, 76, 79.

(*c*) *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244, 249. This applies both to the original presumption and to the rebutting presumption. When a tenant in fee simple pays off a charge, the original presumption is in favour of merger. Where under the circumstances it is for his advantage to keep the charge alive, there may be a rebutting presumption which prevents merger; but see *Manks* v. *Whiteley*, [1912] W. N. 87, C. A. As to infant owners, see p. 323, *post*.

(*d*) See *Re Gibbon, Moore* v. *Gibbon*, [1909] 1 Ch. 367, 373. Although the declaration is expressed to keep the charge alive for the benefit of the owner, "his heirs and assigns," it will pass on his death as personal estate (*ibid.*); and where, subsequently to a proviso in a conveyance of the land that the land is to be the primary fund for payment of the charge, the grantor pays it off, it will be kept alive as part of his personal estate (*Pears* v. *Weightman* (1856), 2 Jur. (N. S.) 586); compare (*Johnson* v. *Webster* (1854), 4 De G. M. & G. 474.

(*e*) *Bailey* v. *Richardson* (1852), 9 Hare, 734, 736.

(*f*) This follows *a fortiori* from the cases which allow merger to be rebutted by evidence of intention derived from the circumstances, without express declaration, although there is no intervening trustee (*Watts* v. *Symes* (1851), 1 De G. M. & G. 240, C. A.; *Adams* v. *Angell* (1877), 5 Ch. D. 634, C. A.).

(*g*) *Re Gibbon, Moore* v. *Gibbon, supra*, at p. 374; see *Swabey* v. *Swabey* (1846), 15 Sim. 106.

SECT. 4. By Merger.

Intention inferred from circumstances attending union.

**573.** Where there is no express declaration, an actual intention can be inferred from the circumstances attending the union of the charge and the estate. The contemporaneous transfer of the charge to a trustee is one of the grounds on which an actual intention can be inferred and the presumption in favour of merger rebutted (*h*). Such a transfer is not, indeed, of itself decisive against merger (*i*), but, if accompanied by a declaration by the owner that the charge is to be held for him and his personal representatives, and if there are not contrary indications, it will probably be conclusive (*k*).

Or from indications occurring subsequent to union.

In cases where the union of the interests takes place otherwise than by the intended acquisition of the charge or estate, or payment off of the charge, so that no indications of intention can exist at the time of union, it is permissible to rely on any such indications occurring subsequently during the life of the owner (*l*), and merger will be prevented by any acts done by him which are only consistent with the charge being kept on foot (*m*). Similarly, merger will be effected where the owner has disposed of the land free from incumbrances, whether by sale (*n*), or mortgage (*o*), or marriage settlement (*p*). In such cases he cannot set up the charge notwithstanding a clear expression of intention to keep it alive at the time he took it (*p*). There will also be a merger where he has devised the estate in such a manner as to show that he treated the charge as non-existing (*q*). But where a tenant for life pays off an incumbrance, intending to discharge the inheritance, he cannot afterwards revive it (*r*).

Presumption to owner.

**574.** Where there is no evidence of any actual intention, an keep the charge alive, notwithstanding that it would

(*h*) *Buckinghamshire* (*Earl*) v. *Hobart* (1818), 3 Swan. 186, 199.

(*i*) *Hood* v. *Phillips* (1841), 3 Beav. 513; *Re Lloyd's Estate*, [1903] 1 I. R. 144, 148.

(*k*) *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244; but see *Hood* v. *Phillips*, *supra*, at p. 518; as to a merger of a lease, compare *Gunter* v. *Gunter* (1857), 23 Beav. 571.

(*l*) *Redington* v. *Redington* (1809), 1 Ball & B. 131, 143; *Swinfen* v. *Swinfen* (No. 3) (1860), 29 Beav. 199, 204; *Re Godley's Estate*, [1896] 1 I. R. 45, 51; though apparently not expressions of intention previously to the union of the interests (*Tyrwhitt* v. *Tyrwhitt*, *supra*, at p. 251).

(*m*) *Tyrwhitt* v. *Tyrwhitt*, *supra*; see *Hatch* v. *Skelton* (1855), 20 Beav. 453; *Lea* v. *Thursby*, [1904] 2 Ch. 57, 65.

(*n*) *Bulkeley* v. *Hope* (1855), 1 K. & J. 482, 489. Apart from intention, the vendor, if he has agreed to sell free from incumbrances, cannot afterwards maintain as against the purchaser that a charge subsisting in lieu of land tax has not merged (*ibid.*); see title SALE OF LAND. But in *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91, general words in a settlement did not include such a charge.

(*o*) *Tyler* v. *Lake* (1831), 4 Sim. 351; *Re Gibbon, Moore* v. *Gibbon*, [1909] 1 Ch. 367, 374.

(*p*) *Gower* (*Countess Dowager*) v. *Gower* (*Earl*) (1783), 1 Cox, Eq. Cas. 53.

(*q*) See *Hood* v. *Phillips*, *supra*; *Re Lloyd's Estate*, [1903] 1 I. R. 144, 149. But a devise of the estate in such terms as to merge charges will not merge them so far as they form a security for subsequent charges made by the owner (*Re Nunn's Estate* (1888), 23 L. R. Ir. 286, 300, C. A.).

(*r*) *Morley* v. *Morley* (1855), 5 De G. M. & G. 610, 626; *Re Godley's Estate*, [1896] 1 I. R. 45, 52.

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*primâ facie* merge, may be presumed where this is for the benefit of the owner (*s*); where, for example, the merger of the charge would let in subsequent charges (*t*), unless such subsequent charges have been created by the owner himself (*a*).

Presumed intention operative notwithstanding owner's ignorance of rights or incapacity.

**575.** The fact that the owner of the estate is ignorant of his rights prevents him from having any actual intention as to merger, but none the less the presumed intention may operate, according to the circumstances, either to effect or to prevent merger (*b*). Similarly, where the owner is under incapacity, the question of merger ordinarily depends technically on the presumed intention, but actually on considering what is most advantageous to him (*c*). Where, indeed, personal estate of an infant or lunatic tenant in fee simple or tenant in tail is used to pay off a charge on the real estate, there is no merger (*d*); but where the charge and the estate are united in an infant or lunatic otherwise than by payment the usual presumptions apply (*e*).

Purchase of equity of redemption by mortgagee

**576.** *Primâ facie* where a mortgagee purchases the equity of redemption, or where, on a purchase, part of the purchase-money is applied in paying off a mortgage, or where the mortgage and the equity of redemption become united by purchase in the same person, the mortgage is merged in the land (*f*); but the person thus entitled to both interests can have the mortgage kept alive for his benefit (*g*). A person advancing money to pay off a charge is entitled to have the charge kept alive and transferred to himself (*h*); and such a transfer should be a transfer both of the debt and the security (*i*). For want of taking this precaution subsequent incumbrancers may gain priority (*j*).

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(*s*) *Swinfen* v. *Swinfen* (No. 3) (1860), 29 Beav. 199, 204; see *Clarendon* (*Earl*) v. *Barham* (1842), 1 Y. & Ch. Cas. 688, 703.

(*t*) *Forbes* v. *Moffatt* (1811), 18 Ves. 384; *Davis* v. *Barrett* (1851), 14 Beav. 542; but see *Manks* v. *Whiteley*, [1912] W. N. 87, C. A. The result is in fact based directly on the advantage to the owner, but technically it is based on the presumed intention (*Grice* v. *Shaw* (1852), 10 Hare, 76, 80; *Byam* v. *Sutton* (1854), 19 Beav. 556, 562).

(*a*) *Johnson* v. *Webster* (1854), 4 De G. M. & G. 474, 488.

(*b*) *Burrell* v. *Egremont* (*Earl*) (1844), 7 Beav. 205, 232; but see *Manks* v. *Whiteley*, *supra*.

(*c*) *Forbes* v. *Moffatt*, *supra*, at p. 392.

(*d*) The ordinary presumption as to merger gives place to the rule that the infant's property is not to be converted so as to affect the rights of his real and personal representatives (*Ware* v. *Polhill* (1805), 11 Ves. 257, 278; *Alsop* v. *Bell* (1857), 24 Beav. 451, 468); see title INFANTS AND CHILDREN, Vol. XXII., p. 84. Formerly, since an infant could dispose by will of personal estate, it was for his advantage to keep the charge alive, and merger was prevented on this ground (*Thomas* v. *Kemeys* (1697), 2 Vern. 348; *Compton* (*Lord*) v. *Oxenden* (1793), 2 Ves. 261, 264; *Forbes* v. *Moffatt*, *supra*). As to merger in the case of lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 451.

(*e*) *Compton* (*Lord*) v. *Oxenden*, *supra*; *Re Hole*, *Davies* v. *Witts*, [1906] 1 Ch. 673, 682, C. A.

(*f*) See *Smith* v. *Phillips* (1837), 1 Keen, 694.

(*g*) *Clark* v. *May* (1852), 16 Beav. 273; *Cooper* v. *Cartwright* (1860), John. 679.

(*h*) See p. 180, *ante*; *Manks* v. *Whiteley*, [1912] W. N. 83, C. A., *per* COZENS-HARDY, M.R.

(*i*) *Medley* v. *Horton* (1844), 14 Sim. 222, 229.

(*j*) *Parry* v. *Wright* (1823), 1 Sim. & St. 369; affirmed (1828), 5 Russ. 142; but, in this case, the advance, though employed to pay off the first

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Acquisition of charge by purchaser of equity of redemption.

**577.** Where the purchaser of the equity of redemption holds or gets in a mortgage upon it, or where the purchase-money is applied in paying off a mortgage, the question of merger should, upon the principles stated above, depend on his intention, actual or presumed. The creator of a charge cannot himself keep it alive against his own subsequent incumbrances, even by express declaration (*k*); and where the purchase is on the terms that the debts due to the purchaser and other mortgagees shall be paid off, the purchaser's own debt is extinguished (*l*). Apart, however, from special circumstances, the purchaser stands in a different position from the mortgagor himself, and there is no reason why he should not have the benefit of the presumption that a mortgage which he holds or pays off will be kept alive if this is for his advantage. He is entitled to keep the mortgage alive as against subsequent incumbrances by an actual intention to that effect, and such intention can be proved, as in other cases, either by express declaration or from the circumstances of the transaction, and it may be immaterial that the mortgage is expressed to have been paid off (*m*). And as against subsequent incumbrances of which he had no notice, actual or constructive, when he acquired the equity of redemption, he is entitled to the benefit of the usual rule; it is for his advantage that the charge should be kept alive, and it has been said that an intention against merger is presumed accordingly (*n*). Yet, as against incumbrances of which he had notice, either actual or constructive, there is authority that no intention against merger

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mortgage, was for the purpose of the purchase of the land free from such mortgage, and the mortgage was extinguished. If this case is correct—which is doubtful (see *Stevens* v. *Mid-Hants Rail. Co.*, *London Financial Association* v. *Stevens* (1873), 8 Ch. App. 1064, 1069)—it must be on the ground that the new mortgagee had so dealt with the prior mortgage as to prevent its being afterwards set up by him; see *Squire* v. *Ford* (1851), 9 Hare, 47, 60. Ordinarily one who advances money to pay off a charge becomes in equity a transferee of the charge and intends to keep it alive; see *Patten* v. *Bond* (1889), 60 L. T. 583; *Chetwynd* v. *Allen*, [1899] 1 Ch. 353; *Butler* v. *Rice*, [1910] 2 Ch. 277; and see p. 180, *ante*.

(*k*) See note (*m*), p. 318, *ante*; and compare *Mackenzie* v. *Gordon* (1839), 6 Cl. & Fin. 875, 883, H. L. But the trustee in bankruptcy of the mortgagor, who acquires a charge on the estate, is entitled to hold the charge for the benefit of creditors (*Squire* v. *Ford*, *supra*, at p. 60; *Adams* v. *Angell* (1877), 5 Ch. D. 634, 647, C. A.; *Cracknall* v. *Janson* (1877), 6 Ch. D. 735; *Bell* v. *Sunderland Building Society* (1883), 24 Ch. D. 618).

(*l*) *Brown* v. *Stead* (1832), 5 Sim. 535; and, as to this case, see *Squire* v. *Ford*, *supra*.

(*m*) *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, 244, C. A.; *Hayden* v. *Kirkpatrick* (1865), 34 Beav. 645; *Adams* v. *Angell* (1877), 5 Ch. D. 634, C. A.; *Re Cork Harbour Docks Co.* (1885), 17 L. R. Ir. 515, C. A.; *Minter* v. *Carr*, [1894] 3 Ch. 498, 501, C. A.; *Thorne* v. *Cann*, [1895] A. C. 11, 19; but see *Manks* v. *Whiteley*, [1912] W. N. 87, C. A. The rule equally applies where a new mortgagee is making an advance to pay off the old mortgage, and an intention to keep the old mortgage alive may be gathered from the circumstances (*Phillips* v. *Gutteridge* (1859), 4 De G. & J. 531, C. A.; *Butler* v. *Rice*, [1910] 2 Ch. 277; compare *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866, 877, where, however, it seems to have been assumed that the presumption was against merger, and that the charge is kept alive unless an intention is shown to merge it).

(*n*) *Manks* v. *Whiteley*, [1911] 2 Ch. 448, at pp. 460, 464, *per* PARKER, J.; but in the Court of Appeal, [1912] W. N. 83, COZENS-HARDY, M.R., declined to admit that there could be a presumption of intention in such a case based upon advantage.

will be presumed; and if this is correct, merger can only be prevented in such a case by proof of actual intention (*o*).

SUB-SECT. 2.—*Merger of Lower in Higher Security.*

General rule.

**578.** As a general rule a person, by taking or acquiring a security of a higher nature in legal operation than one he already possesses, merges and extinguishes his legal remedies upon the inferior security or cause of action; thus the taking a bond or covenant, or the obtaining a judgment for a simple contract debt, merges and extinguishes the simple contract debt (*p*). But for this purpose the superior security must be co-extensive with the inferior security and between the same parties (*q*); and a security, given by

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(*o*) *Toulmin* v. *Steere* (1817), 3 Mer. 210. GRANT, M.R., *ibid.*, at p. 224, enunciated the rule that the purchaser of "an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice," the notice in that case being constructive. But to a certain extent this is clearly wrong, and the purchaser can by actual intention keep alive a charge which he has got in, or which he has paid off, against charges of which he has notice (*Adams* v. *Angell* (1877), 5 Ch. D. 634, C. A.). This leaves *Toulmin* v. *Steere*, *supra*, only as an authority that, in the absence of actual intention, whether expressed or shown by the circumstances, the presumption against merger will not apply in his favour, and beyond this it will not be extended (*Stevens* v. *Mid-Hants Rail. Co.*, *London Financial Association* v. *Stevens* (1873), 8 Ch. App. 1064; *Adams* v. *Angell*, *supra*). But even to this extent it is opposed to principle. There is no reason for giving the second mortgagee a benefit at the expense of the purchaser of the equity of redemption who is under no liability to pay him (*Stevens* v. *Mid-Hants Rail. Co.*, *London Financial Association* v. *Stevens*, *supra*); and the decision has been frequently questioned (see *e.g.*, *Watts* v. *Symes* (1851), 1 De G. M. & G. 240, 244, C. A.; *Thorne* v. *Cann*, [1895] A. C. 11, 16). In *Liquidation Estates Purchase Co.* v. *Willoughby*, [1896] 1 Ch. 726, C. A., LINDLEY, L.J., at p. 734, seems to have regarded it as overruled by the *dicta* in *Thorne* v. *Cann*, *supra*, and it would perhaps have been formally overruled by the House of Lords in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321, had the question of merger really arisen. But in *Manks* v *Whiteley*, [1911] 2 Ch. 448, PARKER, J., at p. 462, regarded it as binding on a court of first instance, though not to be extended beyond the actual case, and not to be applied, therefore, to the case of a person who had paid off a first mortgage, and thereby become equitable assignee, taking a new legal security; see *ibid.*, p. 463; and the Court of Appeal (COZENS-HARDY, M.R., and BUCKLEY, L.J., MOULTON, L.J., dissenting), [1912] W. N. 87, C. A., accepted *Toulmin* v. *Steere*, *supra*, and, reversing PARKER, J., held that it applied to the case in question, and that, having regard to the mode of conveyancing, the first mortgage was extinguished. But the dissentient judgment of FLETCHER MOULTON, L.J., taken with the previous criticisms of *Toulmin* v. *Steere*, *supra*, leaves it extremely doubtful whether that decision is sound. In the Privy Council the doctrine of *Toulmin* v. *Steere*, *supra*, has been held not to be applicable in a court administering rules of justice, equity and good conscience, apart from technical conveyancing considerations (*Gokuldoss Gopaldoss* v. *Rambux Seochand* (1884), L. R. 11 Ind. App. 126).

(*p*) *Owen* v. *Homan* (1851), 3 Mac. & G. 378, 407; affirmed (1853), 17 Jur. 861, H. L.; as to judgments, see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209; pp. 226, 288, *ante*; and, as to interest recoverable, see pp. 226, 227, *ante*; and title ESTOPPEL, Vol. XIII., pp. 334 *et seq.* A judgment does not prevent a petition in bankruptcy on the original debt (title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 39; *Re Mostyn, Ex parte Griffiths* (1853), 3 De G. M. & G. 147, C. A.).

(*q*) *Holmes* v. *Bell* (1841), 3 Man. & G. 213; *Norfolk Rail. Co.* v. *M'Namara* (1849) 3 Exch. 628.

SECT. 4. By Merger.

one of two co-debtors to secure a simple contract debt, does no merge the simple contract debt (*r*).

Effect of judgment.

**579.** The obtaining of a judgment for the mortgage debt does not, while the judgment remains unsatisfied (*s*), prevent the mortgagee from enforcing his security (*t*); and a judgment on a debt secured by equitable mortgage does not deprive that mortgage of its priority, notwithstanding that the judgment operates as a legal charge on the land (*t*). But taking a conveyance of part of the lands extended under an *elegit* in satisfaction of part of the debt is a satisfaction of the judgment altogether (*a*).

Effect of legal mortgage on equitable charge.

**580.** A mere charge created by deposit of deeds is extinguished by the taking of a formal mortgage, even though the mortgage does not pass the legal estate, and the sum thenceforth secured is the sum mentioned in the mortgage, notwithstanding that other sums were covered by the deposit (*b*). But where a charge on two estates is kept alive in equity in favour of a person paying it off, he does not lose the benefit of the charge by taking a mortgage of one estate (*c*), and an equitable security is not merged by taking a security which is ineffectual (*d*).

Merger must not be opposed to the contract.

**581.** A security will not be merged if such merger would be opposed to the contract between the parties; thus an assignment made by way of further security cannot prejudice the continuance of any existing security for the same debt (*e*); and a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances (*f*).

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(*r*) *Bell* v. *Banks* (1841), 3 Man. & G. 258; *Ansell* v. *Baker* (1850), 15 Q. B. 20; *Sharpe* v. *Gibbs* (1864), 16 C. B. (N. S.) 527; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76; *Westmoreland Green and Blue Slate Co.* v. *Fielden*, [1891] 3 Ch. 15, 26, C. A.

(*s*) *Lloyd* v. *Mason* (1845), 4 Hare, 132, 138; *O'Brien* v. *Lewis* (1863), 3 De G. J. & Sm. 606, C. A.; see *Re Lonergan, Ex parte Sheil* (1877), 4 Ch. D. 789, 793, C. A.

(*t*) *Re Jennings' Estate* (1885), 15 L. R. Ir. 277.

(*a*) *Hele* v. *Bexley* (*Lord*) (1853), 17 Beav. 14; see title EXECUTION, Vol. XIV., pp. 69, 70.

(*b*) *Re Annesley, Vaughan* v. *Vanderstegen* (1854), 2 Eq. Rep. 1257. As to merger of a claim for necessaries in a bottomry bond, see *The Elpis* (1872), L. R. 4 A. & E. 1; and see title SHIPPING AND NAVIGATION.

(*c*) *Chetwynd* v. *Allen*, [1899] 1 Ch. 353; see *Butler* v. *Rice*, [1910] 2 Ch. 277. And as to loss of an equitable lien, see title LIEN, Vol. XIX., p. 30.

(*d*) *Re Emery, Ex parte Harvey* (1839), Mont. & Ch. 261.

(*e*) *Twopenny* v. *Young* (1824), 3 B. & C. 208; *Boaler* v. *Mayor, supra*, at p. 83; see *Re Warwick and Clagett, Ex parte Whitmore* (1838), 3 Deac. 365. Though it seems that a covenant to pay a simple contract debt necessarily turns it into a specialty debt (*Stamps Commissioners* v. *Hope*, [1891] A. C. 476, P. C.); and an agreement under seal to execute a mortgage to secure a simple contract debt turns it into a specialty debt (*Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 477). As to collateral securities, see title GUARANTEE, Vol. XV., pp. 439, 440.

(*f*) *Tenison* v. *Sweeny* (1844), 1 Jo. & Lat. 710, 717; *Re James, Ex parte Harris* (1874), L. R. 19 Eq. 253; compare *Re Dix, Ex parte Whitbread* (1841), 2 Mont. D. & De G. [illegible]

# Part X.—Priority of Mortgagees.

## SECT. 1.—*As between Mortgagees of Land.*

### SUB-SECT. 1.—*Effect of Possession of Legal Estate.*

SECT. 1. As between Mortgagees of Land.

Position of mortgagee obtaining legal estate.

**582.** A mortgagee of land who advances his money without notice of an earlier equitable incumbrance, and who obtains the legal estate in the land at the time of the advance, is entitled by virtue of his legal estate to priority over the earlier mortgage (*g*). If he is plaintiff his legal title gives him an effective title at law (*h*), and equity, if there is no special reason for postponing him, in this respect follows the law (*i*); and he is entitled to foreclosure and other equitable remedies (*k*). If he is defendant he can set up the plea of purchase for value without notice, and this, combined with his legal estate, renders his position impregnable (*l*); and the like efficacy attaches to his legal estate in whatever manner the question of priority arises (*m*).

Position of mortgagee with the better right to call for legal estate.

The effect is the same if a mortgagee, though he does not get the legal estate at the time of his advance, obtains the better right to call for it; where, for instance, he advances his money to pay off an existing legal mortgage on the understanding that he shall have the legal estate (*n*), or where the legal estate is held in trust for him (*o*). But an equitable mortgagee with an undertaking for a legal mortgage is not, by virtue of such undertaking, entitled to priority over a subsequent mortgagee without notice who actually obtains the legal estate (*p*).

Provided the legal estate is got in at the time of the advance, the mortgagee has priority over all equitable interests then existing of which he has not notice, even though the conveyance to him is made by a trustee in breach of trust (*q*).

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(*g*) *Bates* v. *Jonnson* (1859), John. 304; *Pilcher* v. *Rawlins* (1872), 7 Ch. App. 259, 268; title EQUITY, Vol. XIII., pp. 81, 82. But as to land in Yorkshire, see p. 336, *post*. A mortgagor of leaseholds, who makes a first mortgage by subdemise, and then assigns the term to another mortgagee, conveys a legal interest to the latter which gives him priority over an earlier equitable incumbrance (*Re Russell Road Purchase-Moneys* (1872), L. R. 12 Eq. 78; but this seems to have been doubted in the Court of Appeal, *ibid.*, at p. 86); and see p. 127, *ante*. As to priorities upon surrenders of mortgages, see title COPYHOLDS, Vol. VIII., p. 94.

(*h*) *Hunt* v. *Elmes* (1860), 2 De G. F. & J. 578, 586, C. A.; see *Wallwyn* v. *Lee* (1803), 9 Ves. 24, 33.

(*i*) *Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571, 574.

(*k*) *Finch* v. *Shaw*, *Colyer* v. *Finch* (1854), 19 Beav. 500, 507; affirmed, *Colyer* v. *Finch* (1856), 5 H. L. Cas. 905, 921; *Heath* v. *Crealock* (1874), 10 Ch. App. 22, 31.

(*l*) *Pilcher* v. *Rawlins*, *supra*.

(*m*) See *Rooper* v. *Harrison* (1855), 2 K. & J. 86, 108.

(*n*) *Pease* v. *Jackson* (1868), 3 Ch. App. 576; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866, 875.

(*o*) *Wilkes* v. *Bodington* (1707), 2 Vern. 599; *Pomfret* (*Earl*) v. *Windsor* (*Lord*) (1752), 2 Ves. Sen. 472, 486; title EQUITY, Vol. XIII., p. 81, note (*q*).

(*p*) *Garnham* v. *Skipper* (1885), 55 L. J. (CH.) 263.

(*q*) ***Pilcher* v. *Rawlins*, *supra*.**

SECT. 1. As between Mortgagees of Land.

Valid defence of purchase for value without notice.

**583.** To sustain the defence of purchase for value without notice (*r*), the legal mortgagee must allege that the mortgagor was or pretended to be entitled to the mortgaged property (*s*); if the mortgage was of an immediate estate, that the mortgagor was in possession (*t*); that there was an actual conveyance, not merely an agreement for a conveyance (*a*); the consideration (*b*); and that it was actually paid, and not merely agreed to be paid (*c*); and the defence must deny notice of the plaintiff's charge at the time of payment of the money (*d*).

Legal estate acquired after mortgage.

**584.** If a mortgagee does not get the legal estate at the time of his advance, and has then no notice of an earlier equitable mortgage, he may get it in afterwards, and use it for his protection in the manner above stated (*e*), and it is immaterial that he has had notice of the earlier mortgage in the meantime (*f*). But this rule is subject to the limitation that he cannot protect himself by the legal estate if the conveyance to himself is a breach of trust, and if he has notice of such breach (*g*). Apparently the same limitation applies if the trustee who conveys to him has notice of the breach of trust, although he himself has not (*h*).

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(*r*) As to this plea, which is now confined in practice to the case of a legal mortgagee or other purchaser who relies on his legal estate against an earlier equitable incumbrancer, see, further, title EQUITY, Vol. XIII., pp. 76—79.

(*s*) *Head* v. *Egerton* (1734), 3 P. Wms. 280, 281; *Story* v. *Windsor* (*Lord*) (1743), 2 Atk. 630. Since pretence of title is sufficient, the plea is available for a purchaser from one falsely asserting title, provided he in fact gets the legal estate without notice of the title of the true owner (*Jones* v. *Powles* (1834), 3 My. & K. 581; *Carter* v. *Carter* (1857), 3 K. & J. 617, 638; *Young* v. *Young* (1867), L. R. 3 Eq. 801).

(*t*) *Trevanian* v. *Mosse* (1684), 1 Vern. 246; *Strode* v. *Blackburne* (1796), 3 Ves. 222, 226; *Wallwyn* v. *Lee* (1803), 9 Ves. 24, 32; *Daniels* v. *Davison* (1809), 16 Ves. 249, 252.

(*a*) *Brandlyn* v. *Ord* (1738), 1 Atk. 571. Where the plea is set up by a mortgagee with the legal estate, there must of course have been a conveyance.

(*b*) *Millard's Case* (1678), Freem. (CH.) 43. A mortgagee is a purchaser *pro tanto* (*Willoughby* v. *Willoughby* (1756), 1 Term Rep. 763, 767).

(*c*) *Hardingham* v. *Nicholls* (1746), 3 Atk. 304; see *Maitland* v. *Wilson* (1754), 3 Atk. 814. A past consideration is not enough (*Aldritt* v. *Maconchy* [1906] 1 I. R. 416.

(*d*) See title EQUITY, Vol. XIII., p. 76, note (*q*); and as to the plea, see Mitford on Pleading, 5th ed., p. 319.

(*e*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 36, C. A.; see *Windham* v. *Richardson* (1676), 2 Cas. in Ch. 212.

(*f*) *Blackwood* v. *London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92, 111; title EQUITY, Vol. XIII., p. 82.

(*g*) *Saunders* v. *Dehew* (1692), 2 Vern. 271; *Baillie* v. *M'Kewan* (1865), 35 Beav. 177; *Mumford* v. *Stohwasser* (1874), L. R. 18 Eq. 556, 563; title EQUITY, Vol. XIII., p. 83.

(*h*) So held in *Carter* v. *Carter* (1857), 3 K. & J. 617, 640; *Bates* v. *Johnson* (1859), John. 304, 316; *Mumford* v. *Stohwasser* (1874), L. R. 18 Eq. 556, 563; but referred to as a doubtful point in *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 36, C. A.; and see *Pilcher* v. *Rawlins* (1872), 7 Ch. App. 259, 274. It is opposed to the principle that the legal owner's right is paramount to every equitable charge not affecting his own conscience (*Liverpool Marine Credit Co.* v. *Wilson* (1872), 7 Ch. App. 507, 511). In *Willoughby* v. *Willoughby* (1756), 1 Term Rep. 763, 771, Lord HARDWICKE considered that the trustee would be liable to his *cestui que trust*, but that the

SECT. 1. As between Mortgagees of Land.

Extent of protection to mortgagee acquiring legal estate.

**585.** Provided that the mortgagee gets in the legal estate or obtains the best right to call for it, it affords protection for all his incumbrances, whether created before or after the acquisition of his legal title, as against all other equitable incumbrances in whatever order they have been created (*i*), and whether he is the original mortgagee or is a transferee of any or all of the securities (*k*). This necessarily follows from the principle that, where the equities are equal except as regards time, the legal estate gives priority to the equities to which it is attached. But the priority is only allowed in respect of advances made without notice of earlier incumbrances (*l*), and the mortgagee loses his priority if he parts with the legal estate before the question between himself and the earlier equitable incumbrancers arises (*m*).

Position of transferee of mortgage.

**586.** A transferee of a legal mortgage who takes without notice is not affected by notice to his transferor (*n*); hence a transferee who obtains the legal estate and makes a further advance gains priority over prior equitable incumbrances for the whole of the money paid by him notwithstanding that the legal mortgagee had notice thereof at the time of a further advance by himself (*o*).

Position of trustee-mortgagee.

**587.** A trustee who has the legal estate, and takes a mortgage of the *cestui que trust's* beneficial interest, thereby gains priority

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mortgagee would be protected by his own want of notice, upon which Lord ELDON observed, in *Ex parte Knott* (1806), 11 Ves. 609, 613, that if the purchaser was safe the trustee ought to be so; but this does not seem to follow.

(*i*) See *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd* (1859), 3 De G. & J. 614, 657, C. A.

(*k*) See *Bates* v. *Johnson* (1859), John. 304. Thus a transferee of the legal mortgage can hold the legal estate to protect further advances made at the date of the transfer (*Carlisle Banking Co.* v. *Thompson* (1884), 28 Ch. D. 398; *Hosking* v. *Smith* (1888), 13 App. Cas. 582), or subsequently (*Wyllie* v. *Pollen* (1863), 3 De G. J. & Sm. 596); in either case without notice of a prior equitable charge.

(*l*) *Lloyd* v. *Attwood*, *Attwood* v. *Lloyd*, *supra*. In *Cooke* v. *Willon* (1860), 29 Beav. 100, a question was raised whether a conveyance of the legal estate was subject to the prior legal charge created by a judgment registered under the Judgments Act, 1838 (1 & 2 Vict. c. 110); but ROMILLY, M.R., avoided it by holding that the conveyance related back to an earlier equitable charge by deposit accompanied by an agreement for a legal mortgage. The purchaser of an equity of redemption who gets in a legal mortgage can use the legal estate to gain priority for purchase-money paid by him over an equitable charge of which he had no notice (*Hipkins* v. *Amery* (1860), 2 Giff. 292).

(*m*) *Rooper* v. *Harrison* (1855), 2 K. & J. 86.

(*n*) *Mertins* v. *Jolliffe* (1756), Amb. 311, 313.

(*o*) *Peacock* v. *Burt* (1834), 4 L. J. (CH.) 33. So held in respect of the further advance of £900 made by the legal mortgagee (the original advance being £7,800) after notice of the second mortgage. The person who paid off the first mortgagee, taking a conveyance of the legal estate, and making a further advance of £3,300, without notice, had priority for the full £12,000 over the second mortgagee. This point as to the £900 is not specially noticed in the judgment, but it seems clear that when the transferee pays his money without notice he cannot be affected by notice to the transferor; though it is presumed that, if he buys the mortgage debt at a discount, he cannot then tack it as against a subsequent incumbrancer for more than the amount he pays; compare *Ledbrook* v. *Passman* (1888), 57 L. J. (CH.) 855, 8[illegible] and see title EQUITY, Vol. XIII., p. 83, note (*k*).

SECT. 1. As between Mortgagees of Land.

over the *cestui que trust's* prior incumbrances of which he has no notice (*p*).

Mortgagor's right to prefer subsequent mortgagee.

**588.** If a mortgagor has created a series of equitable incumbrances he cannot afterwards, except on the occasion of a further advance or other new consideration, give a later one priority by conveying to him the legal estate (*q*), especially if the mortgagor has contracted to execute a legal mortgage to the earlier incumbrancer (*r*); but notwithstanding such contract, he can prefer a subsequent mortgagee by conveying to him the legal estate on the occasion of a new advance (*s*).

Effect of possession of title deeds.

**589.** The possession of the title deeds by an equitable incumbrancer is important in considering whether there has been such negligence on the part of the legal mortgagee as to deprive him of the benefit of the legal estate (*t*); but the mere possession of deeds does not entitle the equitable incumbrancer to priority (*u*), and in proceedings by the legal mortgagee he can be required to give them up notwithstanding that he is a *bonâ fide* purchaser for value without notice (*a*).

SUB-SECT. 2.—*Tacking.*

Nature of the doctrine.

**590.** The superiority allowed in equity to the legal estate has given rise to the doctrine of tacking. Where a legal mortgage is followed by second and third mortgages, and the third mortgagee, having advanced his money without notice of the second mortgage, takes a transfer of the first mortgage and gets in the legal estate, he thereby gains priority for his third mortgage, and is entitled to payment of both the first and third mortgages before the second mortgagee is paid (*b*).

(*p*) *Phipps* v. *Lovegrove*, *Prosser* v. *Phipps* (1873), L. R. 16 Eq. 80, 88; *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*q*) *Sharples* v. *Adams* (1863), 32 Beav. 213, 216.

(*r*) *Maxfield* v. *Burton* (1873), L. R. 17 Eq. 15, 19.

(*s*) *Garnham* v. *Skipper* (1885), 55 L. J. (CH.) 263.

(*t*) See p. 342, *post*. As to the custody of title deeds, see pp. 204 *et seq.*, *ante*.

(*u*) *Thorpe* v. *Holdsworth* (1868), L. R. 7 Eq. 139, 146; see *Taylor* v. *Russell*, [1891] 1 Ch. 8, 19, C. A.

(*a*) As to the change in the practice in this respect since the Judicature Acts, see title EQUITY, Vol. XIII., p. 78.

(*b*) *Marsh* v. *Lee* (1670), 2 Vent. 337; *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491; *Matthews* v. *Cartwright* (1742), 2 Atk. 347; *Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571; *Belchier* v. *Renforth* (1764), 5 Bro. Parl. Cas. 292; see *Finch* v. *Shaw*, *Colyer* v. *Finch* (1854), 19 Beav. 500, 508; *Bates* v. *Johnson* (1859), John. 304, 313; *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 216. This privilege is known as the creditor's *tabula in naufragio*, a term attributed to HALE, C.J. (2 P. Wms. 491; 2 Ves. Sen. 573); see title EQUITY, Vol. XIII., p. 83. The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 7, abolished tacking as from the commencement of the Act (7th August, 1874). This section was repealed by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 129, as from the date when it came into operation, except as to anything duly done thereunder before the commencement of the repealing Act (1st January, 1876). Apparently, therefore, a legal estate acquired between these two dates gave no right to tack (*Robinson* v. *Trevor* (1883),

SECT. 1. As between Mortgagees of Land.

Essentials

**591.** The essential points in tacking are: (1) that the advance to be tacked was made on the security of the land (*c*); (2) that the third mortgagee had not notice of the second mortgage when he made his advance (*d*), and has otherwise, save as to time, an equal equity (*e*); (3) that he has got in and still holds (*f*) the legal estate (*g*); and (4) that he holds the legal mortgage and the third mortgage in the same right (*h*). The puisne mortgagee can protect himself by getting in the legal estate *pendente lite*; for example, during an action by the second mortgagee to redeem the first (*i*); but not after a judgment finally settling the priorities (*j*).

Conveyance by satisfied mortgagee ineffectual.

**592.** A puisne mortgagee cannot protect himself by getting in the legal estate from a satisfied mortgagee, since the latter is a trustee

Q. B. D. 423, 432, C. A., partly overruled on another ground; *Hosking* v. *Smith* (1888), 13 App. Cas. 582; p. 332, *post*). As to tacking against a surety, see title GUARANTEE, Vol. XV., p. 514.

(*c*) *Lacey* v. *Ingle* (1847), 2 Ph. 413. Consequently a judgment creditor cannot get in the first mortgage and tack his judgment debt (*Brace* v. *Marlborough* (*Duchess*) (1782), 2 P. Wms. 491; *Ex parte Knott* (1806), 11 Ves. 609, 617; *Beavan* v. *Oxford* (*Earl*) (1856), 6 De G. M. & G. 507, 518); but a first mortgagee, if he becomes also a judgment creditor, is treated as having made a further advance on the security of the land (*Ex parte Knott*, *supra*; *Baker* v. *Harris* (1810), 16 Ves. 397; *Godfrey* v. *Tucker* (1863), 33 Beav. 280). In this respect the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5 (title EXECUTION, Vol. XIV., pp. 70, 72, note (*a*)), seems to have made no difference. And as to tacking by judgment creditors, see *ibid.*, p. 70.

(*d*) *Brace* v. *Marlborough* (*Duchess*), *supra*, at p. 495; *Lacey* v. *Ingle*, *supra*; *Bates* v. *Johnson* (1859), John. 304, 313; including notice by *lis pendens* (*Morret* v. *Paske* (1740), 2 Atk. 52; compare *Tenison* v. *Sweeny* (1844), 1 Jo. & Lat. 710, 716). As to searches for *lis pendens*, see title REAL PROPERTY AND CHATTELS REAL. Notice to one of several joint mortgagees prevents their tacking a further advance, even though that mortgagee has died (*Freeman* v. *Laing*, [1899] 2 Ch. 355).

(*e*) *Lacey* v. *Ingle*, *supra*, at p. 419.

(*f*) See pp. 328, 329, *ante*.

(*g*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 36, C. A. Apart f om the legal estate, the incumbrancers, if the equities are equal save as regards time, must rank in order of time; it is only by reason of the "superior force and strength" allowed in equity to the legal estate that the later incumbrancer gains priority (*Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 571). Hence if after the third mortgagee has got in the first mortgage, it turns out that the legal estate is outstanding, the incumbrancers must be paid according to their priority in point of time (*Brace* v. *Marlbor ugh* (*Duchess*), *supra*, at p. 496; *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 216; *Thorpe* v. *Holdsworth* (1868), L. R. 7 Eq. 139, 146); but, if a subsequent mortgagee gets in the legal estate, he can tack his advance to the first mortgage, notwithstanding that he made the advance to, and took his security from, one who falsely represented himself to be owner (*Young* v. *Young* (1867), L. R. 3 Eq. 801; note (*s*), p. 328, *ante*).

(*h*) *Morret* v. *Paske*, *supra*, at p. 53; *Barnett* v. *Weston* (1806), 12 Ves. 130.

(*i*) *Marsh* v. *Lee* (1670), 2 Vent. 337; *Brace* v. *Marlborough* (*Duchess*), *supra*; *Belchier* v. *Butler*, *Renforth* v. *Ironside* (1760), 1 Eden, 523; *Robinson* v. *Davison* (1779), 1 Bro. C. C. 63; *Rooper* v. *Harrison* (1855), 2 K. & J. 86, 109.

(*j*) *Hawkins* v. *Taylor* (1687), 2 Vern. 29; *Bristol* (*Earl*) v. *Hungerford* (1705), 2 Vern. 524; *Wortley* v. *Birkhead*, *supra*; *Ex parte Knott*, *supra*, at p. 419; *Prosser* v. *Rice* (1859), 28 Beav. 68, 74. As to an order scheduling incumbrances not being final, see *Re Scott's Estate*, *Ex parte Johnston* (1862), 14 I. Ch. R. 57.

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for the equitable incumbrancers according to their priorities (*k*); but he may get it in from an unsatisfied mortgagee (*l*), notwithstanding that both he himself (*m*), and also the first mortgagee (*n*), then have notice of the second mortgage.

Mortgage by way of trust for sale: statutory receipts.

**593.** The doctrine of tacking is available where a mortgage is made by way of trust for sale (*o*); and a statutory receipt by a building or other society (*p*), if it vests the legal estate in a puisne incumbrancer who pays off the society and makes a further advance, operates to the same extent as a conveyance, and enables him to tack his further advance to the mortgage (*q*).

Further advances.

**594.** A legal mortgagee, who makes a further advance without notice of an intermediate incumbrance, is entitled to priority for his further advance by virtue of his legal estate (*r*). And apart from the legal estate, where a mortgage is made to cover a present advance and further advances, the mortgagee is entitled to tack the further advances by force of the contract, and he can do so as against intermediate incumbrances, not protected by the legal estate, of which he had no notice at the time of the further advance; and the same principle applies to a mortgage to secure a current account (*s*).

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(*k*) *Bates* v. *Johnson* (1859), John. 304, 316; *Prosser* v. *Rice* (1859), 28 Beav. 68, 74; *Taylor* v. *Russell*, [1892] A. C. 244, 259; see title EQUITY, Vol. XIII., pp. 83, 84.

(*l*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25, C. A.

(*m*) *Marsh* v. *Lee* (1670), 2 Vent. 337; *Wortley* v. *Birkhead* (1754), 2 Ves. Sen. 574; see *Belchier* v. *Butler*, *Renforth* v. *Ironside* (1760), 1 Eden, 523, 530; *Blackwood* v. *London Chartered Bank of Australia* (1874), L. R. 5 P. C. 92, 111; *Taylor* v. *Russell*, [1891] 1 Ch. 8, 27, C. A.; affirmed, [1892] A. C. 244, 259; *Taylor* v. *London and County Banking Co.*, *London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231, C. A.; see title EQUITY, Vol. XIII., p. 83.

(*n*) See *Peacock* v. *Burt* (1834), 4 L. J. (CH.) 33; title EQUITY, Vol. XIII., p. 83, note (*k*). But this gives the first mortgagee power to prefer the third (*Rooper* v. *Harrison* (1855), 2 K. & J. 86, 109; and see p. 330, *ante*); and it must not be assumed that if both second and third mortgagees were offering to redeem, the legal mortgagee could, by transferring the legal estate to the third, give him priority; see *West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954, 963, C. A.

(*o*) Thus where there is a legal mortgage to A., a second mortgage to B., and an assignment to C. (without notice of B.'s mortgage) on trust to sell and pay A. and debts due to D. and C., and the residue to the owner, C., on getting in A.'s mortgage and the legal estate, can tack his debt to the first mortgage and exclude B. (*Spencer* v. *Pearson*, *Pearson* v. *Spencer* (1857), 24 Beav. 266; see *Wilmot* v. *Pike* (1845), 5 Hare, 14, 21); but a trustee to sell and pay first, second, and third mortgage debts and to pay the surplus to the mortgagor, where no debt is then due to him, is in the position of the mortgagor, and if he pays off the first mortgagee (with the legal estate) and third mortgagee (who had no notice of the second mortgage), and takes transfers of their securities, he cannot tack against the second mortgagee, any more than the mortgagor himself could have done (*Ledbrook* v. *Passman* (1888), 57 L. J. (CH.) 855).

(*p*) See title BUILDING SOCIETIES, Vol. III., p. 371.

(*q*) *Hosking* v. *Smith* (1888), 13 App. Cas. 582, 588, overruling on this point *Robinson* v. *Trevor* (1883), 12 Q. B. D. 423, C. A.

(*r*) *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491; *Morret* v. *Paske* (1740), 2 Atk. 52, 53; *Shepherd* v. *Titley* (1742), 2 Atk. 348; *Tenison* v. *Sweeny* (1844), 1 Jo. & Lat. 710, 715; *Wyllie* v. *Pollen* (1863), 11 W. R. 1081; and compare *Peacock* v. *Burt*, *supra*.

(*s*) *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; *Calisher* v. *Forbes* (1871),

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But notice of a subsequent incumbrance prevents any further advances from gaining priority (*t*), even though made in pursuance of a covenant in the original mortgage (*a*), and, where the amount of the further advances is limited by the mortgage, advances beyond the limit cannot be referred to the mortgage, and can only be tacked by virtue of the legal estate (*b*).

Effect of death of mortgagor as regards tacking debts

**595.** Debts which have not been incurred on the security of the land cannot be tacked either against the mortgagor (*c*) or persons claiming under him *inter vivos* (*d*); but after his death they can be tacked against persons on whom the equity of redemption has devolved, so far as the land is in their hands assets for payment of the unsecured debt (*e*). Thus, since both specialty and simple contract debts are payable out of land (*f*), they can be tacked as against the heir or devisee (*g*); and a mortgagee of leaseholds can tack a specialty or simple contract debt as against the executor (*h*); and now that real estate devolves upon the personal representatives (*i*), the right to tack is available against them as regards both real and personal estate. But this tacking is allowed only for the purpose of avoiding circuity of action (*k*). and it cannot be made use of so as to gain priority over other creditors (*l*).

7 Ch. App. 109; *Re O'Byrne's Estate* (1885), 15 L. R. Ir. 189, 373, C. A.; see *Re Weniger's Policy*, [1910] 2 Ch. 291, 295.

(*t*) *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; *London and County Banking Co.* v. *Ratcliffe* (1881), 6 App. Cas. 722; *Bradford Bankin Co.* v. *Briggs* (1886), 12 App. Cas. 29; *Union Bank of Scotland* v. *National Bank of Scotland* (1886), 12 App. Cas. 53. At first it was held that the second mortgagee would be postponed to the further advances, if he had notice of the nature of the first mortgage (*Gordon* v. *Graham* (1716), 2 Eq. Cas. Abr. 598); but this was doubted (*Blunden* v. *Desart* (1842), 2 Dr. & War. 405, 431; *Shaw* v. *Neale* (1855), 20 Beav. 157; (1858), 6 H. L. Cas. 581, 608), and finally overruled by *Hopkinson* v. *Rolt*, *supra*. As to exclusion of the rule by a trade custom, see *Daun* v. *City of London Brewery Co.* (1869), L. R. 8 Eq. 155; *Menzies* v. *Lightfoot* (1871), L. R. 11 Eq. 459; and title CUSTOM AND USAGES, Vol. X., p. 275. As to constructive notice, see title EQUITY, Vol. XIII., pp. 84 *et seq.*

(*a*) *West* v. *Williams*, [1899] 1 Ch. 132, C. A.

(*b*) See *Hopkinson* v. *Rolt*, *supra*.

(*c*) *Anon.* (1755), 2 Ves. Sen. 662; *Jones* v. *Smith* (1794), 2 Ves. 372, 376; *Du Vigier* v. *Lee* (1843), 2 Hare, 326, 339.

(*d*) *Coleman* v. *Winch* (1721), 1 P. Wms. 775; *Troughton* v. *Troughton* (1748), 1 Ves. Sen. 86; *Adams* v. *Claxton* (1801), 6 Ves. 226; *Richardson* v. *Horton* (1843), 7 Beav. 112, 123.

(*e*) Hence, when land was only assets for specialty debts by which the heir was bound, such debts could be tacked against the heir or devisee (*Coleman* v. *Winch*, *supra*; *Troughton* v. *Troughton*, *supra*; *Elvy* v. *Norwood* (1852), 5 De G. & Sm. 240; and see note to *Price* v. *Fastnedge* (1770), Amb. 685).

(*f*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246.

(*g*) *Rolfe* v. *Chester* (1855), 20 Beav. 610; *Thomas* v. *Thomas* (1856), 22 Beav. 341.

(*h*) *Coleman* v. *Winch*, *supra*.

(*i*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1.

(*k*) *Anon.* (1755), 2 Ves. Sen. 662; *Troughton* v. *Troughton*, *supra*; *Jones* v. *Smith*, *supra*; see title EQUITY, Vol. XIII., p. 71, note (*m*).

(*l*) *Pile* v. *Pile* (1875), 23 W. R. 440; see *Heams* v. *Bance* (1748), 3 Atk. 630; *Adams* v. *Claxton*, *supra*; *Rolfe* v. *Chester*, *supra*; *Irby* v. *Irby* (1855), 22 Beav. 217.

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SUB-SECT. 3.—*As between Equitable Mortgagees.*

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Order in time the determining factor.

**596.** When the legal estate is outstanding the priority of incumbrancers depends in the first instance upon their order in point of time (*m*). This is in accordance with the maxim *qui prior est tempore, potior est jure* (*n*), and follows from the principle that the mortgagor can only confer on the later incumbrancer such title as is left in him; that is, he conveys subject to the earlier incumbrance (*o*). Against such earlier incumbrance the later incumbrancer cannot rely on the plea of purchase for value without notice (*p*), and he can only gain priority on the ground of some act or neglect of the earlier incumbrancer of such a nature as to render it inequitable for him to retain his initial advantage (*q*). Similarly where land is mortgaged in breach of trust by a trustee or other person in a fiduciary position to a mortgagee who does not obtain the legal estate, the mortgagee is postponed to the claims of the beneficiaries (*r*).

SUB-SECT. 4.—*Effect of Registration of Deeds.*

Registration in Middlesex.

**597.** Under the Middlesex Registry Act, 1708 (*s*), memorials of all

(*m*) As to the order of deeds executed at the same time, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 439; *Hopgood* v. *Ernest* (1865), 3 De G. J. & Sm. 116. As to statutory charges ranking in order of time, see *Pollock* v. *Lands Improvement Co.* (1888), 37 Ch. D. 661. In a contributory mortgage to trustees and their solicitors, taken in the names of the solicitors, a guarantee by the solicitors of the trustees' portion does not postpone the solicitors as mortgagees (*Stokes* v. *Prance*, [1898] 1 Ch. 212).

(*n*) *Brace* v. *Marlborough* (*Duchess*) (1728), 2 P. Wms. 491, 496; *Willoughby* v. *Willoughby* (1756), 1 Term Rep. 763, 773; see *Mackreth* v. *Symmons* (1808), 15 Ves. 329, 354; *Rooper* v. *Harrison* (1855), 2 K. & J. 86, 109; *Cory* v. *Eyre* (1863), 1 De G. J. & Sm. 149, 167, C. A.

(*o*) *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208, 215; *West* v. *Williams*, [1899] 1 Ch. 132, 143, C. A.; see title EQUITY, Vol. XIII., p. 79. A mortgagee, whether legal (*Wilson* v. *Kelland*, [1910] 2 Ch. 306) or equitable (*Re Connolly Brothers, Ltd., Wood* v. *The Co.*, (1912), 56 Sol. Jo. p. 360), who provides the money for the purchase of property will have priority over debenture-holders; and see title EQUITY, Vol. XIII., p. 88, note (*k*).

(*p*) *Phillips* v. *Phillips*, *supra*.

(*q*) *Thorpe* v. *Holdsworth* (1868), L. R. 7 Eq. 139, 146; *Taylor* v. *London and County Banking Co.*, *London and County Banking Co.* v. *Nixon*, [1901] 2 Ch. 231, 260, C. A. He cannot gain priority by giving notice to the legal mortgagee, the rule as to priority by notice not applying to land (see title EQUITY, Vol. XIII., p. 80), and when a debt is secured on land such rule does not apply to the debt, so that an equitable incumbrancer does not gain priority by giving notice to the mortgagor (*Re Richards, Humber* v. *Richards* (1890), 45 Ch. D. 589); and similarly as to an equitable sub-mortgagee (*Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347).

(*r*) *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Harpham* v. *Shacklock* (1881), 19 Ch. D. 207, C. A. As to priorities in respect of a renewed lease, see *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93, C. A.; and in respect of a reversion purchased instead of renewal, see *Leigh* v. *Burnett* (1885), 29 Ch. D. 231. As to beneficiaries being bound by the acts of their trustees, see *Re Ffrench's Estate* (1887), 21 L. R. Ir. 283, C. A.; *Re Sloane's Estate*, [1895] 1 I. R. 146; *Re Bobbett's Estate*, [1904] 1 I. R. 461; note (*m*), p. 345, *post*; title TRUSTS AND TRUSTEES.

(*s*) 7 Anne, c. 20; see Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64); Land Registry (Middlesex Deeds) Rules, 1892 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, p. 128); and, as to registration of instruments and as to the instruments which require registration, see title REAL PROPERTY AND CHATTELS REAL; and p. 86, *ante*.

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deeds and conveyances may be registered (*t*), and every deed is to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless it is registered before the registration of the conveyance to the subsequent purchaser or mortgagee (*u*). *Primâ facie* therefore registered mortgages affecting land in Middlesex rank according to date of registration (*a*), and registered prevail over unregistered mortgages (*b*). But registration is not allowed to avoid the effect of notice, and a registered mortgage is postponed to an earlier unregistered mortgage of which the registered mortgagee had actual notice at the time he made his advance (*c*).

Statutory effect on operation of legal estate.

Moreover, such registration is not notice to subsequent mortgagees (*d*), and the statute does not abolish the effect of the legal estate. Hence a later unregistered legal mortgagee has priority over an earlier registered equitable mortgagee (*d*), provided he took without notice (*d*); and a legal registered mortgagee can tack a further advance made without notice, but after the registra-

(*t*) As to whether charges arising in favour of sureties by payment require registration, see title GUARANTEE, Vol. XV., pp. 513, 522.

(*u*) Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 1.

(*a*) Where registration of two deeds is effected on the same day and at the same hour, that which bears the earlier number is presumed to have been registered first (*Neve* v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170). A mortgage subsequent in date, given priority by registration, has priority for all purposes, including the right of consolidation (*ibid.*). As to consolidation, see pp. 208 *et seq.*, *ante*.

(*b*) *Re Wight's Mortgage Trust* (1873), L. R. 16 Eq. 41.

(*c*) *Le Neve* v. *Le Neve* (1747), Amb. 436. As to notice of a judgment, see *Tunstall* v. *Trappes* (1830), 3 Sim. 286, 301; *Benham* v. *Keane* (1861), 1 John. & H. 685; affirmed, 3 De G. F. & J. 318, C. A. At law the first registered conveyance has priority (*Doe* d. *Robinson* v. *Allsop* (1821), 5 B. & Ald. 142); but in equity a subsequent mortgagee registering in order to obtain priority over a charge of which he has notice commits a fraud, and, in accordance with the principle that equity will not allow a statute to be made an instrument of fraud (see title EQUITY, Vol. XIII., p. 75), his registration is not allowed to be effectual (*Cheval* v. *Nichols* (1725), 1 Stra. 664; *Blades* v. *Blades* (1727), 1 Eq. Cas. Abr. 358, pl. 12). This has been criticised as an infringement of the statute, but has been acquiesced in (*Wyatt* v. *Barwell* (1815), 19 Ves. 435; *Agra Bank, Ltd.* v. *Barry* (1874), L. R. 7 H. L. 135). The notice to the registered mortgagee must, however, be actual, and not merely constructive notice (*Agra Bank, Ltd.* v. *Barry*, *supra*, overruling *Wormald* v. *Maitland* (1865), 35 L. J. (CH.) 69), "notice so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another"; see *Jolland* v. *Stainbridge* (1797), 3 Ves. 478; *Wyatt* v. *Barwell*, *supra*; *Chadwick* v. *Turner* (1866), 1 Ch. App. 310, 319; compare *Benham* v. *Keane* (1861), 3 De G. F. & J. 318, C. A. Suspicion of notice is not enough (*Hine* v. *Dodd* (1742), 2 Atk. 275); nor is *lis pendens* notice for this purpose (*Wyatt* v. *Barwell*, *supra*; *Wallace* v. *Donegal* (*Marquis*) (1837), 1 Dr. & Wal. 461); though actual notice to an agent is actual notice to the principal (*Sheldon* v. *Cox* (1764), Amb. 624; *Rolland* v. *Hart* (1871), 6 Ch. App. 678; *Agra Bank, Ltd.* v. *Barry*, *supra*). But a mortgagee who takes without notice of a prior mortgage, either unregistered or defectively registered (*Essex* v. *Baugh* (1842), 1 Y. & C. Ch. Cas. 620), can, on receiving notice, gain priority by registering; see *Elsey* v. *Lutyens* (1850), 8 Hare, 159.

(*d*) *Morecock* v. *Dickins* (1768), Amb. 678; *Williams* v. *Sorrell* (1799), 4 Ves. 389; *Bushell* v. *Bushell* (1803), 1 Sch. & Lef. 90, 97; *Underwood* v. *Courtown* (*Lord*) (1804), 2 Sch. & Lef. 41, 64; *Re Russell Road Purchase-Moneys* (1871), L. R. 12 Eq. 78, 83.

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tion, of a second mortgage (*e*). If the second mortgagee wishes to prevent this he can do so by giving notice. But unless the legal mortgagee registers a charge for his further advance he cannot assert it against a later registered mortgagee; as against such later mortgagee the charge for the further advance is void under the statute (*f*). Similarly, while an equitable unregistered mortgagee cannot, by getting in the legal estate, gain priority over a subsequent equitable registered mortgage, yet, if his equitable mortgage is subsequent to the registered mortgage, and he advances his money without notice, he can get in the legal estate and thereby obtain priority over the registered mortgage (*g*).

**Mortgage to secure further advances.**

Where a registered mortgage is given to secure present and future advances, its validity for the further advances over subsequent incumbrances does not depend on the possession of the legal estate, and it secures such advances as against subsequent registered incumbrances not protected by the legal estate, so long as the advances are made without notice, and do not exceed any limit specified in the mortgage. But advances beyond the limit require a fresh charge (*h*).

**Registration in Yorkshire. Priorities.**

**598.** Under the Yorkshire Registries Act, 1884 (*i*), assurances entitled to be registered have priority according to the date of registration, and not according to the date of the assurances or of the execution thereof; but this does not interfere with the priorities as between themselves of any assurances the dates of registration of which may be identical (*k*). All priorities given by the statute must have full effect in all courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests are entitled to corresponding priorities; and no priority is lost merely by actual or constructive notice, except in cases of actual fraud (*k*). Moreover, tacking is expressly abolished as regards all lands in the three ridings, except as regards any estate or interest

**Tacking.**

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(*e*) *Bedford* v. *Backhouse* (1730), 2 Eq. Cas. Abr. 615; *Wrightson* v. *Hudson* (1738), 2 Eq. Cas. App. 609.

(*f* *Credland* v. *Potter* (1874), 10 Ch. App. 8.

(*g*) See *Credland* v. *Potter*, *supra*. The corresponding Irish statute, (1707) 6 Anne, c. 2, s. 4, contains the further provision that registered deeds are to be "good and effectual, both in law and equity, according to the priority of time of registering," and these words make a registered equitable mortgage prevail over a legal mortgage. Hence in Ireland an unregistered legal mortgage does not prevail against an ea lier registered equitable mortgage, and the doctrine of tacking is excluded (*Bushell* v. *Bushell* (1803), 1 Sch. & Lef. 90, 98; *Latouche* v. *Dunsany* (*Lord*) (1803), 1 Sch. & Lef. 137, 157, 160; *Drew* v. *Norbury* (*Earl*) (1846), 3 Jo. & Lat. 267, 298; *Mill* v. *Hill* (1852), 3 H. L. Cas. 828); but the Irish statute does not, any more than the Middlesex Registry Act, 1708 (7 Anne, c. 20), make a registered mortgage prevail over an earlier unregistered mortgage of which the registered mortgagee had notice at the time of his advance (*Agra Bank, Ltd.* v. *Barry* (1874), L. R. 7 H. L. 135).

(*h*) Compare *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; see pp. 332, 333, *ante*; and *Re O'Byrne's Estate* (1885), 15 L. R. Ir. 373, C. A.

(*i*) 47 & 48 Vict. c. 54; see further, p. 87, *ante*.

(*k*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14. This provision gives to a volunteer no further priority or protection than his grantor was entitled to, and a disposition or charge which would be fraudulent and void if unregistered is fraudulent and void notwithstanding registration (*ibid.*). As to registration not being notice, see note (*t*), p. 337, *post*.

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which existed before the 1st January, 1885 (*l*). Hence, all mortgages and charges on lands in Yorkshire rank according to priority of registration, and the legal estate does not give to a subsequent registered incumbrance priority over an incumbrance previously registered (*m*).

Unregistered instruments

Unregistered instruments are not expressly made fraudulent and void against registered instruments, and in terms the statute (*n*) prescribes only the order of priority between registered instruments (*o*); but in effect it gives such instruments priority over all instruments entitled to be, but in fact not, registered (*p*). As between themselves unregistered charges rank solely as equitable incumbrances, since the legal estate does not give priority (*q*).

Further advances.

A mortgage for future advances registered under the Yorkshire Registries Act, 1884 (*r*), is a good security for the further advances—but if any limit is specified, only up to that limit—against a second mortgage, whether registered or not, of which the mortgagee has no notice at the time of the further advance (*s*). Mere registration of the second mortgage is not notice (*t*). But where the limit is exceeded, and also where a first registered mortgagee makes a further advance when his mortgage does not cover such advance, he cannot include the further advance against a subsequent registered mortgage unless he has taken and registered a fresh charge for it before the registration of the subsequent mortgage (*u*).

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(*l*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 16; see *Manks* v. *Whiteley*, [1911] 2 Ch. 448; [1912] W. N. 83, C. A.

(*m*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 16, which expressly excludes the protection of the legal estate, and so produces the same result as the Irish statute (1707) 6 Anne, c. 2 (see note (*g*), p. 336, *ante*).

(*n*) See note (*k*), p. 336, *ante*.

(*o*) It is framed in this respect differently both from the Middlesex and Irish Acts; compare *Re Burke's Estate* (1881), 9 L. R. Ir. 24, C. A., on the Irish statute (1707) 6 Anne, c. 2 (where, however, the decision was that a security by deposit of title deeds without writing did not require registration); *contra*, where the deposit is in pursuance of a written undertaking (*Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309).

(*p*) See article in 52 Sol. Jo. 168, where colonial decisions on corresponding statutes, which support the statement in the text, are discussed; and compare *Black* v. *Williams*, [1895] 1 Ch. 408, on shipping mortgages. A conveyance which in fact only comprises the interest of the grantor subject to unregistered charges does not give priority (*Jones* v. *Barker*, [1909] 1 Ch. 321).

(*q*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 16, which is not confined to registered instruments, but applies generally to lands in Yorkshire.

(*r*) 47 & 48 Vict. c. 54.

(*s*) *Re O'Byrne's Estate* (1885), 15 L. R. Ir. 373, C. A., which appears to apply to the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); and see p. 332, *ante*.

(*t*) Registration was not equivalent to notice prior to the passing of the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); see *Wiseman* v. *Westland* (1826), 1 Y. & J. 117, 120. The Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 15, made registration actual notice, but this is repealed (Yorkshire Registries Amendment Act, 1885 (48 & 49 Vict. c. 26), s. 5); and see *Manks* v. *Whiteley*, [1911] 2 Ch. 448; on appeal, [1912] W. N. 83, C. A.

(*u*) The Yorkshire Registries Acts, 1884 (47 & 48 Vict. c. 54), and 1885 (48 & 49 Vict. c. 26), overrule *Credland* v. *Potter* (1874), 10 Ch. App. 8 (see p. 336, *ante*), for Yorkshire, as to advances made subsequently to the

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Bank mortgages.

Thus in practice a banker who has taken and registered in Yorkshire a mortgage to secure a current account up to a certain limit can honour the customer's cheques up to that limit without searching the register again until he has actual notice of a further registered mortgage. When the limit is reached he must not increase the overdraft without searching the register and taking a fresh charge. In Middlesex he must also obtain the legal estate, unless he relies on the deposit of the deeds.

SUB-SECT. 5.—*Where Title to Land is Registered.*

Registered charges rank in order of registration.

**599.** Where the title to land is registered under the Land Transfer Acts, 1875 and 1897 (*x*), registered charges on the land rank as between themselves according to the order in which they are entered on the register, and not according to the order in which they are created (*a*). Incumbrances which are not registered rank behind registered charges, but as between themselves their priority is determined in the same manner as if the land was not on the register (*b*).

Effect of registration on of

The legal estate in the land is not necessarily in the registered proprietor (*c*), and as between unregistered charges it may be used for the purpose of gaining priority or of tacking (*d*). But the possession of the legal estate is immaterial as between registered charges; thus a later registered incumbrancer cannot by getting in the legal estate acquire priority over an earlier registered incumbrancer, nor can a registered incumbrancer with the legal estate tack a subsequent charge as against an intermediate registered incumbrancer (*e*). But where a registered charge is given to secure present and future advances, or a current account, it is effective to secure the future advances or the account until the incumbrancer has notice of a subsequent registered charge (*f*); and, for this

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second registered mortgage which are not covered by the first mortgage: whether made before or after the second mortgage, they require to be covered by a new registered charge, and, to be available against the second mortgage, the new charge must be prior in registration.

(*x*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; and see, further, pp. 84–86, *ante*. As to registration of title generally, see title REAL PROPERTY AND CHATTELS REAL.

(*a*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 28. Instruments delivered at the Land Registry (Lincoln's Inn Fields, London) rank in order of delivery (Land Transfer Rules, 1903, r. 111). As to two or more instruments delivered by the same person, see *ibid.*, r. 112. As to instruments delivered by post or under cover, see *ibid.*, r. 113. As to priority notice in respect of an intended transaction, see *ibid.*, r. 117.

(*b*) See Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 49, under which, subject to the maintenance of the estate and right of the registered proprietor, interests can be created off the register. Since registered charges are created in virtue of the registered title, these appear to have an absolute priority over unregistered charges; but an unregistered incumbrancer can protect himself by a notice or caution entered on the register (*ibid.*).

(*c*) *Capital and Counties Bank, Ltd.* v. *Rhodes*, [1903] 1 Ch. 631, C. A.; see p. 85, *ante*.

(*d*) Unregistered charges take effect as between themselves in the same manner as if the land was not registered. See Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 49, and pp. 327, 330, *ante*.

(*e*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 28.

(*f*) Charges to secure further advances are provided for by Land Transfer Rules, 1903, r. 160; and they appear to be subject to the principle of *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514; see pp. 332, 333, *ante*.

purpose, the mere registration of the subsequent charge is, apparently, not notice (*g*).

## SECT. 2.—*As between Mortgagees of Personalty.*

### SUB-SECT. 1.—*Notice.*

Choses in action.

**600**. Where the mortgaged property is a debt or other money owing (*h*), or an interest in trust funds (*i*), a mortgagee who gives notice to the debtor or trustee gains priority over a mortgagee earlier in date who omits to give notice (*k*). The omission leaves the property under the control of the mortgagor, and deprives the second mortgagee of the chance of ascertaining the existence of the first mortgage by inquiry of the debtor or trustee. The priority of the second mortgagee does not depend on whether in fact he made inquiry; in such a case it depends solely on notice (*l*); but a solicitor's lien on a policy does not lose priority by the solicitor's omission to give notice (*m*). Where the notices are contemporaneous the incumbrances rank in order of time (*n*).

Insurance policies.

**601**. Insurance policies are, in respect of notice, subject to the same rule as other choses in action, and notice to the office by a

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(*g*) Compare pp. 335, 337, *ante*, as to registration of deeds.

(*h*) It is sufficient if notice is given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment (*Addison* v. *Cox* (1872), 8 Ch. App. 76, 79); but he must at the time he receives the notice be bound by some contract or obligation to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied. The doctrine of acquiring priority by notice does not apply to land (see title EQUITY, Vol. XIII., p. 80), nor to personalty which by statute is real estate (*Re Carew's Estate* (1868), 16 W. R. 1077); but it applies to proceeds of sale of real estate or to any interest in land which can only reach the hands of the assignor in the form of money (*Re Hughes' Trusts* (1864), 2 Hem. & M. 89, 92; *Re Roche's Estate* (1890), 25 L. R. Ir. 284, 292, C. A.; *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865; see title CHOSES IN ACTION, Vol. IV., p. 386). As to mortgages of choses in action, see pp. 130 *et seq.*, *ante*.

(*i*) *Dearle* v. *Hall* (1828), 3 Russ. 1, 11, 12, 23.

(*k*) As to the position of a trustee in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 189, note (*s*).

(*l*) *Ward* v. *Duncombe*, [1893] A. C. 369; see title CHOSES IN ACTION, Vol. IV., pp. 379 *et seq.*, where the question of priority by notice, and the nature of the notice required, are fully discussed. As to notice where there are several trustees, see *ibid.*, p. 383. A notice given to all the trustees is a sufficient protection, notwithstanding that new trustees are subsequently appointed (*Re Wasdale, Brittin* v. *Partridge*, [1899] 1 Ch. 163); a notice given to one only is not a sufficient protection (*Timson* v. *Ramsbottom* (1837), 2 Keen, 35, 50); see *Ward* v. *Duncombe*, *supra*). Notice given to an executor who afterwards renounces (*Re Dallas*, [1904] 2 Ch. 385, C. A.), or to an administrator before he obtains administration (*Re Kinahan's Trusts*, [1907] 1 I. R. 321), is ineffectual. Where the mortgagor claims under a derivative settlement, the notice must be to the trustees of that settlement (title CHOSES IN ACTION, Vol. IV., p. 382; *Stephens* v. *Green*, *Green* v. *Knight* [1905] 2 Ch. 148, C. A.). As to assignments executed abroad, see title CHOSES IN ACTION, Vol. IV., p. 366.

(*m*) *West of England Bank* v. *Batchelor* (1882), 51 L. J. (CH.) 199; but this was partly on the ground that, since the solicitor held the policy, there was notice to all the world of an outstanding interest in it; see pp. 342, 344, *post*.

(*n*) *Boss* v. *Hopkinson* (1870), 18 W. R. 725; *Calisher* v. *Forbes* (1871), 7 Ch. App. 109.

SECT. 2.

**As between Mortgagees of Personalty.**

later incumbrancer will, in the absence of other circumstances, give him priority over an earlier incumbrancer (*o*).

Companies are not bound to receive notice of assignments of shares, and the priorities of incumbrancers on shares are therefore not regulated by notice (*p*).

**Shares in companies.**

SUB-SECT. 2.—*Registration.*

Registration determines priority.

**602.** Where securities on personal property require to be registered, their priority is determined by the order of the dates of registration. This is so as regards bills of sale (*q*), mortgages of ships and shares of ships (*r*), and patents (*s*).

SUB-SECT. 3.—*Stop Orders on Funds in Court.*

Stop order as notice.

**603.** Where the subject of the security is a fund in court, the obtaining of a stop order gives the same priority as notice to the trustees with regard to funds in their hands (*a*), and notice to the trustees is ineffectual (*b*); but notice to the trustees before the payment of the fund into court continues to be effectual notwithstanding a stop order obtained by another incumbrancer (*c*); though the trustee himself will not, without obtaining a stop order,

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(*o*) *Re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151; *Re Weniger's Policy*, [1910] 2 Ch. 291. This result is assisted by the statutory effect of notice under the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3; see, further, p. 131, *ante*; and see title INSURANCE, Vol. XVII., pp. 559 *et seq.*

(*p*) See *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20, *per* Lord SELBORNE, at p. 30. This applies to companies constituted under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see title COMPANIES, Vol. V., p. 197. But where a company has a lien on shares to secure a debt due from a shareholder, it is affected by notice of a subsequent incumbrance so as, on the principle of *Hopkinson* v. *Rolt* (1861), 9 H. L. Cas. 514, to prevent it from tacking further indebtedness (*Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29).

(*q*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10; see title BILLS OF SALE, Vol. III., p. 71.

(*r*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 33. The priority in order of registration prevails notwithstanding any express, implied or constructive notice, and notice is equally ineffectual to preserve the priority of unregistered mortgages (*Black* v. *Williams*, [1895] 1 Ch. 408; *Barclay & Co.* v. *Poole*, [1907] 2 Ch. 284); and see p. 133, *ante*, and title SHIPPING AND NAVIGATION.

(*s*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 71; and see, generally, title PATENTS AND INVENTIONS.

(*a*) *Greening* v. *Beckford* (1832), 5 Sim. 195; see *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26, C. A.; title CHOSES IN ACTION, Vol. IV., p. 384, and cases there cited. As to a stop order on a fund carried to a separate account, see *ibid.* The stop order, though in terms affecting the whole fund, will be confined to the part in respect of which it is obtained (*Macleod* v. *Buchanan* (1864), 4 De G. J. & Sm. 265, C. A.); but it should be drawn up so as to show its actual effect (*ibid.*; see 1 Seton, Judgments and Orders, 6th ed., p. 491).

(*b*) *Pinnock* v. *Bailey* (1883), 23 Ch. D. 497.

(*c*) *Livesey* v. *Harding* (1856), 23 Beav. 141; *Re Anglesey* (*Marquis*), *De Galve* (*Countess*) v. *Gardner*, [1903] 2 Ch. 727, 732; title CHOSES IN ACTION, Vol. IV., p. 384. A stop order will not be granted on funds of a lunatic in favour of an assignee of the presumptive next of kin (*Re Wilkinson, a Lunatic* (1874), 10 Ch. App. 73, overruling *Re Pigott, a Lunatic* (1851), 3 Mac. & G. 268).

have priority for a charge in his own favour against an incumbrancer who obtains a stop order (*d*).

SECT. 2. AS BETWEEN MORTGAGEES OF PERSONALTY.

SUB-SECT. 4.—*Notice in lieu of Distringas.*

Effect of protection.

**604.** An incumbrancer with an equitable interest in shares can protect himself by serving on the company a *distringas* notice (*e*). This does not give him any priority in respect of his incumbrance (*f*), but it prevents the registration of a transfer of the shares without notice to the incumbrancer and until he has had time to obtain an order restraining the transfer.

SECT. 3.—*Failure to Gain, or Loss of, Priority.*

SUB-SECT. 1.—*By Notice of Prior Rights.*

Failure to gain priority if notice received.

**605.** An incumbrancer later in point of time who would, by reason of his possession of the legal estate, or (in Middlesex) by registration of his mortgage, or by notice to a debtor or to trustees or to an insurance office, or by obtaining a stop order, or by registration in the register of patents, be *primâ facie* entitled to priority over an earlier incumbrancer, will fail to gain this priority if he has notice of the earlier incumbrance at the time when he advances his money (*g*). Such notice may be either actual or constructive.

Actual notice.

**606.** Actual notice is equally effectual whether it is received by the incumbrancer himself or by a solicitor or other agent (*h*) employed by him in the matter of the mortgage (*i*).

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(*d*) *Swayne* v. *Swayne* (1848), 11 Beav. 463.

(*e*) R. S. C., Ord. 46, rr. 3, 4; see title COMPANIES, Vol. V., pp. 151, 198.

(*f*) Unless there is no trustee to whom notice can be given, in which case a *distringas* notice will give priority (*Etty* v. *Bridges* (1843), 2 Y. & C. Ch. Cas. 486); see title CHOSES IN ACTION, Vol. IV., p. 384.

(*g*) For notice avoiding priority in particular cases, see (as to mortgagees getting in the legal estate) pp. 327, 328, *ante;* as to registration in Middlesex, pp. 86, 334, *ante;* as to a debtor, *Ward* v. *Royal Exchange Shipping Co., Ex parte Harrison* (1887), 58 L. T. 174, 178; *Re Ind, Coope & Co., Ltd., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co.*, [1911] 2 Ch. 223); as to notice to trustees, *Ward* v. *Duncombe*, [1893] A. C. 369, *per* Lord MACNAGHTEN, at p. 392; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26, 38, C. A.; as to an insurance policy, *Newman* v. *Newman* (1885), 28 Ch. D. 674; *Re Weniger's Policy*, [1910] 2 Ch. 291; as to the register of patents, *New Ixion Tyre and Cycle Co.* v. *Spilsbury*, [1898] 2 Ch. 484, C. A. As to cases where the register prevails over notice, see p. 336, *ante* (lands in Yorkshire), pp. 86, 338, *ante* (registered title to land), and pp. 133, 340, *ante* (ships). As to priorities between trustees for debenture-holders with a floating charge and specific assignees of a chose in action, see *Re Ind, Coope & Co., Ltd., Fisher* v. *The Co., Knox* v. *The Co., Arnold* v. *The Co., supra.*

(*h*) As to notice to a solicitor or agent being imputed to the principal, see title EQUITY, Vol. XIII., pp. 84, 85; *Bouts* v. *Stenning* (1892), 8 T. L. R. 600; *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685, 707; compare *Sharpe* v. *Foy* (1868), 4 Ch. App. 35; *Sankey* v. *Alexander* (1874), 9 I. R. Eq. 259, 269, n., 300, C. A. The notice is imputed to the mortgagee notwithstanding that it was to the solicitor's interest not to communicate it (*Bradley* v. *Riches* (1878), 9 Ch. D. 189). Notice to a director is not necessarily notice to the company (*Bank of Ireland* v. *Cogry Spinning Co.*, [1900] 1 I. R. 219, 248; *Re Payne* (*David*) *& Co., Ltd., Young* v. *Payne* (*David*) *& Co., Ltd.*, [1904] 2 Ch. 608, C. A.).

(*i*) See title EQUITY, Vol. XIII., pp. 84, 85; *Brotherton* v. *Hatt* (1707), 2 Vern. 574; *Marjoribanks* v. *Hovenden* (1843 Drury *temp.* Sug. 11, 18. Where

SECT. 3. Failure to Gain, or Loss of, Priority.

Constructive notice.

**607.** A mortgagee has constructive notice of an earlier incumbrance if it would have come to his knowledge, or to the knowledge of his solicitor or other agent, if proper inquiries and inspections of deeds had been made (*k*). Thus the mortgagee is affected with notice if he omits to make usual and proper inquiries as to the mortgagor's title (*l*), and if such inquiries would have disclosed the earlier incumbrance (*m*); *a fortiori* if he designedly abstains from making inquiry in order to avoid notice, and also if he omits to follow up an inquiry suggested by actual notice (*n*).

SUB-SECT. 2.—*By Conduct in relation to Title Deeds.*

Duty to obtain deeds.

**608.** A legal mortgagee who, on taking his mortgage, omits to inquire for the title deeds is postponed to an earlier incumbrancer in whose possession they then are (*o*), and also to a subsequent

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the mortgagor is himself a solicitor and prepares the mortgage, and the mortgagee employs no other solicitor, knowledge of the mortgagor will not be imputed to the mortgagee (*Hewitt* v. *Loosemore* (1851), 9 Hare 449, 455; *Espin* v. *Pemberton* (1859), 3 De G. & J. 547). A solicitor to whom the mortgagee's solicitors delegate some ministerial duty is not the agent of the mortgagee for the purpose of imputed notice (*Wyllie* v. *Pollen* (1863), 3 De G. J. & Sm. 596; *Foxon* v. *Gascoigne* (1874), 9 Ch. App. 657, n., 658, n.).

(*k*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1). As to the effect of the statutory restriction on the doctrine of constructive notice, see *Bailey* v. *Barnes*, [1894] 1 Ch. 25, C. A.; *Hunt* v. *Luck*, [1902] 1 Ch. 428, C. A.; and see title EQUITY, Vol. XIII., p. 87.

(*l*) *Gainsborough* (*Earl*) v. *Watcombe Terra Cotta Co.*, *Dunning* v. *Gainsborough* (*Earl*) (1895), 54 L. J. (CH.) 991, 994. But a company entitled to a statutory charge may be absolved from the duty of making inquiries (*General Land Drainage and Improvement Co.* v. *United Counties Bank* (1910), 103 L. T. 418).

(*m*) A mortgagee having notice of a deed forming a link in the mortgagor's title has notice of the contents of the deed (*Patman* v. *Harland* (1881), 17 Ch. D. 353); but not of matters which the deed would not have disclosed (*Carter* v. *Williams* (1870), L. R. 9 Eq. 678; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, 487, C. A.).

(*n*) See title EQUITY, Vol. XIII., p. 87, note (*k*). Actual notice of an incumbrance is constructive notice of matters which the intending mortgagee would have discovered if he had made inquiries as to the incumbrance (*Taylor* v. *Baker* (1818), 5 Price, 306; *Jones* v. *Smith* (1841), 1 Hare, 43, 55; *Penny* v. *Watts* (1849), 1 Mac. & G. 150; *Jones* v. *Williams* (1857), 24 Beav. 47, 58; *Montefiore* v. *Browne* (1858), 7 H. L. Cas. 241), and as to the doctrine of constructive notice generally, see cases cited in title EQUITY, Vol. XIII., p. 86, note (*e*); *Aldritt* v. *Maconchy*, [1906] 1 I. R. 416; [1908] 1 I. R. 333, C. A.; *Bank of Bombay* v. *Suleman Somji* (1908), 99 L. T. 532. As to notice where a deed may or may not affect the land, see title EQUITY, Vol. XIII., p. 87, note (*k*); *West* v. *Reid* (1843), 2 Hare, 249, 258; *Lloyd's Banking Co.* v. *Jones* (1885), 29 Ch. D. 221, 230. As to notice from failure to make inquiries of the tenant, see title EQUITY, Vol. XIII., pp. 87, 88, note (*k*); *Bailey* v. *Richardson* (1852), 9 Hare, 734; *Holmes* v. *Powell* (1856), 8 De G. M. & G. 572, C. A. (possession of mines); *Cavander* v. *Bulteel* (1873), 9 Ch. App. 79 (property in possession of partnership where mortgage by one partner of a moiety for his private debt); *Green* v. *Rheinberg* (1911), 104 L. T. 149. But where the possession i vacant, inquiry need not be made of the last tenant (*Miles* v. *Langley* (1829), 1 Russ. & M. 39); and see *Penny* v. *Watts* (1849), 1 Mac. & G. 150); (1850), 2 De G. & Sm. 501, 520, as to an agreement not conferring an immediate title to possession.

(*o*) As to the right to custody of deeds, see pp. 204 *et seq.*, *ante*. Formerly the omission to make any inquiry for the deeds was treated as evidence of fraud, or gross or wilful negligence, and on this ground the l gal mortgagee was postponed (*Hewitt* v. *Loosemore* (1851), 9 Hare, 449, 458;

incumbrancer who inquires for the deeds and gets them or, if he is the third incumbrancer, inquires and finds that they are with the second incumbrancer (*p*). But the legal mortgagee is not postponed if he makes inquiry and receives a reasonable excuse for the non-delivery of the deeds (*q*); nor is he postponed if he receives only part of the deeds under a reasonable belief that he is receiving all (*r*).

SECT. 3. Failure to Gain, or Loss of, Priority.

**609.** A legal mortgagee who gets the title deeds into his custody and subsequently loses or parts with possession of them is not postponed to a subsequent incumbrancer to whom they are delivered on the ground of mere negligence or want of prudence in the custody of them (*s*), nor is he postponed if he has lent them to the mortgagor upon a reasonable representation made by the latter as to his object in borrowing them (*a*); but he will be postponed on the ground of fraud, that is, where he has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate (*b*); and he will also

Effect of conduct of legal mortgagee.

*Hunt* v. *Elmes* (1860), 2 De G. F. & J. 578, C. A.; *Colyer* v. *Finch* (1856), 5 H. L. Cas. 905, 928; see *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482, 491, C. A.); and it was said that in order to postpone him it must be possible for the court to infer wilful abstention (*Ratcliffe* v. *Barnard* (1871), 6 Ch. App. 652); but the present view is that the mere omission to make the ordinary inquiry for title deeds is sufficient to postpone the legal mortgagee, either because it gives him constructive notice of the earlier incumbrance (*Berwick & Co.* v. *Price*, [1905] 1 Ch. 632; *Walker* v. *Linom*, [1907] 2 Ch. 104), or because his negligence deprives him of the benefit of the legal estate (*Oliver* v. *Hinton*, [1899] 2 Ch. 264, C. A.; see *Lloyd's Banking Co.* v. *Jones* (1885), 29 Ch. D. 221). The postponement was placed on the ground of notice in *Worthington* v. *Morgan* (1849), 16 Sim. 547; *Hipkins* v. *Amery* (1860), 2 Giff. 292; *Spencer* v. *Clarke* (1878), 9 Ch. D. 137; *Re Weniger's Policy*, [1910] 2 Ch. 291; and see *Maxfield* v. *Burton* (1873), L. R. 17 Eq. 15. In copyholds, the copy admission should be called for; it is not sufficient to search the rolls (*Whitbread* v. *Jordan* (1835), 1 Y. & C. (EX.) 303). The negligence of trustees binds their *cestuis que trust*, although infants (*Lloyd's Banking Co.* v. *Jones*, *supra*; *Walker* v. *Linom*, *supra*); see title TRUSTS AND TRUSTEES. Where mortgages are contemporaneous, the mortgagee who gets the title deeds has priority over one who does not inquire for them (*Hopgood* v. *Ernest* (1865), 3 De G. J. & Sm. 116, C. A., where, apparently, the mortgagees were tenants in common or joint tenants of the legal estate).

(*p*) *Clarke* v. *Palmer* (1882), 21 Ch. D. 124. Where the legal mortgagee does not inquire for the deeds, the same principle applies both to prior and subsequent incumbrances (*Walker* v. *Linom*, *supra*); but there must be some evidence of negligence (*Re Greer*, *Greer* v. *Greer*, [1907] 1 I. R. 57).

(*q*) *Hewitt* v. *Loosemore* (1851), 9 Hare, 449, 458; *Agra Bank, Ltd.* v. *Barry* (1874), L. R. 7 H. L. 135; *Brown* v. *Stedman* (1896), 44 W. R. 458; see *Barnett* v. *Weston* (1806), 12 Ves. 130.

(*r*) *Hunt* v. *Elmes*, *supra*; *Colyer* v. *Finch*, *supra*; *Ratcliffe* v. *Barnard*, *supra*; *Cottey* v. *National Provincial Bank of England* (1904), 20 T. L. R. 607; the same principle applies as between successive mortgagees by deposit (*Roberts* v. *Croft* (1857), 2 De G. & J. 1; *Dixon* v. *Muckleston* (1872), 8 Ch. App. 155), unless the prior mortgagee has left the substantial part of the deeds with the mortgagor and is otherwise negligent (*Re Lambert's Estate* (1884), 13 L. R. Ir. 234, C. A.; and see p. 79, *ante*.

(*s*) *Northern Counties of England Fire Insurance Co.* v. *Whipp*, *supra*.

(*a*) *Peter* v. *Russel* (1716), 1 Eq. Cas. Abr. 321; *Martinez* v. *Cooper* (1826), 2 Russ. 198. But he may be postponed if he is guilty of negligence in not obtaining possession of the title deeds (*Walker* v. *Linom*, *supra*).

(*b*) *Northern Counties of England Fire Insurance Co.* v. *Whipp*, *supra*. The judgment in this case was an attempt to give exactness to Lord

SECT. 3. Failure to Gain, or Loss of, Priority.

be postponed if he has returned the deeds to, or left them with, the mortgagor for the purpose of enabling the mortgagor to raise money on them (*c*), notwithstanding that the limit which he has assigned for the loan has been exceeded (*d*).

Possession of deeds by equitable incumbrancer.

**610.** As between equitable incumbrancers the mere possession of the title deeds is not enough to give a subsequent incumbrancer priority over an earlier one (*e*); there must be some default on the part of the earlier incumbrancer (*f*); but if the possession of the title deeds is an essential part of the earlier incumbrancer's security, the same considerations arise as in the case of a legal mortgagee, and if he omits to inquire for and get in the deeds (*g*), or, having got them, allows them by negligence or design to be again, without sufficient reason, in the possession of the mortgagor (*h*), he will be

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ELDON'S requirement in *Evans* v. *Bicknell* (1810), 6 Ves. 174, 190, of fraud or gross negligence amounting to evidence of fraud as the condition for postponing the legal mortgagee. In *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482, C. A., FRY, L.J., at p. 494, while pointing out that negligence and fraud were incompatible, recognised that omission to use ordinary care in the custody of the deeds might be evidence of fraud; but the decision seems to have made it impracticable to postpone the legal mortgage in the case in question except on the ground of actual fraud (*Manners* v. *Mew* (1885), 29 Ch. D. 725); compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 692, 693.

(*c*) *Briggs* v. *Jones* (1870), L. R. 10 Eq. 92.

(*d*) *Perry Herrick* v. *Attwood* (1857), 2 De G. & J. 21; *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173. This is frequently put on the ground of estoppel and is fully treated in title ESTOPPEL, Vol. XIII., pp. 393, 394.

(*e*) See *Evans* v. *Bicknell* (1801), 6 Ves. 174, where Lord ELDON, L.C., at p. 183, corrected the statement of BULLER, J., in *Goodtitle* d. *Norris* v. *Morgan* (1787), 1 Term Rep. 755, at p. 762, that a second mortgagee who took the title deeds without notice was always preferred. In *Bailey* v. *Fermor* (1821), 9 Price, 262, 267, *Goodtitle* d. *Norris* v. *Morgan*, *supra*, is treated as overruled on this point; and see *Barnett* v. *Weston* (1806), 12 Ves. 130, 132; *Allen* v. *Knight* (1846), 5 Hare, 272, 279; on appeal (1847), 11 Jur. 527. As to the postponement of equitable incumbrancers, see title EQUITY, Vol. XIII., p. 80.

(*f*) *Allen* v. *Knight* (1847), 11 Jur. 528. He is not in default if the mortgage is of a reversion (*Tourle* v. *Rand* (1789), 2 Bro. C. C. 650), or if he gets the only title deed available at the time (*Union Bank of London* v. *Kent* (1888), 39 Ch. D. 238, C. A.); and since a purchaser is not entitled to the deeds until completion, his equitable title under the contract prevails over an equitable incumbrance created by the vendor by deposit of the title deeds after the contract (*Flinn* v. *Pountain* (1889), 58 L. J. (CH.) 389). But a mortgagee not immediately entitled to deeds is not bound to take precautions against a future fraud by the mortgagor in respect of them (*Union Bank of London* v. *Kent*, *supra*), and if the mortgagee omits to get in the deeds, by reason of a false recital in the mortgage of an existing mortgage by deposit, he is not postponed to a subsequent actual mortgage by deposit (*Frazer* v. *Jones* (1846), 5 Hare, 475; on appeal (1848), 12 Jur. 443; see *Jones* v. *Thomas* (1862), 11 W. R. 50).

(*g*) *Farrand* v. *Yorkshire Banking Co.* (1888), 40 Ch. D. 182; see title EQUITY, Vol. XIII., p. 80. A blank transfer should be accompanied by the certificate, and the later of two transferees, who gets the certificate, will have priority (*Kelly* v. *Munster and Leinster Bank* (1891), 29 L. R. Ir. 19, C. A.).

(*h*) If they are redelivered to the mortgagor for a particular purpose, it is negligence for the mortgagee not to press for their return after a reasonable time (*Waldron* v. *Sloper* (1852), 1 Drew. 193; *Dowle* v. *Saunders* (1864), 2 Hem. & M. 242; *Layard* v. *Maud* (1867), L. R. 4 Eq. 397).

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postponed to a subsequent incumbrancer to whom they are delivered.

Rights as between equitable mortgagee and unpaid vendor.

**611.** Where an unpaid vendor hands to the purchaser the title deeds with a conveyance containing a receipt for the purchase-money, he thereby enables the purchaser to represent himself as the owner of the property, and he will be postponed to an equitable mortgagee from the purchaser who obtains the deeds (*i*); and, if he remains in possession as tenant to the purchaser, there is no notice to a subsequent incumbrancer of his lien for unpaid purchase-money (*k*). An owner of shares who hands a transfer and the certificate to a broker for the purpose of sale is postponed to an equitable mortgagee from the broker notwithstanding that the broker by mortgaging the shares exceeds his authority (*l*).

*Cestui que trust* and trustee's assignees.

**612.** Where a trust has been constituted, the title deeds are properly left in the custody of the trustee, and if he uses them, in breach of trust, for the purpose of creating an equitable incumbrance, the title of the *cestui que trust* will prevail over that of the incumbrancer (*m*). If, however, the trustee is authorised to dispose of the property, and purports to dispose of it in accordance with his authority, the *cestui que trust* will be postponed to an equitable mortgagee under the purchaser (*n*), unless the disposition is in substance one not authorised by the trust (*o*).

SUB-SECT. 3.—*By Fraud.*

Fraud.

**613.** Where the evidence establishes that a mortgage has been created in fraud of prior incumbrances, the mortgagee will be postponed (*p*).

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(*i*) *Rice* v. *Rice* (1853), 2 Drew. 73; *Smith* v. *Evans* (1860), 28 Beav. 59. But a prior incumbrancer who has been induced by misrepresentation to release his security will not necessarily be postponed (*Beckett* v. *Cordley* (1784), 1 Bro. C. C. 353).

(*k*) *White* v. *Wakefield* (1835), 7 Sim. 401, 417.

(*l*) *Rimmer* v. *Webster*, [1902] 2 Ch. 163, where the result was treated as an application of the principle of agency; see *Perry Herrick* v. *Attwood* (1857), 2 De G. & J. 21; and see pp. 343, 344, *ante*.

(*m*) *Shropshire Union Railways and Canal Co.* v. *R.* (1875), L. R. 7 H. L. 496; *Bradley* v. *Riches* (1878), 9 Ch. D. 189; *Burgis* v. *Constantine*, [1908] 2 K. B. 484, C. A.; see title EQUITY, Vol. XIII., pp. 80, 81. Where the trustees improperly invest the trust fund in the purchase of land the *cestuis que trust* are entitled to follow it into the land, and this is not a mere equity, but gives them an equitable interest in the land, so that they will not be postponed to an equitable incumbrancer under the trustees without notice (*Cave* v. *Cave* (1880), 15 Ch. D. 639); but a different view has prevailed in Ireland, and the *cestuis que trust* in such a case are treated as having an inferior equity to the incumbrancer (*Re Ffrench's Estate* (1887), 21 L. R. Ir. 283, 312, C. A.; *Re Sloane's Estate*, [1895] 1 I. R. 146, 165; *Bank of Ireland* v. *Cogry Spinning Co.*, [1900] 1 I. R. 219); and generally an executor or trustee disposing of the estate or trust funds to a purchaser for value without notice has been treated as giving the purchaser an equity superior to that of the *cestuis que trust* (*Bourke* v. *Lee*, [1904] 1 I. R. 280; *Re Bobbett's Estate*, [1904] 1 I. R. 461).

(*n*) *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192; see title EQUITY, Vol. XIII., p. 81, note (*k*).

(*o*) *Capell* v. *Winter*, [1907] 2 Ch. 376. As to a *cestui que trust* being bound by his trustee's negligence, see note (*o*), p. 342, *ante*.

(*p*) See *Evans* v. *Bicknell* (1801), 6 Ves. 174; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 694 *et seq.*, 703 *et seq.*

SECT. 4. **As between Mortgagees and other Incumbrancers.**

## SECT. 4.—*As between Mortgagees and other Incumbrancers.*

**614.** A judgment debt or Crown debt can be made a charge on land of the debtor (*q*), but, in order that the charge may be effectual against a mortgagee, a writ or order for enforcing the debt must have been registered at the time of the mortgage (*r*).

Judgment or Crown debts.

Statutory registered charges.

Under various statutes money may be raised for the improvement of land and secured by charge upon it, and registers of such charges are kept. Such registered charges may have priority both over existing and future incumbrances (*s*). In the same way charges for compensation for enfranchisement of copyhold land have priority over incumbrances on the land (*t*).

Annuities.

Annuities created otherwise than by marriage settlement require to be registered in the Central Office of the High Court of Justice, and unless so registered do not affect any lands so far as regards mortgagees (*u*).

Deeds of arrangement.

Deeds of arrangement with creditors require to be registered under the Deeds of Arrangement Act, 1887 (*a*), and unless so registered do not affect mortgagees (*b*).

Bankruptcy.

A receiving order made against a debtor does not prejudice a mortgagee who takes his security before the date of the receiving order without notice of the act of bankruptcy (*c*).

*Lis pendens.*

An adverse claim against the mortgagor in respect of the property, if the subject of litigation, should be registered as a *lis pendens*, and on such registration will, if established, have priority over subsequent dispositions (*d*).

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(*q*) See title EXECUTION, Vol. XIV., p. 70.

(*r*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 6; Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 3; see title EXECUTION, Vol. XIV., p. 70. As to the title of a mortgagee from a devisee as against creditors of the deceased, see *Re Atkinson, Proctor* v. *Atkinson*, [1908] 2 Ch. 307: title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 246: as to priorities between mortgagees and tenant by *elegit*, see title EXECUTION, Vol. XIV., p. 70. The title of an equitable mortgagee of goods will prevail over that of an execution creditor (*Usher* v. *Martin* (1889), 24 Q. B. D. 272); title INTERPLEADER, Vol. XVII., p. 596.

(*s*) See title LAND IMPROVEMENT, Vol. XVIII., p. 297.

(*t*) See title COPYHOLDS, Vol. VIII., p 119.

(*u*) Judgments Act, 1855 (18 & 19 Vict. c. 15), s. 12; see title RENT-CHARGES AND ANNUITIES.

(*a*) 50 & 51 Vict. c. 57, s. 5.

(*b*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 329.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 183, 288.

(*d*) As to *lis pendens* and the registration of writs and orders affecting land, see titles EXECUTION, Vol. XIV., pp. 70, 81, 82; REAL PROPERTY AND CHATTELS REAL; and as to the searches to be made by purchasers, see title SALE OF LAND. As to priority between a wife's equity to a settlement and a mortgage by the husband, see title HUSBAND AND WIFE, Vol. XVI., p. 339; and as to concealment of restraint on anticipation, see *ibid.*, p. 366. As to priority as between liens and mortgages, see title LIEN, Vol. XIX., pp. 19, 24.

# Part XI.—Avoidance of Mortgages.



**615.** Mortgages may be set aside in certain circumstances on the ground of undue influence, or because they defraud other creditors, or because they are in contravention of the bankruptcy law, or because they are opposed to public policy. These matters are dealt with elsewhere (*e*).

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 281; CONTRACT Vol. VII., p. 357; EQUITY, Vol. XIII., p. 17; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 100, 101. Where part of the consideration is illegal, the security i only avoided to that extent (*Sheehy* v. *Sheehy*, [1901] 1 I. R. 239).

## MORTMAIN.

*See* CHARITIES; CORPORATIONS; REAL PROPERTY AND CHATTELS REAL; WILLS.

## MORTUARIES.

*See* BURIAL AND CREMATION.

## MOTION.

*See* PRACTICE AND PROCEDURE

## MOTOR TRAFFIC.

*See* STREET AND AERIAL TRAFFIC.

## MUNICIPAL CORPORATIONS.

*See* LOCAL GOVERNMENT; METROPOLIS.

## MUNICIPAL ELECTIONS.

*See* ELECTIONS.

# MURDER.

*See* CRIMINAL LAW AND PROCEDURE.

# MUSEUMS.

*See* LITERARY AND SCIENTIFIC INSTITUTIONS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

# MUSICAL COPYRIGHT.

*See* COPYRIGHT AND LITERARY PROPERTY.

# MUSIC HALLS.

INFANTS AND CHILDREN; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

# MUTINY.

*See* CRIMINAL LAW AND PROCEDURE; ROYAL FORCES.

# MUTUAL CREDIT.

*See* BANKRUPTCY AND INSOLVENCY; SET-OFF AND COUNTERCLAIM.

# NAME AND ARMS, CHANGE OF.

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## SECT. 1.—*Change of Name in General.*

Liberty to change.

**616.** The law prescribes no rules limiting a man's liberty to change his name (*a*). He may assume any name he pleases in addition to or substitution for his original name; and in adopting even the name or combination of names by which another person is already known he does not commit a legal wrong against that person (*b*). The law concerns itself only with the question whether he has in fact assumed and has come to be known by a name different from that by which he was originally known.

First or christian name.

**617.** With regard to the first or christian name given to a person on baptism, it is said that it can be changed on confirmation, and it seems to be implied that otherwise no change is possible (*c*).

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(*a*) As to change of a name of a building society, see title BUILDING SOCIETIES, Vol. III., p. 330; as to change of name of a company, see title COMPANIES, Vol. V., p. 84; as to change of name of a corporation, see title CORPORATIONS, Vol. VIII., pp. 307, 308; as to change of name of a friendly society, see title FRIENDLY SOCIETIES, Vol. XV., pp. 135, 136; as to change of name of an industrial society, see title INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES, Vol. XVII., pp. 13, 14.

(*b*) *Du Boulay* v. *Du Boulay* (1869), L. R. 2 P. C. 430; *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450; but as to the use of trade names, see *Du Boulay* v. *Du Boulay*, *supra*, per Lord CHELMSFORD, at p. 441; and title TRADE MARKS, TRADE NAMES, AND DESIGNS. A man has no legal right to the exclusive use of a name he chooses to affix to any part of his landed property, whether house or land; see *Day* v. *Brownrigg* (1878), 10 Ch. D. 294, C. A., *per* JESSEL, M.R., at p. 302. As to the naming of streets, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 255. As to tortious acts in general, see title TORT.

(*c*) Co. Litt. 3 a: "A man may have divers names at divers times, but not divers Christian names." With regard to change of name at confirmation, which is also mentioned in the same connection, some doubt was thrown on Coke's *dictum* by Dr. Burn (Ecclesiastical Law, Vol. I., p. 111), but in the opinion of Sir R. Phillimore (Phillimore, Ecclesiastical Law of the Church of England, 2nd ed., Vol. I., p. 517) the *dictum* still remains good and the law has not been altered. Coke mentions the case of Sir Francis Gawdie, Chief Justice of the Common Pleas, who, being baptised as Thomas, took the name of Francis on confirmation. As recently as 1886 a similar change took place; see Notes and Queries, 7th Series., Vol. II., p. 77; and title ECCLESIASTICAL LAW,

SECT. 1. Change of Name in General.

It may be correct to say that a first name, other than that received at baptism or at confirmation, is not a christian name; but it is clear that a man may at any time assume another name in addition to or in place of his baptismal name, and that for all practical purposes the name so assumed may become his first or christian name (*d*). In a modern instance authority to take a new christian name was given by Act of Parliament (*e*).

A person who in executing an instrument subscribes a first name which is not his christian name may be sued in that name, and is bound as he would be if he had signed his proper name (*f*). In this respect there is no difference between the christian or first name and the surname.

The name of either kind which a man himself adopts, and which is adopted by his friends and other persons having dealings with him, becomes his name.

Surname.

**618.** As regards surnames (*g*), there never was any doubt that, as in the first instance they were arbitrarily assumed, so they could be changed at pleasure. An Act of Parliament, Royal Licence, or other such formality is not required for the purpose (*h*).

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Vol. XI., p. 689. An addition to the baptismal name at confirmation is usual in the Roman Catholic Church (Phillimore and Fry, Changes of Name, 1905 ed., p. xxi.).

(*d*) *R.* v. *Billingshurst* (*Inhabitants*) (1814), 3 M. & S. 250 (Abraham Langley had for three years been known in the village, where his banns of marriage were published, by the name of George Smith; it was held that the banns in which he was designated by that name were properly published). As to the baptismal name ceasing on the acquisition of a new name at confirmation, see *Walden* v. *Holman* (1704), 6 Mod. Rep. 115, *per* HOLT, C.J., at p. 116. As to the necessity of inserting the old as well as the new name in a memorandum of a conveyance executed in the old name, see *Staunton* v. *Staunton* (1864), 15 I. Ch. R. 464. It has been said that where there is a double name there is a presumption that the person is known by the first name (*Re Richards, Ex parte Richards* (1842), 6 Jur. 136). As to the assumption of a surname by a bastard, see title BASTARDY, Vol. II., p. 438.

(*e*) Private Act, entitled "Baines' Name," 1907, whereby the name of Henry Rodd was assumed in lieu of the original christian name, Raymond Hill.

(*f*) *Evans* v. *King* (1745), Willes, 554; *Gould* v. *Barnes* (1811), 3 Taunt. 504; *Williams* v. *Bryant* (1839), 5 M. & W. 447. When pleas in abatement were allowed, and such a plea might be founded on a mistake made with regard to the defendant's name, it was not enough to say that the name applied to him was not his baptismal name; it had further to be averred that he had not by repute acquired that name (*Walden* v. *Holman* (1704), 6 Mod. Rep. 115; *Jones* v. *Macquillin* (1793), 5 Term Rep. 195; *Addis* v. *Power* (1831), 7 Bing. 455).

(*g*) The practice of using surnames was, it is said, first introduced about the time of the Norman conquest, and was not commonly adopted until the close of the fourteenth century; see Markland's paper in "Archæologia," Vol. XVIII., p. 105; Lower on English Surnames, Vol. I., p. 37; Vol. II., p. 60; Lower, Patronymica Britannica, 1860 ed., p. xiii. As to the necessity of a surname being the last name used, see *Spencer* v. *Spencer* (1912), *Times*, 21st March, and note (*r*), p. 352, *post*.

(*h*) *Barlow* v. *Bateman* (1730), 3 P. Wms. 65; *Gulliver* v. *Ashby* (1766), 4 Burr. 1929; *Doe* d. *Luscombe* v. *Yates* (1822), 5 B. & Ald. 544; *Davies* v. *Lowndes* (1835), 1 Bing. (N. C.) 597, 618. For a discussion of the question, see the debate in the House of Commons in the case of *Jones taking the name of Herbert*, Parliamentary Debates, Series 3, Vol. 167, cols. 430 to 436. At that time the idea seems to have prevailed that a Royal Licence was necessary to secure official recognition of a change of name. Now, it seems, the War Office does not require a Royal Licence.

SECT. 1. CHANGE OF NAME IN GENERAL.

**619.** By repute and without formality of any kind, names may be adopted so as to constitute the true christian name or surname of a person for the purpose of the due publication of banns (*i*).

SECT. 2.—*Change of Name in Particular Cases.*

Name adopted for purpose of marriage.

**620.** Change of name without any formality has been constantly recognised by the courts in regard to attorneys and solicitors. An application for a change of the name on the rolls is made to the Master of the Rolls. All that is required of a solicitor seeking to have his new name entered on the roll is the production of a Royal Licence (*j*), or a statement of some plausible reason for the change, and an assurance that no legal proceedings against him in his original name are apprehended (*k*).

Solicitors.

Married woman.

**621.** When a woman on her marriage assumes, as she usually does in England (*l*), the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute (*m*). The change of name is in fact rather than in law a consequence of the marriage. Having assumed her husband's name she retains it, notwithstanding the dissolution of the marriage by decree, unless she chooses thereupon to resume her maiden name (*n*). On her second marriage there is nothing in point of law to prevent her from retaining her first husband's name (*o*).

Persons taking under wills etc.

**622.** When in a will or other such instrument an individual, described by the name by which, at the date of the instrument, he is known, is named as a person to take a benefit under it, there can be no doubt that the adoption by that individual of another name cannot affect his rights under the instrument (*p*). A woman, for instance, mentioned in a will by her maiden name, who before the testator's death has married and taken her husband's name, is none the less entitled under the will. But when the person who should take is one of a class, not a named individual, and it is further provided that he shall bear a certain name, it is a question of

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(*i*) See titles ECCLESIASTICAL LAW, Vol. XI., pp. 699, note (*a*), 708; HUSBAND AND WIFE, Vol. XVI., p. 287.

(*j*) *Ex parte Benthall* (1843), 6 Man. & G. 722. Before this case such applications had been rejected; see *ibid.*, note.

(*k*) *Re Dearden* (1850), 5 Exch. 740; *Re James* (*Thomas*) (1850), 5 Exch. 310; *Re Matthews* (1852), 16 Beav. 245; *Re Gimlet* (1862), 11 W. R. 210. In the footnote to *Re Gimlet*, *supra*, it is noted that in a later case the court observed that in future the allegation of some special reason for change would be required. Doubtless attention had been called to the question of change of name by the discussion in Parliament in the case mentioned in note (*h*), p. 350, *ante*.

(*l*) In Scotland, although a married woman is usually addressed by the surname of her husband, the maiden name is frequently used, as, for example, in announcing her death; and see Phillimore and Fry, Changes of Name, 1905 ed., p. xvii.

(*m*) In Spain and certain other countries it is said that the wife does not adopt her husband's name (Notes and Queries, 7th Series, Vol. IV., p. 127).

(*n*) *Fendall* v. *Goldsmid* (1877), 2 P. D. 263; see title HUSBAND AND WIFE, Vol. XVI., p. 594.

(*o*) *Cowley* (*Earl*) v. *Cowley* (*Countess*), [1901] A. C. 450; see title HUSBAND AND WIFE, Vol. XVI., p. 594.

(*p*) As to misdescriptions of the name of a grantee in a deed, see *Janes* v. *Whitbread* (1851), 11 C. B. 406.

SECT. 2. **Change of Name in Particular Cases.**

construction whether the word "name" is to be read in its primary sense, or is used to denote the stock to which the beneficiary shall belong (*q*).

SECT. 3.—*Formalities as to Change of Name or of Arms.*

Purposes for which formalities may be necessary.

**623**. In order to preserve testimony and to obviate the doubt and confusion which a change of name is likely to involve, it is usual to adopt one of the three following courses, that is, to obtain a private Act of Parliament, to obtain a Royal Licence, or to execute a deed poll.

Frequently in a will or settlement in which the assumption of the name of the testator or settlor or of his name and arms is enjoined, the adoption of one of those formalities is also directed. The assumption of the name either in addition to or in substitution for the person's original name, evidenced by the prescribed formality, may, by means of a forfeiture clause, be made the condition on which his right to property depends (*r*).

Act of Parliament.

**624**. Recourse to Parliament for authority to adopt a new surname is unusual, but it may be necessary to obtain a private Act, as, for instance, in a case in which the "name and arms" clause directs the adoption of that course (*s*).

Royal Licence.

**625**. Another method by which a change of name can be authenticated is by Royal Licence (*t*).

(*q*) In *Barlow* v. *Bateman* (1735), 2 Bro. Parl. Cas. 272, it was held that a condition requiring the donee to marry a person of the name of Barlow was not satisfied by her marrying a man who took that name. In *Leigh* v. *Leigh* (1808), 15 Ves. 92, where the gift was "to the first and nearest of my kindred of my name and blood," it was held that the qualification as to name was not satisfied by a person having taken the name under a Royal Licence; see *Doe* d. *Wright* v. *Plumptre* (1820), 3 B. & Ald. 474. On the other hand, in *Pyot* v. *Pyot* (1749), 1 Ves. Sen. 335; and *Carpenter* v. *Bott* (1847), 15 Sim. 606, the other view was taken on the construction of the instrument. As to wills generally, see title WILLS.

(*r*) *D'Eyncourt* v. *Gregory* (1876), 1 Ch. D. 441; *Re Eversley, Mildmay* v. *Mildmay*, [1900] 1 Ch. 96. In order to comply with a clause requiring the taking and using of a surname it is not necessary to use the surname on occasions of signing when a surname is not commonly used (*Re Drax, Dunsany* (*Baroness*) v. *Sawbridge* (1906), 75 L. J. (CH.) 317); and it has been held in the Court of Session that the surname need not necessarily be taken as the last name unless the clause says so (*Spencer* v. *Spencer* (1912), *Times*, 21st March). As to such a forfeiture clause being void for uncertainty, see *Re Gassiot, Brougham* v. *Rose-Gassiot* (1907), 51 Sol. Jo. 570; and as to "name and arms" clauses, see, further, title SETTLEMENTS.

(*s*) See, 3 Davidson's Precedents in Conveyancing, 2nd ed., Part I., p. 283. Such an Act is not imperative in its terms; it merely permits the assumption of a new name. For a recent instance, see the private Act entitled "Clifton's Name," 22 Vict. c. 1 (1859). As to name Bills, see title PARLIAMENT, p. 761, *post*.

(*t*) The first instance of a Royal Licence is said to have occurred in 1679, when the Earl of Ogle, son of the Duke of Newcastle, was allowed to take the name of Percie. A Royal Licence has, like a private Act of Parliament, the advantage of giving a formal sanction to the change, and of securing, as far as is possible, the recognition of the new name by the world in general. It has this further advantage, that it secures a record of the reasons for the change and of all other matters relevant to the granting of the licence, inasmuch as Royal Licences are recorded in the College of Arms pursuant to the terms of the licence; see p. 353, *post*.

SECT. 3. Formalities as to Change of Name or of Arms.

In order to comply with a "name and arms" clause the proper and usual method is to apply for a Royal Licence. Without a Royal grant a man cannot properly assume armorial bearings, for the granting of arms is part of the prerogative of the Sovereign (*u*).

Procedure to obtain Royal Licence.

In order to obtain a Royal Licence authorising a change of surname and assumption of arms, an application has to be made to an officer of arms at the College of Arms (*a*) that a petition in proper form, stating the reasons for the application and other necessary matters, may be drawn up by one of the officers of the college, to be signed by the applicant, and submitted through the Home Secretary to the Sovereign. The granting of a Licence for change of surname is a matter of discretion, as to which the Sovereign is advised by the Home Secretary, who obtains a report thereon from the Kings of Arms as representing the Earl Marshal (*b*).

When the prayer of a petition is granted, a warrant addressed to the Earl Marshal, following in its terms the allegations of the petition, is issued under the Royal sign manual, and is duly recorded in the College of Arms by warrant of the Earl Marshal (*c*). In its terms the Licence is permissive; it does not purport to confer a new name.

Exemplification and record of arms.

**626.** As regards armorial bearings, the Royal Licence contains a proviso that the arms shall be exemplified according to the law of arms and recorded in the College of Arms, and that otherwise the licence and permission shall be null and of no effect (*d*). It is the function of the Kings of Arms to deal with all matters connected with the grant of arms. It is their duty, on an application being made in compliance with a "name and arms" clause, to decide whether the testator or settlor had a valid claim to the arms used by him, and, according as that question may be decided, to grant

(*u*) *Re Croxon, Croxon* v. *Ferrers*, [1904] 1 Ch. 252, in which case the decision turned on the particular terms of the will which required the person taking under it lawfully to assume the testator's arms. To use arms, other than the Royal Arms (as to which see title CONSTITUTIONAL LAW, Vol. VI., p. 361), without a grant or other title is not unlawful in the sense that any penalty is attached. The Earl Marshal's Court, which had jurisdiction in such matters, has not sat for the last two centuries; see titles COURTS, Vol. IX., p. 116; PEERAGES AND DIGNITIES. The question as to the necessity for a Royal grant was raised but not decided in *Austen* v. *Collins* (1886), 54 L. T. 903; also in *Beran* v. *Mahon-Hagan* (1891), 27 L. R. Ir. 399; (1893), 31 L. R. Ir. 342, C. A.

(*a*) As to the Heralds' College and Kings at Arms, see title PEERAGES AND DIGNITIES.

(*b*) The Home Secretary refers such petitions to the Kings of Arms for report on the genealogical and heraldic aspects of the case. No precise rules are laid down as to the exercise of the discretion, and probably no such rules could well be formulated; but it may be broadly stated that a voluntary application made in compliance with a request contained in a will or in consideration of some pecuniary or other benefit, or based on representation in blood traced to some maternal ancestor, will be favourably considered; while an application made in pursuance of a direction which is coupled with a forfeiture clause is invariably granted. On the other hand an application for which no reasonable ground is alleged, or which is made from mere caprice, is likely to be rejected.

(*c*) The Royal Warrant is usually notified in the *London Gazette*.

(*d*) *Austen* v. *Collins* (1886), 54 L. T. 903,

SECT. 3. Formalities as to Change of Name or of Arms.

those arms, or arms as little different from them as the law of arms will admit, to the applicant (*e*).

In respect of every Licence issued a stamp duty is payable (*f*).

Deed poll.

**627.** Thirdly, the declaration of a person's intention to change his surname may be evidenced by a deed poll. He may declare his determination to assume a new name in addition to or in substitution for his original name.

The deed poll, when duly executed and attested, may be enrolled in the Central Office of the Supreme Court (*g*).

Public notice is usually given by advertisement in the *London Gazette* and one or more newspapers of the assumption of the new name and of the execution and enrolment of the deed poll (*h*).

(*e*) For the form of grant, see *Stubs* v. *Stubs* (1862), 1 H. & C. 257. Since it is not within the competency of the College of Arms to grant the proper arms of A. to B., the practice is to make the grant with a difference, *i.e.*, to make some addition to or alteration in the arms; see *Austen* v. *Collins* (1886), 54 L. T. 903.

(*f*) If the application is voluntary, a duty amounting to £10 is charged by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 74, and in the case of a compulsory application made under a clause in a will or settlement the duty amounts to £50 (*ibid.*). As to stamp duties generally, see title REVENUE. In addition there are various fees payable to the Officers of Arms for preparing and presenting the petition, for reporting to the Home Secretary and recording the Royal Licence, and for granting or exemplifying the arms. There are also fees due to the Home Office. These amount in all to £44 13*s.*, exclusive of the costs of preparation of petition and advertising.

(*g*) See R. S. C., Ord. 61, r. 12. The fee payable on enrolment is 1*s.* per folio of 72 words.

(*h*) For forms of deed poll, statutory declaration and notice of change, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 2--5.

# NATIONAL DEBT.

*See* CONSTITUTIONAL LAW; REVENUE.

# NATIONAL GALLERY.

*See* LITERARY AND SCIENTIFIC INSTITUTIONS.

# NATIONAL INSURANCE.

*See* WORK AND LABOUR.

# NATIONAL MONUMENTS.

*See* OPEN SPACES AND RECREATION GROUNDS.

# NATIONALITY.

*See* ALIENS; CONFLICT OF LAWS; CONSTITUTIONAL LAW.

# NATURAL ALLEGIANCE.

*See* CONSTITUTIONAL LAW.

# NATURALISATION AND DENISATION.

*See* ALIENS.

# NAVAL COURTS-MARTIAL.

*See* COURTS; ROYAL FORCES.

# NAVIGABLE WATERS.

*See* SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

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*See* SHIPPING AND NAVIGATION.

# NAVY.

*See* ROYAL FORCES.

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# NEGLIGENCE.

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# Part I.—General Principles of Liability for Negligence.

SECT. 1. **What Constitutes Negligence.**

## SECT. 1.—*What Constitutes Negligence.*

### SUB-SECT. 1.—*Meaning and Application of the Term "Negligence."*

Failure to exercise care required by the circumstances.

**628.** Negligence in a legal sense is a negative rather than a positive term (*a*), and in any given circumstances is the failure to exercise that care which the circumstances demand (*b*). It is, therefore, not susceptible of any precise definition which will be of universal application (*c*). It may consist in doing something which ought either to be done in a different manner or not at all, or in omitting to do something which ought to be done (*d*). Where there is no duty to exercise care at all, negligence in the popular sense has no legal consequences (*e*). Where there is a duty to take care, the degree of care required in the particular case depends on the accompanying circumstances (*f*), and may vary according to the amount of risk to be encountered and to the magnitude of the prospective injury (*g*). The same act or omission may accordingly involve liability as being negligent in some circumstances (*h*), although in other circumstances it will not do so.

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(*a*) *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, *per* WILLES, J., at p. 612; compare *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317, 337.

(*b*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 694: "The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody"; see also *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch., where WILLES, J., at p. 688, defined it as "the absence of care according to the circumstances"; *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, *per* ALDERSON, B., at p. 784; *Grill* v. *General Iron Screw Collier Co.*, *supra*; *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, 507, C. A.; *Kettlewell* v. *Watson* (1882), 21 Ch. D. 685; *Snook* v. *Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308; *Wakelin* v. *London and South Western Rail. Co.*, [1896] 1 Q. B. 189, n., 191, C. A.

(*c*) *Ford* v. *London and South Western Rail. Co.* (1862), 2 F. & F. 730, *per* ERLE, C.J., at p. 732.

(*d*) *Blyth* v. *Birmingham Waterworks Co.*, *supra*, *per* ALDERSON, B., at p. 784.

(*e*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A., *per* Lord ESHER, M.R., at p. 497; *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216; *Scholfield* v. *Londesborough* (*Earl*), [1895] 1 Q. B. 536, C. A.; affirmed, [1896] A. C. 514; *Gray* v. *North Eastern Railway and the Washington Colliery Co.* (1883), 48 L. T. 904; *Box* v. *Jubb* (1879), 4 Ex. D. 76; *Dickson* v. *Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A.; *Cox* v. *Burbridge* (1863), 13 C. B. (N. S.) 430; compare *Caledonian Rail. Co.* v. *Warwick* (1897), 35 Sc. L. R. 54, H. L.; see p. 363, *post*.

(*f*) *Grill* v. *General Iron Screw Collier Co.*, *supra*; see *ibid.*, *per* MONTAGUE SMITH, J., at p. 614, and cases cited in note (*h*), *infra*.

(*g*) *Mackintosh* v. *Mackintosh* (1864), 2 Macph. (Ct. of Sess.) 1357; compare *Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1, Ex. Ch.; and see pp. 365, 366, *post*.

(*h*) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; and see *ibid.*, at p. 781, where it was said by BRAMWELL, B., that negligence is always

SECT. 1. What Constitutes Negligence.

Where an act or omission is negligent, it may involve a greater or less degree of moral culpability, but, so far as any legal result is concerned, a classification on this basis will at most afford a ground for awarding greater or smaller damages (*i*). The material considerations are the absence of the care due in the circumstances of the case on the part of the defendant and injury suffered by the plaintiff, and a demonstrable relation of cause and effect between the two (*j*).

Material considerations.

Knowledge, or the opportunity of knowledge, that a particular course is fraught with danger does not necessarily render its adoption negligent, but such knowledge or opportunity of knowledge is frequently an ingredient of negligence (*k*), because a man may reasonably be expected to take extra precaution on account of better knowledge of the facts (*l*). In every case

Knowledge, or opportunity of knowledge, as an ingredient.

relative to some circumstance of time and place or person; compare *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, 694, C. A. Thus, to keep premises in a defective and unsafe condition is negligent, if they are situated in a public street (*Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Silverton* v. *Marriott* (1888), 59 L. T. 61; see pp. 397 *et seq.*, *post*); but it will not be so if they are ruins in a private park to which no stranger has any right or leave to go; compare *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; *Forbes* v. *Aberdeen Harbour Commissioners* (1888), 25 Sc. L. R. 239; and see p. 392, *post*. For an excellent illustration of different degrees of care required with regard to the same subject-matter, see *Nelson* v. *Macintosh* (1816), 1 Stark. 237.

(*i*) The degrees of care are sometimes sought to be denoted by the terms "ordinary," "slight," or "gross" negligence. These terms are not adopted in this title, as they have been the subject of much unfavourable judicial comment; see *Wilson* v. *Brett* (1843), 11 M. & W. 113, *per* ROLFE, B.; *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, *per* WILLES, J.; compare *Hinton* v. *Dibbin* (1842), 2 Q. B. 646; *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1850), 10 C. B. 454; *Mackintosh* v. *Mackintosh* (1864), 2 Macph. (Ct. of Sess.) 1357; and see *Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc. L. R. 475, *per* Lord LOW.

(*j*) *Wright* v. *Midland Rail. Co.* (1884), 51 L. T. 539, *per* MANISTY, J.; and see p. 378, *post*. As to the essential element of injury in a claim for negligence, see pp. 481 *et seq.*, *post*. As to effective or proximate cause, see pp. 378 *et seq.*, *post*. Negligence must be distinguished from trespass (see *Stanley* v. *Powell*, [1891] 1 Q. B. 86; and title TRESPASS), from fraud (*Kettlewell* v. *Watson* (1882), 21 Ch. D. 685; and see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 692, 693), and from nuisance, although in many cases the two subjects overlap (see, generally, p. 382, *post*; and title NUISANCE, p. 507, *post*).

(*k*) *Davis* v. *England and Curtis* (1864), 33 L. J. (Q. B.) 321. Where there is a duty to know of the safety of a particular place or thing, the neglect to avail oneself of an existing means of knowledge renders one equally liable if damage results, as the failure, if the danger were known, to take the precautions necessary to guard against it (*Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, approving the judgment in *Mersey Docks and Harbour Board* v. *Penhallow* (1861), 7 H. & N. 329, Ex. Ch.; followed and applied in *Campbell* v. *Hornsby* (1873), 7 I. R. C. L. 540, Ex. Ch.; *R.* v. *Williams* (1884), 9 App. Cas. 418).

(*l*) *Clarke* v. *Holmes* (1862), 7 H. & N. 937, Ex. Ch.; compare *Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1, Ex. Ch. In *Brooks* v. *London and North Western Rail. Co.* (1884), 33 W. R. 167, knowledge by the defendants that one of three fastenings to a gate was defective—and, by the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 68, 75, the defendants had to maintain these—was said to be evidence of negligence.

SECT. 1. What Constitutes Negligence.

it is a question of fact whether conduct which disregards such knowledge or opportunity of knowledge, amounts to negligence or not (*m*). Knowledge that a particular risk will be incurred may render a defendant liable for negligence if he persists in incurring the risk, even though it is incurred in doing what he contracted to do (*n*).

SUB-SECT. 2.—*How the Duty to Take Care Arises.*

Cases in which the duty to take care arises.

**629.** A duty to take care may arise:—

(1) from ownership, possession, or control of real property (*o*);

(2) from ownership, possession, or control of goods, animals, or other things (*p*);

(3) from proximity to, or coming into contact with, other persons or their property (*q*);

(4) from special, contractual, or *quasi*-contractual relationships (*r*);

(5) from the application of statutes imposing special duties involving care in their performance

SECT. 2.—*Standard and Degree of Care Ordinarily Required.*

SUB-SECT. 1.—*In General.*

Basis upon which standard of care is ascertained.

**630.** It is necessary to distinguish between the standard of care ordinarily required in a particular case and the degree of care actually exercised. It is the duty of the court, if necessary, to define what the standard is, and the duty of the jury to decide, when the facts are in dispute, whether such standard has been attained (*t*). This standard is founded upon a consideration of the care which would be observed by a prudent and reasonable man (*a*). It is the

(*m*) *Clarke* v. *Holmes* (1862), 7 H. & N. 937, Ex. Ch.; compare *Silverton* v. *Marriott* (1888), 59 L. T. 61.

(*n*) *Combe* v. *Simmonds* (1853), 1 W. R. 289; thus, where the plaintiff sends wire to be galvanised, and it is in such a state that it cannot be galvanised without spoiling it, if the defendant, knowing this, tries to galvanise it, he is guilty of negligence.

(*o*) See pp. 382 *et seq.*, *post.*

(*p*) See pp. 393, 405 *et seq.*, 419, *post.*

(*q*) See pp. 410 *et seq.*, *post.*

(*r*) See pp. 426 *et seq.*, *post.* Sometimes the relationship may impose a duty the breach of which will found an action *ex delicto* as well as *ex contractu* (see *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157, C. A.; *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442); and sometimes *ex delicto* alone, as in *Gladwell* v. *Steggall* (1839), 5 Bing. (N. C.) 733; see note (*b*), p. 367, *post*; and see *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, C. A.; *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A.; title TORT.

(*s*) See p. 429, *post.*

(*t*) See pp. 441, 442, *post.*

(*a*) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193; compare *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, *per* ALDERSON, B., at p. 784, "negligence is the omission to do something which a reasonable man guided upon the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do"; see also *Ford* v. *London and South Western Rail. Co.* (1862), 2 F. & F. 730; *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468; *Dean* v. *Keate* (1811), 3 Camp. 4; compare *London General Omnibus*

SECT. 2.
Standard and Degree of Care Ordinarily Required.

same for everyone of full age who is in possession of all his faculties and is of sound mind (*b*), and it does not vary with the intelligence of the individual upon whom the particular duty to take care rests (*c*).

The standard of care required having been ascertained on this basis, it is not enough that some care has been taken (*d*) if it falls short of this standard (*e*). On the other hand, if the care taken attains to this standard, no liability for negligence will result. Thus, no liability for negligence attaches to a party when in the prosecution of a lawful act injury to another is caused by a pure accident (*f*), nor can anyone be said to be negligent merely because he fails to make provision against an accident which he could not be reasonably expected to foresee (*g*).

Effect of act if care taken attains to standard required.

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*Co., Ltd.* v. *Tilbury Contracting and Dredging Co.* (1906), *Ltd.* (1907), 71 J. P. 534; *Clothier* v. *Webster* (1882), 12 C. B. (N. S.) 790; *Smith* v. *Browne* (1891), 28 L. R. Ir. 1; *Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 453, C. A.; *Hyman* v. *Nye* (1881), 6 Q. B. D. 685; *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.; *Cornman* v. *Eastern Counties Rail. Co.* (1859), 4 H. & N. 781; compare *Hayman* v. *Hewitt* (1798), Peake, Add. Cas. 170 (but compare with this case *Illidge* v. *Goodwin* (1831), 5 C. & P. 190); *Tolhausen* v. *Davies* (1888), 58 L. J. (Q. B.) 98, C. A.; and other cases cited at pp. 367, 379, 381, 393, *post.* See also the following Scottish cases: *Mackie* v. *Macmillan* (1898), 36 Sc. L. R. 137; *Wisely* v. *Aberdeen Harbour Commissioners* (1887), 24 Sc. L. R. 315; *Shaw* v. *Croall & Sons* (1885), 22 Sc. L. R. 792; compare *Weems* v. *Mathieson* (1861), 4 Macq. 221, 227, H. L.

(*b*) See p. 463, *post.* With regard to persons of physical incapacity it is submitted that, in the absence of any special duty, only such care as they can take under the circumstances can be expected of them. Holmes, The Common Law, p. 109, says: "A blind man is not required to see at his peril, and, although he is no doubt bound to consider his infirmity in regulating his actions, yet, if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another"; but this is only true so long as there is no positive duty devolving on the blind man to avoid such injury. Such a positive duty may arise, for example, if the person, with knowledge of his incapacity, voluntarily does that which brings about the risk and results in the injury.

(*c*) *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468; compare *Jones* v. *Bird* (1822), 5 B. & Ald. 837, 846.

(*d*) *Anderson* v. *Blackwood* (1885), 23 Sc. L. R. 227.

(*e*) The plaintiff, as a rule, must prove his case, and the mere fact that the defendant cannot explain the cause of an accident does not of itself render him liable (*Macfarlane* v. *Thomson* (1884), 22 Sc. L. R. 179; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145), unless the circumstances are such as to call upon him for an explanation, *e.g.*, *Walton* (*Isaac*) *& Co.* v. *Vanguard Motorbus Co., Ltd.* (1908), 25 T. L. R. 13 (motor omnibus running off the roadway on to the footway); *Hyman* v. *Nye* (1881) 6 Q. B. D. 685, and *Sharp* v. *Grey* (1833), 9 Bing. 457 (cases of defective vehicles used as public conveyances); compare *Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390; *Hammack* v. *White* (1862), 11 C. B. (N. S.) 588; and see, generally, pp. 435 *et seq.*, 439 *et seq.*, *post.*

(*f*) *Davis* v. *Saunders* (1770), 2 Chit. 639; *Wakeman* v. *Robinson* (1823), 1 Bing. 213; *Great Western Rail. Co.* v. *Davies* (1878), 39 L. T. 475; *Douglas* v. *Gray* (1890), 27 Sc L. R. 687; and see p. 467, *post.*

(*g*) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; *Lay* v. *Midland Rail. Co.* (1874), 30 L. T.

SECT. 2. **Standard and Degree of Care Ordinarily Required.**

Degree of care in ordinary circumstances.

Test of reasonable care.

**631.** In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions (*h*), nor are they bound to exercise scientific care (*i*) or to take extravagant precautions (*j*). They are generally entitled to assume (*k*) that others will to a reasonable extent take care to look out for themselves and take proper steps to avoid known risks (*l*).

A fair test of what is reasonable care is often the consideration of what is habitually done in the same or similar circumstances (*m*); for the omission to take precautions which are usually taken is some evidence of negligence (*a*).

529; *Lay* v. *Midland Rail. Co.* (1875), 34 L. T. 30; *Keeble* v. *East and West India Dock Co.* (1888), 5 T. L. R. 312, C. A.; *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253; *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.; *Robinson* v. *Reid's Trustees* (1900), 37 Sc. L. R. 718.

(*h*) *Keeble* v. *East and West India Dock Co., supra*; *Lay* v. *Midland Rail. Co.* (1874), 30 L. T. 529; *Lay* v. *Midland Rail. Co.* (1875), 34 L T. 30; *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; see *Horsburgh* v. *Sheach* (1900), 38 Sc. L. R. 197; *Royan* v. *M'Lellans* (1889), 27 Sc. L. R. 79; compare *Ross* v. *Keith* (1888), 16 R. (Ct. of Sess.) 86.

(*i*) *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A.; *Shaftesbury* (*Earl*) v. *London and South Western Rail. Co.* (1895), 11 T. L. R. 269, C. A.; *Port-Glasgow and Newark Sail Cloth Co., Ltd.* v. *Caledonian Rail. Co., Ltd.* (1892), 29 Sc. L. R. 577; *M'Gill* v. *Bowman & Co.* (1890), 28 Sc. L. R. 144.

(*j*) *Wright* v. *Midland Rail. Co.* (1884), 51 L. T. 539; the law there laid down being approved in the Court of Appeal, which reversed the decision of the court below on the application of the law to the facts, see *Brown* v. *Great Western Rail. Co.* (1885), 1 T. L. R. 406, note; compare *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010; *Ford* v. *London and South Western Rail. Co.* (1862), 2 F.& F. 730; *Freemantle* v. *London and North Western Rail. Co.* (1861), 10 C. B. (N. S.) 89; *M'Inulty* v. *Primrose* (1897), 34 Sc. L. R. 334; *Wisely* v. *Aberdeen Harbour Commissioners* (1887), 24 Sc. L. R. 315.

(*k*) Unless the particular act, or course of conduct, is such as to increase the ordinary risks to others (*Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258, commenting on *Bilbee* v. *London, Brighton and South Coast Rail. Co.* (1865), 18 C. B. (N. S.) 584, and approved of in *Ellis* v. *Great Western Rail. Co.* (1874), L. R. 9 C. P. 551, Ex. Ch.); compare *Thompson* v. *North Eastern Rail. Co.* (1860), 2 B. & S. 106; *Mitchell* v. *Caledonian Rail. Co.* (1909), 46 Sc. L. R. 517; but see *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45.

(*l*) *Wright* v. *Midland Rail. Co., supra*; see *Brown* v. *Great Western Rail. Co., supra*; *Walker* v. *Midland Rail. Co.* (1886), 2 T. L. R. 450, H. L.; *Mackie* v. *Macmillan* (1898), 36 Sc. L. R. 137; compare *Falkiner* v. *Great Southern and Western Rail. Co. of Ireland* (1871), 5 I. R. C. L. 213; *Curtin* v. *Great Southern and Western Rail. Co. of Ireland* (1887), 22 L. R. Ir. 219, C. A.; *Stubley* v. *London and North Western Rail. Co.* (1865), L. R. 1 Exch. 13; *Clayards* v. *Dethick* (1848), 12 Q. B. 439.

(*m*) *Bryant* v. *North Metropolitan Tramways Co.* (1890), 6 T. L. R. 396; *Snook* v. *Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308, 310; *Great Western Rail. Co.* v. *Davies* (1878), 39 L. T. 475; *Powell* v. *Thorndike* (1910), 102 L. T. 600.

(*a*) *Blamires* v. *Lancashire and Yorkshire Rail. Co.* (1873), L. R. 8 Exch. 283, Ex. Ch.; *Snook* v. *Grand Junction Waterworks Co., supra*; compare *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058; *Blenkiron* v. *Great Central Gas Consumers Co.* (1860), 2 F. & F. 437.

SUB-SECT. 2.—*Gravity of Risk.*

SECT. 2. Standard and Degree of Care Ordinarily Required.

**632.** Where there are special circumstances which increase the risk attendant on some act or operation not usually dangerous (*b*), or where the act or operation is, from its nature, likely to cause injury to others unless special precautions are taken (*c*), the degree of care required is proportionately high (*d*). From the failure to use those precautions, which skill, foresight, and experience suggest as being necessary in such circumstances, negligence will be inferred (*e*).

Degree of care increased by unusual risk.

Thus where a duty exists, such as that imposed on harbour commissioners having control of a harbour of refuge, which if neglected will probably endanger the lives of others, the adoption of expensive and even somewhat unusual precautions may be required (*f*).

Examples of cases where special precautions required.

Consummate caution, too, is required from those handling dangerous weapons, such as loaded guns (*g*), or from those dealing with dangerous articles, such as gas (*h*) or explosives (*i*).

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(*b*) *E.g.*, such as driving at night (*M'Kechnie* v. *Couper* (1887), 24 Sc. L. R. 252), or in a crowd (*The European* (1885), 10 P. D. 99; compare *The Europa* (1850), 14 Jur. 627); see *James* v. *Great Western Rail. Co.* (1866), cited L. R. 2 C. P. 634; *Shepherd* v. *Midland Rail. Co.* (1872), 25 L. T. 879 (frost rendering platform slippery); compare *Rigg* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1866), 14 W. R. 834. For the principles applicable where there are no such special circumstances, see *The Western Belle* (1906), 95 L. T. 364 (barge moored in a river and left unattended); and see p. 364, *ante*.

(*c*) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, 345, C. A.; *Edwards* v. *Hutchcon* (1889), 26 Sc. L. R. 550 (cases of dangerous machinery); *Grizzle* v. *Frost* (1863), 3 F. & F. 622 (employment of a young person at a dangerous machine); *Robinson* v. *Smith (W. H.) & Son* (1901), 17 T. L. R. 423, C. A. (boy employed at a railway book-stall); *Grant* v. *Great Western Rail. Co.* (1898), 14 T. L. R. 174, C. A. (complicated shunting operations); compare *Smith* v. *Highland Rail. Co.* (1888), 26 Sc. L. R. 33 (where plaintiff, a trespasser, was injured by shunting operations); see *Thrussell* v. *Handyside* (1888), 20 Q. B. D. 359 (dangerous work carried on over a place where others were working); compare *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45; see *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468; *Stapley* v. *London, Brighton and South Coast Rail. Co.* (1865), L. R. 1 Exch. 21.

(*d*) See cases cited in notes (*b*) and (*c*), *supra*.

(*e*) *Blenkiron* v. *Great Central Gas Consumers Co.* (1860), 2 F. & F. 437; *Mose* v. *Hastings and St. Leonards Gas Co.* (1864) 4 F. & F. 324; *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058; *Burrell* v. *Tuohy*, [1898] 2 I. R. 271; and see, generally, pp. 403, 407, *post*.

(*f*) *Burrell* v. *Tuohy*, *supra* (hammer test of ring attached to mooring buoy was not sufficient; a straining test ought to have been applied). As to harbour commissioners and their duties generally, see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*g*) *Dixon* v. *Bell* (1816), 5 M. & S. 198; *Potter* v. *Faulkner* (1861), 1 B. & S. 800, Ex. Ch., see *ibid.*, *per* ERLE, C.J., at p. 805; *Sullivan* v. *Creed*, [1904] 2 I. R. 317, C. A.

(*h*) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640, P. C.; *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Mose* v. *Hastings and St. Leonards Gas Co.*, *supra*; *Blenkiron* v. *Great Central Gas Consumers Co.*, *supra* (where, however, the jury negatived negligence in bringing lights in close proximity to escaping gas); compare *Jackson* v. *Carshalton Gas Co.* (1888), 6 T. L. R. 69; and see title GAS, Vol. XV. p. 359.

(*i*) *Brabant & Co.* v. *King*, [1895] A. C. 632, P. C.; *Williams* v. *Eady*

SECT. 2. Standard and Degree of Care Ordinarily Required.

Dangerous employment.

Young servants.

It is the duty of a master to provide safe tackle and appliances for his servants, and in ordinary cases to take reasonable care to keep them so (*k*). Where, however, the employment is of a dangerous character, such as that of a steeple-jack (*l*), such special precautions as are appropriate to the employment must be taken to see that the tackle and appliances are as safe as is possible (*m*). So, too, a master's duty towards young servants may differ from that owed to adults (*n*). Thus he must not only protect them, so far as is reasonably possible, from the dangers of their employment, but must take proper steps to ensure that they appreciate the risks (*o*).

Carriers.

The duty of a carrier of passengers for hire is to use the best precautions in known practical use for securing safety, and the fact that a vehicle breaks down is *primâ facie* evidence of negligence, but he is not responsible for disaster occasioned from latent defects which no human skill could have prevented or detected (*p*).

SUB-SECT. 3.—*Imminence of Risk.*

Imminent risk amounting to emergency.

**633.** If risk is so imminent as to amount to an emergency the act to which liability for a resulting injury would otherwise attach may be excusable (*q*). The test in such a case is not whether

(1893), 10 T. L. R. 41, C. A.; compare *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A.; and see p. 409, *post*. For regulations as to the carriage of explosives, see titles CARRIERS, Vol. IV., p. 27; EXPLOSIVES, Vol. XIV., pp. 385 *et seq*.

(*k*) *Weems* v. *Mathieson* (1861), 4 Macq. 221, 227, H. L.; *Wood & Co.* v. *Mackay* (1906), 43 Sc. L. R. 458; compare *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A.; *Murphy* v. *Phillips* (1876), 35 L. T. 477; and see title MASTER AND SERVANT, Vol. XX., pp. 130, 131.

(*l*) *Fraser* v. *Fraser* (1882), 19 Sc. L. R. 646.

(*m*) *Ibid.*; *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, C. A.; see title MASTER AND SERVANT, Vol. XX., p. 131.

(*n*) *Robinson* v. *Smith (W. H.) & Son* (1901), 17 T. L. R. 423, C. A.; *Crocker* v. *Banks* (1888), 4 T. L. R. 324, C. A. As to the duty of the employer to inquire as to the age of the infant employee, see *Gibb* v. *Crombie* (1875), 2 R. (Ct. of Sess.) 886; compare *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K. B. 548; and see title MASTER AND SERVANT, Vol. XX., pp. 130, 131.

(*o*) *Crocker* v. *Banks*, *supra*; *Grizzle* v. *Frost* (1863), 3 F. & F. 622. Thus it was held that a master ought not to have put a child under fourteen to work at a carding machine contrary to the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16) (now repealed), where absence of the caution that an older person would be expected to show might render her occupation dangerous (*Sharp* v. *Pathhead Spinning Co.* (1885), 22 Sc. L. R. 368); compare, however, *Morris* v. *Boase Spinning Co.* (1895), 32 Sc. L. R. 243 (where no liability was attached to the employers where a girl under fourteen was killed by a machine whose guards she had improperly removed); see also *Bass* v. *Hendon Urban District Council* (1912), 28 T. L. R. 317, C. A.; and for cases where the failure to instruct as to the danger was a failure of a fellow-servant, compare *Cribb* v. *Kynoch, Ltd.*, *supra*; *Young* v. *Hoffmann Manufacturing Co., Ltd.*, [1907] 2 K. B. 646, C. A.; and see p. 407, *post*.

(*p*) See title CARRIERS, Vol. IV., p. 45.

(*q*) *Jones* v. *Boyce* (1816), 1 Stark. 493; compare *Wakeman* v. *Robinson* (1823), 1 Bing. 213; see *Scott* v. *Shepherd* (1773), 3 Wils. 403; compare *R.* v. *Pitts* (1842), Car. & M. 284; *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L. R. 4 C. P. 739; compare *Gee* v. *Metropolitan Rail. Co.*

a better course was in fact open, but whether what was done was what an ordinarily prudent man might reasonably have been expected to do in such an emergency (*r*). Where the emergency is so great that no amount of foresight, care or skill, would have prevented the accident which caused the injury, the accident may be held to have been inevitable, in which case there is no cause of action (*s*).

SECT. 2. **Standard and Degree of Care Ordinarily Required.**

Inevitable accident.

SUB-SECT. 4.—*Profession of Special Skill.*

**634.** The practice of a profession, art, or calling which, from its nature, demands some special skill, ability and experience (*t*), carries with it a representation that the person practising or exercising it possesses, to a reasonable extent, the amount of skill, ability, and experience which it demands (*a*). Such a person is liable for injury caused to another to whom he owes a duty to take care (*b*), if he fails to possess that amount of skill and experience which is

Implied representation of ability.

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(1873), L. R. 8 Q. B. 161, Ex. Ch.; see *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *The City of Lincoln* (1889), 15 P. D. 15, C.A.; and see p. 479, *post*.

(*r*) *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876, *per* Lord BLACKBURN, at p. 891; *Wilkinson* v. *Kinneil Cannel and Coking Coal Co., Ltd.* (1897), 34 Sc. L. R. 533; compare *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798; *Jenoure* v. *Delmege*, [1891] A. C. 73, P. C., *per* Lord MACNAGHTEN, at p. 77.

(*s*) See title TORT; and see p. 467, *post*.

(*t*) The following may be included in addition to the professions or callings usually practised: carriers; see *Christie* v. *Griggs* (1809), 2 Camp. 79; *Sharp* v. *Grey* (1833), 9 Bing. 457; *Winterbottom* v. *Wright* (1842), 10 M. & W. 109; *Burns* v. *Cork and Bandon Rail. Co.* (1863), 13 I. C. L. R. 543; *Simson* v. *London and General Omnibus Co.* (1873), L. R. 8 C. P. 390; and see title CARRIERS, Vol. IV., pp. 44, 45; and for the duties of drivers of public vehicles, and the standard of care required, see *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Simon* v. *London General Omnibus Co., Ltd.* (1907), 23 T. L. R. 463; *Hase* v. *London General Omnibus Co., Ltd.* (1907), 23 T. L. R. 616; and see titles CARRIERS, Vol. IV., p. 44; STREET AND AERIAL TRAFFIC: trade protection societies; see *Woods* v. *Woods* (1862), 3 F. & F. 244: barbers; see *Hales* v. *Kerr*, [1908] 2 K. B. 601: patent and other agents; see *Lee* v. *Walker* (1872), L. R. 7 C. P. 121; and see note (*c*), p. 368, *post*.

(*a*) In Fitz. Nat. Brev., Writ de Trespass sur le Case, 94D, cited in *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655, *per* WILLIAMS, J., the following passage appears: "If a smith prick my horse with a nail etc., I shall have my action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought"; and see *Harmer* v. *Cornelius* (1858), 5 C. B. (N. S.) 236; compare *Seare* v. *Prentice* (1807), 8 East, 348; *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Lanphier* v. *Phipos* (1838), 8 C. & P. 475; *Farquhar* v. *Murray* (1901), 38 Sc. L. R. 642.

(*b*) This will usually arise from the fact of his employment, but the right arises both *ex contractu* and *ex delicto* (*Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, C. A.; *Hayn* v. *Culliford* (1879), 4 C. P. D. 182, C. A., *per* BRAMWELL, L.J., at p. 185; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944, C. A.; *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134, C. A.; and see note (*r*), p. 362, *ante*. Privity of contract, however, is not necessary to enable a person injured by want of skill on the part of a medical man to recover damages; thus a doctor is liable for negligent treatment although he may be employed by another person to look after that patient (*Pippin* v. *Sheppard* (1822), 11 Price, 400; *Gladwell* v. *Steggall* (1839), 5 Bing. (N. C.) 733; compare *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442; and see title MEDICINE AND PHARMACY, Vol. XX., p. 331, note (*f*)).

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Effect of want of skill or neglect to it.

usual in his profession or calling (*c*), or if he neglects to use the skill and experience which he possesses (*d*) or the necessary degree of care demanded or professed (*e*). His duty is honestly and diligently to use that care which would be used by others in the

(*c*) *Seare* v. *Prentice* (1807), 8 East, 348; *Blair* v. *Assets Co.*, [1896] A. C. 409. It has been said that, where no extraordinary degree of skill is contracted for, the fact that five out of ten skilled and experienced members of a particular profession would have done the same act, or have come to the same conclusion, that is complained of as negligent on the part of the defendant, entitles the latter to a verdict (*Chapman* v. *Walton* (1833), 10 Bing. 57; see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 295, note (*n*)). As to negligence on the part of accountants, see *Re Kingston Cotton Mill Co., Ltd.* (No. 2), [1896] 2 Ch. 279, C. A.; *Henry Squire, Cash Chemist, Ltd.* v. *Ball, Baker & Co., Mead* v. *Ball, Baker & Co.* (1911), 106 L. T. 197, C. A.; see title COMPANIES, Vol. V., p. 269; agents, see title AGENCY, Vol. I. pp. 185, 196, 230; auctioneers, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 514, 516; bailees, see title BAILMENT, Vol. I., pp. 531, 537, 538, 544, 552, 560, 564; barbers, see note (*t*), p. 367, *ante*; barristers, see title BARRISTERS, Vol. II., pp. 394, 401, 402; building contractors, see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 189, 315, 316; and as to architects, see *ibid.*, pp. 293, 295 *et seq.*, 306; engineers, see *ibid.*, pp. 295 *et seq.*; and quantity surveyors, see *ibid.*, p. 311; carriers, see title CARRIERS, Vol. IV., pp. 4 *et seq.*, 25 *et seq.*; company directors, see title COMPANIES, Vol. V., pp. 231 *et seq.*; corporations, see title CORPORATIONS, Vol. VIII., pp. 386, 387; executors and administrators, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 316; innkeepers, see title INNS AND INNKEEPERS, Vol. XVII., pp. 313 *et seq.*; insurance agents and brokers, see title INSURANCE, Vol. XVII., pp. 356, 357; masters and employers, see title MASTER AND SERVANT, Vol. XX., pp. 119 *et seq.*, 128 *et seq.*, 248 *et seq.*; medical practitioners, see title MEDICINE AND PHARMACY, Vol. XX., pp. 330 *et seq.*; patent agents, see title PATENTS AND INVENTIONS; pawnees, see title PAWNS AND PLEDGES; postal officials, see title POST OFFICE; railway companies and their officials, see title RAILWAYS AND CANALS; servants and workmen, see titles BAILMENT, Vol. I., p. 557; MASTER AND SERVANT, Vol. XX., pp. 125 *et seq.*, 276 *et seq.*; WORK AND LABOUR; receivers, see title RECEIVERS; sheriffs and bailiffs, see title SHERIFFS AND BAILIFFS; shipowners, see title SHIPPING AND NAVIGATION; solicitors, see titles BARRISTERS, Vol. II., pp. 401, 402; SOLICITORS; stockbrokers, see title STOCK EXCHANGE; trustees, see title TRUSTS AND TRUSTEES; valuers and appraisers, see *Love* v. *Mack* (1905), 92 L. T. 345; title VALUERS AND APPRAISERS.

(*d*) *Price* v. *Metropolitan House Investment and Agency Co., Ltd.* (1907), 23 T. L. R. 630, C. A., *per* COZENS-HARDY, M.R., at p. 631 (quoting LAWRANCE, J., in the court below): "A man who is employed to act for another as his agent is bound to exercise all the skill and all the knowledge he has of a particular business, all the diligence, all the zeal, and all the energy that he is capable of, and any interests he may have himself he is bound to exercise to the fullest extent for the sole and exclusive benefit of the person for whom he is acting": compare Beven, Negligence in Law, 3rd ed., pp. 1129, 1131, n. The passage from Story, Law of Agency, s. 183, there referred to does not appear to conflict with the judgment above cited, and on general principles it would appear that he who, having special knowledge of that which he is employed to do, negligently omits to use it, and thereby causes injury, is liable, notwithstanding that a person of ordinary skill could not have avoided causing such injury; see, however, note (*f*), p. 369, *post*.

(*e*) *Seare* v. *Prentice*, *supra*; *Blair* v. *Assets Co.*, *supra*; *Dickson* v. *Hygienic Institute* (1910), 47 Sc. L. R. 286; and cases cited in note (*f*), p. 369, *post*. As to what degree of negligence would be an answer to an action by the skilled person for his fees, see *Moneypenny* v. *Hartland* (1824), 1 C. & P. 352; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 395.

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same profession or calling (*f*). He will not, however, generally be held liable for loss resulting either from a mere error of judgment on a difficult point (*g*) or from want of skill in performance of some act which is not appropriate to be performed by the members of his particular profession (*h*). A man should not, however, undertake to do a work of skill unless he is fitted for it, and it is his duty to know whether he is so fitted or not (*i*).

Error of judgment.

**635.** A professional man is not liable for failure to use the skill expected from his profession when he is acting not in his professional capacity, but as an arbitrator or *quasi*-arbitrator (*k*), as, for instance, when an architect settles a dispute between a builder and a building owner, or gives a certificate which under the building contract is conclusive evidence of work done (*l*).

Liability where act not done in professional capacity.

**636.** Where skilled persons are employed together, but each one is separately engaged by the employer, each is only liable for his own lack of skill, but where it is part of the skilled employment to engage subordinates there may be a liability for failure to take proper care in engaging them; thus a broker is liable to his principal for negligence in failing to employ a good broker where another one has to be employed (*m*); he may also be liable to his principal for failing to act in accordance with the custom of the particular market he deals in, or for neglecting to make an enforceable contract (*n*),

Negligence arising out of failure to perform incidental matters.

(*f*) *Chapman* v. *Walton* (1833), 10 Bing. 57; *Hunter* v. *Caldwell* (1847), 10 Q. B. 69; *Jenkins* v. *Betham* (1854), 15 C. B. 168; *Rich* v. *Pierpoint* (1862), 3 F. & F. 35. Those responsible for a hospital are not, however, liable for any want of care on the part of surgeons on their staff (*Hillyer* v. *St. Bartholomew's Hospital* (*Governors*), [1909] 2 K. B. 820, C. A.; compare *Perionowsky* v. *Freeman* (1866), 4 F. & F. 977). The statement in *Price* v. *Metropolitan House Investment and Agency Co., Ltd.* (1907), 23 T. L. R. 630, C. A., that the duty of a skilled person was to exercise all the skill and knowledge he has of a particular business, all the diligence, zeal, and energy he is capable of (see note (*d*), p. 368, *ante*), seems rather an extension of the usual rule as laid down in the above cases.

(*g*) *Godefroy* v. *Dalton* (1830), 6 Bing. 460; *Hart* v. *Frame* (1839), 6 Cl. & Fin. 193, H. L.; *Faithfull* v. *Kesteven* (1910), 103 L. T. 56, C. A.; *Purves* v. *Landell* (1845), 12 Cl. & Fin. 91, H. L.; compare *Blair* v. *Assets Co.*, [1896] A. C. 409. For the consideration of criminal responsibility for negligence on the part of professional men, see *R.* v. *Spencer* (1867), 10 Cox, C. C. 525; *Pharmaceutical Society* v. *Wheeldon* (1890), 24 Q. B. D. 683; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 585.

(*h*) *Pappa* v. *Rose* (1872), L. R. 7 C. P. 32, 525, Ex. Ch.; compare *Jenkins* v. *Betham* (1854), 15 C. B. 168.

(*i*) *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Ruddock* v. *Lowe* (1865), 4 F. & F. 519; *Jones* v. *Fay* (1865), 4 F. & F. 525; *Dickson* v. *Hygienic Institute* (1910), 47 Sc. L. R. 286.

(*k*) See title ARBITRATION, Vol. I., p. 459; *Tharsis Sulphur Co.* v. *Loftus* (1872), L. R. 8 C. P. 1 (average adjuster).

(*l*) *Stevenson* v. *Watson* (1879), 4 C. P. D. 148; *Chambers* v. *Goldthorpe*, *Restell* v. *Nye*, [1901] 1 K. B. 624, C. A.; but such a certificate is not necessarily conclusive as between the architect and the building owner (*Rogers* v. *James* (1891), 8 T. L. R. 67, C. A.; see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 210).

(*m*) *Ecossaise Steamship Co.* v. *Lloyd, Low & Co.* (1890), 7 T. L. R. 76, C. A.

(*n*) *Neilson* v. *James* (1882), 9 Q. B. D. 546, C. A.; compare *Lamert* (1846), 15 M. & W. 486.

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or for omitting any usual term from the contract (*o*); and a patent agent, though not bound to be accurately acquainted with patent law, is expected to be familiar with the practice of obtaining patents; so that ignorance of decisions which have an important bearing on that practice would as a rule render him liable to a client injured in consequence (*p*).

Reliance on advice of third party.

**637.** In some cases a skilled person may be protected if he has relied on the advice of another upon whom he is justified in relying (*q*). Thus a solicitor is not liable if he acts upon the clear opinion and direction of an experienced counsel given upon a properly and carefully drawn case (*r*), but it is otherwise where he ought himself to have knowledge of the particular matter (*s*) or the question is one of practical procedure (*a*), unless indeed questions of doubt are involved (*b*).

### SUB-SECT. 5.—*Notice of Fact Demanding Special Care.*

Article supplied in a condition to cause danger.

**638.** The fact that a certain state of circumstances exists may in some cases create a duty to take special care even where no such duty would otherwise exist, and may involve the employment of special precautions (*c*). Thus, while no liability ordinarily attaches for injury resulting from a defect in an article supplied if the article is not dangerous in itself, yet, if it is in a condition likely to cause danger (*d*), knowledge of this fact imposes on the person supplying it a duty to take precautions to prevent it causing injury and a

(*o*) *Mallough* v. *Barber* (1815), 4 Camp. 150; compare *Glaser* v. *Cowie* (1813), 1 M. & S. 52. In *Smith* v. *Price* (1862), 2 F. & F. 748, a firm of brokers, before completion, abandoned business which they had undertaken and were held liable; and see, generally, titles AGENCY, Vol. I., pp. 185 *et seq.*; STOCK EXCHANGE.

(*p*) *Lee* v. *Walker* (1872), L. R. 7 C. P. 121; and see title PATENTS AND INVENTIONS.

(*q*) He must take care to obtain advice from, or to rely upon, an experienced person (*Ecossaise Steamship Co.* v. *Lloyd, Low & Co.* (1890), 7 T. L. R. 76, C. A.; and see *Scholes* v. *Brook* (1891), 63 L. T. 837; *Lowry* v. *Guilford* (1832), 5 C. & P. 234; compare *Russell* v. *Palmer* (1767), 2 Wils. 325; see *Godefroy* v. *Dalton* (1830), 6 Bing. 460; *Baikie* v. *Chandless* (1811), 3 Camp. 17.

(*r*) *Kemp* v. *Burt* (1833), 4 B. & Ad. 424; compare *Lowry* v. *Guilford*, *supra*; and see, generally, titles BARRISTERS, Vol. II., pp. 401 *et seq.*; SOLICITORS.

(*s*) *Godefroy* v. *Dalton*, *supra*, *per* TINDAL, C.J.

(*a*) *Russell* v. *Palmer*, *supra*; *Baikie* v. *Chandless*, *supra*; compare *Compton* v. *Chandless* (1802), cited 3 Camp. 19.

(*b*) *Laidler* v. *Elliott* (1825), 3 B. & C. 738.

(*c*) *The European* (1885), 10 P. D. 99; compare *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45, *per* Lord HATHERLEY, L.C., at pp. 56, 57; *Richardson* v. *Great Eastern Rail. Co.* (1876), 1 C. P. D. 342, C. A.; *Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258. The question whether there is such a duty must be determined by the light of the circumstances at the time when it is alleged to be broken (*Cunnington* v. *Great Northern Rail. Co.* (1883), 49 L. T. 392, *per* BRETT, M.R., at p. 393 (carrier delivering wrong empty casks).

(*d*) *Winterbottom* v. *Wright* (1842), 10 M. & W. 109; *Longmeid* v. *Holliday* (1851), 6 Exch. 761; *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A. It must, however, be remembered that the rule is different where articles are

liability for any injury which may result to the person to whom the article is supplied (*e*).

Consignment of dangerous goods.

Similarly, persons consigning goods of a dangerous character are bound to communicate to the carrier the facts within their knowledge which indicate the dangerous character of the goods (*f*), and in cases where the carrier has neither knowledge nor means of knowledge of such dangerous character and is under a duty to accept the goods for carriage, a warranty that no special danger is involved in the carriage of them may be implied from the request and the consequent obligation to carry (*g*).

Increase of degree of care in special circumstances known to the person liable to use care.

**639.** Where a duty to take care already exists, the fact that there are special circumstances brought to the notice of the person under that duty, which call for special precautions, may increase the degree of care required to be taken (*h*). Thus, while an occupier of premises abutting on or adjoining the highway is under a general obligation to keep the premises in a safe condition as regards members of the public on the highway (*i*), the cognisance by him of some

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supplied for a particular purpose under circumstances which throw on the persons supplying them a duty of seeing that the articles are reasonably fit for that purpose (*Elliott* v. *Hall* (1885), 15 Q. B. D. 315 (defective railway truck); *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, C. A. (defective chain supplied by shipowner for unloading a ship); *Hawkins* v. *Smith* (1896), 12 T. L. R. 532 (rotten sack supplied for unloading grain)); see p. 407, *post*; and see also title SALE OF GOODS.

(*e*) *Earl* v. *Lubbock*, [1905] 1 K. B. 253, 258, C. A., approving *dictum* of BOWEN, L.J., in *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A. So, too, in the case of a contract of sale, a duty is imposed on the vendor, if there is some dangerous quality in the goods sold of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be requisite (*Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A.); see *Preist* v. *Last*, [1903] 2 K. B. 148, C. A.; *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A.; *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193, C. A.; and generally, p. 407, *post*; and see title SALE OF GOODS.

(*f*) *Brass* v. *Maitland* (1856), 6 E. & B. 470; *Farrant* v. *Barnes* (1862), 11 C. B. (N. S.) 553; compare *Williams* v. *East India Co.* (1802), 3 East, 192.

(*g*) *Acatos* v. *Burns* (1878), 3 Ex. D. 282, C. A., as discussed and commented on in *Bamfield* v. *Goole and Sheffield Transport Co., Ltd.*, [1910] 2 K. B. 94, C. A., by FLETCHER MOULTON, L.J., at p. 111. In the latter case it was held that where a consignor does not give notice to a carrier that the goods are dangerous he must, unless the carrier knows or ought to know the dangerous character of the goods, be taken impliedly to warrant that the goods are not dangerous, though the consignor himself may not be aware of their dangerous nature; compare *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392. The responsibility and liability of a carrier in respect of dangerous goods which he has accepted for carriage is usually determined by special contract; see title CARRIERS, Vol. IV., p. 85.

(*h*) *Shepherd* v. *Midland Rail. Co.* (1872), 25 L. T. 879; *Daniel* v. *Metropolitan Rail. Co. (Directors etc.)* (1871), L. R. 5 H. L. 45; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229; *Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc. L. R. 475; compare *Pickering* v. *Belfast Corporation* (1911), 45 I. L. T. 34, C. A.; *Lowery* v. *Walker*, [1911] A. C. 10.

(*i*) See *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; and cases cited in notes (*a*), (*c*), p. 399, *post*; compare *Broggi* v. *Robbins* (1899), 15 T. L. R. 224, C. A.; *Tredway* v. *Machin* (1904), 91 L. T. 310, C. A.; *Cavalier* v. *Pope*, [1906] A. C. 428; *Malone* v. *Laskey*, [1907] 2 K. B. 141, C. A., as to the liability of a landlord to persons other than the actual tenant as

SECT. 2. **Standard and Degree of Care Ordinarily Required.**

condition of those premises which is a source of risk or danger (*k*), even though it be brought about by the act of a stranger (*l*), imposes on the occupier in addition the special duty of guarding against that danger (*m*). Persons using a highway are required, when they have notice of special circumstances which enhance the danger involved in such use, to take such special care as a reasonably prudent man would take to obviate it (*n*). The fact that persons are known to be in a position which may be rendered dangerous by the carrying out of certain operations makes it the duty of those carrying out those operations to safeguard those endangered (*o*).

The degree of care required.

The degree of care incumbent upon a person who has notice of facts demanding special care naturally varies with the extent of the knowledge he has of the relevant circumstances (*p*). No liability, however, attaches where the knowledge of the circumstances leads to the taking of such precautions as leave no reasonably probable event unforeseen and unprovided for (*q*).

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affected by notice of the defective state of the premises which he has let; and see p. 382, *post*; and titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 153, note (*h*); LANDLORD AND TENANT, Vol. XVIII., pp. 504, 505.

(*k*) In *Shepherd* v. *Midland Rail. Co.* (1872), 25 L. T. 879, it was held that in very frosty weather the defendants' servants ought to have been on the alert to see that water did not collect and freeze upon the station platform; compare *O'Keefe* v. *Edinburgh Corporation* (1910), 48 Sc. L. R. 50.

(*l*) *Silverton* v. *Marriott* (1888), 59 L. T. 61, following *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314, and *Barnes* v. *Ward* (1850), 9 C. B. 392; compare *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.

(*m*) *Shepherd* v. *Midland Rail. Co.*, *supra*; *O'Keefe* v. *Edinburgh Corporation*, *supra*; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 134; and compare *Anthony* v. *Midland Rail. Co.* (1908), 25 T. L. R. 98 (where a train overshot the platform in a fog the duty of warning passengers not to alight was cast on the defendants, but was held not to have been neglected).

(*n*) *Cruden* v. *Fentham* (1799), 2 Esp. 685 (extra care in obeying rule of the road in fog or darkness); see title STREET AND AERIAL TRAFFIC; *Gray* v. *North Eastern Rail. Co. and Washington Colliery Co.* (1883), 48 L. T. 904; *M'Kechnie* v. *Couper* (1887), 24 Sc. L. R. 252; compare *Springett* v. *Ball* (1865), 4 F. & F. 472; see *The European* (1885), 10 P. D. 99; compare *The Europa* (1850), 14 Jur. 627; *James* v. *Great Western Rail. Co.* (1866), cited L. R. 2 C. P. 634 (duty to whistle at level crossing in fog); *Anderson* v. *Blackwood* (1885), 23 Sc. L. R. 227; *R.* v. *Walker* (1824), 1 C. & P. 320; *R.* v. *Longbottom* (1849), 3 Cox, C. C. 439. In *Smith* v. *Browne* (1891), 28 L. R. Ir. 1, and *M'Kechnie* v. *Couper*, *supra*, the persons injured were deaf; unless, however, the other person had notice of their infirmity no extra precaution would be required.

(*o*) *Thrussell* v. *Handyside* (1888), 20 Q. B. D. 359; *The Andalusian* (1877), 2 P. D. 231 (launch of a vessel in a crowded river); and as to persons injured on a level crossing, see *Rogers* v. *Rhymney Rail. Co.* (1872), 26 L. T. 879; and see pp. 377, 424, note (*d*), *post*.

(*p*) *Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1; *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45. Where there is a statutory duty to maintain premises in a certain condition, neglect to ascertain whether they were in that condition, when the means of knowing it existed, is equivalent to actual knowledge that they were not in that condition (*Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93); and see title NUISANCE, p. 518, *post*. As to extra care required in relation to animals known to be dangerous, see title ANIMALS, Vol. I., pp. 372 *et seq.*; and see p. 405, *post*.

(*q*) *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A.; *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; *Cornman* v. *Eastern Counties Rail. Co.*

SECT. 2. Standard and Degree of Care Ordinarily Required.

Increase of degree of care in relation to acts by children.

Injury contributed to by act of child.

**640.** Every person must be taken to know that children are likely to meddle with what comes within their reach, and this knowledge may impose a relatively higher degree of duty to take care on anyone who leaves that which may be dangerous (*r*), if meddled with, in a place where it is probable that children will reach it, than if there was no such probability (*s*). In determining whether a higher degree of care is so imposed it is material to consider whether the place is one which children do frequent or are entitled and likely to frequent (*t*), the purpose for which they frequent it, the age of, and means of control over, the children who do or may be expected to frequent it, and the extent to which that which is left is calculated to attract children to meddle with it (*u*). Where a child is injured owing to the neglect to take the higher degree of care so required it is no answer to say that the injured child himself or some other child caused the injury by his own act in meddling with the dangerous thing, since such meddling is the very thing which should have been guarded against (*a*). Similarly, where a person of full age does that which will probably afford an inducement or an opportunity for children to run into danger, he is bound to take reasonable precautions to prevent such inducement or opportunity resulting in danger, or to guard against the consequences (*b*).

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(1859), 4 H. & N. 781, *per* BRAMWELL, B., at p. 786; *Bailey* v. *Neal* (1888), 5 T. L. R. 20 (roller left securely tied); *M'Gregor* v. *Ross and Marshall* (1883), 10 R. (Ct. of Sess.) 725. As to the statutory duties imposed in respect of the employment of children generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 150 *et seq.*

(*r*) As to what is to be considered capable of being "dangerous" for this purpose, see *Duff* v. *National Telephone Co., Ltd.* (1889), 26 Sc. L. R. 512 (barrow left chained to wall in lane; held to be not within the rule).

(*s*) *Cormack* v. *Wick and Pulteneytown School Board* (1889), 16 R. (Ct. of Sess.) 812; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229; compare *Lowery* v. *Walker*, [1911] A. C. 10, reversing S. C., [1910] 1 K. B. 173, C. A., on the facts as found by the county court judge; see *Lay* v. *Midland Rail. Co.* (1875), 34 L. T. 30. Compare with these cases the following cases in which it was considered that there was no obligation on the owner of property to keep his property free from peril to young children by taking elaborate precautions:—*Holland* v. *Lanarkshire Middle Ward District Committee*, [1909] S. C. 1142; *Royan* v. *M'Lellans* (1889), 27 Sc. L. R. 79; *Duff* v. *National Telephone Co., Ltd.* (1889), 26 Sc. L. R. 512; *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A.

(*t*) *Angus* v. *Findlay* (1887), 24 Sc. L. R. 237 (waste ground); *Cummings* v. *Darngavil Coal Co.* (1903), 40 Sc. L. R. 389 (owner of waste ground, open through failure of road authority to fence; held not liable); *Morris* v. *Carnarvon County Council*, [1910] 1 K. B. 159, 164 (school); *Jackson* v. *London County Council* (1911), 28 T. L. R. 66 (school), affirmed (1912), 56 Sol. Jo. 428, C. A.; and as to schools, see title EDUCATION, Vol. XII., pp. 33 *et seq.*

(*u*) *Jewson* v. *Gatti* (1886), 2 T. L. R. 441 (cellar flap left open while painting going on inside); *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A. (rotten fence near highway), and see note (*s*), *supra*; but where the place is rendered dangerous by the act of a trespasser the occupier is not as a rule liable (*Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.).

(*a*) *King* v. *Ford* (1816), 1 Stark. 421; compare *Williams* v. *Eady* (1893), 10 T. L. R. 41; see *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Martin* v. *Ward* (1887), 24 Sc. L. R. 557; *Smith* v. *Martin and Kingston-upon-Hull Corporation*, [1911] 2 K. B. 775, C. A. As to children trespassing, see p. 394, *post.*

(*b*) *Robinson* v. *Smith (W. H.) & Son* (1901), 17 T. L. R. 423, C. A.;

SECT. 2. SUB-SECT. 6.—*Gratuitous Services.*

**Standard and Degree of Care Ordinarily Required.**

**641.** Where a person, not professing to be skilled in the particular matter (*c*), undertakes to do an act for another, without reward, he is only bound to exercise honestly that care which he, as an ordinarily prudent man, would exercise if acting for himself (*d*). He is not to be held liable for a mistake, or for an error of judgment, which a reasonably prudent man might commit (*e*), or for mere non-success (*f*).

Not professing skill.

Act involving skill.

Where a person skilled in a particular matter gratuitously undertakes to do something involving the exercise of skill, he must do it to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess (*g*).

When liability attaches.

**642.** No one, whether skilled or not, who undertakes to render services or to do certain acts gratuitously, is bound to render those services or to do those acts (*h*); but if he does render or do them, he is under a liability, should he be guilty of negligence in rendering them or in doing that which he has undertaken to do (*i*).

Such a person, too, must abide by the terms of his undertaking (*k*);

*Shrimpton* v. *Hertfordshire County Council* (1911), 104 L. T. 145, H. L. As to cases between master and servant, see title MASTER AND SERVANT, Vol. XX., p. 131; and, as to the employment of children in dangerous performances, see title INFANTS AND CHILDREN, Vol. XVII., pp. 153, 154.

(*c*) See p. 367, *ante*.

(*d*) *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158; see title MEDICINE AND PHARMACY, Vol. XX., p. 331, note (*f*); *Wilkinson* v. *Coverdale* (1793), 1 Esp. 75 (negligence in obtaining a fire policy; see title INSURANCE, Vol. XVII., p. 356); *Rae* v. *Meek* (1889), 14 App. Cas. 558; *Knox* v. *Mackinnon* (1888), 13 App. Cas. 753; *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727 (trustees gratuitously undertaking trusts; see title TRUSTS AND TRUSTEES); compare *Speight* v. *Gaunt* (1883), 9 App. Cas. 1, *per* Lord BLACKBURN, at p. 17; *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115 (master driving a servant for the latter's convenience); *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317 (bank gratuitous bailee of plaintiff's debentures); *Bullen* v. *Swan Electric Engraving Co.* (1907), 23 T. L. R. 258, C. A. (gratuitous bailees); and see titles AGENCY, Vol. I., p. 185; BAILMENT, Vol. I., pp. 531—534, 540—543.

(*e*) *Shiells* v. *Blackburne*, *supra*; *Coggs* v. *Bernard* (1703), 1 Salk. 26; 1 Smith, L. C., 11th ed. 173; compare *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, Ex. Ch., *per* CROMPTON, J., at pp. 341, 342; *Doorman* v. *Jenkins* (1854), 2 Ad. & El. 256; *Scholes* v. *Brook* (1891), 63 L. T. 837.

(*f*) *Dartnall* v. *Howard* (1825), 4 B. & C. 345 (failure to obtain a sufficient security for money).

(*g*) *Wilson* v. *Brett* (1843), 11 M. & W. 113 (a person skilled in horse management undertook, gratuitously, to ride a horse in order to exhibit him at a sale; owing to some want of care the horse slipped, fell and was injured); *Shiells* v. *Blackburne*, *supra*. A person may be held to be skilled if he either expressly or impliedly so represents himself (*Whitehead* v. *Greetham* (1825), 2 Bing. 464, Ex. Ch.; *Donaldson* v. *Haldane* (1840), 7 Cl. & Fin. 762, H. L.; compare *The Rhosina* (1884), 10 P. D. 24, 29 (harbour master directing, gratuitously, where a vessel was to be beached)).

(*h*) *Coggs* v. *Bernard*, *supra*; *Elsee* v. *Gatward* (1793), 5 Term Rep. 143; *Wilkinson* v. *Coverdale*, *supra*; *Balfe* v. *West* (1853), 13 C. B. 466.

(*i*) *Speight* v. *Gaunt*, *supra*, at p. 17; see *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A.; and cases cited in note (*h*), *supra*.

(*k*) *Bringloe* v. *Morrice* (1676), 1 Mod. Rep. 210 (where a gratuitous

but if services have been gratuitously rendered on some occasions, negligence will not necessarily be inferred from a discontinuance of them on other and distinct occasions (*l*).

Duty in respect of loan of chattel.

**643.** A person who gratuitously lends a chattel to another for a particular use, such as a crane for lifting heavy goods (*m*), is bound to communicate any defects existing in that chattel which are known to him (*n*) and are relevant to the use to which it is to be put.

Duty to gratuitous agent.

**644.** There is the same duty to take care owed to a person who gives his services gratuitously as would in the like circumstances be owed to an ordinary employee (*o*).

## SECT. 3.—*Malfeasance, Misfeasance, and Nonfeasance.*

### SUB-SECT. 1.—*Malfeasance.*

Act unlawful *per se*.

**645.** The term "malfeasance" indicates the commission of some unlawful act (*p*), and is usually applied to those unlawful acts, such as trespass, which are actionable *per se* and do not require express proof of negligence or malice to make them so (*q*). As a general rule, such an act carries with it a responsibility for all the consequences of doing it (*r*).

### SUB-SECT. 2.—*Misfeasance and Nonfeasance.*

Definition and distinction.

**646.** The term "misfeasance" is used to describe the improper performance of some lawful act (*s*): "nonfeasance" indicates the

bailee of a horse having the personal use of it only, was held liable for injury caused to it by being ridden by his servants); compare *Camoys* (*Lord*) v. *Scurr* (1840), 9 C. & P. 383; and see title BAILMENT, Vol. I., p. 540.

(*l*) *Loader* v. *London and India Docks Joint Committee* (1891), 8 T. L. R. 5, C. A. (dock owners voluntarily altering mooring ropes of vessels).

(*m*) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; and see title BAILMENT, Vol. I., pp. 550—552.

(*n*) *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, C. A., approving *Blakemore* v. *Bristol and Exeter Rail. Co.*, *supra*; and see note (*h*), p. 393, *post*.

(*o*) See *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773, approved in *Ruck* v. *Williams* (1858), 3 H. & N. 308; and see note (*i*), p. 386, *post*.

(*p*) Wharton's Law Lexicon, 10th ed.

(*q*) See title TORT.

(*r*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327, and the cases there cited by COCKBURN, C.J. In *Ellis* v. *Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767, persons who employed an independent contractor to do an unlawful act were held liable for damage resulting from it; compare *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488. In *Paterson* v. *Lindsay* (1885), 23 Sc. L. R. 180, blasting operations carried on near to the premises of another were said to be illegal, and a person injured on that other's property recovered damages.

(*s*) Wharton's Law Lexicon, 10th ed.; compare *Newton* v. *Ellis* (1855), 5 E. & B. 115. For instances of misfeasance, see *Victoria Corporation* v. *Patterson*, *Same* v. *Lang*, [1899] A. C. 615, P. C. (bridge rendered unsafe by the act of defendant's servant); *R.* v. *Great North of England Rail. Co.* (1848), 9 Q. B. 315 (cutting through a highway); *Henley* v. *Lyme Regis Corporation* (1831), 5 Bing. 91; in error (1832), 3 B. & Ad. 77; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 154, "a public body will be liable if by its acts it

SECT. 3. **Malfeasance, Misfeasance, and Nonfeasance.**

Application of the distinction between misfeasance and nonfeasance.

failure or omission to perform some act which there is an obligation to perform (*t*). Thus it is a misfeasance for a highway authority which has a duty to repair roads to remake a road and open it to the public with a hole in it (*a*), and a nonfeasance to permit a road to become worn into a hole (*b*). The distinction has no application to the question of liability when the duty to do or not to do the particular act omitted or improperly performed has been established (*c*), but the distinction between an injury arising from misfeasance or from mere nonfeasance has a material bearing on the question whether a duty does or does not exist towards the individual injured (*d*).

Its bearing on negligence is limited to the cases of injury resulting from (1) the omission to do something in the course of gratuitous services, and (2) the non-performance by public bodies of acts authorised by their statutory powers.

alters the normal condition of something which it has a statutory duty to provide or maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured." In *Shoreditch Borough Council* v. *Bull* (1904), 2 L. G. R. 756, H. L., Lord HALSBURY, L.C., was of opinion that in several cases what had been described as an act of nonfeasance might on consideration by the House of Lords be held to be acts of misfeasance. See, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 133.

(*t*) *Boorman* v. *Brown* (1842), 3 Q. B. 511, 525, 526; compare *Elsee* v. *Gatward* (1793), 5 Term Rep. 143. In Wharton's Law Lexicon, 10th ed., it is defined as an offence of omission. For instances of nonfeasance in addition to those noted in title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 133 *et seq.*, see *R.* v. *Birmingham and Gloucester Rail. Co.* (1843), 3 Q. B. 223 (failing to provide arches in accordance with statutory duties to connect lands severed by the railway line: held, that the company could be indicted); *Chapman* v. *Fylde Waterworks Co.*, [1894] 2 Q. B. 599, C. A. (defendants having a duty to repair a stop-cock box in a street, held liable to a person injured by its being out of repair); *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A. (failure to supply water at a certain pressure); compare *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102. C. A. (failure to remedy defective system of drainage); *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch. (failure to maintain a sluice and a cut in accordance with the duties imposed by a drainage Act).

(*a*) *Smith & Co.* v. *West Derby Local Board* (1878), 3 C. P. D. 423; *Newton* v. *Ellis* (1855), 5 E. & B. 115; *Pictou Municipality* v. *Geldert*, [1893] A. C. 524, P. C.; *Torrance* v. *Ilford Urban District Council* (1909), 25 T. L. R. 355, C. A.

(*b*) *Thompson* v. *Brighton Corporation*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q. B. 332, C. A.; *Gibson* v. *Preston Corporation* (1870), L. R. 5 Q. B. 218; compare *Winslowe* v. *Bushey Urban District Council* (1908), 72 J. P. 259, C. A.

(*c*) *Boorman* v. *Brown*, *supra*; *Brabant & Co.* v. *King*, [1895] A. C. 632, P. C.; *McClelland* v. *Manchester Corporation*, [1912] 1 K. B. 118; *Queen* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A. (where it was said that if the breach of duty—whether a misfeasance or a nonfeasance—is punishable on indictment in the case of a private person, a corporation guilty of that breach cannot escape); compare *R.* v. *Birmingham and Gloucester Rail. Co.* (1843), 3 Q. B. 223; *R.* v. *Great North of England Rail. Co.* (1846), 9 Q. B. 315; and see title TORT.

(*d*) See cases cited in note (*b*), *supra*.

SECT. 3.

**Malfeasance, Misfeasance, and Nonfeasance.**

In relation to (i.) gratuitous undertakings; (ii.) failure to exercise statutory powers or to perform statutory duties.

Nonfeasance of a gratuitous undertaking does not impose liability, misfeasance, on the contrary, does (*e*).

The failure to exercise statutory powers or to perform statutory duties only renders the body having such powers or duties liable to a civil action if the statute intended to give a right of action to a person injured by such failure (*f*). Thus it is not given in the case of a sanitary authority for failing to remedy a defective system of drainage which it was under a statutory duty to do (*g*); nor, in the case of a water company, does the fact that penalties are imposed for the breach of a duty directed by statute, for example, that of furnishing a sufficient supply of water for public purposes at a particular pressure, enable a person injured by the failure to supply water to recover damages (*h*). On the other hand, where a duty, imposed, but not sanctioned by a penalty, to indicate the position of fire-plugs in the street by marks on buildings near, was carried out by placing such a mark so as to indicate incorrectly the position of a fire-plug, the defendant was held liable (*i*). Similarly, a waterworks company, placed under a statutory duty to repair stop-cock boxes put by it in the street, which failed to perform that duty, was held liable for injury caused in consequence (*k*); so, too, a drainage Act directing the maintenance of certain works (*l*) and a statute directing the safe maintenance of lighthouses and buoys in a harbour (*m*), and the Railways Clauses Consolidation Act, 1845 (*n*), by which the duty to maintain a proper gate at a level

(*e*) *Elsee* v. *Gatward* (1793), 5 Term Rep. 143; and see pp. 374, 375, *ante*.

(*f*) *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767, C. A.; see *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Pictou Municipality* v. *Geldert*, [1893] A. C. 524, P. C.; compare *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400, P. C.; and see p. 422, *post*, and title TORT.

(*g*) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; compare *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*, [1894] 2 Q. B. 842, C. A.

(*h*) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; and see p. 423, *post*.

(*i*) *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A., reversing S. C. (1910), 27 T. L. R. 46.

(*k*) *Chapman* v. *Fylde Waterworks Co.*, [1894] 2 Q. B. 599, C. A.; *Osborn* v. *Metropolitan Water Board* (1910), 102 L. T. 217; compare *Rosenbaum* v. *Metropolitan Water Board* (1910), 103 L. T. 284, 739, C. A. (where doubt was thrown on the decision in the last-named case), and *Batt* v. *Metropolitan Water Board*, [1911] 2 K. B. 965, C. A. (where it was held that the liability in that case was on the consumer and not on the Board, and that *Chapman* v. *Fylde Waterworks Co.*, *supra*, no longer applied to the Metropolis, since the consumer there had been given a power to repair communication pipes in the street).

(*l*) *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch. In *Henley* v. *Lyme Corporation* (1828), 5 Bing. 91, and *Lyme Regis Corporation* v. *Henley* (1832), 3 B. & Ad. 77, the defendants' charter imposed the duty of maintaining sea-walls, and an action lay at the suit of a person injured by nonfeasance of this duty.

(*m*) *Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795; compare *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; and see p. 416, *post*, and title WATERS AND WATERCOURSES.

(*n*) 8 & 9 Vict. c. 20, s. 61; see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 131; RAILWAYS AND CANALS.

SECT. 3. **Malfeasance, Misfeasance, and Non-feasance.**

crossing is imposed (*o*), have been held to contemplate a right of action to persons injured by the failure to carry out those duties.

The wrongful exercise of statutory powers or the negligent performance of statutory duties carries with it liability if injury results (*p*).

Wrongful exercise of statutory powers.

## SECT. 4.—*Effective Cause.*

Liability only attaches to negligence as an effective cause.

**647**. Although a plaintiff may be able to trace even a consequential connection between an injury he has suffered and the negligent act or omission of another, the law does not necessarily attach liability to the person who has been negligent (*q*). Liability only attaches to negligence which is either the sole effective cause of the injury complained of (*r*), or is so connected with it as to be a cause materially contributing thereto (*s*).

When negligence is the effective cause.

**648**. Negligence is the effective cause of an injury when it has in fact brought about that injury as a direct (*t*) and natural (*a*) consequence. When negligence has been established, liability follows

(*o*) *Parkinson* v. *Garstang and Knott End Railway*, [1910] 1 K. B. 615.

(*p*) *Hammond* v. *St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Victoria Corporation* v. *Patterson*, *Same* v. *Lang*, [1899] A. C. 615, P. C.; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590; and see p. 422, *post*.

(*q*) *Walker* v. *Goe* (1859), 4 H. & N. 350; *The Douglas* (1882), 7 P. D. 151, C. A.; *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419; compare *Glover* v. *London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 25.

(*r*) *E.g.*, *Romney Marsh* (*Lords Bailiff-Jurats*) v. *Trinity House Corporation* (1872), L. R. 7 Exch. 247, Ex. Ch.; *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K. B. 489, C. A. In *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, at p. 210, Lord BLACKBURN quotes Lord BACON'S maxim: "It were infinite for the law to consider the causes of causes and their impulsion one of another."

(*s*) *Jackson* v. *Metropolitan Rail. Co.* (1877), 2 C. P. D. 125, 145, C. A.; reversed on the question of evidence, *sub nom. Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, 198, 212.

(*t*) Thus while the driver's leaving a van has been held to be the direct cause of an accident due to the attempt by the van boy to drive the van (*Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.), negligence in the custody of a seal has been held not to be the direct cause of a secretary securing money by forged deeds (*Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities in Ireland* (*Trustees*) (1855), 5 H. L. Cas. 389); see also *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161, Ex. Ch. (improper fastening of railway carriage doors); *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L. R. 4 C. P. 739; *Metropolitan Rail. Co.* v. *Jackson*, *supra*; *Cobb* v. *Great Western Rail. Co.*, *supra* (overcrowding of railway carriages), commenting upon *Merchants of the Staple of England* (*Mayor etc.*) v. *Bank of England* (*Governor and Co.*) (1887), 21 Q. B. D. 160, C. A.; *Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385; *Re United Service Co.*, *Johnston's Claim* (1871), 6 Ch. App. 212 (no connection between bank's negligence and costs of litigation between client and other parties).

(*a*) Thus it is a natural consequence of frightening cattle that they should wildly rush to their own destruction (*Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A.), while it is not a natural consequence of negligently washing a van in the street that the water should freeze and become dangerous owing to a defective drain (*Sharp* v. *Powell* (1872), L. R. 7 C. P. 253); see *Pearson* v. *Cox* (1877), 2 C. P. D. 369, C. A.; *Walworth* v. *Barton* (1859), 8 W. R. 190; *Scott's Trustees* v. *Moss* (1889), 27 Sc. L. R. 30; *Robinson* v. *Reid's Trustees* (1900), 37 Sc. L. R. 718;

SECT. 4. Effective Cause.

for all the consequences which are in fact the direct and natural outcome of it (*b*), whether the injury is a consequence that was foreseen or not (*c*).

Act not necessarily proximate in time.

A negligent act may be the effective cause of an injury though it be not proximate in time (*d*), if it is the particular incident in a chain of events which has in fact led to the injury (*e*), that is, if it is the real cause of a subsequent accident (*f*); and where an original negligent act has placed another in such a position that, while conducting himself as a reasonable and prudent man would under the difficulties so brought upon him, he in fact makes a mistake, the original negligent act still is the cause of the consequent injury (*g*). But the mere fact that a careless act is in the same chain of events as an accident does not entail liability unless

Negligent act followed by plaintiff's mistake.

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compare examples in Lord HALSBURY'S judgment in *Brintons, Ltd.* v. *Turvey*, [1905] A. C. 230, 233 (a case under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37); see title MASTER AND SERVANT, Vol. XX., p. 162).

(*b*) Other examples of the general proposition than those cited in notes (*t*) and (*a*), p. 378, *ante*, are *Holbach* v. *Warner* (1623), Cro. Jac. 665; *Rooth* v. *Wilson* (1817), 1 B. & Ald. 59; *Powell* v. *Salisbury* (1828), 2 Y. & J. 391; *Lee* v. *Riley* (1865), 18 C. B. (N. S.) 722 (all of which cases deal with injuries to horses, in which the proximate cause was the neglect of proper fencing); see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 131.

(*c*) *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch. (where the leaving of dried grass near the railway line was the proximate cause of the burning of a cottage a considerable distance away), in which case a *dictum* in *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781, of BRAMWELL, B., at p. 785, is explained in the sense of the text, *supra*; *O'Gorman* v. *O'Gorman*, [1903] 2 I. R. 573 (plaintiff thrown from his horse which had been stung by defendant's bees).

(*d*) *Romney Marsh* (*Lords Bailiff-Jurats*) v. *Trinity House Corporation* (1872), L. R. 7 Exch. 247, Ex. Ch. (a grounded vessel eventually driven against and damaging a sea-wall); *Davis* v. *Garrett* (1830), 6 Bing. 716 (where a vessel while deviating from its course was run ashore to loss and damage of cargo); *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A.; compare *M'Intyre* v. *Gallagher* (1883), 21 Sc. L. R. 58. Particular importance attaches to the statement in the text, *supra*, that an effective cause need not be proximate in point of time, owing to the fact that the distinction between that which is and that which is not to be considered a cause is often stated as a distinction between that which is proximate and that which is remote: *Causa proxima non remota spectatur*. The word "*proxima*" here, or the words "immediate" or "direct," which are sometimes used, must be taken as equivalent to the contrary of *remota*, and as meaning without the intervention of some other fact which breaks the sequence from the alleged cause to the effect. See, further, titles SHIPPING AND NAVIGATION; TORT.

(*e*) See cases cited in note (*d*), *supra*; *Smith* v. *London and South Western Rail. Co.*, *supra*; *Gilbertson* v. *Richardson* (1848), 5 C. B. 502 (a carriage collision); *Hill* v. *New River Co.* (1868), 9 B. & S. 303 (horses, frightened by wrongful act, falling into an excavation); *Harris* v. *Mobbs* (1878), 3 Ex. D. 268 (horse frightened by an obstruction); *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561 (where a mare which strayed on to a cricket field was driven back by the players and having tried to jump the fence was injured: the effective cause of the injury was the negligence in leaving open the gate through which she strayed).

(*f*) *Peterson* v. *Blackburn Corporation* (1892), 9 T. L. R. 55, C. A.

(*g*) *The George and Richard* (1871), L. R. 3 A. & E. 466; *The City of Lincoln* (1889), 15 P. D. 15, C. A.; compare *Scott* v. *Shepherd* (1773), 3 Wils. 403;

SECT. 4. **Effective Cause.**

the act has in fact brought about the accident (*h*): it may be the plaintiff's own negligence which is the real cause of his injury (*i*). Although in fact negligence has caused an accident, there may possibly be a good defence if it can be established that the plaintiff's injury must necessarily have happened with or without the defendant's negligence (*k*), but it will not avail to prove that the injury might have happened without the defendant's negligence (*l*). Provided the defendant's default is actively continuing, it may, and if the accident would otherwise not have happened, it will, still be the effective cause of injury (*m*).

Act or intervention of third party.

**649**. So long as there is a direct chain of causation between a negligent act and an injury, *primâ facie* he who is guilty of the negligent act is responsible (*n*), and he cannot shelter himself behind the negligence of a third party (*o*); but such an intervention may in some circumstances remove from an act of negligence its responsibility for a consequent injury. What has been called the conscious act of another volition (*p*) may remove liability from one who has

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1 Smith, L. C., 11th ed., 454; *Romney Marsh* (*Lords Bailiff-Jurats*) v. *Trinity House Corporation* (1872), L. R. 7 Exch. 247, Ex. Ch.

(*h*) *Bartlett* v. *Baker* (1864), 3 H. & C. 153 (obstruction left in navigable river had, at the time of the accident, been so altered by a new owner that it was not the defendant's negligence that was the effective or proximate cause); *The Douglas* (1882), 7 P. D. 151, C. A. (where an abandoned wreck did the damage, but quite apart from the defendant's negligence); compare *Milne* v. *Smith* (1814), 2 Dow, 390, H. L. In *Walker* v. *Goe* (1859), 4 H. & N. 350, Ex. Ch., the defendant's negligence (namely, not giving notice of necessary repairs to property) was a continuing default, but was not the effective cause of the injury. See also *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217; *Jones* v. *Lee* (1911), 28 T. L. R. 92 (horse straying on highway); *Ellis* v. *Banyard* (1912), 28 T. L. R. 122, C. A.

(*i*) *Flower* v. *Adam* (1810), 2 Taunt. 314; *The George and Richard* (1871), L. R. 3 A. & E. 466; *Walker* v. *Midland Rail. Co.* (1886), 2 T. L. R. 450, H. L.; compare *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.; and see pp. 445 *et seq.*, *post*.

(*k*) *Davis* v. *Garrett* (1830), 6 Bing. 716.

(*l*) *Ibid.*, *per* TINDAL, C.J., at p. 724.

(*m*) *Ibid.*; *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A.; compare *Marshall* v. *Caledonian Rail. Co.* (1899), 36 Sc. L. R. 845; *Hill* v. *New River Co.* (1868), 9 B. & S. 303.

(*n*) *Shoreditch Borough Council* v. *Bull* (1904), 2 L. G. R. 756, H. L.; see especially the judgment of COLLINS, M.R., in S. C., 19 T. L. R. 64, C. A., the reasoning of which was approved by Lord HALSBURY, L.C., in the House of Lords, in 2 L. G. R., at p. 759; compare *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.

(*o*) *Rigby* v. *Hewitt* (1850), 5 Exch. 240; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327 (where responsibility for having placed a dangerous obstruction in a road was not removed from defendant although the danger had been increased by a stranger). Where the evidence points only to negligence by a third party, the defendant is not liable (*Latch* v. *Rumner Rail. Co.* (1858), 27 L. J. (EX.) 155).

(*p*) *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A.; compare *dictum* of WILLES, J., in *R.* v. *Markuss* (1864), 4 F. & F. 356, at p. 359; *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640, 647, P. C.; "for against such conscious act of volition no precaution can really avail." The difference between such a conscious act and a negligent act is illustrated in the judgment of the court in

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been previously negligent if it is proved that in fact that conscious act was the real cause which brought the injury about (*q*), but not if it is left in doubt whether such conscious act was the real cause or not, nor if such a conscious act was one of the possible events which there was a duty on the part of the negligent person to guard against (*r*). The intervention of another does not avoid the liability for a negligent act when the negligent act has placed that other in such a position that he could only reasonably have acted in the way in which he did act (*s*); and, so long as the consequence complained of is the natural and direct outcome of the original negligence, the interference of another, however wrongfully (*t*), or even criminally (*u*), the latter may have acted, does not affect the liability (*a*).

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*Sullivan* v. *Creed*, [1904] 2 I. R. 317, 356, C. A., in which a loaded gun having been negligently left about, the man who so left it was held liable for an accident caused by the trigger being pulled even by another's carelessness, but would not have been held liable if the trigger had been deliberately pulled by another.

(*q*) Compare *R.* v. *Ledger* (1862), 2 F. & F. 857, 858, n.

(*r*) *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *Illidge* v. *Goodwin* (1831), 5 C. & P. 190; *Hughes* v. *Macfie*, *Abbott* v. *Macfie* (1863), 2 H. & C. 744; *Harrison* v. *Great Northern Rail. Co.* (1864), 3 H. & C. 231; *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Burrows* v. *March Gas and Coke Co.* (1872), L. R. 7 Exch. 96, Ex. Ch.; *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279; *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.; *Bull* v. *Shoreditch Corporation* (1902), 19 T. L. R. 64, C. A.; *De la Bere* v. *Pearson, Ltd.*, [1907] 1 K. B. 483; affirmed, [1908] 1 K. B. 280, C. A.; *Baker* v. *Snell*, [1908] 2 K. B. 352; compare *Daniels* v. *Potter* (1830), 4 C. & P. 262; *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253; *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A.

(*s*) *Scott* v. *Shepherd* (1773), 3 Wils. 403; *Clark* v. *Chambers*, *supra*.

(*t*) *Harrison* v. *Great Northern Rail. Co.*, *supra* (the defective banking of a cut still the proximate cause, although the wrongful act of a third party caused a wholly unexpected rush of water); compare *Engelhart* v. *Farrant & Co.*, *supra*; and distinguish *Ely Brewery Co.* v. *Pontypridd Urban District Council* (1903), 68 J. P. 3, C. A.; *Box* v. *Jubb* (1879), 4 Ex. D. 76 (cases in which the wrongful acts of third parties, and their acts only, were to blame for plaintiff's injuries); see also *Murphy* v. *Great Northern Rail. Co.*, [1897] 2 I. R. 301; *Barker* v. *Herbert*, [1911] 2 K. B. 633, 646, 647, C. A. (a case of nuisance).

(*u*) *De la Bere* v. *Pearson, Ltd.*, *supra* (where negligence in recommending a stockbroker resulted in the plaintiff being swindled), distinguishing *Baxendale* v. *Bennett* (1878), 3 Q. B. D. 525, C. A. (in which case defendant's negligence was not the proximate cause); *Marshall* v. *Caledonian Rail. Co.* (1899), 36 Sc. L. R. 845 (where defendants' negligence led to a robbery).

(*a*) *Collins* v. *Middle Level Commissioners*, *supra* (damage caused by defective banking of a cut which remained the effective cause, although a third party had interfered with precautions that the plaintiff had taken to protect himself); *Paterson* v. *Blackburn Corporation* (1892), 9 T. L. R. 55, C. A. (defendants in removing a gas-meter left a projecting pipe which a third party broke, making defendants responsible for the explosion that occurred); *Illidge* v. *Goodwin*, *supra* (unattended horse and cart interfered with by a third person); *Byrne* v. *Wilson* (1862), 15 I. C. L. R. 332 (a person upset out of a vehicle into a lock and drowned by the action of the lock-keeper); compare *Ellerman Lines, Ltd.* v. *Clyde Navigation Trustees* (1910), 48 Sc. L. R. 44.

**Effective Cause.**

Act of two or more parties.

An accident may have been brought about by the negligence of two or more parties. In such case, if all are equally to blame, they are all equally liable, and, except in Admiralty cases (*b*), any of them can be made wholly to compensate the plaintiff (*c*). The negligence of each party is equally an effective cause, and without each one's negligence the accident would not have happened (*d*).

# Part II.—Negligence in Regard to Property.

## SECT. 1.—*In Regard to Particular Parties.*

### SUB-SECT. 1.—*General Observations.*

General right and duty of owner and occupier.

**650.** The owner or occupier of land or buildings (*e*) has a right to use it or them in the natural and ordinary course unless in so doing he interferes with some right recognised by law or arising from contract (*f*). Such interference may be a nuisance (*g*), a trespass (*h*), an interference with an easement (*i*), a breach of contract (*k*), or it may be a negligent user of the property resulting in injury to a person to whom a duty to take care is owed.

Liability of owner to tenant.

**651.** As between the owner of premises and his tenant, apart from some special agreement, an owner who lets premises in a dangerous condition and who is under no obligation to repair, is not liable for injuries, sustained either by the tenant, his family, his servants, guests, or customers, which are due to the defective condition of the premises (*l*). Even where he has contracted to do the

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(*b*) In these cases there may be a contribution between the guilty parties; see title SHIPPING AND NAVIGATION; and. for the rule as to division of loss, see Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 1; *The Rosalia*, [1912] P. 109. But the common law rule applies except in a case of collision between two ships which are both at fault (*The Seacombe, The Devonshire*, [1912] P. 21, C. A.).

(*c*) *Rigby* v. *Hewitt* (1850), 5 Exch. 240; *Greenland* v. *Chaplin* (1850), 5 Exch. 243; *Burrows* v. *March Gas Co.* (1870), L. R. 5 Exch. 67; *Devlin* v. *Belfast Corporation*, [1907] 2 I. R. 437, C. A.; compare *Smith* v. *Dobson* (1841), 3 Man. & G. 59.

(*d*) *Devlin* v. *Belfast Corporation, supra.*

(*e*) In *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244, it was said that there was no distinction between injuries from the careless management of an animal or other personal chattel and those resulting from the negligent management of fixed real property. It is, however, more convenient to deal with them separately. As to liability for injuries of the former nature, see p. 405, *post.*

(*f*) *Wilson* v. *Waddell* (1877), 2 App. Cas. 95; *Quarman* v. *Burnett* (1840), 6 M. & W. 499, 510; *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; compare *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A.; *Thomas* v. *Birmingham Canal Co.* (1879), 49 L. J. (Q. B.) 851.

(*g*) See *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221; *St. Helens Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; title NUISANCE, pp. 524 *et seq.*, *post.*

(*h*) See title TRESPASS.

(*i*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 330.

(*k*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 501 *et seq.*

(*l*) *Cavalier* v. *Pope*, [1906] A. C. 428, approving *Robbins* v. *Jones*, *supra*; *Norris* v. *Catmur* (1885), Cab. & El. 576; *Hart* v. *Windsor* (1843), 12 M. & W. 68; *Keates* v. *Cadogan* (*Earl*) (1851), 10 C. B. 591;

repairs he is not liable to any person other than the tenant for any injury (*m*) unless he has retained control over that part of the premises where the accident occurred (*n*). Where there is a contract to repair and the tenant is injured because of the landlord's neglect to perform it, the tenant's remedy is upon the contract (*o*), and even then the landlord is not liable if he was ignorant of the defect complained of (*p*), or if the tenant knew of the danger and elected to run the risk (*q*).

Contractual liability.

v. *Laskey*, [1907] 2 K. B. 141, C. A.; compare *Kennedy* v. *Bruce*, [1907] S. C. 845, where *Cavalier* v. *Pope*, [1906] A. C. 428, was distinguished, apparently because of the difference between English and Scottish law. Under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 75, the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), s. 12, and the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 14, a landlord of premises who lets a house or part of a house for habitation by persons of the working class is subject to the implied condition that, at the commencement of the holding, the house is in all respects reasonably fit for human habitation; see title LANDLORD AND TENANT, Vol. XVIII., pp. 503, 504. A similar provision in the now repealed Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 12, was held to entitle a tenant to recover from the landlord in respect of injuries sustained by his wife in consequence of the defective state of repair of the premises (*Walker* v. *Hobbs & Co.* (1889), 23 Q. B. D. 458; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION). Where a landlord lets premises furnished, or partly furnished, a term is implied that the house or furniture is fit for the purpose for which it was to be used (*Smith* v. *Marrable* (1843), 11 M. & W. 5; *Wilson* v. *Finch Hatton* (1877), 2 Ex. D. 336; but see *Hart* v. *Windsor* (1843), 12 M. & W. 68, 86, 87; and see title LANDLORD AND TENANT, Vol. XVIII., p. 569; see also title BAILMENT, Vol. I., p. 550), but not that it remains so during the term (*Sarson* v. *Roberts*, [1895] 2 Q. B. 395, C. A.), and no such term is implied in ordinary leases of houses, lands or warehouses (*Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; see title LANDLORD AND TENANT, Vol. XVIII., p. 481); where land is let for pasturing cattle there is no implied condition that it shall be reasonably fit for that purpose (*Sutton* v. *Temple* (1843), 12 M. & W. 52; *Hart* v. *Windsor*, *supra*; see title LANDLORD AND TENANT, Vol. XVIII., pp. 481, 501). As to liability for a nuisance begun before and continued during a tenancy, see *Rosewell* v. *Prior* (1702), 2 Salk. 460; *Thomson* v. *Gibson* (1841), 7 M. & W. 456; and see title NUISANCE, pp. 531, 533, 555, 556, 560, *post*.

(*m*) Thus in *Cavalier* v. *Pope*, *supra*, and *Cameron* v. *Young*, [1908] A. C. 176, the plaintiffs were held to be not entitled to recover on the ground that they were strangers to the contract. In *Malone* v. *Laskey*, [1907] 2 K. B. 141, C. A., there was a similar decision in the case of a licensee of the tenant where the landlord, not being under any covenant to repair, voluntarily did repairs, the execution of which was found to be negligent. As to the duty to licensees, see, further, p. 391, *post*.

(*n*) *Miller* v. *Hancock*, [1893] 2 Q. B. 177, C. A.; *M'Manus* v. *Armour* (1901), 38 Sc. L. R. 791; compare *Mills* v. *Temple-West* (1885), 1 T. L. R. 503; *Huggett* v. *Miers*, [1908] 2 K. B. 278, C. A.; *Powell* v. *Thorndike* (1910), 102 L. T. 600; see *Hargroves, Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472; *Grant* v. *M'Clafferty* (1906), 44 Sc. L. R. 179; *M'Martin* v. *Hannay* (1872), 10 Macph. (Ct. of Sess.) 411. Such control is *primâ facie* in the tenant or occupier (*Russell* v. *Shenton* (1842), 3 Q. B. 449; *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53); and see title LANDLORD AND TENANT, Vol. XVIII., p. 505.

(*o*) *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, *per* ERLE, C.J., at p. 240; *Hart* v. *Windsor* (1843), 12 M. & W. 68.

(*p*) *Tredway* v. *Machin* (1904), 20 T. L. R. 726, C. A.; compare *Broggi*

(*q*) For note (*q*) see next page.

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Liability of owner to stranger.

**652.** Where a stranger is injured by reason of the defective condition of premises which are let to a tenant, *primâ facie* the occupier, and not the owner, of the premises is liable (*r*). The latter, however, may become liable to the stranger in the following ways:—

(1) Where he has undertaken to do the repairs at the premises in question, and for this purpose has a partial control of those premises, and an injury is caused to a passer-by (*s*).

(2) Where he is guilty of misfeasance (*t*), and, in consequence of that misfeasance, injury is caused to some person to whom, under the circumstances, a duty to take care is owed by the owner (*a*). Such a

v. *Robins* (1899), 15 T. L. R. 224, C. A.; *Mathieson's Tutor* v. *Aikman's Trustees* (1909), 47 Sc. L. R. 36; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 505, 512.

(*q*) *Cavalier* v. *Pope*, [1906] A. C. 428; compare *Driscoll* v. *Partick Burgh Commissioners* (1900), 37 Sc. L. R. 274.

(*r*) *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318, followed in *Russell* v. *Shenton* (1842), 3 Q. B. 449; *R.* v. *Watts* (1703), 1 Salk. 357; *Payne* v. *Rogers* (1794), 2 Hy. Bl. 349; compare *Sly* v. *Edgley* (1806), 6 Esp. 6; *Coupland* v. *Hardingham* (1813), 3 Camp. 398; *De Boos* v. *Collard* (1892), 8 T. L. R. 338; and see title LANDLORD AND TENANT, Vol. XVIII., p. 504. It is sometimes a doubtful question whether the landlord has resumed possession of the premises; see *Jarvis* v. *Dean* (1826), 3 Bing. 447; *Page* v. *Hatchett* (1846), 8 Q. B. 187, 593. In *Bishop* v. *Bedford Charity Trustees* (1859), 1 E. & E. 697, a child was injured by falling through a grating over an area. The building had been leased by the defendants, and the lessee had sublet the premises in separate holdings, but had retained possession of the area. The lessee became bankrupt, and the defendants called on the sub-tenants to pay rents direct to them, but it was held that the defendants had not by so doing exercised their power of re-entry, and until they did so they were not in occupation of the area, and consequently were not liable. The question of liability where the tenancy is by the week is discussed in *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 439, note (*o*), 505, note (*c*); and see note (*l*), p. 382, *ante*.

(*s*) *Cavalier* v. *Pope*, [1905] 2 K. B. 757, C. A., *per* COLLINS, M.R., at p. 762; *Mathieson's Tutor* v. *Aikman's Trustees*, *supra*; compare *Payne* v. *Rogers*, *supra*; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311; but see remarks on this case in note (*t*), *infra*; and see title LANDLORD AND TENANT, Vol. XVIII., p. 504.

(*t*) *Lane* v. *Cox*, [1897] 1 Q. B. 415, C. A., *per* Lord ESHER, M.R., at p. 417. In *Nelson* v. *Liverpool Brewery Co.*, *supra*, it was stated that liability can be created "in the case of misfeasance by the landlord, as for instance where he lets premises in a ruinous condition." This *dictum* was unnecessary for the decision of the case and, unqualified, is not in accordance with the earlier authorities, such as *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, approved in *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658; and with the later cases of *Lane* v. *Cox*, *supra*, and *Copp* v. *Aldridge & Co.* (1895), 11 T. L. R. 411; although it is supported to some extent by *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377; *Sandford* v. *Clarke* (1888), 21 Q. B. D. 398; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; *M'Manus* v. *Armour* (1901), 38 Sc. L. R. 791; and as to cases where misfeasance was alleged to have caused a nuisance, see, further, title NUISANCE, pp. 515, 530, *post*. As to cases where the injury arises after a change of ownership, from acts done before the change, see *Granville* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall* v. *Norfolk* (*Duke*), [1900] 2 Ch. 493.

(*a*) *Lane* v. *Cox*, *supra*, *per* Lord ESHER, M.R., at p. 417.

duty is owed to a neighbouring owner (*b*) or to a person on the highway adjoining such premises (*c*).

Change of occupation.

**653.** A landlord who lets land for purposes which may involve danger to persons coming on to it will not necessarily escape liability, unless the letting is a *bonâ fide* contract of tenancy which results in the tenant and not the landlord being in occupation of the premises where the danger is encountered (*d*).

SUB-SECT. 2.—*Duty to Invitees.*

Invitees.

**654.** The term "invitee" (*e*) is applied to persons (other than mere volunteers (*f*) or bare licensees (*g*), guests (*h*), servants (*i*), or persons

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(*b*) *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377; and see p. 395, *post*.

(*c*) *Gandy* v. *Jubber* (1864), 5 B. & S. 78 (reversed on another point (1865), 9 B. & S. 15, Ex. Ch.); *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; *Mills* v. *Temple-West* (1885), 1 T. L. R. 503; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 153; LANDLORD AND TENANT, Vol. XVIII., pp. 504, 505.

(*d*) *Glass* v. *Paisley Race Committee* (1902), 40 Sc. L. R. 17; compare *Philips* v. *Humber* (1904), 41 Sc. L. R. 626 (where the duty upon a person letting premises for a shooting gallery was held to be to see that persons resorting to it were not exposed to unusual risks, and that the premises were reasonably safe for use as a shooting gallery). For the consideration of the case in which a landlord or occupier may escape liability by employing an independent contractor, see p. 471, *post*. As to cases where the landlord lets land for a purpose which in the ordinary course results in a nuisance, see *Harris* v. *James* (1876), 45 L. J. (Q. B.) 545; title NUISANCE, pp. 525 *et seq.*, 531, 556, 557, *post*.

(*e*) This definition is substantially that given in *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, by WILLES, J., at p. 288; affirmed (1867), L. R. 2 C. P. 311, Ex. Ch.; compare *White* v. *France* (1877), 2 C. P. D. 308. The term is sometimes used as synonymous with "licensee" as distinguished from a "bare" or "mere" licensee; see *Holmes* v. *North Eastern Rail. Co.* (1869), L. R. 4 Exch. 254, 258, *per* CHANNELL, B.; and see note (*g*), p. 386, *post*.

(*f*) A volunteer is a person who, without being under a paid contract of service, associates himself with the servant of another in the performance of that servant's work (*Potter* v. *Faulkner* (1861), 1 B. & S. 800, Ex. Ch.), or who puts himself under the control of an employer to act in the capacity of servant (*Johnson* v. *Lindsay & Co.*, [1891] A. C. 371, 377, disapproving *Woodhead* v. *Gartness Mineral Co.* (1877), 4 R. (Ct. of Sess.) 469). He does not cease to be a volunteer by reason of having given assistance at the request of a workman of the employer whose work he has helped at (*Potter* v. *Faulkner*, *supra*; approved in *Lunnie* v. *Glasgow and South Western Rail. Co.* (1906), 43 Sc. L. R. 372, following *M'Ewan* v. *Edinburgh and District Tramways Co.* (1899), 6 Scots Law Times, 400). A volunteer must, however, be distinguished from a person who, although assisting to do work which is properly the work of the defendants, is at the same time doing so in his own interests, or from one who is on the premises of another, with the latter's consent, engaged in a transaction of common interest to both (*Wright* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 298; affirmed (1876), 1 Q. B. D. 252, C. A., following *Holmes* v. *North Eastern Rail. Co.* (1869), L. R. 4 Exch. 254; affirmed (1871), L. R. 6 Exch. 123, Ex. Ch.). Similarly, where the servant of a master gives assistance to the defendant to expedite delivery of his master's goods, he is not a volunteer, the reason being that there is a common interest (*Holmes* v. *North Eastern Rail. Co.*, *supra*; *Wyllie* v. *Caledonian Rail. Co.* (1871), 9 Macph. (Ct. of Sess.) 463). It has been held

(*g*), (*h*), (*i*) For notes (*g*), (*h*), and (*i*), see next page.

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whose employment is of such of a kind that danger may be taken to have been actually bargained for) who go on to premises upon business which concerns the occupier and upon his invitation, either express (*k*) or implied (*l*).

Invitee distinguished from bare licensee.

An invitee differs from a bare licensee in that the latter has merely permission to be on the premises and is not there by invitation or on lawful business of interest to both parties (*m*).

that a passer-by, who was casually appealed to by a workman for information as to which of two mains in a highway was the gas main, and who in order to indicate it got into the trench and was injured, did not become a volunteer (*Cleveland* v. *Spier* (1864), 16 C. B. (N. S.) 399). In *O'Sullivan* v. *O'Connor & Son* (1887), 22 L. R. Ir. 467, C. A., the plaintiff, after buying some felt, went to the defendant's loft to inspect it, and while assisting the defendant's servant to unroll it, fell from the loft, which was unsafe: held that he was a volunteer or a mere licensee; but *semble*, the case might have been otherwise if he had been inspecting before purchasing with a view to purchasing. As to the position of a volunteer with regard to the doctrine of common employment, see title MASTER AND SERVANT, Vol. XX., pp. 133, 134; *Bass* v. *Hendon Urban District Council* (1912), 28 T. L. R. 317, C. A.

(*g*) "Bare licensees" or "mere licensees" are persons who have permission to be on premises when, without such permission, they would be trespassers; see, further, p. 391, *post*. As to a "bare licence" to search for minerals, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 568. As to licences to enter upon land, see, further, titles REAL PROPERTY AND CHATTELS REAL; TRESPASS.

(*h*) The term "guest" so used is equivalent to visitor, and applies only to a person who does not pay for the accommodation given. Such a person is a bare licensee with the added disability of being in the same position as a servant (*Southcote* v. *Stanley* (1856), 1 H. & N. 247; *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex. D. 341, 348, C. A.; and see note (*t*), p. 388, *post*). For the definition of "guest" at an inn, see title INNS AND INNKEEPERS, Vol. XVII., p. 313. As to negligence arising out of the special relation of innkeeper and guest, see p. 431, *post*.

(*i*) As to the position of servants, see title MASTER AND SERVANT, Vol. XX., pp. 102, 120, 138. They are not included in the same category as invitees or licensees at common law; see *Priestley* v. *Fowler* (1837), 3 M. & W. 1. The master of the house must not lay traps for either visitors or servants, but he need take no more care of them than he may reasonably be expected to take of himself (*Southcote* v. *Stanley*, *supra*).

(*k*) *E.g.*, by direct invitation or request, as in *Wingfield* v. *Jenkinson* (1884), 1 T. L. R. 102.

(*l*) For example, by conduct which induces persons having business with the occupier to come on to the premises, or to use the particular way (*Gavin* v. *Arroll & Co.* (1889), 26 Sc. L. R. 370; *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274; and see cases cited in note (*m*), *infra*).

(*m*) *Smith* v. *London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326 (optician taking instruments to ship); *White* v. *France* (1877), 2 C. P. D. 308; *Chapman* v. *Rothwell* (1858), E. B. & E. 168; *Gallagher* v. *Humphery* (1862), 10 W. R. 664; *Southcote* v. *Stanley*, *supra*; *Bolch* v. *Smith* (1862), 7 H. & N. 736 (where the respective positions of bare licensees and invitees are discussed). The distinguishing test of "business" has also been applied in *Holmes* v. *North Eastern Rail. Co.*, *supra*; *King* v. *Great Western Rail. Co.* (1871), 24 L. T. 583 (servant of consignee taking delivery of stone injured by crane provided by defendants for the purpose); *Wyllie* v. *Caledonian Rail. Co.* (1871), 9 Macph. (Ct. of Sess.) 463; *Wright* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 298; affirmed (1876), 1 Q. B. D. 252, C. A.; *Brady* v. *Parker* (1887), 24 Sc. L. R. 561; compare *Nicolson* v. *Macandrew & Co.* (1888), 25 Sc. L. R. 607 (plaintiff went to a place where he had no work to get a tool which had been lent to another man). In *Burchell* v.

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Classification of invitees.

**655.** The following classes of persons are ordinarily held to be invitees:—

Customers at shops or offices (*n*) during business hours (*o*);

Passengers at railway stations (*p*) or in trains (*q*);

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*Hickisson* (1880), 50 L. J. (Q. B.) 101, the plaintiff, a child, accompanied his sister who went on business to the defendant's house; a rail being absent from the railings of the steps, the plaintiff fell through and was hurt: there was no invitation to the plaintiff: *semble*, if the sister who was on business had fallen through, the defendant would have been liable; and see *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A. Compare also *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244 (where plaintiff had merely permission to be on defendants' premises); *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80 (lodgers using roof to dry linen); *Stiles* v. *Cardiff Steam Navigation Co.* (1864), 10 Jur. (N. S.) 1199; *Duthie* v. *Caledonian Rail. Co.* (1898), 35 Sc. L. R. 726; *Elliott* v. *Hall* (1855), 15 Q. B. D. 315 (where defendants knew that trucks of coal would be unloaded by the consignee's servants, who would have to get into the trucks); *Steer* v. *St. James's Residential Chambers Co.* (1887), 3 T. L. R. 500 (the tenant of chambers let by defendants invited plaintiff to visit him; the plaintiff fell down a lift well in the occupation of the defendants while on his way to his friend); *Seymour* v. *Maddox* (1851), 16 Q. B. 326 (chorus singer crossing dark floor to reach the stage); compare *Weems* v. *Mathieson* (1861), 4 Macq. 215, H. L.; *Redgrave* v. *Belsey* (1897), 13 T. L. R. 484; and further, as to duty on a master to provide proper plant for his servant, see title MASTER AND SERVANT, Vol. XX., p. 139. As to the statutory liability to secure safety in factories and workshops, see title FACTORIES AND SHOPS, Vol. XIV., pp. 464 *et seq.*

(*n*) *Chapman* v. *Rothwell* (1858), E. B. & E. 168; see *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, *per* WILLES, J., at p. 287; *Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, Ex. Ch.; *Dolan* v. *Burnett* (1896), 33 Sc. L. R. 399; compare *Paterson* v. *Kidd's Trustees* (1896), 34 Sc. L. R. 69, where *Dolan* v. *Burnett*, *supra*, was distinguished on the ground that the occupier had, two years prior to the accident, employed a thoroughly competent tradesman to overhaul the building, and was held not to be liable to the plaintiff as he had used reasonable precautions to make his premises safe; compare *O'Sullivan* v. *O'Connor & Son* (1887), 22 L. R. Ir. 467, C. A.; and see pp. 364, 372, 385, 386, note (*f*), *ante*, and p. 390, *post*.

(*o*) *Mason* v. *Langford* (1888), 4 T. L. R. 407, where the plaintiff went to a shop after business hours: the shutters were up but the door was ajar; on pushing the door further open he fell down a flight of steps: the jury were directed to inquire whether the facts disclosed an invitation or not.

(*p*) *Sturges* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 231, C. A.; *Watkins* v. *Great Western Rail. Co.* (1877), 46 L. J. (Q. B.) 817, and *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13, C. A., were cases in which the plaintiffs were accompanying passengers to see them off by train; compare *Holmes* v. *North Eastern Rail. Co.* (1869), L. R. 4 Exch. 254; *Nicholson* v. *Lancashire and Yorkshire Rail. Co.* (1865), 3 H. & C. 534; *King* v. *Great Western Rail. Co.* (1871), 24 L. T. 583; and, as to railway stations, see, further, title RAILWAYS AND CANALS. In *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, where the defendant company tacitly permitted children to come on to its premises and to play with a turntable which was in a dangerous condition, the House of Lords held that in the peculiar circumstances of the case there was evidence of negligence to go to a jury; and see *Jenkins* v. *Great Western Railway*, *supra*.

(*q*) *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655; compare *Duthie* v. *Caledonian Rail. Co.*, *supra* (where a workman of one railway company was injured by a train of another being backed negligently into a yard where he worked). In *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A., it was held that a "bare licensee" when being carried has a right to a higher measure of duty than one who is merely permitted

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Passengers on piers (*r*);
Persons having business at the premises (*s*);
Persons paying to come on to the premises (*t*);

Nature of duty required.

**656.** The duty of the occupier of premises on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden (*a*), of whose

to pass across the licensor's premises. Where the negligence complained of is in connection with the working of a railway or tramway by a public authority in intended execution of statutory powers, an action will not lie, unless it is commenced within six months of the occurrence (*Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A.); see title LIMITATION OF ACTIONS, Vol. XIX., p. 176. As to negligence arising out of the special relation of carrier and passenger, see p. 426, *post*.

(*r*) *John* v. *Bacon* (1870), L. R. 5 C. P. 437; compare *Monaghan* v. *Buchanan* (1886), 23 Sc. L. R. 580; *Dalyell* v. *Tyrer* (1858), E. B. & E. 899. For the nature of the duty owed to persons using docks or wharves, see p. 419, *post*.

(*s*) See cases cited in notes (*l*)—(*o*), pp. 386, 387, *ante*. Where a child at school, who was told by a teacher to leave the room, was injured by a dangerous spring door, it was held that she had been invited to use it, and that the defendants were liable (*Morris* v. *Carnarvon County Council*, [1910] 1 K. B. 159); see *Wright* v. *Lefever* (1902), 51 W. R. 149, C. A. (person inspecting a house, the keys of which were given him by a house agent). A person who comes on to premises to perform a statutory duty, *e.g.*, a pilot (see title SHIPPING AND NAVIGATION), is in the position of an invitee, and does not take all risks with regard to the safety of the premises (*Smith* v. *Steele* (1875), L. R. 10 Q. B. 125; compare *Smith* v. *London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326).

(*t*) *Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, 243, Ex. Ch.; and *Shoebottom* v. *Egerton* (1868), 18 L. T. 889 (canal companies charging tolls); *Brazier* v. *Polytechnic Institution* (1859), 1 F. & F. 507; and *Pike* v. *Polytechnic Institution* (1859), 1 F. & F. 712 (visitors paying to go to an exhibition); *Axford* v. *Prior* (1866), 14 W. R. 611 (guest for reward at an hotel); *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501, Ex. Ch. (person paying for place on grand stand at racecourse); *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch. (payment to go on towing path); *Sandys* v. *Florence* (1878), 47 L. J. (Q. B.) 598 (guest for reward at an hotel), distinguishing *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371 (where the guest was not a guest for reward; see title INNS AND INNKEEPERS, Vol. XVII., p. 313); *Lax* v. *Darlington Corporation* (1879), 5 Ex. D. 28, C. A. (cattle accommodation provided for reward at a market); *Welsh* v. *Canterbury and Paragon, Ltd.* (1894), 10 T. L. R. 478 (person paying and visiting music hall); *Glass* v. *Paisley Race Committee* (1902), 40 Sc. L. R. 17 (grand stand at racecourse); *Duncan* v. *Perthshire Cricket Club* (1904), 42 Sc. L. R. 327 (stand at cricket match); *Greenlees* v. *Royal Hotel, Dundee* (1905), 42 Sc. L. R. 317 (guest for reward at hotel); *The Bearn*, [1906] P. 48, C. A. (wharf owner letting wharf). For the liability to invitees of servants of the Crown or of public bodies, see pp. 417, 418, *post*; and see titles CONSTITUTIONAL LAW, Vol. VI., pp. 413 *et seq.*; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*a*) *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274; affirmed (1867), L. R. 2 C. P. 311, Ex. Ch.; see *Lowery* v. *Walker*, [1910] 1 K. B. 173, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 183; *Chapman* v. *Rothwell* (1858), E. B. & E. 168; *Axford* v. *Prior*, *supra* (cases of dangerous holes in floors left unguarded); *Crafter* v. *Metropolitan Rail. Co.* (1866), L. R. 1 C. P. 301; *North Eastern Rail. Co.* (*Directors etc.*) v. *Wanless* (1874), L. R. 7 H. L. 12 (omitting to close gates of a level crossing); *John* v. *Bacon*, *supra* (unguarded hatchway on hulk used as pier); *Parnaby* v. *Lancaster Canal*

existence the occupier is aware or ought to be aware (*b*), or, in other words, to have his premises reasonably safe for the use that is to be made of them (*c*). If this duty is neglected, an invitee who is injured thereby can recover damages in respect of his injuries (*d*). The occupier is not bound, however, to adopt the most recent inventions or devices, provided that he has done what is ordinarily and reasonably done to ensure safety (*e*).

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*Co.* (1839), 11 Ad. & El. 243, Ex. Ch. (neglect to fence off dangerous places by path); *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Woodcock* (1871), 25 L. T. 335; *Smith* v. *Steele* (1875), L. R. 10 Q. B. 125; *Lax* v. *Darlington Corporation* (1879), 5 Ex. D. 28, C. A. (dangerous railing in cattle market); *Philipps* v. *Humber* (1904), 41 Sc. L. R. 626 (shooting gallery). In *Watkins* v. *Great Western Rail. Co.* (1877), 46 L. J. (Q. B.) 817, LOPES, J., at p. 822, said that he recognised no distinction between that which had been called a "trap" and ordinary actionable negligence, except so far as the word "trap" might be used to designate a negligent act which is calculated to mislead a person using ordinary care and caution.

(*b*) *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274; *Wright* v. *Lefever* (1902), 51 W. R. 149, C. A.; "*Apollo*" (*Owners*) v. *Port Talbot Co., The* "*Apollo*," [1891] A. C. 499.

(*c*) *Morris* v. *Carnarvon County Council*, [1910] 1 K. B. 840, C. A. (spring door dangerous to small children); *King* v. *Great Western Rail. Co.* (1871), 24 L. T. 583 (defective crane used by consignees at railway yard); *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378. Ex. Ch. (towing path out of repair); *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A. (defective rope in a staging supplied by dock owners), explained in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, 497. C. A.; *Elliott* v. *Hall* (1885), 15 Q. B. D. 315 (railway waggon out of repair); *Monaghan* v. *Buchanan* (1886), 23 Sc. L. R. 580 (mismanagement of mooring ropes); *Brady* v. *Parker* (1887), 24 Sc. L. R. 561 (open hatchway); *Gavin* v. *Arroll & Co.* (1889), 26 Sc. L. R. 370 (unfenced path near railway cutting); *Sturges* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 231, C. A. (obstruction on platform); compare *Stevenson* v. *Glasgow Corporation* (1908), 45 Sc. L. R. 860 (unfenced stream in public path held not a breach of duty), following *Hastie* v. *Edinburgh Magistrates*, [1907] S. C. 1102; *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501, Ex. Ch. (grand stand for use of spectators); *Marney* v. *Scott*, [1899] 1 Q. B. 986 (dangerous ship's ladder); compare *Redgrave* v. *Belsey* (1897), 13 T. L. R. 484, C. A. (trap-door left open by fellow servant, but premises not unsafe otherwise); *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633. As to the statutory duty of providers of public entertainments to make provision for the safety of children, see title INFANTS AND CHILDREN, Vol. XVII., p. 173; and see title THEATRES AND OTHER PLACES OF ENTERTAINMENT.

(*d*) The following cases all bear on the question of negligence on the part of the occupiers:—*Griffiths* v. *London and North Western Rail. Co.* (1866), 14 L. T. 797 (defective sling in crane apparatus); *Shoebottom* v. *Egerton*, 18 L. T. 889 (trustees of a canal taking reward for its use are bound to keep the bridges and ways in good repair); *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501, Ex. Ch. (defect in grand stand); *Sandys* v. *Florence* (1878), 47 L. J. (Q. B.) 598 (fall of ceiling in room at an hotel); *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13, C. A. (passenger on platform struck by the open door of a guard's van); *Welsh* v. *Canterbury and Paragon, Ltd.* (1894), 10 T. L. R. 478 (Blondin dropped a chair on a visitor at a music hall); *Moore* v. *Ransome's Dock Committee* (1898), 14 T. L. R. 539, C. A. (dock unprovided with appliances, such as chains or ladders, to enable persons falling in to get out); *The Bearn*, [1906] P. 48, C. A. (dangerous berth at wharf).

(*e*) *Crafter* v. *Metropolitan Rail. Co.* (1866), L. R. 1 C. P. 301 (the fact better steps might have been provided did not constitute negligence),

SECT. 1. In Regard to Particular Parties.

Liability commensurate with invitation.

**657.** The liability of the occupier is only commensurate with the extent of the invitation (*f*). Where, therefore, the occupier of premises has placed a notice warning persons of the existence of danger, and a person disregards the notice (*g*), or the circumstances show that the limits of the invitation have been otherwise exceeded (*h*), the liability is limited in a corresponding degree, and if the invitee wanders about in such a way as to be unable to see if there is danger or not (*i*), or if he knows of the danger and undertakes the risk (*k*), the occupier of the premises is not liable.

Rule applies to invitation to use chattels.

**658.** The effect of an invitation both on the invitee and the person inviting him, apart from any contract between the parties, is the same in the case of an invitation to use appliances or

distinguishing *Longmore* v. *Great Western Rail. Co.* (1865), 19 C. B. (N. S.) 183 (dangerous footbridge over railway); *M'Gill* v. *Bowman & Co.* (1890), 28 Sc. L. R. 144.

(*f*) *Mackie* v. *Macmillan* (1898), 36 Sc. L. R. 137; *Walker* v. *Midland Rail. Co.* (1886), 2 T. L. R. 450, H. L.

(*g*) *Anderson* v. *Coutts* (1894), 58 J. P. 369 (notice on cliff promenade warning persons from going near the edge and to keep inside a bank); compare *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch. (where the Exchequer Chamber thought that the defendants would not be responsible if they issued a warning to invitees paying tolls, that they were to take the premises as they found them).

(*h*) *E.g.*, *O'Sullivan* v. *O'Connor & Son* (1887), 22 L. R. Ir. 467, 476, C. A.; *Walker* v. *Midland Rail. Co.*, *supra* (where an innkeeper was held not to be under a duty to his guest to keep those places safe where visitors are not entitled to go, and where they cannot be reasonably expected to go by mistake: thus where there was a well-lighted and properly indicated lavatory accommodation, it was held that a guest, who went about looking for the lavatory in the dark through a service room, and was injured, could not recover); and see title INNS AND INNKEEPERS, Vol. XVII., p. 314.

(*i*) *Walker* v. *Midland Rail. Co.*, *supra*; *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633 (a doubtful authority, except in so far as it decides that, if the plaintiff chooses to go wandering about in the dark, he ceases to be an invitee and becomes a licensee; see observations in *Paddock* v. *North Eastern Rail. Co.* (1868), 18 L. T. 60, Ex. Ch.); *Fleming* v. *Eadie & Son* (1898), 35 Sc. L. R. 422 (sanitary inspector, asked to inspect drains in a house being reconstructed, went down cellar steps without a light and was injured because the lower steps were cut away; the darkness should have been a warning; compare *Cairns* v. *Boyd* (1879), 6 R. (Ct. of Sess.) 1004); *Lewis* v. *Ronald* (1909), 26 T. L. R. 30 (tradesman delivering goods to tenant of flat, the staircase of which the landlord contracted to light, wandered into a part of the staircase which was unlit and was injured: held, that the landlord was not liable); see *Driscoll* v. *Partick Burgh Commissioners* (1900), 37 Sc. L. R. 274 (duty of the landlord of flats to light the common stairs); compare *Schofield* v. *Bolton Corporation* (1910), 26 T. L. R. 230, C. A. (where a child strayed through a gate in a field, where the defendants allowed it to play, and eventually was injured on a railway line, but the defendants were held not liable, as there was no duty on the defendants to keep the gate shut, and no evidence that any child had strayed before); and see *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A.

(*k*) See *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 694; *Driscoll* v. *Partick Burgh Commissioners*, *supra*; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Woodcock* (1871), 25 L. T. 335; compare *Brooks* v. *Courtney* (1869), 20 L. T. 440; and see p. 476, *post*.

other chattels not dangerous in themselves (*l*) as in the case of an invitation to come upon the invitor's premises (*m*). Thus, for example, there is a duty on a charterer of a vessel, upon which the servants of a stevedore are to come for the purpose of loading, to devote reasonable attention to the condition of the tackle and appliances which will be used in the work, though he is not bound to have a minute survey made (*n*). Where the use of any chattel, which is known to be in such a condition as to cause danger not necessarily incident to its use, is invited, there is a duty to warn the invitee of that danger (*o*).

Nature of duty.

### SUB-SECT. 3.—*Duty to Bare Licensees and Visitors.*

**659.** A licensee is a person who has permission to do an act which without such permission would be unlawful (*p*). The term

Definition.

(*l*) For the consideration of the duty in dealing with dangerous articles, see p. 407, *post*.

(*m*) *Elliott* v. *Hall* (1885), 15 Q. B. D. 315 (defective coal truck used by servant of consignee); see *Earl* v. *Lubbock*, [1905] 1 K. B. 253, C. A., *per* COLLINS, M.R., at p. 257; *Smith* v. *Steele* (1875), L. R. 10 Q. B. 125 (negligently slung boat causing injury to a pilot); *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A. (defective rope in staging supplied by dock owners); *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I. R. 143, H. L., affirming [1910] 2 I. R. 470, C. A. (craneman employed by respondents causing injury to seaman employed by shipowners in unloading); *King* v. *Great Western Rail. Co.* (1871), 24 L. T. 583; *Smith* v. *London and St. Katharine Docks Co.* (1868) L. R. 3 C. P. 326; *Gurling* v. *Hurst & Co.* (1889), 6 T. L. R. 94 (negligent use of flaps of a hoist where sacks were being raised); *Edwards* v. *Hutcheon* (1889), 26 Sc. L. R. 550 (unguarded threshing machine); *Hawkins* v. *Smith* (1896), 12 T. L. R. 532 (rotten sack for unloading grain); compare *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A.

(*n*) *Marney* v. *Scott*, [1899] 1 Q. B. 986; compare *Scott* v. *Foley, Aikman & Co.* (1899), 5 Com. Cas. 53. Where a stevedore has had an opportunity of inspecting tackle supplied by a ship for the use of his men, the respective liability of the stevedore and the shipowner for an accident is not always clear (*Biddle* v. *Hart*, [1907] 1 K. B. 649, C. A.; *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, C. A.; but see *Simpson* v. *Burrell & Son and Paton* (1896), 33 Sc. L. R. 413; *M'Lachlan* v. *Steamship "Peveril" Co., Ltd. and Macgregor and Ferguson* (1896), 33 Sc. L. R. 634; compare *Wood & Co.* v. *Mackay* (1906), 43 Sc. L. R. 458; *M'Gill* v. *Bowman & Co.* (1890), 28 Sc. L. R. 144, *per* Lord YOUNG, at p. 147; and *O'Neill* v. *Everest* (1892), 8 T. L. R. 426, C. A.). In the absence of an opportunity of inspecting the tackle supplied by the ship, it would seem that the stevedore is not under any liability to his men under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) (*Traill & Sons* v. *Actieselskabat Dalbeattie, Ltd.* (1904), 41 Sc. L. R. 615); compare *Kiddle* v. *Lovett* (1885), 16 Q. B. D. 605 (where by contract the supervision of the tackle was left to the ship); and see title MASTER AND SERVANT, Vol. XX., pp. 139, 142.

(*o*) *Earl* v. *Lubbock*, [1905] 1 K. B. 253, C. A., *per* STIRLING, L.J., at p. 258; *Elliott* v. *Hall*, *supra* (the liability does not extend to latent defects not discoverable by an ordinary inspection).

(*p*) *Thomas* v. *Sorrel* (1673), Vaugh. 330, 351, Ex. Ch., cited by ROMER, L.J., in *Warr* (*Frank*) *& Co., Ltd.* v. *London County Council*, [1904] 1 K. B. 713, C. A.; compare *Great Northern Rail. Co.* v. *Harrison* (1854), 10 Exch. 376; and title LANDLORD AND TENANT, Vol. XVIII., p. 338. For the distinction between a licence and an easement, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 239; and, as to licences in relation to land generally, see title REAL PROPERTY AND CHATTELS REAL; see also title FISHERIES, Vol. XIV., p. 584; and compare title GAME, Vol. XV., p. 219.

SECT. 1. **In Regard to Particular Parties.**

Persons within the term.

"bare" or "mere" licensee is used to describe a person who has merely a permission, without any invitation express or implied (*q*). This permission or licence may also be either express or implied (*r*).

A visitor, other than one who pays for the accommodation given him (*s*), is a bare licensee (*t*). So also is a servant (*a*), and the latter cannot, at common law, recover where the injury is caused by the negligence of a fellow servant (*b*).

Rights of the licensee and liability of the licensor.

**660.** A bare licensee is entitled to no more than permission to use the subject of the licence as he finds it. He must accept the permission with its concomitant conditions and perils (*c*). The grantor of the licence is in a position similar to that of the donor of a gift, and is not responsible for the safety of the licensee, unless acceptance of the grant involves a hidden peril, wilful suppression of the knowledge of which amounts to a deceit practised on the donee (*d*).

(*q*) See p. 386, *ante*. As to a "bare licence" to search for minerals, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 568.

(*r*) *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731; *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; *White* v. *France* (1877), 2 C. P. D. 308. A distinction must, however, be drawn between cases of mere tacit acquiescence in persons coming upon premises without leave and cases where there is some encouragement or inducement which amounts to permission to use the premises (*Lowery* v. *Walker*, [1910] 1 K. B. 173, 185, 202, C. A.; reversed on the particular facts in the House of Lords, [1911] A. C. 10). Habitual user of a particular way across private property may amount to user by permission in a particular case (S. C., [1911] A. C. 10); compare *Barrett* v. *Midland Rail. Co.* (1858), 1 F. & F. 361; and see title TRESPASS.

(*s*) Such a visitor is an invitee; see pp. 385, 386, *ante*, and cases there cited.

(*t*) *Southcote* v. *Stanley* (1856), 1 H. & N. 247. In *Collis* v. *Selden* (1868), L. R. 3 C. P. 495, there was no averment as to the capacity in which the plaintiff, who was injured by a chandelier falling, was upon the defendant's premises—a public-house—and accordingly judgment was given for the defendant. In *Axford* v. *Prior* (1866), 14 W. R. 611, the plaintiff was a guest presumably for reward.

(*a*) *Southcote* v. *Stanley*, *supra*; *Priestley* v. *Fowler* (1837), 3 M. & W. 1. But one who, though employed, does an act not on duty, but to oblige the employer, has greater rights while doing the act than those of a bare licensee (*Mansfield* v. *Baddeley* (1876), 34 L. T. 696).

(*b*) *Swainson* v. *North Eastern Rail. Co.* (1878), 3 EX. D. 341, C. A.; as to statutory remedies, see title MASTER AND SERVANT, Vol. XX., pp. 134 *et seq.*

(*c*) *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731; *Castle* v. *Parker* (1868), 18 L. T. 367; see *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, *per* WILLES, J., at p. 285; *Bolch* v. *Smith* (1862), 7 H. & N. 736, 742; *Gallagher* v. *Humphery* (1862), 6 L. T. 684; *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80; *Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474, C. A.; *O'Brien* v. *Enrico, Arbib & Co.* (1907), 44 Sc. L. R. 686.

(*d*) *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371, *per* WILLES, J., at p. 375, who says: "The dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew of its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver"; and see *Robbins* v. *Jones* (1864), 15 C. B. (N. S.) 221. In *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556, such a hidden peril, amounting to a trap,

The licensee has, however, the right to expect that the natural perils incident to the subject of the licence shall not be increased without warning by the negligent behaviour of the grantor, and, if they are so increased, he can recover for injuries sustained in consequence thereof (*e*). A grantor of a licence to come on to his premises, who is aware that a licensee is actually there, is bound to take reasonable care not to do anything to injure him (*f*).

Duty of licensor with regard to increase in risk.

Where the acceptance of the licence involves the doing of some act by the grantor, the licensee has a right to expect that that act shall be performed with such reasonable care as the circumstances of the case require (*g*).

With regard to performance of necessary act.

**661.** A person to whom a chattel is lent gratuitously is in the position of a bare licensee. He cannot recover for injuries sustained owing to a defect in the chattel, unless he can show that the lender knew the chattel to be defective for the purpose for which it was lent and failed to communicate the knowledge (*h*).

Gratuitous bailee.

was held sufficient to render the defendant liable. The defendant, however, who caused the existence of the peril was not the grantor of the licence, but another licensee, so that the decision might equally well have resulted had the obstruction been placed by the defendant upon a public way. The case is distinguished in *Bolch* v. *Smith* (1862), 7 H. & N. 736, where it was said that, were a peril masked by apparent security, liability might follow (*per* CHANNELL, B., at p. 742); compare *Sullivan* v. *Waters* (1864), 14 I. C. L. R. 460; see, further, title MASTER AND SERVANT, Vol. XX., p. 137.

(*e*) *Gallagher* v. *Humphery* (1862), 6 L. T. 684, *per* COCKBURN, C.J., at p. 685, as explained in *Murley Brothers* v. *Grove* (1882), 46 J. P. 360; *M'Feat* v. *Rankin's Trustees* (1879), 16 Sc. L. R. 614 (unfenced quarry near private road, used with consent of owner); see *Lowery* v. *Walker*, [1910] 1 K. B. 173, *per* KENNEDY, L.J., at p. 197, reversed on the particular facts, [1911] A. C. 10.

(*f*) *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13, C. A. Where a railway company permits persons to cross its line at a particular spot, there is a duty on the company to use reasonable care in moving over that portion of its line (*Barrett* v. *Midland Rail. Co.* (1858), 1 F. & F. 361); but where the grantor of a licence has no reason to suppose that a licensee will be in a particular place, there is no duty to take precautions against accident (*Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474, C. A.; see also *Holmes* v. *North Eastern Rail. Co.* (1875), L. R. 4 Exch. 254; *Griffiths* v. *London and North Western Rail. Co.* (1866), 14 L. T. 797; *Tolhausen* v. *Davies* (1888), 58 L. J. (Q. B.) 98, C. A.).

(*g*) *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, C. A. Thus, "where a person undertakes to provide for the conveyance of another, although he does so gratuitously, he is bound to exercise due and reasonable care" (*Lygo* v. *Newbold* (1854), 9 Exch. 302, *per* PARKE, B., at p. 305); and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty (*Harris* v. *Perry & Co.*, *supra*, *per* COLLINS, M.R., at p. 226; see also *Great Northern Rail. Co.* v. *Harrison* (1854), 10 Exch. 376; *Moffat* v. *Bateman* (1869), L. R. 3 P. C. 115; *Shrimpton* v. *Hertfordshire County Council* (1911), 27 T. L. R. 251, H. L.). As to the carriage of goods, see *Southcote's Case* (1601), 4 Co. Rep. 83 b; and, generally, title CARRIERS, Vol. IV., pp. 1 *et seq.*

(*h*) *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, C. A.; see *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371, 375; and see title BAILMENT, Vol. I., pp. 539 *et*

SECT. 1. In Regard to Particular Parties.

Negligence of bare licensee.

**662.** A bare licensee who fails to use reasonable care and is injured in consequence cannot recover, even though the grantor of the licence might otherwise have been liable (*i*).

Liability of bare licensee for act involving danger.

**663.** If the licensee is to do something upon the premises of the grantor of the licence, which may involve danger to the grantor or his property, or to other persons, it is the duty of the licensee to see that the premises are not left in a dangerous state, and if he fails to do so he is responsible for resulting damage (*k*).

SUB-SECT. 4.—*Duty to Trespassers.*

Extent of liability.

**664.** The occupier of premises owes no duty to persons who come upon them as trespassers (*l*). He must not, however, encourage or attract trespassers to a place where they are exposed, whether intentionally or not, to some specific danger of which he is cognisant (*m*), nor may he, when aware of the presence of a trespasser on his premises, do any act which endangers his safety (*n*).

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(*i*) See p. 445, *post*. This principle requires some qualification in its application to the case of children, who cannot be presumed capable of taking the same amount of care as grown-up persons; see *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229; *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A.; and see pp. 366, 373, *ante*.

(*k*) *Re Williams* v. *Groucott* (1863), 4 B. & S. 149; compare *Sybray* v. *White* (1836), 1 M. & W. 435; *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556; *Great Laxy Mining Co.* v. *Clague* (1878), 4 App. Cas. 115, P. C.

(*l*) *Grand Trunk Railway of Canada* v. *Barnett*, [1911] A. C. 361, P. C.; *Hardcastle* v. *South Yorkshire Rail. Co.* (1859), 4 H. & N. 167; see *Lygo* v. *Newbold* (1854), 9 Exch. 302; *Great Northern Rail. Co.* v. *Harrison* (1854), 10 Exch. 376; *Stone* v. *Jackson* (1855), 16 C. B. 199; *Harrison* v. *North Eastern Rail. Co.* (1874), 29 L. T. 844; *McCabe* v. *Guinness* (1876), 10 I. R. C. L. 21; *Murley Brothers* v. *Grove* (1882), 46 J. P. 360; *Stiefsohn* v. *Brooke, Bond & Co.* (1889), 5 T. L. R. 684; *French* v. *Hills Plymouth Co.* (1908), 24 T. L. R. 614. The same principle applies in the case of animals trespassing (*Jordin* v. *Crump* (1841), 8 M. & W. 782; *Stansfield* v. *Bolling* (1870), 22 L. T. 799; *Ponting* v. *Noakes*, [1894] 2 Q. B. 281; see *Deane* v. *Clayton* (1817), 7 Taunt. 489; title ANIMALS, Vol. I., pp. 396, 397); but while the use of man-traps, spring guns, or other engines calculated to destroy human life or inflict grievous bodily harm on any person, is a criminal offence (see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 605), the use of traps to catch animals addicted to hunting is lawful (see title GAME, Vol. XV., p. 227), and will not give a cause of action to a trespasser injured thereby (*Wootton* v. *Dawkins* (1857), 2 C. B. (N. S.) 412). Special circumstances may occasionally throw the responsibility on occupiers to keep out trespassers; compare *Haughton* v. *North British Rail. Co.* (1892), 30 Sc. L. R. 111; see p. 398, *post*; and, generally, title TRESPASS. As to persons unintentionally straying from the highway, see p. 397, *post*.

(*m*) *Jewson* v. *Gatti* (1886), 2 T. L. R. 441, C. A.; *Cooke* v. *Midland Great Western Railway of Ireland*, *supra*. In these cases there was an attraction, held by the court to be irresistible by children, to go to a place where there was risk of injury to them from a specific cause, but there was no intention to injure them. In the case of *Townsend* v. *Wathen* (1808), 9 East, 277, traps were set for dogs and baited with flesh for the express purpose of enticing them into danger.

(*n*) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773. Thus if an occupier of land were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie (*ibid.*, *per* BRAMWELL, B.; compare *Smith* v. *Highland Rail. Co.* (1888), 26 Sc. L. R. 33). But the trespasser cannot maintain an action unless he has a right to complain of the act causing the injury and to complain thereof against the

SUB-SECT. 5.—*Duty to Neighbours.*



Nature of duty.

**665.** It is the duty of an occupier of premises to take reasonable care to prevent such consequences as may infringe the rights of his neighbours and inflict damage upon them arising from his use of those premises (*o*). In cases where there is no infringement of natural or acquired rights of property (*p*), such consequences may result from a non-natural and extraordinary use of the premises, in which case the occupier is liable, whether he has been negligent or not (*q*); but they may also arise from the use of the premises for ordinary purposes and in a customary manner, in which case the occupier is not liable to an action for negligence unless there is an omission to take reasonable care on his part (*r*).

Extraordinary user.

Ordinary user.

Duty in particular cases.

**666.** An occupier is under a duty to prevent injury to his neighbour from the fabric of a building (*s*), from the escape of noxious and dangerous things from the premises (*t*), from failure to keep cattle in where there is a duty to do so (*a*), from the

person he has made defendant in the action, so that an action cannot be maintained by a trespasser against a railway company for the negligence of its servants in carrying him (*Grand Trunk Railway of Canada* v. *Barnett*, [1911] A. C. 361, 369, P. C.).

(*o*) See title ACTION, Vol. I., pp. 9, 10; and see title NUISANCE, pp. 525, 530, *post*.

(*p*) As to which see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 295, 324, 330, 333; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 570 *et seq.*; TRESPASS.

(*q*) *Ball* v. *Ray* (1873), 8 Ch. App. 467; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Hurdman* v. *North Eastern Railway* (1878), 3 C. P. D. 168, C. A.; *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258. In such cases the action is not for negligence, but for nuisance; see title NUISANCE, pp. 526 *et seq.*, *post*, and cases cited at p. 396, *post*.

(*r*) *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Dalton* v. *Angus* (1881), 6 App. Cas. 740. The question of whether the user is ordinary or not is one of fact in each case (*Smith* v. *Kenrick* (1849), 7 C. B. 515; *Smith* v. *Fletcher* (1874), L. R. 9 Exch. 64, Ex. Ch.; *Fletcher* v. *Smith* (1877), 2 App. Cas. 781). Ordinary user has been held to include mining and quarrying in addition to ordinary agricultural operations (*Wilson* v. *Waddell* (1876), 2 App. Cas. 95; *A.-G.* v. *Tomline* (1879), 12 Ch. D. 214). Removing shingle from the foreshore by the owner was held, in *A.-G.* v. *Tomline*, *supra*, not to be a natural user; compare *Crompton* v. *Lea* (1874), L. R. 19 Eq. 115. Playing cricket appears to be a natural user of land; at any rate it has been held not to be negligent to play it near to the property of others where a person on that other property was injured (*Ward* v. *Abraham* (1910), 47 Sc. L. R. 252). Shooting, however, where the bullets or pellets might fall on a place where the shooter has not permission to shoot, is negligent (*ibid.*; see *Taylor* v. *Dick* (1897), 4 Scots Law Times 297; and see p. 400, *post*).

(*s*) *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377; see *Chauntler* v. *Robinson* (1849), 4 Exch. 163; see also titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 136; LANDLORD AND TENANT, Vol. XVIII., pp. 504, 505; and see title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 315.

(*t*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; compare *Tenant* v. *Goldwin* (1704), 1 Salk. 360; 2 Ld. Raym. 1089; and see title NUISANCE, pp. 515, 528, 529, *post*.

(*a*) *Churchill* v. *Evans* (1809), 1 Taunt. 529; *Hilton* v. *Ankesson* (1872), 27 L. T. 519; and see title ANIMALS, Vol. I., p. 376.

SECT. i. In Regard to Particular Parties.

presence of dangerous things on the boundary (*b*), or from negligent conduct in the ordinary use of the premises (*c*).

Construction of buildings.

**667**. Where buildings or works are constructed of such a nature that, unless proper care is taken, injury will be caused to the neighbour's property, there is a duty on the owner of the buildings or works to see that such care is exercised (*d*). Where, however, a person is conducting building operations in a town, he is not liable to indemnify his neighbours against inconvenience or damage to their property caused by dust or the partial blocking up of the access to their premises unless such operation is in itself unlawful, or, if lawful, is executed in a negligent manner (*e*), as, for example, if in pulling down his house he takes no steps to prevent the

(*b*) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5. Where poisonous trees are planted within the boundary and do not project there is no liability for injury to a neighbour's cattle in the absence of a duty to keep such cattle out (*Wilson* v. *Newberry* (1871), L. R. 7 Q. B. 31; *Ponting* v. *Noakes*, [1894] 2 Q. B. 281). Where, however, the relations between the parties are such that one has already acquired rights, an alteration of the other's premises made within one boundary, which is prejudicial to those rights, will give a ground of action (*Re Williams* v. *Groucott* (1863), 4 B. & S. 149); and see titles AGRICULTURE, Vol. I., p. 297; BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 126, 127. In *Smith* v. *Giddy*, [1904] 2 K. B. 448, the court purported to follow *Crowhurst* v. *Amersham Burial Board*, *supra*, but there the defendants had trees, which were noxious and likely to cause injury, brought on to the land, while in *Smith* v. *Giddy*, *supra*, the trees were ash trees and harmless, and there was no evidence that the defendants planted them or that they were likely to do any harm when planted; see also *Giles* v. *Walker* (1890), 24 Q. B. D. 656 (a plaintiff could not recover for damage done by thistle seeds being blown from defendant's land on to his, although this resulted from the land being brought under cultivation); compare *Brady* v. *Warren*, [1900] 2 I. R. 632; *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 781, 787; *Bryant* v. *Lefever* (1879), 4 C. P. D. 172, 176, C. A.; and see title AGRICULTURE, Vol. I., p. 295.

(*c*) *Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376; *Bagnall* v. *London and North Western Rail. Co.* (1862), 1 H. & C. 544, Ex. Ch.; compare *Ward* v. *Abraham*, [1910] S. C. 299.

(*d*) *Dodd* v. *Holme* (1834), 1 Ad. & El. 493, *per* LITTLEDALE, J., at p. 503 (plaintiff's house injured by the negligent building of the defendant's house); *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279 (defective construction of the bank of a cut, in consequence of which water overflowed); compare *Hurdman* v. *North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A. (raising surface of land so as to collect water and throw it on to plaintiff's land); *Gill* v. *Edouin* (1895), 72 L. T. 579, C. A. (alteration in lead flat and rainwater gutters); *Broder* v. *Saillard* (1876), 2 Ch. D. 700; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 135, 136; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 315, 316; METROPOLIS, Vol. XX., p. 492.

(*e*) *Laurent* v. *Lord Advocate* (1869), 7 Macph. (Ct. of Sess.) 607; compare *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642, *per* Lord WESTBURY, at p. 650; *Massey* v. *Goyder* (1829), 4 C. & P. 161; *Bower* v. *Peate* (1876), 1 Q. B. D. 321. The removal of soil which supports an adjoining building is not necessarily wrongful (see *Richards* v. *Rose* (1853), 9 Exch. 218), where there is no right of support (see *Peyton* v. *London Corporation* (1829), 9 B. & C. 725; *Brown* v. *Windsor* (1830), 1 Cr. & J. 20; *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871; title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 251, 321).

bricks falling upon his neighbour's house (*f*). The amount of care to be taken in a particular case varies according to the circumstances (*g*).

SUB-SECT. 6.—*Duty to the Public.*

How the duty arises.

**668.** The duty on the occupiers (*h*) of premises adjoining places to which members of the public are entitled to go, such as highways or other public places (*i*), or to which they may reasonably be expected to go while using such public places in the ordinary manner with due care (*k*), may arise in two ways:

(1) a duty may exist towards members of the public who inadvertently stray off a public place while using such place in the ordinary manner with ordinary care (*l*);

(2) a duty may exist towards members of the public, while in a public place, in respect to a danger arising on the adjacent premises.

(1) Duty towards public straying off public place in ordinary course.

**669.** Although there is no general duty on an occupier to fence off his land from a highway (*m*), still, where the occupier of

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(*f*) *Bradbee* v. *Christ's Hospital* (*Governors etc.*) (1842), 4 Man. & G. 714; see *ibid.*, at p. 759, approving *Dodd* v. *Holme* (1834), 1 Ad. & El. 493.

(*g*) *Laurent* v. *Lord Advocate* (1869), 7 Macph. (Ct. of Sess.) 607; *Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1, Ex. Ch. Where a stranger undermines and negligently damages a house, he is liable without any proof of a right to support (*Bibby* v. *Carter* (1859), 4 H. & N. 153; see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 135).

(*h*) As to the liability of the owners of premises that are let, see p. 384, *ante*.

(*i*) *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470, 479; compare the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 3 (place of public resort dedicated to the public); see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 634, 635.

(*k*) *Bedman* v. *Tottenham Local Board of Health* (1887), 4 T. L. R. 22 (the defendants kept a private way leading directly from a public road, of which the private way was substantially a part, under a low archway dangerous to persons driving along the private way; and the plaintiff, by mistake, drove along it and was injured: held, that he could recover, and the fact that he was a trespasser at the moment made no difference, as the place was dangerous to people using the highway); *Messer* v. *Cranston & Co.* (1897), 35 Sc. L. R. 42 (persons using waste ground of a docks for storing timber were held to be under a duty to store it in such a way as to protect members of the public using the place habitually); compare *Hawken* v. *Shearer* (1887), 56 L. J. (Q. B.) 284; *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244; and, as to notices limiting the liability of persons to members of the public using public places, see *Anderson* v. *Coutts* (1894), 58 J. P. 369.

(*l*) *Binks* v. *South Yorkshire Railway and River Dun Co.*, *supra*; and cases cited in note (*k*), *supra*. Such persons are unintentional trespassers, and the duty is confined to them. Those who, in consequence of failure to exercise ordinary care while using public places in the ordinary way, come upon private premises, become trespassers, to whom the occupier owes no duty to take care; see *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.; and p. 394, *ante*.

(*m*) See title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128, 129. As to the duty of a highway authority in urban districts to fence off adjoining land, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 254. As to the duty of a highway authority to fence a highway, see *ibid.*, p. 115.

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premises adjoining a highway permits some danger (*n*) to exist at a place sufficiently near to the highway to be unsafe (*o*) to members of the public using it with ordinary care, it is incumbent on such occupier to take reasonable precautions to protect the public from falling into that danger (*p*), unless the danger existed before the highway was dedicated (*q*). If a person under statutory authority diverts a highway, it is his duty to protect it by fencing or otherwise at the point of diversion in cases where there is risk of the public being misled (*r*).

(*n*) *E.g.*, such as an excavation or quarry (*Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; compare *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, 864); a canal (*Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244); a ditch (*Barnes* v. *Ward* (1850), 9 C. B. 392); a hoist hole (*Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53); a pond (*Ross* v. *Keith* (1888), 26 Sc. L. R. 55); or an archway so low as to be dangerous (*Bedman* v. *Tottenham Local Board of Health* (1887), 4 T. L. R. 22). Liability may arise to a member of the public injured by reason of the occupier's negligence, or by a nuisance which he occasions (*Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; compare *R.* v. *Watts* (1703), 1 Salk. 357); and see, generally, title NUISANCE, p. 515, *post*.

(*o*) It is a question of fact in each case whether the danger is so near as to be unsafe to the public using the highway (*Hardcastle* v. *South Yorkshire Rail. Co.*, *supra*). It must be substantially adjoining the highway, so that by a false step, or sudden giddiness, or by the frightening of a horse, a person might meet the danger (*ibid.*); and so, where the plaintiff lost his way and fell into a quarry 150 feet away from the highway, it was held he could not recover (*Prentices* v. *Assets Co., Ltd.* (1890), 27 Sc. L. R. 401; compare *Devlin* v. *Jeffray's Trustees* (1902), 40 Sc. L. R. 92; *Jenkins* v. *Great Western Railway* [1912] 1 K. B. 525, C. A.); see, however, the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), by which it is provided that any quarry, pit or opening, other than any natural opening, made for getting stone, slate, lime, chalk, clay, gravel or sand, which is dangerous to the public, and on open land within 50 yards of a highway or place of public resort, shall, unless kept reasonably fenced to prevent accident, be deemed to be a nuisance to be dealt with summarily under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91 *et seq.*; and see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 169; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 634, 635; and, as to nuisances summarily abatable, see title NUISANCE, pp. 566 *et seq.*, *post*; compare *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731, where *Blyth* v. *Topham* (1607), Cro. Jac. 158, was followed; *Evans* v. *Rhymney Local Board* (1887), 4 T. L. R. 72.

(*p*) *Ross* v. *Keith* (1888), 26 Sc. L. R. 55; *Silverton* v. *Marriott* (1888), 59 L. T. 61; and cases cited in note (*o*), *supra*; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128, 129. It is no defence by an occupier as against an injured person that the duty to fence is by statute thrown on other persons who have neglected it (*Wettor* v. *Dunk* (1864), 4 F. & F. 298; see also Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19)).

(*q*) *Cooper* v. *Walker* (1862), 2 B. & S. 773; *Fisher* v. *Prowse* (1862), 2 B. & S. 770, in which *Coupland* v. *Hardingham* (1813), 3 Camp. 398, was disapproved on this point; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221; compare *Jarvis* v. *Dean* (1826), 3 Bing. 447; *Cornwell* v. *Metropolitan Commissioners of Sewers* (1855), 10 Exch. 771; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 156, note (*r*).

(*r*) *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918; and see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 129, 130; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 78.

SECT. 1. In Regard to Particular Parties.

(2) Duty towards public in respect of state of premises adjoining public place.

**670.** The occupier of premises adjoining a highway (*s*) is under an obligation to take reasonable care (*t*) not to injure persons on the highway, and is liable if, in consequence of failing to exercise such care, a member of the public is injured in the following cases:—

(a) where the premises are in a state likely to cause injury to persons passing by (*a*), and the occupier knows, or, where the defect is not merely temporary, ought reasonably to know, of their state (*b*);

(b) where something, calculated to cause injury (*c*) to those

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(*s*) Where a portion of the premises is also a part of the highway—*e.g.*, a cellar grating—and the defective state is due to wear and tear by the public, the occupier is not under any obligation to repair that portion (*Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221); *aliter*, if it was worn out for the occupier's benefit. There is, however, a duty on the occupier to see that nothing he does shall render it insecure (*Braithwaite* v. *Watson* (1889), 5 T. L. R. 331); and see note (*i*), p. 401, *post*; title NUISANCE, p. 515, *post*.

(*t*) Where all reasonable care has been taken to prevent injury being done by the property, and all reasonably probable events have been foreseen and provided against, the occupier is not liable (*McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A.; compare *Palmer* v. *Bateman*, [1908] 2 I. R. 393, C. A.; and see note (*n*), p. 474, *post*). For cases in which the employment of a contractor to do work affects the liability of the owner or occupier, see p. 471, *post*.

(*a*) *R.* v. *Watts* (1703), 1 Salk. 357; *Russell* v. *Shenton* (1842), 3 Q. B. 449, following *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318; *Kearney* v. *London and Brighton Rail. Co.* (1871), L. R. 6 Q. B. 759, Ex. Ch. (brick falling from a bridge over the road); *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314 (lamp projecting over a highway); *Silverton* v. *Marriott* (1888), 59 L. T. 61; *Beveridge* v. *Kinnear & Co.* (1883), 21 Sc. L. R. 260 (faultily secured warehouse door); *Braithwaite* v. *Watson*, *supra* (insecure cellar plate in pavement); *Palmer* v. *Bateman*, *supra* (defective guttering). In *Robinson* v. *Reid's Trustees* (1900), 37 Sc. L. R. 718, it was held that a passer-by who was injured by falling glass due to the breaking of a sash cord known to be defective could not recover, as no one could possibly contemplate that such an accident would happen; compare *Bishop* v. *Bedford Charity Trustees* (1859), 1 E. & E. 697 (area grating); *M'Martin* v. *Hannay* (1872), 10 Macph. (Ct. of Sess.) 411 (defective common staircase); see *O'Keefe* v. *Edinburgh Magistrates* (1910), 48 Sc. L. R. 50.

(*b*) *Palmer* v. *Bateman*, *supra*; *Tarry* v. *Ashton*, *supra*; compare *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658; *O'Keefe* v. *Edinburgh Magistrates*, *supra*, where it was held that, to make the defendants liable where the plaintiff slipped on ice, formed by the freezing of the overflow from a fountain of which the defendants had control, there must either have been a structural defect in it, which made it overflow, or else some temporary defect brought to their notice. In *McLoughlin* v. *Warrington Corporation* (1910), 75 J. P. 57, C. A., it was held that the fact that during a royal procession a man climbed up a fountain, many years old, and dislodged the top stone, which fell and injured a boy in the highway, was evidence upon which the jury could find negligence in having the fountain in a defective condition; compare *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 133, 134.

(*c*) *Proctor* v. *Harris* (1830), 4 C. & P. 337 (flap in footway giving access to cellar of public-house); *Jewson* v. *Gatti* (1886), 2 T. L. R. 441, C. A. (unsafe barrier to area); compare *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A. (defective fence); *Brown* v. *Eastern and Midlands Rail. Co.* (1889), 22

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using the highway, is attached to (*d*) or placed upon the premises (*e*);

(c) where the nature of the occupation of the premises (*f*), or the acts done by persons upon the premises (*g*), are such that injury may be caused to passers-by on the highway (*h*).

Act of third party.

**671.** If the injury occurs through the unauthorised interference of a third person causing what would otherwise be safe to become

Q. B. D. 391, C. A. (heap of earth on ground near to highway calculated to cause horses to shy); *Shearer* v. *Malcolm* (1898), 35 Sc. L. R. 924 (stepping stone projecting into highway); *Watson* v. *Ellis* (1885), 1 T. L. R. 317; *De Teyron* v. *Waring* (1885), 1 T. L. R. 414 (carpets placed from doorway to edge of kerb). In *Duff* v. *National Telephone Co., Ltd.* (1889), 26 Sc. L. R. 512, it was held not negligent to chain a two-wheeled barrow, not in itself dangerous, to a wall in a lane; but see p. 410, *post*. *Elgin County Road Trustees* v. *Innes* (1886), 24 Sc. L. R. 35, and *Stewart* v. *Wright* (1893), 9 T. L. R. 480, are cases where injury was caused by barbed wire fencing adjoining a highway, and the occupiers were held liable; compare *Gibson* v. *Plumstead Burial Board* (1897), 13 T. L. R. 273; see Barbed Wire Act, 1893 (56 & 57 Vict. c. 32); and title BOUNDARIES, FENCES, AND PARTY WALLS, p. 128. Compare *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199 (spikes on a wall); and see title NUISANCE, p. 515, *post*.

(*d*) As in *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314, and *Palmer* v. *Bateman*, [1908] 2 I. R. 393, C. A. It must be remembered that where occupiers of premises adjoining a highway had the right of placing goods upon the highway before its dedication, the right remains afterwards (*Morant* v. *Chamberlin* (1861), 6 H. & N. 541); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 156, note (*r*).

(*e*) See cases cited in note (*c*), p. 399, *ante*. In *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A., it was held to be the duty of an occupier to prevent a nuisance from remaining on his land, although the nuisance was caused by the wrongful acts of the public themselves, namely, throwing refuse on to his land; see title NUISANCE, pp. 527, 555, 556, *post*.

(*f*) *Byrne* v. *Boadle* (1863), 2 H. & C. 722 (warehousemen raising and lowering bales of goods); *Messer* v. *Cranston & Co.* (1897), 35 Sc. L. R. 42 (timber storage); compare *Stiefsohn* v. *Brooke, Bond & Co.* (1889), 5 T. L. R. 684 (plaintiff, injured by climbing up to a hole in a wall adjoining the highway, held not entitled to recover, as it was his own fault that he was injured); *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470 (coal cellar left open).

(*g*) *De Boos* v. *Collard* (1892), 8 T. L. R. 338 (where cellar flap opening suddenly was dangerous to members of the public unless warned, but the defendants were not the occupiers, and were accordingly held not liable); *Milne & Co.* v. *Nimmo* (1898), 35 Sc. L. R. 883 (where a horse was yoked and left in a yard and so able to bolt into street); compare *Smith* v. *Wallace & Co.* (1898), 35 Sc. L. R. 583, and, as supporting the latter case, *Tolhausen* v. *Davies* (1888), 57 L. J. (Q. B.) 392. It appears that a prolonged and loud whistle on a railway adjoining a highway might under certain circumstances, such as proof that there was no necessity to whistle, render the railway company liable if, in consequence, a horse was frightened and damage resulted; see *Glancy* v. *Glasgow and South Western Rail. Co.* (1898), 35 Sc. L. R. 462. It would appear not to be negligent to play cricket near to a highway except in very special circumstances; see *Ward* v. *Abraham* (1910), 47 Sc. L. R. 252 (where it was held not to be negligent to play quite near to neighbours' premises).

(*h*) *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A., and see note (*t*), p. 399, *ante*.

dangerous the occupier is not liable (*i*), unless he knew of the altered and dangerous condition (*k*).

## SECT. 2.—*In Regard to Water.*

Distinction in duty.

**672.** The duties of an occupier of land in regard to water which flows or collects naturally upon it are distinguishable from his duties where the water is brought there or accumulated artificially (*l*). In the first case, the duties are principally confined to such matters as interference with the natural course of a stream or the pollution of its waters, and such liability as may result does not ordinarily depend on negligence (*m*). In the second case, the occupier is responsible for that which may escape from his control and prove a source of damage to others (*n*). It is his duty, therefore, to keep it in control.

When proof of wrongful act necessary.

Where the risk to others is due simply to the fact of the artificial treatment of water, the duty upon the occupier is absolute, and no proof of negligence is required if the water escapes and damage ensues (*o*). Where this is not the case and the risk is due to some extraneous fact or circumstance, liability for negligence only ensues upon proof that such fact or circumstance was due to a wrongful act or omission on the part of the defendant (*p*).

Natural or non-natural user.

The question of the natural or non-natural user of the land is

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(*i*) *McDowall* v. *Great Western Railway*, [1903] 2 K. B. 331, C. A. (the defendants left some railway waggons on a siding with the brakes on; some boys went on to the siding, opened the door of the van, took off the brakes, and the carriages ran down the line and knocked down the plaintiff, who was on a level crossing: held, that the defendants were not liable); *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A. (plaintiff, a boy, was injured by falling from a ledge inside defendants' area railing through which he had crawled, an opening having been made by a trespasser breaking the railing: held, that the defendant was not liable, since he had not created the danger or continued it after knowledge that it existed); compare *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A.; *Murphy* v. *Smith* (1886), 23 Sc. L. R. 709 (unauthorised forcible interference with sliding door to a yard; the groove had become blocked); compare *Beveridge* v. *Kinnear & Co.* (1883), 21 Sc. L. R. 260 (where a faultily secured door was thrown into the street by being hit with a bale of goods lowered from a third person's warehouse); *Braithwaite* v. *Watson* (1889), 5 T. L. R. 331 (where it was held to be negligent to leave a cellar plate unsecured so that anyone could move it); and the cases cited in note (*c*), p. 399, *ante*.

(*k*) *Silverton* v. *Marriot* (1888), 59 L. T. 61.

(*l*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 310, 311, 315.

(*m*) See titles FISHERIES, Vol. XIV., pp. 569—589; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 588, 592; NUISANCE, pp. 527 *et seq.*, 546, *post*; TRESPASS; WATERS AND WATERCOURSES.

(*n*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, affirming *Fletcher* v. *Rylands* (1886), L. R. 1 Exch. 265, Ex. Ch.; see *Smith* v. *Kenrick* (1849), 7 C. B. 515; *Hurdman* v. *North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A. As to the relative liabilities of a water company and of the occupier of premises in respect of an escape from a service pipe, see *Stacey* v. *Metropolitan Water Board* (1911), 9 L. G. R. 174; and title WATER SUPPLY.

(*o*) *Rylands* v. *Fletcher*, *supra*.

(*p*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A.; *Fletcher* v. *Smith* (1877), 2 App. Cas. 781; compare *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A.

SECT. 2. In Regard to Water.

material in considering the origin of the injuries, but is not conclusive of liability (*q*). Thus an owner of mining rights is entitled to exercise them to the full and is not liable for injury resulting to his neighbour's mine through the percolation of water (*r*), even if the percolation is guided by artificial means not in the ordinary course of mining (*s*); but such right does not extend to throwing a greater burden upon his neighbour by operations in the course of mining which discharge into his neighbour's mine a greater quantity of water than would naturally gravitate there (*t*).

Water supplied to, and drained from, houses.

**673.** Where water is artificially introduced into buildings for supply to the occupants, or is in the ordinary course artificially drained away by pipes or gullies, liability for damage caused by its escape only ensues upon proof of negligence (*a*).

Liability of statutory undertakers.

Water companies and others, who are entitled by statute to accumulate water artificially, are not liable except for acts which are not authorised directly or by implication, or for acts which, although authorised, are negligently performed (*b*).

Sewage.

**674.** The propositions above stated in regard to water generally apply also to sewage (*c*).

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(*q*) The natural and non-natural user of land is discussed in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; *Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822; and see title NUISANCE, pp. 525 *et seq.*, *post*.

(*r*) *Wilson* v. *Waddell*, *supra*; *Lomax* v. *Stott* (1870), 39 L. J. (CH.) 834; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742; *Harrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, C. A.

(*s*) *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 782, C. A.

(*t*) *Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376; *Crompton* v. *Lea* (1874), L. R. 19 Eq. 115; *Firmstone* v. *Wheeley* (1844), 2 Dow. & L. 203; *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A. (where a railway company, having made an embankment, as it was entitled by statute to do, cut trenches in it, and wrongfully discharged accumulated water upon the plaintiff's land); and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 590, 591.

(*a*) *Blake* v. *Woolf*, [1898] 2 Q. B. 426; see *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217; *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602, C. A.; *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; *Sutton and Ash* v. *Card*, [1886] W. N. 120; *Blake* v. *Land and House Property Corporation, Ltd.* (1887), 3 T. L. R. 667; *Ruddiman & Co.* v. *Smith* (1889), 60 L. T. 708 (taps left running); *Abelson* v. *Brockman* (1889), 54 J. P. 119 (sink stopped up); *Gill* v. *Edouin* (1891), 71 L. T. 762, affirmed (1895), 72 L. T. 579, C. A.; *Hargroves, Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472.

(*b*) *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Snook* v. *Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308; *Green* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547, C. A. For a discussion of the general principles governing the duties of those who exercise statutory powers, see title TORT. Where a canal or waterworks company is guilty of an act which is not authorised, and the remedy for it is provided by the statute from which the company draws its powers, that remedy must be employed. In some cases the statute appears to contemplate that there may also be an action for negligence (*Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626). As to unauthorised acts in relation to liability for nuisance, see title NUISANCE, pp. 516 *et seq.*, *post*.

(*c*) *Rylands* v. *Fletcher*, *supra*; *Tenant* v. *Goldwin* (1704), 2 Ld. Raym.

## SECT. 3.—*In Regard to Fire.*

SECT. 3. **In Regard to Fire.**

Liability only extends to fire purposely kindled by occupier's own agency.

**675.** The duty of an occupier of premises, on which a fire is purposely kindled by the agency of the occupier or someone for whom he is responsible, is to secure that it shall not escape beyond the bounds of his premises so as, in the ordinary course, to cause damage to his neighbours or their property, or the public (*d*). For the results of a fire so kindled he is liable, but he is not liable for the results of a fire which is kindled by accident and without negligence (*e*), nor of one which is kindled or which spreads through the unauthorised act of a stranger (*f*), or *vis major*, or the act of God (*g*).

Liability for chimney fire.

**676.** If a chimney is on fire in an urban district, there is a statutory presumption of negligence against the occupier resulting in liability to a penalty (*h*). In the county of London he can, however, recover the penalty summarily in whole or in part from any other person to whose neglect or wilful default he proves the fire to be due (*i*). Elsewhere in boroughs and urban districts he is liable

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1089; *Humphries* v. *Cousins* (1877), 2 C. P. D. 239; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115, C. A.; compare *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393; and see titles NUISANCE, pp. 528, 529, *post*; SEWERS AND DRAINS.

(*d*) *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733, applying the rule laid down in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; see *Beaulieu* v. *Finglam* (1401), Y. B. 2 Hen. 4, 18, pl. 6. The duty applies equally whether the fire is kindled in a building or on premises (*Turberville* v. *Stampe* (1697), 1 Ld. Raym. 264; *Filliter* v. *Phippard* (1847), 11 Q. B. 347), or in an engine on a highway (*Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A; *Gunter* v. *James* (1908), 24 T. L. R. 868).

(*e*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86. Although this is a local Act, this provision applies to the whole country. It does not, however, affect agreements on the subject between landlord and tenant (*ibid.*); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 519, 521. Liability was by this Act removed from one on whose premises fire accidentally commenced. Doubt at one time existed whether in view of this provision liability would attach to an accidental fire, even if there were negligence in causing it (see *Canterbury* (*Viscount*) v. *A.-G.* (1843), 1 Ph. 306, *per* Lord LYNDHURST, L.C., at p. 320, citing the opinion of Sir William Blackstone), but it is now decided that where negligence is proved liability will still attach (*Filliter* v. *Phippard*, *supra*; see *Piggot* v. *Eastern Counties Rail. Co.* (1846), 3 C. B. 229). The effect, therefore, is that, if a fire be proved to be accidental, the plaintiff must show that there was negligence before he can recover (see *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468); and see, further, title INSURANCE, Vol. XVII., p. 542.

(*f*) *Turberville* v. *Stampe*, *supra*, *per* HOLT, C.J., but the presumption until the contrary is proved is that it is due to the fault of the occupier (*Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, *per* Lord TENTERDEN, C.J., at p. 958). Where a contractor negligently lit a fire upon the property of an employer, it was held that the employer was liable unless he could show that the contractor was not acting within the scope of his contract (*Black* v. *Christchurch Finance Co.*, [1894] A. C. 48, P. C.).

(*g*) *Turberville* v. *Stampe*, *supra*, *per* HOLT, C.J.

(*h*) Not exceeding £1 (Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 23). As to the enforcement of orders of courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(*i*) *Ibid.*; see title METROPOLIS, Vol. XX., p. 418.

SECT. 3. **In Regard to Fire.**

to the penalty unless he can prove that the fire was in no way due to the carelessness, neglect, or omission of himself or his servants (*j*).

Fire kindled under statutory powers.

**677.** Persons who kindle a fire in the exercise of statutory powers are not liable for injury which is the direct result of doing with all due precautions an act authorised directly or by implication (*k*); but they are liable for injury which is the result of doing an unauthorised act or the negligent doing of an act which is authorised (*l*). The precautions required will vary with the circumstances, but may be stated generally to be all such as are practicable, and dictated by reason and experience (*m*).

Fire escapes in factories, workshops, and certain other buildings.

**678.** Factories and workshops throughout the country (*n*), and in London places requiring a licence as places of entertainment, and certain buildings (*o*), must be provided with means of escape from fire. The provision of appliances for extinguishing fires is not generally required, and in view of the varying degree of risk of fire in different classes of buildings it is not possible to lay down any rule, but it is probable that failure to provide such appliances in factories and places where the risk is considerable would be evidence of negligence (*p*). The pulling down of buildings rendered dangerous by a fire may be justified (*q*).

Fire brigades.

Their powers.

**679.** In London a fire brigade is established by statute (*r*), and in the case of boroughs, urban districts, and even rural parishes (*s*) power is given by statute for the establishment of a brigade. Such brigades are authorised by statute to enter and take possession of premises where fire breaks out within their districts (*t*); but voluntary fire brigades have no such authority, and if they enter on premises without being called upon to do so they enter on them

(*j*) Penalty not exceeding 10*s*. (Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 31; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 171); see titles NUISANCE, p. 541, *post*; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) *R.* v. *Pease* (1832), 4 B. & Ad. 30; *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.; *Fremantle* v. *London and North Western Rail. Co.* (1860), 2 F. & F. 337, 340; see, generally, title TORT.

(*l*) *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch.; and see p. 378, *ante*.

(*m*) *Fremantle* v. *London and North Western Rail. Co.*, *supra*, at p. 340; *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058; *Groom* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 253.

(*n*) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 14—16; see title FACTORIES AND SHOPS, Vol. XIV., pp. 467, 468.

(*o*) See title METROPOLIS, Vol. XX., pp. 488—491; and see *ibid.*, p. 476. Elsewhere boroughs and urban districts have power to make their own provision by bye-law; see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; THEATRES AND OTHER PLACES OF ENTERTAINMENT; and see title INFANTS AND CHILDREN, Vol. XVII., p. 173.

(*p*) See Beven, Negligence in Law, 3rd ed., pp. 492, 493.

(*q*) *Dewey* v. *White* (1827), Mood. & M. 56.

(*r*) See title METROPOLIS, Vol. XX., p. 417.

(*s*) See titles GAS, Vol. XV., p. 308; LOCAL GOVERNMENT, Vol. XIX. p. 253; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), s. 12; see

merely as trespassers (*a*). A fire brigade maintained by a local authority has power to keep order, and may, if it is considered necessary, exclude the members of a voluntary fire brigade (*b*).

SECT. 3. **In Regard to Fire.**

Voluntary brigades.

**680.** The London County Council, and presumably any local authority whose officers commit acts of negligence, are liable for the damage caused by such acts (*c*). The members of a voluntary fire brigade who enter premises where a fire breaks out are jointly and severally liable for similar acts of negligence, and, if they are within the premises without being called upon by the occupier to do so, liability would attach to them as trespassers without proof of acts of negligence (*a*).

Extent of liability of local authority or of members of voluntary brigade.

Damage by sparks from engines.

**681.** Railway companies and others who use or make use of engines are liable for such damage as is caused by sparks or cinders emitted from them (*d*), and, if they are acting under statutory authority, are liable if the engine is negligently used (*e*), but negligence need not be proved where damage is done to agricultural lands or agricultural crops by sparks or cinders from a railway engine, and a sum not exceeding £100 is claimed, provided due notice is given to the railway company (*f*).

## SECT. 4.—*In Regard to Animals.*

Duty varies with knowledge of character.

**682.** The duty of an owner of animals, apart from statute, varies with the knowledge he has of their character (*g*). Thus it is his absolute duty to control wild animals which he keeps (*h*) in a state

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*Joyce* v. *Metropolitan Board of Works* (1881), 44 L. T. 811; Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 87.

(*a*) See *Carter* v. *Thomas*, [1893] 1 Q. B. 673; title TRESPASS.

(*b*) *Ibid.*; see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), ss. 87—89; title METROPOLIS, Vol. XX. pp. 417, 418.

(*c*) *Joyce* v. *Metropolitan Board of Works*, *supra*. There may be negligence by which a member of the brigade or voluntary helper suffers, and if it is due to defective apparatus the injured person may recover against the authority maintaining the brigade, but if the act complained of is that of a member of the brigade, the doctrine of common employment (as to which see, generally, title MASTER AND SERVANT, Vol. XX., pp. 132 *et seq.*) will apply, even if the person injured is an infant (*Bass* v. *Hendon Urban District Council* (1912), 28 T. L. R. 317, C. A.).

(*d*) *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733; *Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A.; *Gunter* v. *James* (1908), 24 T. L. R. 868.

(*e*) *Fremantle* v. *London and North Western Rail. Co.* (1860), 2 F. & F. 337, 340; *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch.; compare *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679, Ex. Ch.; *Shaftesbury* (*Earl*) v. *London and South Western Rail. Co.* (1895), 11 T. L. R. 269, C. A.; *Canadian Pacific Railway* v. *Roy*, [1902] A. C. 220, P. C.; and see title NUISANCE, p. 519, *post*.

(*f*) Railway Fires Act, 1905 (5 Edw. 7, c. 11), s. 1; and see, further, titles AGRICULTURE, Vol. I., pp. 279, 280; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 64 *et seq.*

(*g*) See title ANIMALS, Vol. I., pp. 372 *et seq.* The owner of a dog which has done injury to cattle is liable by statute for the injury done without proof of knowledge of the animal's dangerous propensity or proof of negligence (Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1 (1); see title ANIMALS, Vol. I., p. 397).

(*h*) As to what constitutes keeping, see *Cleverton* v. *Uffernel* (1887), 3 T. L. R. 509, and title ANIMALS, Vol. I., pp. 372 *et*

SECT. 4. **In Regard to Animals.**

Wild animals.

Domestic animals.

of captivity, or animals which, although not wild by nature, are known by him to be of a savage disposition (*i*). If they escape from his premises and cause damage (*k*), or if, while upon his premises, they cause damage to persons who are there by his invitation or licence, he is liable for the damage caused without further proof of negligence (*l*). In the case of domestic animals not known to be of a savage disposition, he is not bound to keep them in unless he is under a duty to fence, and is therefore not liable for negligence if they wander from his premises and cause damage to another upon a highway (*m*). If, however, by his own act, or that of someone for whom he is responsible, he causes such an animal to go on to a highway or public place, and leaves it there unattended, in circumstances which result in damage being done to others, he is liable for the damage (*n*).

(*i*) See title ANIMALS, pp. 374, 375; *Card* v. *Case* (1848) 5 C. B. 622; *Wyatt* v. *Rosherville Gardens* (1886), 2 T. L. R. 282; *Burton* v. *Moorhead* (1881), 8 R. (Ct. of Sess.) 892; *Clark* v. *Armstrong* (1862), 24 Dunl. (Ct. of Sess.) 1320 (a bull is not necessarily to be regarded as savage); *Harpers* v. *Great North of Scotland Rail. Co.* (1886), 13 R. (Ct. of Sess.) 1139 (mere notice to a domestic servant of a dog having bitten someone is not sufficient); *Colgit* v. *Norrish* (1885), 2 T. L. R. 471, C. A.

(*k*) *May* v. *Burdett* (1846), 9 Q. B. 101; *Filburn* v. *People's Palace and Aquarium Co.* (1890), 25 Q. B. D. 258, C. A.

(*l*) *Baker* v. *Snell*, [1908] 2 K. B. 352, 825, C. A.; see also *Mansfield* v. *Baddeley* (1876), 34 L. T. 696; *Smillie* v. *Boyd* (1886), 24 Sc. L. R. 148; *Lowery* v. *Walker*, [1910] 1 K. B. 173, C. A.; reversed on the particular facts, [1911] A. C. 10. A mere trespasser cannot, however, recover (*Marlor* v. *Ball* (1900), 16 T. L. R. 239; see *Lowery* v. *Walker*, *supra*). In *Baker* v. *Snell*, *supra*, the plaintiff was a housemaid to the defendant, who owned a dog known to be savage which was in the care of a servant, who incited it to attack the plaintiff. COZENS-HARDY, M.R., and FARWELL, L.J., were of opinion that the owner of such a dog keeps it at his peril, and is liable for any injurious consequences caused by its escape, notwithstanding that it does so by reason of the intervening wilful act of a third party; but KENNEDY, L.J., dissented from this conclusion. The decision of the majority of the Court of Appeal formed the subject of a criticism by the late Mr. Thomas Beven (see Harvard Law Review, May, 1909, p. 465, title "Responsibility for the Keeping of Animals"), which points out that, though the judgments of the majority of the Court of Appeal profess to be based on the decisions of *May* v. *Burdett*, *supra*, and other cases cited in this note, they do not, when examined, go the length of deciding that a defendant is not at liberty to prove facts which may exculpate him. As to the *dictum* of FARWELL, L.J., in *Baker* v. *Snell*, *supra*, that one who keeps a vicious dog does a wrongful act, and keeps it at his peril in all circumstances, see *Beck* v. *Dyson* (1815), 4 Camp. 198; *Brock* v. *Copeland* (1794), 1 Esp. 203, cited in *Bird* v. *Holbrook* (1828), 4 Bing. 628, 638; *Sarch* v. *Blackburn* (1830), 4 C. & P. 297. See also the analogous cases of keeping dangerous things likely to do harm if they escape, cited at p. 407, *post*. As to invitees and licensees, see pp. 385, 391, *ante*.

(*m*) *Higgins* v. *Searle* (1909), 100 L. T. 280, C. A.; *Hadwell* v. *Righton*, [1907] 2 K. B. 345; *Ellis* v. *Banyard* (1911), 106 L. T. 51, C. A.; *Jones* v. *Lee* (1911), 106 L. T. 123; see *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430; title ANIMALS, Vol. I., pp. 375 *et seq.* Where, however, the person injured had an interest in the soil of the highway, the owner of the animal might be liable to him in trespass (*Higgins* v. *Searle*, *supra*; see title TRESPASS). As to the duty to fence, see p. 409, *post*.

(*n*) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422.

SECT. 4. In Regard to Animals.

The possession or disposal of animals known by the owner to be suffering from an infectious disease imposes upon him a duty to take precautions that the disease shall not be communicated to animals owned by others (*o*) or to persons employed by him (*p*).

Diseased animals.

## SECT. 5.—*Dangerous or Injurious Goods or Matter.*

**683.** The possession or use of articles which are dangerous by nature, such as fireworks (*q*), firearms (*r*), or dangerous chemicals and explosives (*s*), imposes upon the person possessing or using them the duty to take the highest possible degree of care (*t*). The mere fact that an accident results from the possession or use of such articles, where with proper care it should not so result, is *primâ facie* evidence of negligence (*a*). Persons who leave such articles where they may be meddled with or used by casual passers-by, or others who are ignorant of their dangerous nature, are liable unless they can show that they were not negligent (*b*).

Duty in respect of articles dangerous by nature.

**684.** The employment of dangerous or defective machinery (*c*) or implements (*d*), or the conduct of dangerous operations (*e*), also imposes a duty to take the most scrupulous care, and failure to do so will render the person by whom they are employed or conducted liable to an employee (*f*) or to any injured person who has a right to be where he was when he suffered an injury (*g*).

Employment of dangerous agencies or conduct of dangerous operations.

(*o*) *Cooke* v. *Waring* (1863), 2 H. & C. 332; and, as to the extent of this duty, see, generally, title ANIMALS, Vol. I., pp. 419 *et seq.*

(*p*) *Davies* v. *England and Curtis* (1864), 33 L. J. (Q. B.) 321.

(*q*) *Whitby* v. *Brock & Co.* (1888), 4 T. L. R. 241, C. A.

(*r*) *Dixon* v. *Bell* (1816), 5 M. & S. 198; *Sullivan* v. *Creed*, [1904] 2 I. R. 317, C. A.

(*s*) *Williams* v. *Eady* (1893), 10 T. L. R. 41, C. A.

(*t*) *Dixon* v. *Bell*, *supra*; *Parry* v. *Smith* (1879), 4 C. P. D. 325.

(*a*) *Whitby* v. *Brock & Co.*, *supra*.

(*b*) *Dixon* v. *Bell*, *supra*; *Williams* v. *Eady*, *supra*; *Sullivan* v. *Creed*, *supra*; compare *McDowall* v. *Great Western Railway*, [1902] 1 K. B. 618; reversed, [1903] 2 K. B. 331, C. A., on the ground that there was no evidence to go to the jury of the risk of interference by others.

(*c*) *The European* (1885), 10 P. D. 99; *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Exch. 130.

(*d*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327.

(*e*) *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.; *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640, P. C.; *The Andalusian* (1877), 2 P. D. 231; *The George Roper* (1883), 8 P. D. 119. As to negligence in the observance of statutory duties imposed to protect employees in dangerous operations, see *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K. B. 146, C. A.; *Butler* (*or Black*) v. *Fife Coal Co., Ltd.*, [1912] A. C. 149; and see note (*c*), p. 424, *post*.

(*f*) See title MASTER AND SERVANT, Vol. XX., pp. 128 *et seq.* In the case of defective machinery etc., an employee must prove not only the defect, but that it arose or remained undiscovered by the negligence of the employer himself or his agent (*Kiddle* v. *Lovett* (1885), 16 Q. B. D. 605; see title MASTER AND SERVANT, Vol. XX., p. 139).

(*g*) *Holliday* v. *National Telephone Co.*, *supra*; *Powell* v. *Fall* (1880), 5 Q. B. D. 587; *Blenkiron* v. *Great Central Gas Consumers Co.* (1860), 2 F. & F. 437; *Paterson* v. *Blackburn Corporation* (1892), 9 T. L. R. 55, C. A.

SECT. 5. **Dangerous or Injurious Goods or Matter.**

Manufacture and supply of electricity and gas, and supply of water.

**685.** The manufacture and supply of electricity or gas and the supply of water are commonly regulated by statute, in which case manufacturers or persons giving the supply are not liable except for acts which are not authorised directly or by implication, or for acts which, although authorised, are negligently performed (*h*). Where the manufacture or supply is not regulated by statute, manufacturers are under an absolute duty to keep the electricity, gas or water under their control (*i*).

Sale or loan of dangerous goods.

**686.** The sale of certain goods which are dangerous in themselves is regulated by statute (*k*).

Implied warranty.

Apart from such regulation, wherever a person sells goods (*l*) or supplies them for hire (*m*) there is a representation, or warranty, express or implied, that they are reasonably fit for the purpose for which they are sold or supplied (*n*). Where they prove not to be so fit, and damage results to the person to whom they are sold or supplied, the person selling or supplying them incurs liability to him (*o*). A third party will not have a right of action in respect of any damage incurred in consequence of a representation whether expressed or implied, unless such representation was made fraudulently with the intention that it should be acted on (*p*) and the damage results from the injured party's reliance on it (*q*).

Duty imposed on vendor or lender apart from warranty.

Independently, however, of any warranty, the sale or supply of goods, which are known to the person selling or supplying them to be dangerous, imposes on him a duty to warn the person to whom they are sold or supplied if there is a doubt of his perception of the danger (*r*). Where this duty is neglected and damage results from

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(*h*) See titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 563 *et seq.*; GAS, Vol. XV., pp. 359 *et seq.*; WATER SUPPLY.

(*i*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A. C. 381, P. C.; *Midwood & Co., Ltd.* v. *Manchester Corporation*, [1905] 2 K. B. 597, C. A.; compare *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330.

(*k*) *E.g.*, by the Explosives Act, 1875 (38 & 39 Vict. c. 17); see title EXPLOSIVES, Vol. XIV., pp. 380 *et seq.*; the Pharmacy Acts, 1868 and 1869 (31 & 32 Vict. c. 121; 32 & 33 Vict. c. 117); see title MEDICINE AND PHARMACY, Vol. XX., pp. 377, 381 *et seq.*; and, as to petroleum, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; SHIPPING AND NAVIGATION.

(*l*) *Randall* v. *Newson* (1877), 2 Q. B. D. 102, C. A.

(*m*) *Ibid.*; *Steel* v. *State Line Steamship Co.* (1878), 3 App. Cas. 72. In *Hyman* v. *Nye* (1881), 6 Q. B. D. 685, LINDLEY, J., at p. 688, held that a hired carriage, to be reasonably fit, must be as fit and proper as care and skill can make it for the journey for which it was required, or if no journey was specified, then along roads or on ground reasonably fit for carriages; see title BAILMENT, Vol. I., pp. 550, 551.

(*n*) *Wallis* v. *Russell*, [1902] 2 I. R. 585, C. A.; *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725; see title FOOD AND DRUGS, Vol. XV., pp. 3, 4.

(*o*) *Priest* v. *Last*, [1903] 2 K. B. 148, C. A.; *Wren* v. *Holt* (1903), 72 L. J. (K. B.) 340, C. A.; *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A.; *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193, C. A.; see, generally, title SALE OF GOODS.

(*p*) *Langridge* v. *Levy* (1837), 2 M. & W. 519; *Thompson* v. *Lucas* (1868), 17 W. R. 520.

(*q*) *Gerhard* v. *Bates* (1853), 2 E. & B. 476; *Barry* v. *Croskey* (1861), 2 John. & H. 1; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 716, 717.

(*r*) *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155,

SECT. 5. Dangerous or Injurious Goods or Matter.

the reasonable use of the goods to the person to whom they are sold or supplied, the person selling or supplying them is liable (*s*). He is also liable in such circumstances to a third party if he had reason to suppose that the goods were sold or supplied for such third party's use (*t*), or where the third party uses them by his invitation direct or implied (*u*). In general, however, his liability to third parties is confined to the case of articles dangerous in themselves where it is necessarily the case that such parties will come within their proximity (*v*).

Liability to third party.

**687.** Persons who give or lend goods which are dangerous are not liable for any damage that may result unless they know of the evil character of the goods at the time and fail to warn the person to whom they are given or lent (*w*).

Knowledge of dangerous character.

**688.** Certain obligations are placed by statute on persons suffering from dangerous infectious disorders to prevent the communication of infection (*x*).

Notification of infectious disorder.

## SECT. 6.—*In Regard to Fences.*

**689.** There is no general duty (*y*) imposed on anyone to fence the boundaries of land except for the purpose of protecting the safety of persons rightfully using the highway either while on the highway itself or when unintentionally straying from it (*a*). Where there is a duty to fence, the fence must be sufficient having regard to the ordinary user of the land fenced (*b*).

Nature of duty.

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C. A. The duty exists both where, as in this case, the danger was incident to the ordinary use of the goods but not readily perceived, or where from their construction or otherwise the goods are in such a condition as to cause danger not necessarily incident to the use of them (*Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A., *per* COTTON and BOWEN, L.JJ., at p. 517).

(*s*) *Ibid.* The duty is a duty as between the parties to the contract (*Winterbottom* v. *Wright* (1842), 10 M. & W. 109; *Earl* v. *Lubbock*, [1905] 1 K. B. 253, C. A.; compare *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 216; *Longmeid* v. *Holliday* (1851), 6 Exch. 761).

(*t*) *George* v. *Skivington* (1869), L. R. 5 Exch. 1; see *Gladwell* v. *Steggall* (1839), 5 Bing. (N. C.) 733.

(*u*) *Heaven* v. *Pender, supra*; compare *Smith* v. *London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326.

(*v*) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640, P. C.; see *Dixon* v. *Bell* (1816), 5 M. & S. 198; *Thomas* v. *Winchester* (1852), 6 New York State Reports, 397; *Parry* v. *Smith* (1879), 4 C. P. D. 325; and see cases cited in note (*o*), p. 408, *ante*. The duty appears to be restricted to the case of things physically dangerous. Thus a valuation or a prospectus does not come within the category of things dangerous in themselves (*Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A., *per* BOWEN, L.J., at p. 503). It is for the court and not for the jury to decide whether a particular thing is within this category (*Blacker* v. *Lake and Elliott* (1912), *Times*, 8th February).

(*w*) *Gautret* v. *Egerton* (1867), L. R. 2 C. P. 371, *per* WILLES, J., at p. 375; see p. 375, *ante*; title BAILMENT, Vol. I., pp. 550 *et seq.*

(*x*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 126—130; see, generally, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*y*) Apart from Act of Parliament, agreement to do so, or prescription, see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 128, 129.

(*a*) See p. 397, *ante*; titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 129; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 78, 114, 115, 133.

(*b*) *Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580; *Manchester, Sheffield and Lincolnshire Railway* v. *Wallis* (1854), 14 C. B.

SECT. 6. In Regard to Fences.

Where excavations are made on land on which other persons have existing rights, the party making the excavation is bound to fence it so as to prevent injury to such other persons or their cattle (*c*). The owner of cattle which, being lawfully on the highway, stray on to and cause damage to adjoining unfenced property, is not liable unless he has been negligent (*d*).

## SECT. 7.—*In Regard to Highways.*

### SUB-SECT. 1.—*In General.*

Liability for obstructions:

**690.** The placing of an obstruction upon, or such an improper use of, a highway as amounts to an obstruction of the traffic on it constitutes a nuisance (*e*). In some cases obstruction of the highway may be authorised by law (*f*) or agreement (*g*), and it may be either temporary (*h*) or permanent (*i*). Where it is temporary, there is a duty, breach of which is an act of negligence, to remove the obstruction as soon as possible (*k*), and to see that it is so guarded that the risk to persons using the highway is reduced as

(i.) temporary;

213; *Luscombe* v. *Great Western Railway*, [1899] 2 Q. B. 313 (no liability where cattle straying on highway got on the line); *Midland Rail. Co.* v. *Daykin* (1855), 17 C. B. 126 (liability where cattle lawfully on highway got on the line); *Bessant* v. *Great Western Rail. Co.* (1860), 8 C. B. (N. S.) 368; *Wiseman* v. *Booker* (1878), 3 C. P. D. 184; *Dawson* v. *Midland Rail. Co.* (1872), L. R. 8 Exch. 8; *Dixon* v. *Great Western Rail. Co.*, [1897] 1 Q. B. 300, C. A.; compare *Knuckey* v. *Redruth Rural Council*, [1904] 1 K. B. 382; *Coaker* v. *Willcocks*, [1911] 2 K. B. 124, C. A.

(*c*) *Re Williams* v. *Groucott* (1863), 4 B. & S. 149; see *Sybray* v. *White* (1836), 1 M. & W. 435; *Hawken* v. *Shearer* (1887), 56 L. J. (Q. B.) 284.

(*d*) *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631; *Tillett* v. *Ward* (1882), 10 Q. B. D. 17; compare *Gilligan* v. *Robb*, [1910] S. C. 856.

(*e*) *R.* v. *Russell* (1805), 6 East, 427; *R.* v. *Bartholomew*, [1908] 1 K. B. 554; see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 151 *et seq.*, 167 *et seq.*; NUISANCE, p. 524, *post*.

(*f*) As in the case of a level crossing on a railway (see *Caledonian Rail. Co.* v. *Ogilvy* (1856), 2 Macq. 229, H. L.; *Ellis* v. *London and South Western Rail. Co.* (1857), 2 H. & N. 424; *Boyd* v. *Great Northern Rail. Co.*, [1895] 2 I. R. 555), or of repairs to the highway itself by the highway authority; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 101 *et seq.*

(*g*) As in the case of a highway dedicated with an obstruction already existing in it (*Fisher* v. *Prouse* (1862), 2 B. & S. 770; *Cornwell* v. *Metropolitan Sewers Commissioners* (1855), 10 Exch. 771), or of an entrance to a cellar through a pavement (*Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470), or of beams used for shoring up a house (*Hoare* v. *Kearsley* (1885), 1 T. L. R. 426); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 44, 45, 251, note (*a*).

(*h*) As in the case of stones set down on a road for purposes of repair (*Foreman* v. *Canterbury Corporation* (1871), L. R. 6 Q. B. 214).

(*i*) As in the case of a flap to an entrance to a cellar (*Pickard* v. *Smith*, *supra*), or gates on a level crossing (see cases cited in note (*f*), *supra*).

(*k*) *Harris* v. *Mobbs* (1878), 3 Ex. D. 268. Where a medical man was detained at a level crossing for twenty minutes owing to the unreasonable and negligent duty of a railway company's servants to open the gates, the company was held liable in damages (*Boyd* v. *Great Northern Rail. Co.*, [1895] 2 I. R. 555). In a case of doubt or difficulty any private right of user must yield to the public right (*A.-G.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276, 281, C. A.).

far as possible (*l*). Where it is permanent, there is a duty, breach of which is an act of negligence, to maintain it in such a state of security as persons using the highway have become accustomed to

(ii.) permanent.

**691.** An obstruction which, if normally placed, would be lawful does not render the owner liable if it is tampered with and rendered dangerous by the act of a wrongdoer (*n*), but a person who places on a highway an obstruction necessarily dangerous to passengers is not relieved from liability by the intervening act of a third party who moves it from one part of the highway to another (*o*).

Act of third party.

**692.** A person who voluntarily encounters an obstruction cannot recover if, in so acting, he has not conducted himself as a reasonably prudent man (*p*), nor can one who involuntarily encounters an obstruction, if the effective cause of the damage he suffers is his own carelessness or want of skill

Where obstruction is not the effective cause.

### SUB-SECT. 2.—*Vehicles on Highways.*

**693.** A duty is imposed by statute upon every person in charge of a vehicle (*r*) on a highway not to cause any hurt or damage by his carelessness to any other person, or to any animals or goods which are lawfully upon the highway (*s*). And apart from statute such a person will be liable if, through neglect of proper care, he injures another in person or property (*t*). Even when animals or goods are negligently left upon the highway, a person who causes them damage is liable for such damage if avoidable negligence on his part is the effective cause of it (*u*).

Duty in respect of persons, animals, or goods on highway.

(*l*) *Foreman* v. *Canterbury Corporation* (1871), L. R. 6 Q. B. 214; *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A. Where the obstruction is open and visible and of a normal description, fencing and guarding is not always required (*M'Lelland* v. *Johnstone* (1902), 39 Sc. L. R. 326; *Plantza* v. *City of Glasgow* (1910), 47 Sc. L. R. 638); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 115, note (*q*), 124, 132 *et seq.*

(*m*) Thus entrances to coal shoots and cellars must be kept closed or, when open, must be guarded (*Proctor* v. *Harris* (1830), 4 C. & P. 337; *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470), and the flap or plate must not be kept in a defective condition (*Gandy* v. *Jubber* (1864), 5 B. & S. 78; *Osborn* v. *Metropolitan Water Board* (1910), 102 L. T. 217; *Rosenbaum* v. *Metropolitan Water Board* (1910), 103 L. T. 739, C. A.); and see pp. 399, 410, *ante*.

(*n*) *Daniels* v. *Potter* (1830), 4 C. & P. 262; compare *Bartlett* v. *Baker* (1864), 3 H. & C. 153.

(*o*) *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; and title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 161.

(*p*) *Lee* v. *Nixey* (1890), 63 L. T. 285.

(*q*) *Flower* v. *Adam* (1810), 2 Taunt. 314; compare *Goldthorpe* v. *Hardman* (1844), 13 M. & W. 377; as to contributory negligence, see pp. 445 *et seq.*, *post*.

(*r*) Including a rider of a horse (*Williams* v. *Evans* (1876), 1 Ex. D. 277); or a bicycle (*Taylor* v. *Goodwin* (1879), 4 Q. B. D. 228).

(*s*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78. Failure in this duty renders the offender liable to a penalty; see note (*a*), p. 412, *post*.

(*t*) *Boss* v. *Litton* (1832), 5 C. & P. 407, 409; *R.* v. *Jones* (1870), 11 Cox, C. C. 545; see p. 416, *post*.

(*u*) *Davies* v. *Mann* (1842), 10 M. & W. 546. In this case an ass had been left on a highway unattended and with its forefeet fettered. The owner

SECT. 7.

**In Regard to Highways.**

Duty in driving and in retaining control.

**694.** It is an unlawful act for a person to drive a vehicle without holding the reins of all the horses in his hands, if there is no other person on foot or on horseback to guide the vehicle; or to quit a vehicle of which he is in charge and go on the other side of the hedge or fence inclosing the highway, or wilfully to be at such a distance from the vehicle of which he is in charge, or in such a situation, that he cannot have the vehicle under his control, or to leave it so as to obstruct the highway (*v*). Commission of any such act renders the doer liable to a penalty, irrespective of any claim for damage from an accident of which such an act may be shown to be the effective cause (*a*).

Duty not to prevent passage.

**695.** It is the duty of a person in charge of a vehicle or beast of burden not to prevent wilfully anybody from passing him or the vehicle or animal under his charge, or to hinder or interrupt such passage (*b*).

Rule of the road.

**696.** If a person in charge of a vehicle or beast of burden meets or is overtaken by another vehicle or person or beast of burden, it is his duty to keep to the left or near side of the highway to permit passage (*c*), and it is a question of fact whether he has left sufficient room for a passer-by (*d*). Failure to observe any of these duties also renders him liable to a penalty (*e*), but non-observance of the rule of the road, while casting upon the person who neglects

was held entitled to recover in spite of his own negligence, on the ground that the accident, which resulted in the death of the ass, might have been avoided but for the defendant's negligence.

(*v*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78. As to leaving vehicles so as to obstruct the highway, see *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400, and, generally, title NUISANCE, p. 524, *post*.

(*a*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78. To leave a carriage unattended is an offence within the meaning of this provision (*Phythian* v. *Baxendale*, [1895] 1 Q. B. 768). The offender, if the owner of the vehicle or animal under his charge, is liable on conviction before two justices to a penalty not exceeding £10; if not the owner, to one not exceeding £5. In default of payment he may be sent to prison with hard labour for any time not exceeding six weeks. He may be convicted by his own confession, by the view of a justice, or upon the oath of one or more credible witnesses. He may be arrested without warrant by anyone seeing the offence committed, and be brought before a justice. If he refuses to give his name he may be proceeded against without being named, or may be sent to prison with hard labour for any period not exceeding three months.

(*b*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78.

(*c*) *Ibid.* This provision embodies what is known as the "Rule of the Road," a custom of very ancient origin based upon the general convenience: "The rule of the road is a paradox quite; for if you go right you go wrong, and if you go left you go right" (old saw). It applies also to persons riding on horses (*Williams* v. *Evans* (1876), 1 Ex. D. 277), and to bicycles (*Taylor* v. *Goodwin* (1879), 4 Q. B. D. 228). There are, however, certain exceptions generally accepted by custom. Thus, a horse without a rider which is being led, or a horse led by the rider of another horse, by custom keeps to the right or off side, in order to enable the man who is leading it to control it better in passing other occupants of the highway; see pp. 414, 416, *post*, and title STREET AND AERIAL TRAFFIC.

(*d*) *Wordsworth* v. *Willan* (1805), 5 Esp. 273.

(*e*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78. The penalty and the provisions relating to its recovery are those set out in note (*a*),

it a more stringent obligation to take care (*f*), is not of itself conclusive evidence of civil liability for the consequences of an accident (*g*); and there may be occasions when, in order to avoid an accident which would otherwise be inevitable, it is not only justified but required (*h*).

Effect of tramlines on rule.

Where the centre of the highway is used for a tramline, the rule of the road is varied in the case of a vehicle overtaking a tramcar, because of the danger of collision involved in its observance. Overtaking vehicles should in such a case pass the tramcar on its left or near side (*i*).

Duty of overtaking vehicles.

In all other cases overtaking vehicles must observe the rule of the road, and should allow for the vehicle which they are about to pass pulling out towards the middle of the road, unless the person in charge of it is seen by the person in charge of the overtaking vehicle to be aware of the latter's intention (*k*).

Speed.

**697.** The speed at which an animal is ridden or a vehicle is driven is material to the question of liability. It is an offence to ride or drive furiously to the danger of any one person or to the common danger of all persons on a highway (*l*).

Guiding considerations.

Both as regards civil and criminal liability, the rate of speed which will be considered dangerous, varies with the nature, conditions, and use of the particular highway and the amount of traffic which actually is, or may be expected to be, on it (*m*).

Cross-roads: level crossings.

**698.** There is a special obligation to take care, both in regard to

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(*f*) *Pluckwell* v. *Wilson* (1832), 5 C. & P. 375. The obligation is especially stringent at night (*Cruden* v. *Fentham* (1799), 2 Esp. 685).

(*g*) *Williams* v. *Richards* (1852), 3 Car. & Kir. 81; *Lloyd* v. *Ogleby* (1859), 5 C. B. (N. S.) 667; *North* v. *Smith* (1861), 10 C. B. (N. S.) 572; see *Cruden* v. *Fentham*, *supra*; *Clay* v. *Wood* (1803), 5 Esp. 44; *Chaplin* v. *Hawes* (1828), 3 C. & P. 554.

(*h*) *Wayde* v. *Carr* (*Lady*) (1823), 2 Dow. & Ry. (K. B.) 255; *Tuley* v. *Thomas* (1837), 8 C. & P. 103; *Finegan* v. *London and North Western Rail. Co.* (1889), 53 J. P. 663.

(*i*) *Ramsay* v. *Thomson & Sons* (1881), 19 Sc. L. R. 125; *Jardine* v. *Stonefield Laundry Co.* (1887), 24 Sc. L. R. 599. Owing to the terms in which the Motor Cars (Use and Construction) Order, 1904, was originally drafted, motor cars were at one time compelled to pass tramcars on the off side, and the owner of a car which passed on the left, or near, side was held liable to a penalty (*Burton* v. *Nicholson*, [1909] 1 K. B. 397); but, in consequence of this decision and the judgments delivered in the Divisional Court, the terms of the order have now been altered (Stat. R. & O., 1909, p. 497).

(*k*) *Mayhew* v. *Boyce* (1816), 1 Stark. 423.

(*l*) Under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 78, the penalty, and the provisions relating to its recovery, are the same as those set out in note (*a*), p. 412, *ante*. Under the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 79, the penalty must not exceed 40*s*., and the power of arrest without a warrant is only given to a constable who witnesses the offence. The Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1, dealing with the same subject, creates a variety of offences. It is therefore necessary in proceedings against an offender to particularise the offence in order to avoid duplicity (*R.* v. *Wells* (1904), 68 J. P. 392); see title STREET AND AERIAL TRAFFIC.

(*m*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, C. A., *per* Lord ESHER, M.R., at p. 497; compare the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1; *Elwes* v. *Hopkins*, [1906] 2 K. B. 1; and see title STREET AND AERIAL TRAFFIC.

SECT. 7. In Regard to Highways.

speed and otherwise, at cross-roads or recognised crossings (*n*), or where the footpath is crowded and persons may be forced into the roadway (*o*).

Examples of negligent acts in connection with driving etc.

**699.** Driving with defective apparatus if the defect might reasonably have been discovered (*p*), or with a horse improperly harnessed (*q*), or leaving a horse or carriage unattended in a public place (*r*), or spurring a horse when close to other persons (*s*), are negligent acts, which render a defendant liable for injuries of which they are the effective cause. But the fact that a horse, which has strayed on a highway, kicks a child (*t*), or that a horse harnessed to a vehicle runs away (*u*) or stops without warning (*a*), or that a vehicle skids (*b*), is not conclusive evidence of negligence.

Intervention of third party.

A driver on a highway may be liable for negligence jointly with another (*c*), and this may be the case even where the injury is actually caused by that other (*d*), but not where the injury results solely from the intervention of a third party (*e*).

(*n*) *Williams* v. *Richards* (1852), 3 Car. & Kir. 81; see also *Springett* v. *Ball* (1865), 4 F. & F. 472. It is the duty of traffic on a side road to give way to that on a main road (*Macandrew* v. *Tillard* (1908), 46 Sc. L. R. 111). A similar duty rests on traffic emerging from a private road on to a highway (*Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc. L. R. 475).

(*o*) *Martin* v. *North Metropolitan Tramways Co.* (1887), 3 T. L. R. 600, C. A.

(*p*) *Welsh* v. *Lawrence* (1818), 2 Chit. 262; *Templeman* v. *Haydon* (1852), 12 C. B. 507; *Cotterill* v. *Starkey* (1839), 8 C. & P. 691; compare *The European* (1885), 10 P. D. 99. But this is not the case where the defect was not known to the person sued (*Doyle* v. *Wragg* (1857), 1 F. & F. 7; *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115). As to injuries to persons who have hired a defective vehicle, see *Hyman* v. *Nye* (1881), 6 Q. B. D. 685; title BAILMENT, Vol. I., pp. 550, 551; and p. 408, *ante*.

(*q*) *Burkin* v. *Bilezikdji* (1889), 5 T. L. R. 673 (where a horse which was too large was put into the shafts of a van); *Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390 (where a horse addicted to kicking was harnessed to an omnibus without a kicking strap being used).

(*r*) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190; *Lynch* v. *Nurdin* (1841), 1 Q. B. 29; *M'Ewan* v. *Cutbill* (1897), 35 Sc. L. R. 58; compare *Goodman* v. *Taylor* (1832), 5 C. & P. 410; and see pp. 411, 412, *ante*.

(*s*) *North* v. *Smith* (1861), 10 C. B. (N. S.) 572.

(*t*) *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430; see title ANIMALS, Vol. I., pp. 377, 378.

(*u*) *Gibbons* v. *Pepper* (1695), 1 Ld. Raym. 38; *Hammack* v. *White* (1862), 11 C. B. (N. S.) 588; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145. But it might be otherwise if it were known that the owner of the horse knew or ought to have known it to be dangerous and unfit to be driven (*Villiers* v. *Avey* (1887), 3 T. L. R. 812).

(*a*) *Watson* v. *Wordie & Co.* (1906), 8 F. (Ct. of Sess.) 876.

(*b*) *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652, C. A.; *Parker* v. *London General Omnibus Co.* (1909), 101 L. T. 623, C. A.; compare *Barnes Urban District Council* v. *London General Omnibus Co.* (1908), 100 L. T. 115, where, however, the vehicle was known to be likely to skid.

(*c*) *Davey* v. *Chamberlain* (1802), 4 Esp. 229; see title TORT.

(*d*) See *R.* v. *Swindall and Osborne* (1846), 2 Car. & Kir. 230, where two persons were driving separate vehicles and abetting each other's furious driving, and both were tried for manslaughter and found guilty; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 582, note (*l*). As to criminal negligence, see p. 420, *post*.

(*e*) *R.* v. *Ledger* (1862), 2 F. & F. 857; *Scott* v. *Shepherd* (1773), 2 Wm. Bl.

Where the driver is a servant, and the negligent act is done in pursuance of his employment, the master is liable (*f*).

Master and servant.

**700.** If the vehicle is a hired vehicle, the person to whom it is hired is only liable for the negligence of the driver in so far as he is in a position to control the actions of the driver (*g*). A mere passenger, even though sitting by the side of the driver, and, therefore, physically in a position to control his actions (*h*), is not liable for the driver's negligence (*i*).

Hired vehicles.

Liability of tramways undertakers.

**701.** Though tramway companies have a statutory right to the use of a highway for the construction of tramlines and the running of trams (*k*), this right is subject to a duty to take care that the safety and convenience of the public are preserved (*l*). They have no monopoly of the highway, and are bound to permit others to use it as freely as if there were no tramway except where they would be intercepting or interfering with the use of the tramway as such (*m*). They are subject to the same liability as the owners or drivers of other vehicles for driving recklessly or dangerously (*n*), or for the use of defective apparatus (*o*).

(*f*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Gordon* v. *Rolt* (1849), 4 Exch. 365; *Seymour* v. *Greenwood* (1861), 7 H. & N. 355, Ex. Ch.; *Williams* v. *Jones* (1865), 3 H. & C. 602, Ex. Ch., *per* BLACKBURN, J., at p. 609. There is no liability attaching to the master where the act is a wanton one on the part of the servant done to effect some purpose of his own (*Croft* v. *Alison* (1821), 4 B. & Ald. 590; *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.; *Sanderson* v. *Collins*, [1904] 1 K. B. 628, C. A.), but there may be if the act, though contrary to the master's orders, was done by the servant to serve his master's interests (*Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, Ex. Ch.); see title MASTER AND SERVANT, Vol. XX., pp. 253 *et seq.*

(*g*) *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; *Wheatley* v. *Patrick* (1837), 2 M. & W. 650.

(*h*) *Pike* v. *London General Omnibus Co.* (1891), 8 T. L. R. 164.

(*i*) Compare the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), which alters the relationship of driver and cab-proprietor to that of master and servant, so far as concerns the public (*King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, C. A.; *Keen* v. *Henry*, [1894] 1 Q. B. 292, C. A.; see title STREET AND AERIAL TRAFFIC), though, as between the parties themselves, leaves them in the position of bailor and bailee (*Smith* v. *London General Motor Cab Co., Ltd.*, [1911] A. C. 188 (claim under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58)); see title MASTER AND SERVANT, Vol. XX., p. 67.

(*k*) Tramways Act, 1870 (33 & 34 Vict. c. 78); see, generally, title TRAMWAYS AND LIGHT RAILWAYS.

(*l*) *Dublin United Tramways Co.* v. *Fitzgerald*, [1903] A. C. 99, *per* Lord HALSBURY, L.C., at p. 103; *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111.

(*m*) *Ibid.*; *Hartley* v. *Chadwick* (1904), 68 J. P. 512. The extent of their rights may be varied by the terms of the local Act, if any, under which they are constructed (*Montreal City* v. *Montreal Street Railway*, [1903] A. C. 482, P. C.); but they have, in general, no right to interfere with the use in safety of the highway by others (*Ogston* v. *Aberdeen District Tramways Co.*, *supra*).

(*n*) *M'Dermaid* v. *Edinburgh Street Tramways Co.* (1884), 22 Sc. L. R. 13; *Rattee* v. *Norwich Electric Tramway Co.* (1902), 18 T. L. R. 562, C. A. The

(*o*) For note (*o*) see next page.

SECT. 7. **In Regard to Highways.**

SUB-SECT. 3.—*Pedestrians on Highways.*

Rights and duties of pedestrians.

). Persons on foot, even if infirm, have a right to be upon a highway, and are entitled to the exercise of reasonable care on the part of persons driving vehicles upon it (*p*); but they are not exempt from a duty to take care of themselves (*q*). The amount of care reasonably to be required of them depends on the usual and actual state of the traffic (*r*), and on the question whether the foot-passenger is at a recognised crossing or not (*s*

Vehicles passing pedestrians.

Duty of driver.

**703**. The rule of the road does not apply to vehicles passing persons on foot (*t*), and the fact that a vehicle is on the wrong side of the road does not free a foot-passenger from his duty to look out (*u*). But the duty of the driver of a vehicle is not satisfied by creating a warning noise (*b*), and in an emergency, where either the vehicle or the foot-passenger must alter his course to avoid collision, the driver of the vehicle does not escape liability if he cannot show that he has tried to pull up or to one side (*c*).

## SECT. 8.—*In Regard to Wharves and Docks.*

### SUB-SECT. 1.—*Duties in Respect of Wharves and Docks.*

Definition of wharf.

**704**. A wharf is a place constructed for the convenience of loading or unloading vessels, on the shore or margin of a harbour, river, or canal (*d*).

amount of care to be observed varies with regard to the circumstances of the highway (*Martin* v. *North Metropolitan Tramways Co.* (1887), 3 T. L. R. 600, C. A.; *Hartley* v. *Chadwick* (1904), 68 J. P. 512; see *Leaver* v. *Pontypridd Urban District Council* (1911), 56 Sol. Jo. 32, H. L.; *Brocklehurst* v. *Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (1886), 17 Q. B. D. 118).

(*o*) *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q. B. D. 17, C. A.

(*p*) *Boss* v. *Litton* (1832), 5 C. & P. 407; see *Cotterill* v. *Starkey* (1839), 8 C. & P. 691; *Anderson* v. *Blackwood* (1885), 23 Sc. L. R. 227.

(*q*) *Cotterill* v. *Starkey, supra*; *Cotton* v. *Wood* (1860), 8 C. B. (N. S.) 568; *Hawkins* v. *Cooper* (1838), 8 C. & P. 473; *Williams* v. *Richards* (1852), 3 Car. & Kir. 81.

(*r*) *Smith* v. *Browne* (1891), 28 L. R. Ir. 1, *per* HOLMES, J., at p. 5; see *Clerk* v. *Patrie* (1879), 16 Sc. L. R. 626; *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 T. L. R. 561, C. A.; *Shearer* v. *Dunedin Corporation*, a New Zealand case cited without reference by Beven, Negligence in Law, 3rd ed., Vol. I., p. 549.

(*s*) *Williams* v. *Richards, supra*; *Springett* v. *Ball* (1865), 4 F. & F. 472.

(*t*) *Cotterill* v. *Starkey* (1839), 8 C. & P. 691.

(*u*) *Hawkins* v. *Cooper* (1838), 8 C. & P. 473; *Lloyd* v. *Ogleby* (1859), 5 C. B. (N. S.) 667; *Clay* v. *Wood* (1803), 5 Esp. 44.

(*b*) *Smith* v. *Browne* (1891), 28 L. R. Ir. 1.

(*c*) *Ibid.*; *Clerk* v. *Petrie* (1879), 16 Sc. L. R. 626; *M'Kechnie* v. *Couper* (1887), 14 R. (Ct. of Sess.) 345. The duty may be based on either of two grounds, the fact that a vehicle is capable of moving at a greater pace than a foot-passenger, or that, in the event of an accident, it is capable of doing so much more damage; compare the rule as between steamers and sailing vessels (*Shannon* (1828), 2 Hag. Adm. 173; *Perth* (1838), 3 Hag. Adm. 414); see title SHIPPING AND NAVIGATION.

(*d*) *Haddock* v. *Humphrey*, [1900] 1 Q. B. 609, C. A.; *Ellis* v. *Cory & Sons* (1901), 85 L. T. 499, C. A.; and see titles SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES. Wharves are of two kinds, legal and sufferance; as to the latter, see *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. 38, 50.

Definition of dock.

A dock is an artificial inclosure, connected with a harbour or a river, provided for the reception of vessels, and is generally shut off from the harbour or river by gates. A dock may be a dry or graving dock—that is, one which is used for the inspection and repair of vessels—or a wet dock, which is used for loading and unloading them (*e*).

Duty of wharfinger with respect to use of wharf.

**705.** A wharfinger does not necessarily undertake to moor safely the vessels coming to his wharf (*f*), but where, for profit, he agrees to allow his wharf to be used by a vessel, he must use reasonable diligence to ascertain whether the berth and the approaches to it are in an ordinary condition of safety for vessels coming to and lying at it (*g*). Thus, if a jetty is so placed that a vessel using it must at low water either come upon some obstruction (*h*), or ground, the wharfinger must see that the obstruction is moved or that the bed is fit for the vessel to ground on, or warn the person in charge of the vessel (*i*) : if he fails to do so, and the vessel is injured, he is liable, even if the control of the bed of the river or berth is in other hands, such as harbour commissioners or trustees, on whom the duty of keeping it safe is imposed (*k*).

Duty of dock owner with respect to use of dock.

**706.** The duty of dock-owners to the ships using their docks frequently depends on the statutes which regulate their authority, as well as on the condition and situation of the dock (*l*).

(*e*) See titles SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

(*f*) *Curling* v. *Wood* (1847), 16 M. & W. 628, Ex. Ch. (vessel damaged by woodwork under the water at low tide).

(*g*) *Tredegar Iron and Coal Co.* v. *Steamship "Calliope" (Owners), The "Calliope,"* [1891] A. C. 11 ; compare *The Bearn*, [1906] P. 48, C. A. ; *The Moorcock* (1889), 14 P. D. 64, C. A.

(*h*) *E.g.*, a "campshed," as in *White* v. *Phillips* (1863), 15 C. B. (N. S.) 245; compare *Curling* v. *Wood*, *supra*.

(*i*) *The Moorcock*, *supra* ; *Tredegar Iron and Coal Co.* v. *Steamship "Calliope" (Owners), The "Calliope,"* *supra* ; *The Bearn*, *supra* ; *White* v. *Phillips*, *supra*.

(*k*) *The Bearn*, *supra* ; *The Moorcock*, *supra*. Harbour boards or trustees may be liable to vessels injured by their negligence in carrying out the duties imposed on them, such as by allowing a particular channel or berth to become unsafe (*e.g.*, *The Bearn*, *supra* ; *Mersey Docks and Harbour Board* v. *Penhallow* (1861), 7 H. & N. 329, Ex. Ch., affirmed in *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, and followed in *Campbell* v. *Hornsby* (1873), 7 I. R. C. L. 540, Ex. Ch. ; *Dormont* v. *Furness Rail. Co.* (1883), 11 Q. B. D. 496 ; *Bede Steamship Co.* v. *River Wear Commissioners*, [1907] 1 K. B. 310, C. A. ; *R.* v. *Williams* (1884), 9 App. Cas. 418, P. C.), or by the negligence of the harbour-master in giving directions which when followed result in a vessel being grounded (*Reney* v. *Kircudbright Magistrates*, [1892] A. C. 264), unless the accident is occasioned by some peculiarity of the build of the vessel of which the harbour-master is ignorant and uninformed, or misinformed by the captain (*Lloyd* v. *Iron* (1865), 4 F. & F. 1011). Where the directions for a change of station are given by the harbour-master in the exercise of discretionary statutory powers, the captain of the vessel so changed must still take all precautions to ensure the vessel's safety, and cannot throw the whole burden of the consequences of the change on to the harbour-master (*The Excelsior* (1868), L. R. 2 A. & E. 268); see, generally, titles SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

(*l*) *The Excelsior*, *supra* (dock-master having discretionary power under

SECT. 8. **In Regard to Wharves and Docks.**

Duty as regards ships and persons connected therewith.

Generally speaking, their duty is to take reasonable care that ships entering and using their docks may do so in safety, both as regards the ships themselves and the persons connected with their working (*m*). If a ship is damaged by an obstruction, such as an accumulation of mud (*n*), or something sunk (*o*), or a snag (*p*), they are liable if they either knew of the obstruction and failed to remove it or to give warning of it, or if they had the means of knowing of it and neglected to use those means (*q*). Thus, where the defendants opened a dock for public use, when the channels leading to it were in such a state as to be dangerous to ships of large size, they were held to be negligent (*r*). If the dock is obviously not a dry dock, but is represented by the proper representative of the dock-owners to be fit for use as such, and as having a level bottom, the owners are liable if, in consequence of so using the dock, the vessel is injured by the bottom being uneven (*s*).

Duty of dock-owner with respect to repair of ship.

**707.** Where the proprietor of the dock undertakes the repair of the ship he must take care to have it properly attended to. So where a sufficient number of workmen were not provided, and in consequence of a high tide breaking down the dock gates the ship was injured, the proprietor was held liable as, had there been a sufficient number of men, precautions could have been taken to prevent the damage after the danger was seen to be approaching (*t*).

statute to change the station of a ship, and using his discretion reasonably, is not liable for damage that may arise); compare *Thompson* v. *North Eastern Rail. Co.* (1860), 2 B. & S. 106, 119.

(*m*) *Parnaby* v. *Lancaster Canal Co.* (1839), 11 Ad. & El. 223, 243, Ex. Ch., approved in *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, affirming *Mersey Docks and Harbour Board* v. *Penhallow* (1861), 7 H. & N. 329, Ex. Ch.; compare *Bede Steamship Co.* v. *River Wear Commissioners*, [1907] 1 K. B. 310, C. A.

(*n*) *Bede Steamship Co.* v. *River Wear Commissioners*, *supra*; *Mersey Docks and Harbour Board* v. *Penhallow*, *supra*; *Mersey Docks Trustees* v. *Gibbs*, *supra*, followed and applied in *Campbell* v. *Hornsby* (1873), 7 I. R. C. L. 540, Ex. Ch.

(*o*) *Parnaby* v. *Lancaster Canal Co.*, *supra* (sunken barge); *White* v. *Phillips* (1863), 15 C. B. (N. S.) 245 (camp-shed); compare *Curling* v. *Wood* (1847), 16 M. & W. 628, Ex. Ch.; *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116.

(*p*) *R.* v. *Williams* (1884), 9 App. Cas. 418, P. C.

(*q*) *Mersey Docks Trustees* v. *Gibbs*, *supra*; *The Moorcock* (1889), 14 P. D. 64, C. A.; compare *Butler* v. *M'Alpine*, [1904] 2 I. R. 445, C. A.

(*r*) *Thompson* v. *North Eastern Rail. Co.*, *supra*. Even if those in charge of the ship knew of the danger and exposed the ship to it the defendants might still be liable, unless those in charge did not act prudently (*ibid.*); compare *Clayards* v. *Dethick* (1848), 12 Q. B. 439; *Williams* v. *Swansea Harbour Trustees* (1863), 14 C. B. (N. S.) 845; *Bede Steamship Co.* v. *River Wear Commissioners*, *supra*.

(*s*) "*Apollo*" (*Owners*) v. *Port Talbot Co.*, *The* "*Apollo*," [1891] A. C. 499. They would not be liable if the only representation was that other vessels had grounded safely and "this one can try her luck" (*ibid.*). In *Wright & Son* v. *Lethbridge* (1890), 63 L. T. 572, C. A., the foreman in a Royal dockyard was held not to be a servant of the defendants (Government officials) for this purpose; see Story, Law of Agency, para. 313.

(*t*) *Leck* v. *Maestaer* (1807), 1 Camp. 138. In *Hibbs* v. *Ross* (1866), L. R. 1 Q. B. 534, it was stated that those in charge of a ship are generally in the

SECT 8. In Regard to Wharves and Docks.

There is no duty on the part of dock-owners to continue to do a voluntary act merely because it has been previously done (*a*).

Duty with respect to persons using premises.

**708.** The duty of wharfingers and dock-owners with respect to persons using their premises is to have those premises reasonably safe for those coming on to them on business (*b*).

SUB-SECT. 2.—*Duty in Respect of Plant and Tackle supplied.*

Duty of dock-owners and wharfingers.

**709.** Where dock-owners or wharfingers in the course of their business provide plant or tackle for the use of ships (*c*), or appliances for obtaining access to them (*d*), they are liable for injuries caused by defects in plant, tackle, or appliances where used in connection with the business of the ship or of the dock-owners or wharfingers (*e*).

SUB-SECT. 3.—*Duty in Respect of Goods landed.*

Wharfinger: (i.) as common carrier;

**710.** A wharfinger does not necessarily act as warehouseman, but may do so; his business, strictly, is concerned with the reception and dispatch of goods (*f*), and he is usually responsible as a common carrier for the delivery of the goods to a properly authorised person (*g*). His responsibility in respect of the goods may by agreement be limited (*h*).

employ of the shipowners: a ship-keeper was held so to be employed in absence of proof that he was employed by someone else, *e.g.*, the dock-owners.

(*a*) Such as the altering of mooring ropes, as the level of the water in the dock, and, in consequence, the ships in it sank (*Loader* v. *London and India Docks Joint Committee* (1891), 8 T. L. R. 5, C. A.).

(*b*) *Smith* v. *London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326, following *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556; *Moore* v. *Ransome's Dock Committee* (1898), 14 T. L. R. 539, C. A., distinguishing *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; compare *Keeble* v. *East and West India Dock Committee* (1889), 5 T. L. R. 312, C. A. (where a stanchion, which supported a chain on a dock bridge, gave way on being seized by a person who slipped on the bridge, and it was held that there was no negligence, as the stanchion was not placed there to support persons falling); and see p. 385, *ante*.

(*c*) *Scott* v. *London and St. Katherine Docks Co.* (1865), 3 H. & C. 597, Ex. Ch.

(*d*) *Smith* v. *London and St. Katharine Docks Co.*, *supra*; *Loader* v. *London and India Docks Joint Committee*, *supra*.

(*e*) *Smith* v. *London and St. Katharine Docks Co.*, *supra*. *Semble*, a guest or person hawking goods would not usually be on such business; see *Moore* v. *Ransome's Dock Committee*, *supra*; and see p. 388, *ante*. As to cases under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), relating to accidents on quays and wharves, see title MASTER AND SERVANT, Vol. XX., pp. 168 *et seq.*

(*f*) *E.g.*, *Leigh* v. *Smith* (1825), 1 C. & P. 638; for the duties of a sufferance wharfinger, compare *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. 38, *per* WILLES, J., at p. 50.

(*g*) *Cobban* v. *Downe* (1803), 5 Esp. 41; followed in *Leigh* v. *Smith*, *supra*; compare *Harman* v. *Anderson* (1809), 2 Camp. 243; see *Holl* v. *Griffin* (1833), 10 Bing. 246; compare *Chattock & Co.* v. *Bellamy & Co.* (1895), 64 L. J. (Q. B.) 250; and see, generally, titles BAILMENT, Vol. I., pp. 562, 563; CARRIERS, Vol. IV., p. 11.

(*h*) *Maving* v. *Todd* (1815), 1 Stark. 72.

SECT. 8. In Regard to Wharves and Docks.

If he acts as warehouseman he undertakes the duties and responsibilities of his position, and must take ordinary care of the goods entrusted to him.

(ii.) as warehouseman.

Dock-owners as warehousemen and wharfingers.

**711.** Dock-owners are usually warehousemen and wharfingers, and their duties, apart from any special contract that may be made, is to take reasonable and ordinary care in dealing with the goods received by them in their capacity of warehousemen and wharfingers (*i*).

# Part III. Criminal Negligence and Neglect of Statutory Duty.

## SECT. 1.—*Relation between Civil and Criminal Remedies for Negligence.*

When civil and criminal proceedings are both available.

**712.** Where negligence consists in or involves an unlawful act or default which is an offence against the public, and renders the person (*j*) who is guilty of the act or default liable to legal punishment, the negligent act or default amounts to a crime (*k*), and where such act or default results in injury to a private person, a right to take civil proceedings may enure to such private person and co-exist with the right to award punishment in proceedings instituted at the suit of the Crown (*l*).

Negligent act or default amounting to a crime.

**713.** A negligent act or default amounts to a crime where either (1) the statute law (*m*) or (2) the common law imposes for the benefit of the public some duty to refrain from such act or omission, as the case may be, and visits the negligent non-performance of such duty with a liability to punishment (*n*), but, even where injury results to an individual from such a negligent act or default, it

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(*i*) See titles BAILMENT, Vol. I., pp. 544 *et seq.*; CARRIERS, Vol. IV., pp. 12, 13; and as to his lien, see titles BAILMENT, Vol. I., pp. 547, 549, 561; CARRIERS, Vol. IV., p. 93.

(*j*) A joint-stock company can be guilty of such an offence (*R.* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A.).

(*k*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 232.

(*l*) *Ibid.*; and see p. 421, *post*. As to the necessity for taking criminal proceedings before instituting a civil action, see titles ACTION, Vol. I., pp. 27 *et seq.*; TORT.

(*m*) Where a statute imposes a duty and does not provide a penalty or punishment, a right of action will generally accrue to an individual who is injured by a breach of that duty; see *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A., *per* FARWELL and KENNEDY, L.JJ., at pp. 156, 159. For a statement of three classes of cases where a liability founded on a statute may be established, see *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. (N. S.) 336, 356; see p. 422, *post*; and titles ACTION, Vol. I., p. 8; PUBLIC AUTHORITIES AND PUBLIC OFFICERS; TORT. As to the construction of statutes, see title STATUTES.

(*n*) For a list of such cases, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 582, note (*l*). The infliction of a pecuniary fine is not necessarily punishment: it may be intended as a pecuniary compensation (*R.* v. *Tyler and International Commercial Co.*, *supra*, *per* BOWEN, L.J., at p. 594).

SECT. 1. Relation between Civil and Criminal Remedies for Negligence.

does not necessarily follow that the individual so injured has a cause of action. The State, in imposing for the benefit of the public a duty to take care, may exclude or refrain from imposing any duty towards any individual (*o*), in which case there is usually no reason why any right should be either impliedly or expressly given to an individual to bring an action for damages resulting from the want of such care; or it may have regard to the benefit of individuals, or of the public, or of some class of the public regarded as a collection of individuals, in which case a duty towards any of the individuals intended to be benefited may reasonably co-exist with the duty towards the State, and it may reasonably be expected that a right of action will impliedly or expressly be given to any such individual, or member of such class, to bring an action for damages resulting from the want of such care (*p*).

Where duty towards individual excluded.

Even where an action for damages resulting from the want of such care is not given by legislation, there may be a co-existing duty owed by the criminal party towards the injured party which is identical with that owed by the criminal party to the State, and in that case also an act which is criminally negligent may give rise to a civil action (*q*). In cases where a right of action is so given, or such an identical duty to take care co-exists and is broken, the act which is criminally negligent may be the ground of a civil action. In other cases the relation between a negligent act regarded as a crime and the same act regarded as a civil wrong arises from the fact that any statement of a legally recognised duty to take care, in order to be complete, must take account of all relevant provisions of the law of the State, criminal as well as civil, and that where any particular act is a breach of duties imposed by different parts of that law, it is necessary to apply the same principles of law and rules of evidence to each aspect of it (*r*).

Where individual remedy may exist.

Remedy by virtue of co-existing duty on the part of person in default.

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(*o*) *M'Kinnon* v. *Penson* (1853), 8 Exch. 319, 329. Under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1 (3), a court having power to inflict punishment may, in addition to any other order made under that Act, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable, not exceeding in the case of a court of summary jurisdiction £10 or any higher limit fixed by the Act relating to the offence; see title MAGISTRATES, Vol. XIX., p. 605.

(*p*) *Beckford* v. *Hood* (1798), 7 Term Rep. 620, 627; *Pharmaceutical Society* v. *Wheeldon* (1890), 24 Q. B. D. 683, *per* HAWKINS, J., at p. 690; *Crosfield (Joseph) & Sons, Ltd.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 133 (such a remedy is particularly likely to be given where the Act is in the nature of a private legislative bargain between persons likely to be affected and a body of undertakers); *Butler (or Black)* v. *Fife Coal Co.*, [1912] A. C. 149. If an absolute duty is imposed on mine-owners by a statute they must be liable to those for whose benefit it is imposed: if the duty imposed is less than absolute there is *primâ facie* a right given to those for whose benefit it has been passed to enforce civil liability for a breach of it (*ibid.*, *per* Lord KINNEAR, at p. 160).

(*q*) *R.* v. *Noakes* (1866), 4 F. & F. 920. The statute may be some evidence of what is due and ordinary care (*Blamires* v. *Lancashire and Yorkshire Rail. Co.* (1873), L. R. 8 Exch. 283, 289, Ex. Ch.). And as to the difference in the degree of negligence necessary to establish liability, see *ibid.*, and p. 425, *post*.

(*r*) *R.* v. *Cator* (1802), 4 Esp. 117, 136, *per* HOTHAM, B., at p. 144. There is no difference in point of evidence whether the case be a criminal or

SECT. 2. **Neglect of or Negligence in Performing Statutory Duty.**

## SECT. 2.—*Neglect of or Negligence in Performing Statutory Duty.*

Negligence: a duty to take care and a breach of the duty.

**714.** In the case of a public authority or a body exercising statutory powers a duty to take care may or may not exist in favour of a particular individual (*s*). Where such a duty exists, the authority or body is liable for an injury caused to such individual by a breach of the duty to take care so owed to him, unless the statute expressly or impliedly excludes such liability (*t*).

Accordingly, as negligence involves the existence of a duty to take care and a breach of such duty, an individual who is injured by negligence in the performance of a statutory duty has a right of action in respect of such negligence unless such right is expressly or impliedly excluded (*u*).

Neglect: omission to perform statutory duty.

**715.** A neglect of, that is an omission to perform, a statutory duty, as distinguished from negligence in the performance of it, does not give rise to a right of action in favour of a person suffering damage by reason of such omission unless such right is expressly or impliedly given by statute (*a*).

Where no remedy for breach of duty imposed for benefit of class.

**716.** When a statute imposes a duty for the benefit of a class and no remedy is provided for a breach of it, an action will lie for a breach of such duty at the suit of any member of the class who is injured thereby (*b*).

Statutory duty not commensurate with remedy.

**717.** When a statute imposes such a duty and a remedy is

civil case; the same rules must apply to both; compare *Ward* v. *Hobbs* (1878), 4 App. Cas. 13; *O'Brien* v. *Arbib & Co.*, [1907] S. C. 975.

(*s*) Even without negligence a liability may arise from the use of something which involves danger and is not authorised expressly or by necessary implication (*West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A.).

(*t*) As to cases where the statute expressly or impliedly excludes such liability, see p. 423, *post*. In *Raleigh Corporation* v. *Williams*, [1893] A. C. 540, P. C., it was held that a right of action existed for breach of a duty to repair part of a drainage system but not for negligent construction of another part as to which arbitration was indicated as the remedy.

(*u*) *Hartnall* v. *Ryde Commissioners* (1863), 4 B. & S. 361, as limited by *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767, C. A.; *Ohrby* v. *Ryde Commissioners* (1864), 5 B. & S. 743; *Scott* v. *Manchester Corporation* (1867), 2 H. & N. 204, Ex. Ch.; *Foreman* v. *Canterbury Corporation* (1871), 40 L. J. (Q. B.) 138; *Taylor* v. *Greenhalgh* (1876), 24 W. R. 311, C. A.; *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256, P. C.; *Shoreditch Corporation* v. *Bull* (1904), 90 L. T. 210, H. L.; *McLelland* v. *Manchester Corporation* (1911), 28 T. L. R. 21; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; and the cases relating to negligence by railway companies in performing their statutory duty to fence, cited in note (*b*), p. 409, *ante*.

(*a*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Sydney Municipal Council* v. *Bourke*, [1895] A. C. 433, P. C.; *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; *Maguire* v. *Liverpool Corporation*, *supra*; and see note (*p*), p. 421, *ante*.

(*b*) *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A. Neglect to take all reasonable means to secure compliance with a rule by his servants may be negligence of the master (*David* v. *Britannic Merthyr Coal Co., Ltd.*, [1910] A. C. 74; *Butler* (*or Black*) v. *Fife Coal Co.*, [1912] A. C. 149; compare *Watkins* v. *Naval Colliery Co.* (1897), *Ltd.*, [1911] 2 K. B. 162, C. A.); see title MASTER AND SERVANT, Vol. XX., p. 130.

provided which is not commensurate with the duty, an action at law may arise on the cessation of the statutory remedy (*e*).

SECT. 2. Neglect of or Negligence in Performing Statutory Duty.

**718.** Where a statutory remedy is given for a particular breach of duty for which there is an already existing remedy, these remedies may co-exist, but if it appears that the statutory remedy is intended to supersede the previously existing one, and it is unreasonable that they should co-exist, the statutory remedy excludes the other (*d*).

Statutory remedy co-existing with remedy previously available.

**719.** Where a new obligation is created by a statute, and performance of that obligation is directed by the statute to be enforced in a specified manner, no other means of enforcing it exists (*e*); but where it appears from the language used, and the nature of the duty, that it was within the purview of the legislature in the particular statute (*f*) to give a private right of action in addition to the remedy, or means provided for enforcing that obligation, then a right of action may arise for the neglect of it. It is a question in each case whether the legislature so intended or not (*g*).

When statutory remedy is the only remedy.

**720.** The failure to perform a duty imposed by a statute under the sanction of a penalty may (*a*), although it does not necessarily (*b*), give a right of action to an individual injured by that omission.

Duty imposed under sanction of a penalty.

(*c*) *Pulsford* v. *Devenish*, [1903] 2 Ch. 625 (remedy for neglect of liquidator's duty to pay *pari passu* after completion of winding up).

(*d*) *Great Northern Fishing Co.* v. *Edgehill* (1883), 11 Q. B. D. 225; compare *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. (N. S.) 336; *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264.

(*e*) *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847; *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; compare *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, C. A.; *R.* v. *Hall*, [1891] 1 Q. B. 747; and see title MAGISTRATES, Vol. XIX., p. 579.

(*f*) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A.; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A., *per* KENNEDY, L.J., at p. 159.

(*g*) In *Dawson & Co.* v. *Bingley Urban Council*, *supra*, a breach of the duty imposed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66, to provide marks indicating the position of street fire-plugs, for breach of which no penalty was imposed, was held to give a right of action where damages resulting from a fire were increased by the delay in finding the fire-plug, owing to the indicating marks being incorrectly placed; and see *Vallance* v. *Falle* (1884), 13 Q. B. D. 109.

(*a*) *Clarke* v. *Holmes* (1862), 7 H. & N. 937, Ex. Ch.; *Caswell* v. *Worth* (1856), 5 E. & B. 849; *Groves* v. *Wimborne* (*Lord*), *supra* (cases of unfenced machinery); *Pickering* v. *James* (1873), L. R. 8 C. P. 489 (returning officer liable in damage to a party aggrieved for breach of the former's duty to see that the official mark was on the ballot paper); compare *Kelly* v. *Glebe Sugar Refining Co.* (1893), 30 Sc. L. R. 758 (unfenced shafting); *Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A. C. 74; *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423; *Butler* (*or Black*) v. *Fife Coal Co., Ltd.*, [1912] A. C. 149 (mining regulations).

(*b*) Especially when the sole penalty is a fine (*Saunders* v. *Holborn District Board of Works*, *supra*; *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347; *Robinson* v. *Workington Corporation*, *supra*; *Atkinson* v. *Newcastle Waterworks Co.*, *supra*; *Pictou Municipality* v. *Geldert*, [1893] A. C. 524, P. C.; *Cowley* v. *Newmarket Local Board*, *supra*; compare *Doe* d. *Rochester* (*Bishop*) v. *Bridges*, *supra*. The law as stated in *Couch* v. *Steel* (1854), 3 E. & B. 402, by Lord CAMPBELL, C.J., at

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When remedy available.

Where the statute aims at the protection of a particular class (*c*), or at the attainment of a particular purpose, which in the ordinary course is calculated to benefit a particular individual or member of a class (*d*), an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain that particular purpose, may have his remedy although a penalty is imposed by the statute (*e*). Where the obligation is to do something for the public generally, or for so large a body of persons that they can only be dealt with *en masse*,

p. 414, "that a person suffering private special damage for the breach of a statutory duty did not lose his remedy because the act imposed a penalty," was doubted in *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A., and treated as overruled in *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64.

(*c*) *E.g.*, persons coming under statutory provisions relating to factories and workshops (*Coe* v. *Platt* (1851), 6 Exch. 752; affirmed (1852), 7 Exch. 460, Ex. Ch.; *Coe* v. *Platt* (1852), 7 Exch. 923; *Caswell* v. *Worth* (1856), 5 E. & B. 849; *Clarke* v. *Holmes* (1862), 7 H. & N. 937, Ex. Ch.; *Kelly* v. *Glebe Sugar Refining Co.* (1893), 30 Sc. L. R. 758; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A.; *Iles* v. *Abercarn Welsh Flannel Co.* (1886), 2 T. L. R. 547; *O'Brien* v. *Arbib & Co.*, [1907] S. C. 975; compare *Hoey* v. *Dublin and Belfast Junction Rail. Co.* (1870), 5 I. R. C. L. 206). It appears that contributory negligence (see p. 445, *post*) may be an answer to an action for negligence by breach of an express statutory duty to fence (*Morrison* v. *General Steam Navigation Co.* (1853), 8 Exch. 733; *Iles* v. *Abercarn Welsh Flannel Co.*, *supra*; *Caswell* v. *Worth*, *supra*; see title MASTER AND SERVANT, Vol. XX., p. 121): but "*volenti non fit injuria*" is not (*ibid.*; *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423; *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Exch. 130; compare *Clarke* v. *Holmes*, *supra*; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A. (persons coming within the provisions of mining regulations); *Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A. C. 74; *Butler* (*or Black*) v. *Fife Coal Co., Ltd.*, [1912] A. C. 149; see title FACTORIES AND SHOPS, Vol. XIV., pp. 531, 532). As to general rules for safety in mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 611 *et seq.* Where the person injured is not one of the class contemplated by the legislature, although the negligence complained of may be a breach of the statute, the person injured cannot set up that breach (*O'Brien* v. *Arbib & Co.*, *supra*; see title FACTORIES AND SHOPS, Vol. XIV., p. 482).

(*d*) Such as provisions for shipment or carriage of dangerous goods (*Brass* v. *Maitland* (1856), 6 E. & B. 470; *Williams* v. *East India Co.* (1802), 3 East, 192; *Cramb* v. *Caledonian Rail. Co.* (1892), 29 Sc. L. R. 869; see title CARRIERS, Vol. IV., p. 27); provisions regulating level crossings, or gates, or fences, in connection with railways (*Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157, as explained in *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41, 43; *Brooks* v. *London and North Western Rail. Co.* (1884), 33 W. R. 167; compare *Corry* v. *Great Western Rail. Co.* (1881), 7 Q. B. D. 322, C. A.; *Charman* v. *South Eastern Rail. Co.* (1888), 21 Q. B. D. 524, C. A.; *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798 (fences); see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 130, 131; RAILWAYS AND CANALS). For breaches of the Merchant Shipping Act, see title SHIPPING AND NAVIGATION.

(*e*) Compare *Ward* v. *Hobbs* (1878), 4 App. Cas. 13 (where a statute made it an offence to send an animal suffering from contagious disease to market, and an animal so suffering was sold on the terms of "no warranty," it was held that the statute did not affect private bargains; see title FOOD AND DRUGS, Vol. XV., p. 4, note (*h*)); and compare *Gorris* v. *Scott* (1874), L. R. 9 Exch. 125.

and the failure to comply with the obligation is liable to affect all such persons alike, although not necessarily in the same degree, no separate right of action will arise from the mere failure to fulfil the obligation (*f*), but a criminal breach of a statutory duty may be used as evidence of negligence in some cases where a duty to take care exists otherwise than by virtue of the statute, as, for example, in the case of passengers on a railway (*g*), or on a highway (*h*).

SECT. 2. Neglect of or Negligence in Performing Statutory Duty.

### SECT. 3.—*Negligence in the Performance of other than Statutory Duties where such Negligence amounts to Crime.*

**721.** Where the duty to take care imposed by the common law for the benefit of the public is identical with the duty imposed for the benefit of an individual, the want of care required to constitute criminal negligence is in general at least as great as that required to found an action for damages (*i*). In such cases, therefore, where there is criminal negligence there is also civil liability unless

What want of care is necessary to constitute criminal negligence.

(*f*) See *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q. B. 592, *per* WILLS, J., at p. 594; see *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B, 149, C. A. From *Leader* v. *Moxton* (1773), 3 Wils. 461, it appears that if a person carry out statutory duties in an oppressive manner, and could have avoided the injury thereby caused, he is liable; and see *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*, [1894] 2 Q. B. 842, C. A.; *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; *Beaumont* v. *Huddersfield Corporation* (1902), 19 T. L. R. 97, C. A., where the statute gave a right to individuals injured to sue for penalties); and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) *North Eastern Rail. Co.* (*Directors etc.*) v. *Wanless* (1874), L. R. 7 H. L. 12; *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798; *Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157 (gates open at level crossing where the statute enjoined they should be closed); *Blamires* v. *Lancashire and Yorkshire Rail. Co.* (1873), L. R. 8 Exch. 283, Ex. Ch.; see title CARRIERS, Vol. IV., p. 52.

(*h*) Lights are now required to be placed on certain vehicles at night; see Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45); Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85; Locomotives Acts, 1865 (28 & 29 Vict. c. 83) and 1898 (61 & 62 Vict. c. 29), s. 5; and Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36). Breach of this duty, although punishable on summary conviction with a fine, would be evidence of negligence in case of a collision occurring at night; compare *Walker* v. *Stretton* (1896), 60 J. P. 313; *Williams* v. *Groves* (1896), 12 T. L. R. 450 (cases on bye-laws before the Lights on Vehicles Act, 1907 (7 Edw. 7, c. 45). Where, however, the provisions of bye-laws are such that they cannot be complied with literally, a breach does not always carry with it liability for negligence. Thus where a bye-law obliged a cabman to be either at the horse's head or on the driver's seat, and the cabman went to the back of the cab to get some food for the horse, which thereupon bolted and injured the plaintiff, it was held that the breach of the bye-law was not negligent (*Shaw* v. *Croall & Sons* (1885), 22 Sc. L. R. 792). As to lights at sea, see title SHIPPING AND NAVIGATION. As to lights on motor cars and bicycles, see title STREET AND AERIAL TRAFFIC.

(*i*) *R.* v. *Noakes* (1866), 4 F. & F. 920; *Edsall* v. *Russell* (1842), 4 Man. & G. 1090, 1099; *R.* v. *Markuss* (1864), 4 F. & F. 356; *R.* v. *Lowe* (1850), 3 Car. & Kir. 123; *R.* v. *Nicholls* (1875), 13 Cox, C. C. 75; *R.* v. *Franklin* (1883), 15 Cox, C. C. 163; *R.* v. *Doherty* (1887), 16 Cox, C. C. 306; compare

SECT. 3. **Negligence in the Performance of other than Statutory Duties etc.**

civil process is for some reason unavailable, as in the case of an infant in arms neglected by its parent (*k*), or in a case where contributory negligence, which is no defence in a criminal charge, is available in a civil action as showing that the real cause of the injury was the act of the party injured

# Part IV.—Negligence arising out of Special Relations.

## SECT. 1.—*Carriers by Road, by Railway, and by Sea.*

### SUB-SECT. 1.—*Damage to Passengers or their Luggage.*

Duty and responsibility of carrier of passengers for hire.

**722.** A carrier (*m*) of passengers for hire undertakes to carry his passengers (*n*) with due care and to carry them safely as far as reasonable care and forethought can attain that end (*o*). He is liable for any negligence on the part of himself or his servants (*p*). He is answerable for the soundness and sufficiency of any means of conveyance provided by him, and is bound to provide against defects by periodical examination when necessary, and it is *primâ facie* evidence of negligence against him if a passenger is injured by reason of want of soundness or sufficiency, or want of such examination, of the means of conveyance (*q*).

*Hammack* v. *White* (1862), 11 C. B. (N. S.) 588; *R.* v. *Fenton* (1830), 1 Lew. C. C. 179. For examples of cases where the omission or breach of some duty to take care amounts to crime, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 582, note (*l*).

(*k*) This duty exists at common law apart from the Children Act, 1908 (8 Edw. 7, c. 67), Part II.; see *R.* v. *Friend* (1802), Russ. & Ry. 20, C. C. R.; and title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 582 *et seq.*, 623; and see the notes to *ibid.*, pp. 582 *et seq.*

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 586, note (*c*). Evidence to show contributory negligence on the part of the deceased is relevant, as tending to prove that the negligence of the accused was not the real cause of the death of the deceased; see *R.* v. *Bunney* (1894), 6 Queensland L. J. 80. As to contributory negligence, see pp. 445 *et seq.*, *post*.

(*m*) Any person who carries goods or passengers for hire or gratuitously is a carrier; see title CARRIERS, Vol. IV., p. 2.

(*n*) A passenger is one who travels or is carried in some vessel or vehicle (Oxford English Dictionary); compare note (*d*), p. 429, *post*. As to whether the payment of a fare is for certain purposes essential, see *The "Lion"* (1869), L. R. 2 P. C. 525; *White* v. *Boulton* (1791), Peake, 113 [81]; *Aston* v. *Heaven* (1797), 2 Esp. 534; *Hamilton* v. *Caledonian Rail. Co.* (1857), 19 Dunl. (Ct. of Sess.) 457.

(*o*) See title CARRIERS, Vol. IV., pp. 44, 45; *Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390.

(*p*) *Ansell* v. *Waterhouse* (1817), 6 M. & S. 385.

(*q*) *Israel* v. *Clark* (1803), 4 Esp. 259; *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 501, Ex. Ch.; *Simson* v. *London General Omnibus Co.*, *supra*.

A gratuitous carrier is bound to exercise due and reasonable care and skill (*r*), and when his occupation or profession implies the possession of a certain degree of skill he is liable for injuries caused by his failure to use that degree of skill (*s*).

Duty of gratuitous carrier.

**723.** The liability of a carrier of passengers may be varied by contract (*t*), and may, in the case of a railway having statutory powers, be altered by enactments relating to the provision of means of, and facilities for, conveyance and incidental accommodation, and to the liability incurred (*a*).

Variation of liability by contract.

Liability of a railway company.

**724.** A railway company is liable for negligence (*b*) in the performance of any duty or the exercise of any power conferred on it by statute for the benefit of passengers if such negligence causes injury to any passenger, whether he is being carried for reward or not (*c*). It is also liable to any passenger for any negligence, whether occurring on its own line or not (*d*), in the performance of the contract of carriage, when such passenger is carried for reward (*e*). It is also liable to any person lawfully on any part

(*r*) *Lygo* v. *Newbould* (1854), 9 Exch. 302; *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442; *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115; *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157, C. A., *per* BAGGALLAY, L.J., at p. 164; *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219; and see p. 367, *ante*.

(*s*) See title CARRIERS, Vol. IV., p. 5; and see pp. 368, 374, *ante*.

(*t*) See p. 428, *post*.

(*a*) See title RAILWAYS AND CANALS.

(*b*) Railway companies are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence (*East Indian Railway* v. *Kalidas Mukerjee*, [1901] A. C. 396, P. C.).

(*c*) See title CARRIERS, Vol. IV., p. 46; *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655; *Austin* v. *Great Western Rail. Co.*, *supra*; compare *Coyle* v. *Great Northern Rail. Co.* (1887), 20 L. R. Ir. 409.

(*d*) The liability is co-extensive with the contractual relation (*Great Western Rail. Co.* v. *Blake* (1862), 7 H. & N. 987, Ex. Ch.; *Thomas* v. *Rhymney Rail. Co.* (1871), L. R. 6 Q. B. 266, 273; *Daniel* v. *Metropolitan Rail. Co.* (*Directors etc.*) (1871), L. R. 5 H. L. 45, 55; compare *Wright* v. *Midland Rail. Co.* (1873), L. R. 8 Exch. 137). There is equally a duty to take care whether the obligation to carry arises from contract or from statute (*East Indian Railway* v. *Kalidas Mukerjee*, *supra*, at p. 402).

(*e*) As to the question how far the carriage, where there is a contract, is in pursuance of a private contract and not merely of a public duty, see *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, C. A. As to what constitutes a contract with the passenger, see *Brien* v. *Bennett* (1839), 8 C. & P. 724; *Cooke* v. *Midland Rail. Co.* (1892), 9 T. L. R. 147, C. A. As to special terms exempting the carrier from liability, see *McCawley* v. *Furness Rail. Co.* (1872), L. R. 8 Q. B. 57; *Gallin* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 212; and note (*o*), p. 428, *post*. As to the necessity of knowledge or adequate means of knowledge of such special terms in order to make them binding, see cases cited in notes (*p*), (*q*), p. 428, *post*, and notes (*r*)—(*c*), p. 429, *post*. In the case of an infant, even if the contract contains an express exemption of the carrier from liability for negligence, the carrier still is liable (*Flower* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 65; see title INFANTS AND CHILDREN, Vol. XVII., pp. 63, 64).

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of its premises for any injury caused by negligence on the part of the company or its servants (*f*).

Passenger's luggage. Liability of common carrier.

**725.** A passenger is entitled to take with him while he is in transit (*g*) a reasonable amount of ordinary personal luggage (*h*), and the obligation of a common carrier in reference to the luggage so taken (*i*), so far as it is not varied by statute or by special contract (*k*), is to afford reasonable facilities for the carriage of it (*l*), and to be responsible as a common carrier for the safety of it so far as it is within the carrier's custody and control (*m*).

Liability for luggage deposited in railway cloak-room.

**726.** A railway company receiving a passenger's luggage or other chattels in a cloak-room is, in the absence of special contract, only bound to take proper care that the luggage or other chattels are safely kept from loss or injury (*n*).

Limitation by special contract of liability in respect of passenger or goods deposited.

**727.** A special contract limiting the liability of the company, either in respect of a contract of carriage or a deposit of chattels, may be entered into and may result from the acceptance for carriage of a passenger or the deposit of a chattel, with notice of the special terms on which the company agrees to carry or to accept the deposit, and will so result if the special terms are either brought to the knowledge of the passenger or bailor or are so brought to his attention that it is reasonable in the circumstances to assume that he assented to them (*o*). Such an assent will be assumed without actual knowledge where the passenger or bailor knows that a ticket, receipt, or other document handed to him contains writing, whether it is printed on the back (*p*) or on the face (*q*), and that the writing contains conditions, or where the delivery to

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(*f*) *Watkins* v. *Great Western Rail. Co.* (1877), 37 L. T. 193; *Rogers* v. *Rhymney Rail. Co.* (1872), 26 L. T. 879; *Thatcher* v. *Great Western Rail. Co.* (1893), 10 T. L. R. 13, C. A.; *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155 (persons crossing rails and injured by negligence); *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q. B. D. 70, C. A. (person injured while on public footway). For other cases relating to persons injured while on a level crossing, see note (*a*), p. 388, *ante*, and note (*f*), p. 393, *ante*; compare note (*i*), p. 401, *ante*; and for other cases where persons so injured were themselves guilty of contributory negligence, see p. 445, *post*.

(*g*) See title CARRIERS, Vol. IV., pp. 42, 43.

(*h*) *Ibid.*, p. 40.

(*i*) *Ibid.*, p. 41.

(*k*) *Ibid.*, p. 43.

(*l*) *Ibid.*, p. 40.

(*m*) *Ibid.*, p. 42.

(*n*) See title BAILMENT, Vol. I., p. 549. If the company fails to take such care it is responsible for the value of the chattels, but not for consequential damages arising from the loss (*ibid.*).

(*o*) *Zunz* v. *South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539; *Parker* v. *South Eastern Rail. Co.*, *Gabell* v. *Same* (1877), 2 C. P. D. 416, C. A., *per* MELLISH, L.J., at pp. 422, 423; and see titles BAILMENT, Vol. I., p. 549; CARRIERS, Vol. IV., pp. 29, 54. As to the necessity for such an agreement being not unreasonable, see title CARRIERS, Vol. IV., pp. 28, 31, 35, 36.

(*p*) *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515 (clear reference on face to conditions on back).

(*q*) *Stewart* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 135; compare *Henderson* v. *Stevenson* (1875), L. R. 2 Sc. & Div. 470.

him of such ticket (*r*), receipt (*a*), or other document (*b*), in such a manner that he can see that there is writing on it, is reasonable notice that the writing contains conditions (*c*).

Liability of carriers by sea.

**728.** The liability of a carrier of passengers by sea (*d*) is altered, in the case of a ship, by statutory enactments relating to the ship, the manning and equipment of it, the provision made for passengers on it, the making of the contract of carriage and breaches of such contract (*e*), and the liability in respect of injuries to passengers from negligence in the performance of such contract (*e*).

Independently of special conditions imposed by statute or by contract (*f*), the owner, and, on his behalf, the master of a ship, is bound to make reasonable provision for the food (*g*), comfort (*h*), and accommodation (*i*), and to take reasonable care for the safety (*j*), of passengers throughout the voyage (*k*), having due regard to what is customary in that respect (*l*), and to provide reasonable facilities for the carriage of a passenger's luggage (*m*), provided it is not in excess of what is usual on a similar voyage (*n*).

### SUB-SECT. 2.—*Damage to Goods.*

Liability of common carrier of goods.

**729.** A common carrier of goods is responsible for the safety of the goods entrusted to him in all events except when loss or injury arises from the act of God, or the King's enemies, or is caused by the inherent defect of the goods (*o*), or by their dangerous nature, unless the carrier knew or ought to have known of it, or by the act or omission of the consignor himself or of some

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(*r*) *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286, C. A.

(*a*) See title BAILMENT, Vol. I., p. 549.

(*b*) *Lockyer* v. *International Sleeping Car and European Express Train Co.* (1892), 61 L. J. (Q. B.) 501 (official guide); *Woodgate* v. *Great Western Rail. Co.* (1884), 51 L. T. 826 (time table).

(*c*) *Richardson, Spence & Co., and "Lord Gough" Steamship Co.* v. *Rowntree*, [1894] A. C. 217. As to conditions in bills of lading, see *Crooks* v. *Allan* (1879), 5 Q. B. D. 38 (type too small to attract notice); title SHIPPING AND NAVIGATION.

(*d*) The term "passenger" for the purposes of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part III., includes any person carried in a ship other than the master and crew, and the owner, his family, and servants (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 267; *The Hanna* (1866), L. R. 1 A. & E. 283); compare note (*n*), p. 426, *ante*.

(*e*) See title SHIPPING AND NAVIGATION.

(*f*) Any reasonable person must suppose that there will, in a contract of carriage of a passenger by sea, be conditions regulating the conduct of the passenger, and giving the shipowner powers of control, without which it would be impossible to secure the safety of passengers or their luggage (*Acton* v. *Castle Mail Packets Co.* (1895), 11 T. L. R. 518).

(*g*) *Siordet* v. *Brodie* (1812), 3 Camp. 253; *Chamberlain* v. *Chandler* (1823), 3 Mason, 242, 245, 246.

(*h*) *Andrews* v. *Little & Co.* (1887), 3 T. L. R. 544, C. A. (neglect to provide means for getting out of berth).

(*i*) *Adderley* v. *Cookson* (1809), 2 Camp. 15.

(*j*) *Andrews* v. *Little & Co.*, *supra*.

(*k*) As to the commencement of the voyage, see *Gillan* v. *Simpkin* (1815), 4 Camp. 241.

(*l*) *Ibid.*

(*m*) *Upperton* v. *Union-Castle Mail Steamship Co.* (1902), 19 T. L. R. 123 (luggage stowed in vacant lavatory and damaged by water).

(*n*) *Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612.

(*o*) See title CARRIERS, Vol. IV., pp. 10, 27, and see p. 371, *ante*.

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person for whom the consignor is responsible (*p*); and, save in reference to these excepted cases, it is unnecessary to allege any want of care in an action for loss or injury (*q*). In reference to these excepted cases he is bound to take all reasonable means to protect the goods from damage arising in consequence of any of the causes above specified, and, if he negligently fails to do so, is liable for any loss or damage resulting from such negligence (*r*).

Variation of liability.

The common law liability of a common carrier of goods for loss, injury, or delay cannot be varied by the exhibition of a public notice purporting to vary it (*s*), but may be varied by statute (*t*) or by a special contract with the consignor in relation to the goods carried (*u*).

Liability of carriers in other cases.

**730**. A carrier of goods who is not a common carrier, or a common carrier when carrying goods of which he is not a common carrier, or when carrying goods outside the scope of his public employment, is liable for negligence in such carriage (*w*), but may protect himself from such liability by a contract which contains sufficiently clear language exonerating him (*x*).

A shipowner carrying goods by sea is entitled to limit his liability for loss arising from the negligence of the master or crew of his ship without his own fault or privity (*a*).

## SECT. 2.—*Bailees.*

Liability of gratuitous bailee.

**731**. A gratuitous bailee is, in the absence of any special agreement, bound to exercise that degree of diligence (*b*), in the safe custody of the chattel entrusted to him, which men of common prudence exercise about their own affairs, and is liable for negligence if, after taking into account all the circumstances, he is found to have failed to exercise it (*c*).

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(*p*) See title CARRIERS, Vol. IV., pp. 8, 9, 15, 16. As to his duties in respect of delivery, see *ibid.*, pp. 11—17; *Bristol and Exeter Railway (Directors etc.)* v. *Collins* (1859), 7 H. L. Cas. 194. As to his duties in a case of stoppage *in transitu*, see titles CARRIERS, Vol. IV., pp. 96 *et seq.*; SALE OF GOODS; SHIPPING AND NAVIGATION.

(*q*) See title CARRIERS, Vol. IV., p. 8; *Devereux* v. *Barclay* (1819), 2 B. & Ald. 702.

(*r*) See title CARRIERS, Vol. IV., pp. 9, 16.

(*s*) See *ibid.*, p. 16.

(*t*) *Ibid.*, pp. 21—35.

(*u*) *Ibid.*, pp. 16, 30—33. As to charterparties and bills of lading, and the special exemptions contained therein, including clauses exempting shipowners from liability for negligence, see title SHIPPING AND NAVIGATION.

(*w*) *Moffat* v. *Great Western Rail. Co.* (1867), 15 L. T. 630; *Pickering* v. *North Eastern Rail. Co.* (1887), 4 T. L. R. 7, C. A.; *Smith* v. *Midland Rail. Co.* (1887), 4 T. L. R. 68; *Ainsby* v. *Great Northern Rail. Co.* (1891), 8 T. L. R. 148.

(*x*) *Rosin and Turpentine Import Co.* v. *Jacobs & Co.* (1910), 27 T. L. R. 259, H. L.

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 592; and see title SHIPPING AND NAVIGATION.

(*b*) *Wilson* v. *Brett* (1843), 11 M. & W. 113; see title BAILMENT, Vol. I., p. 531.

(*c*) See title BAILMENT, Vol. I., pp. 531, 532; and see p. 374, *ante*. Mere inability to find goods after a lapse of three years is not sufficient to establish negligence (*Powell* v. *Graves & Co.* (1886), 2 T. L. R. 663); but if they are not returned the burden of proof is on the bailee (*Bain* v. *Strang* (1889), 16 R. (Ct. of Sess.) 186; *Sutherland* v. *Hutton* (1896), 23 R. (Ct. of Sess.) 718). As to the liability for the act or default of a servant, see *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, C. A.; title MASTER AND SERVANT, Vol. XX., pp. 249 *et seq.*

A bailee for reward in the absence of special contract is not an insurer. He is bound to exercise such care as a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character (*d*).

## SECT. 3.—*Innkeepers.*

Liability as regards guests.

**732.** An innkeeper is bound to take reasonable care of the persons of his guests (*e*), and is liable for any damage resulting to them from his negligence while they are his guests (*f*). His duty to take reasonable care extends to all food and accommodation which he provides or holds himself out as providing for his guests (*g*).

Liability as regards goods.

**733.** An innkeeper (*h*), in the absence of special provision by contract or statute, is bound to keep the goods of his guests which are brought to his inn by them, without subtraction, while they are his guests (*i*), and he is liable for any loss (*j*) of or damage to such goods (*k*) unless the loss or damage arises from the misconduct or negligence of the guest who owns them (*l*), or of someone for whose misconduct or negligence the guest is responsible (*m*), or from the act of God or of an alien enemy (*n*), or unless the guest has himself assumed the exclusive control of the goods in such a way as to relieve the innkeeper from responsibility (*o*). If he retains the goods of his guest in the exercise of his lien upon them for charges due, he is not required to use greater care in their custody than he uses as to his own (*p*).

Limitation of liability by special contract or statute.

**734.** The liability of an innkeeper in respect of damage to the person or goods of his guest may be limited by special contract. His liability to make good any loss of or injury to his guests' property, not being a live animal or carriage, to a greater amount than £30, is limited by statute, provided the notice required by the

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(*d*) See title BAILMENT, Vol. I., p. 544; *Smith* v. *Cook* (1875), 1 Q. B. D. 79; and see p. 368, *ante*. It has been held that where goods are taken from the bailee by order of a court of law the fact that he, having informed the court as to the bailment, did not inform the bailor as to the proceedings is not evidence of negligence (*Ranson* v. *Platt*, [1911] 1 K. B. 499).

(*e*) See title INNS AND INNKEEPERS, Vol. XVII., p. 313.

(*f*) As to what constitutes a guest, see *ibid.*, pp. 313, 318; *Axford* v. *Prior* (1866), 14 W. R. 611. As to the duty to persons who are not guests, but are volunteers or licensees, see pp. 385, 391, *ante*.

(*g*) See title INNS AND INNKEEPERS, Vol. XVII., pp. 302, 307.

(*h*) This liability is confined to an innkeeper strictly so called; see title INNS AND INNKEEPERS, Vol. XVII., p. 316. Keepers of restaurants, boarding-houses, or lodging-houses, which are not inns (see *ibid.*, pp. 308, 316), are only liable if negligence is proved: see *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92; *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, C. A.

(*i*) See title INNS AND INNKEEPERS, Vol. XVII., pp. 314, 317.

(*j*) Including loss by an accidental fire: see *Thorogood* v. *Marsh* (1819), Gow, 105. The fact of loss is *primâ facie* evidence of negligence (*Dawson* v. *Chamney* (1843), 5 Q. B. 164).

(*k*) The goods include a horse left at an innkeeper's livery stable (*Day* v. *Bather* (1863), 2 H. & C. 14).

(*l*) *Oppenheim* v. *White Lion Hotel Co.* (1871), L. R. 6 C. P. 515; compare *Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44.

(*m*) See title INNS AND INNKEEPERS, Vol. XVII., pp. 319, 320.

(*n*) See *ibid.*, p. 321; *Richmond* v. *Smith* (1828), 8 B. & C. 9.

(*o*) See title INNS AND INNKEEPERS, Vol. XVII., p. 320.

(*p*) *Angus* v. *McLachlan* (1883), 23 Ch. D. 330.

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statute is duly exhibited, unless the loss occurs through the wilful act, default, or neglect of the innkeeper or his servant, or unless the property has been deposited with him expressly for safe custody (*q*).

## SECT. 4.—*Bankers.*

Duty as to payments out of customer's funds.

**735.** The duty of a banker, as to payments out of the funds of a customer in his hands, is to pay cheques to order of a named payee which are drawn on him by the customer, provided he has in his hands funds sufficient and available for the purpose. If the banker refuses to pay when there are funds available, or pays his customer's funds to a wrong party, there is a failure to fulfil this duty irrespective of any proof of negligence on the banker's part (*r*). If the cheque is made payable to a fictitious person or to bearer, the banker is not liable if he paid it in good faith and without negligence (*s*).

A third party cannot require information from a banker as to his customer's account except under compulsion of law, and a banker who answers inquiries regarding his customer's position is not responsible for loss or damage sustained in consequence, unless such answers are put into writing and signed by him (*t*).

Duty in respect of customer's acceptances.

The relation of banker and customer does not of itself impose a duty of honouring the customer's acceptances (*u*), but such a duty may be imposed by some special arrangement, expressed or implied, in respect of genuine bills of exchange, and where such a duty exists, the banker, in the absence of special terms, is under a duty to pay to the person named as payee (*v*), or by special arrangement may be liable only in respect of a failure to take reasonable care in ascertaining the identity of that person.

Duty of customer.

Where a banker is by law or by such a special arrangement under such a duty towards his customer, the customer owes a duty to the banker (*a*) to take such reasonable care and precautions as must be taken to have been in the contemplation of the parties when the relation of banker and customer, or the special arrangement, as the case may be, was entered into (*b*), and where the customer's negligent omission to perform that duty causes the banker to be misled into the act or default complained of, the

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(*q*) Innkeepers Act, 1863 (26 & 27 Vict. c. 41). The notice exhibited must be an accurate copy of *ibid.*, s. 1, without the omission of any material word (*Spice* v. *Bacon* (1877), 2 Ex. D. 463, C. A.). See title INNS AND INNKEEPERS, Vol. XVII., p. 321.

(*r*) See title BANKERS AND BANKING, Vol. I., p. 602.

(*s*) See titles BANKERS AND BANKING, Vol. I., p. 608; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 474.

(*t*) See title BANKERS AND BANKING, Vol. I., p. 643.

(*u*) *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, *per* Lord MACNAGHTEN, at p. 157. As to paying on an indemnity in respect of a lost negotiable instrument, see title EQUITY, Vol. XIII., p. 26.

(*v*) *Ibid.*, *per* Lord WATSON, at p. 131; and see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 550, 551.

(*a*) The duty must be owed to the banker (*Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K. B. 489, C. A.).

(*b*) *Halifax Union* v. *Wheelwright* (1875), L. R. 10 Exch. 183; *Young* v. *Grote* (1827), 4 Bing. 253; *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395; *Bank of England* v. *Vagliano Brothers*, *supra*; *Scholfield* v. *Londesborough* (*Earl*), [1896] A. C. 514; *Kepitigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, 1909] 2 K. B. 1010.

customer may be estopped from claiming in respect of such act or default (*c*).

Duty of banker in respect of bills for collection.

**736.** The duty of a banker in respect of bills of exchange entrusted to him for collection is to take all reasonable and proper steps having regard to what is customary with respect to the presentation for payment, and, in case of refusal, with respect to the protesting of a bill, when protest is necessary (*d*).

Duty of banker in respect of valuables deposited.

**737.** In respect of valuables deposited with a banker for safe custody, the standard of care required depends on whether the banker is to be regarded as a gratuitous bailee or as a bailee for reward (*e*); but, whether the bailment is gratuitous or for reward, a banker is not an insurer and contracts only to use reasonable care and diligence (*f*).

# Part V.—Liability of Particular Parties.

## SECT. 1.—*Private Persons.*

Principal a agent.

**738.** Actionable negligence is a tort, and the person who is under a duty to take care, and fails to fulfil that duty, is responsible for such failure, whether the duty rests on him and he fails to fulfil it on his own behalf, or as servant of or agent for another (*g*), and whether he himself, or someone for whom he is responsible, is the person on whom the duty rests and who fails to fulfil it (*h*).

Joint tortfeasors.

**739.** Any one of two or more joint tortfeasors is liable for the tort, and therefore, where two or more persons jointly owe a duty to

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(*c*) See title ESTOPPEL, Vol. XIII., pp. 385 (neglect to give information as to forgery), 400, 401, 402; *Wallace's Trustees* v. *Port-Glasgow Harbour Trustees* (1880), 7 R. (Ct. of Sess.), 645, 648.

(*d*) See, further, title BANKERS AND BANKING, Vol. I., p. 598. As to cheques, see *ibid.*, pp. 590 *et seq.*; and see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 531.

(*e*) See titles BAILMENT, Vol. I., pp. 533, 534; BANKERS AND BANKING, Vol. I., pp. 627, 628; and see p. 374, *ante*.

(*f*) *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A., *per* FARWELL, L.J., at p. 513; reversed, for reasons not yet given (1912), 132 L. T. Jo. 534, H. L.

(*g*) See titles AGENCY, Vol. I., p. 224; MASTER AND SERVANT, Vol. XX., pp. 276, 277; TORT.

(*h*) See title TORT. As to the responsibility for a contractor, see *ibid.*, and pp. 471, 472, *post*. As to the responsibility of a husband for his wife's torts, see titles HUSBAND AND WIFE, Vol. XVI., pp. 436, 437; TORT. As to the responsibility of a master for a servant's negligence, see titles MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*; TORT; and see *Lloyd* v. *Grace, Smith & Co.*, *supra*. The master is not responsible to a servant in his employment for the negligent act of a fellow-servant in the same employment; see title MASTER AND SERVANT, Vol. XX., pp. 132, 133; *Tarrant* v. *Webb* (1856), 18 C. B. 797, approved of in *Wilson* v. *Merry* (1868), L. R. 1 Sc. & Div. 326; *Hedley* v. *Pinkney & Sons Steamship Co.*, [1892] 1 Q. B. 58, C. A.; *Coldrick* v. *Partridge, Jones & Co., Ltd.*, [1910] A. C. 77. It is to be noticed that this defence does not apply where one servant sues a fellow-servant for negligence (*Lees* v. *Dunkerley Brothers*, [1911] A. C. 5).

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take care and fail in the fulfilment of that duty, each one of them is responsible for such failure (*i*).

Persons jointly interested

**740.** A person is liable where, by reason of his being jointly in possession of, or jointly interested with another in, a chattel managed by that other for the benefit of both, they owe a joint duty to take care and fail to fulfil it (*k*), whether such joint duty arises merely out of such possession or interest, or also out of statutes regulating the conditions under which the chattel is to be dealt with (*l*). Thus a cab-proprietor in London (*m*) may be liable for damage caused by the negligent driving of the cab by the driver, although the relationship between them is that of a bailor and bailee (*n*).

Liability affected by characteristics, capacity, or relationship.

**741.** Where it is sought to make anyone liable for injury resulting from a failure to fulfil a duty to take care, an answer to the claim may arise, not only out of the nature of the act alleged to be negligent and the circumstances in which it occurred, but also out of the characteristics of the person who owed the duty (*o*), or out of the capacity in which he was acting (*p*), or out of the relationship of the person to the party injured (*p*).

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(*i*) See titles SHIPPING AND NAVIGATION; TORT; see *The Secombe, The Devonshire*, [1912] P. 21, C. A. As to costs where one defendant is found not to have been negligent, see *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.

(*k*) *Davey* v. *Chamberlain* (1802), 4 Esp. 229.

(*l*) *Steel* v. *Lester* (1877), 3 C. P. D. 121 (defendant, registered as "managing owner," was held liable for damage done by the ship, although the latter was navigated by another, who chose the crew and the ports to be visited). The owner of a traction engine who lets it out on hire for a term is not responsible for the negligence of the hirer in its use, even though his name and address remain upon it (*Smith* v. *Bailey*, [1891] 2 Q. B. 403, C. A., disapproving *Stables* v. *Eley* (1825), 1 C. & P. 614, which, if correctly reported, decided that if a person permits a vehicle bearing his name to go upon the highway he holds himself out as liable for the negligence of the person driving it). In *Smith* v. *Bailey*, *supra*, Lord ESHER, M.R., at p. 406, thought that "the utmost effect which could be given to that decision is that under such circumstances there would be *primâ facie* evidence of liability, which might be met, however, by showing the truth of the matter"; and see title BAILMENT, Vol. I., pp. 564, 565.

(*m*) To which place alone the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), applies; see, further, title STREET AND AERIAL TRAFFIC. The London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), was passed for the protection of the public, and, although it does not so expressly enact, it has been interpreted as imposing responsibility on the cab-owner as if he were the master of the driver; see the cases cited in note (*n*), *infra*.

(*n*) *Smith* v. *General Motor Cab Co., Ltd.*, [1911] A. C. 188; see *Gates* v. *Bill (R.) & Son*, [1902] 2 K. B. 38; *Keen* v. *Henry*, [1894] 1 Q. B. 292, C. A., overruling *King* v. *Spurr* (1881), 8 Q. B. D. 104; *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, C. A.; *Venables* v. *Smith* (1877), 2 Q. B. D. 279; *Powles* v. *Hider* (1856), 6 E. & B. 207; compare *Doggett* v. *Waterloo Taxi-Cab Co., Ltd.*, [1910] 2 K. B. 336, C. A.

(*o*) Thus, where the person is an infant or a lunatic, the duty to take care may differ from that required from a person of full age and sound understanding; see titles INFANTS AND CHILDREN, Vol. XVII., pp. 46, 74; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 403; TORT; pp. 362, 363, *ante*, and pp. 453, 463, *post*.

(*p*) See p. 435, *post*.

### SECT. 2.—*Persons Acting in Particular Capacities.*

SECT. 2. Persons Acting in Particular Capacities.

Facts affecting extent of duty to take care or liability in respect of it.

**742.** Where a person who is alleged to have failed to fulfil a duty to take care was, in the matter out of which the alleged duty and failure arose, acting on behalf of the Crown (*q*), or in a judicial capacity (*r*), or as a witness (*s*) or counsel or advocate in a court of law (*t*), or as a public official in the exercise of statutory powers or the performance of statutory duties (*u*), or in certain other capacities to which express statutory protection is given (*v*), the fact that he was acting in such capacity may affect the extent of the duty to take care or the liability for a failure to fulfil it (*w*).

### SECT. 3.—*Persons Standing in Particular Relation to the Person Injured.*

Circumstances affecting or modifying duty.

**743.** The relationship of the person to the party injured may affect the duty to take care or the liability for an act or omission which is alleged to be a failure to fulfil such duty (*x*), as, for instance, where the parties are in one employment (*y*). Or again, the duty to take care may be modified by some agreement with or consent by the party to whom the duty would otherwise be owed (*z*).

# Part VI.—Proof of Negligence.

### SECT. 1.—*Burden of Proof.*

Burden primarily on plaintiff.

What proof involves.

**744.** The burden of proof in an action for damages for negligence rests primarily upon the plaintiff, who, in order to maintain the action, must show that he was injured by an act or omission for which the defendant is in law responsible (*a*). Except in those cases in which the law presumes liability from an act or omission immediately upon proof of its occurrence (*b*), this involves

(*q*) See titles ACTION, Vol. I., p. 14; CONSTITUTIONAL LAW, Vol. VI., pp. 413 *et seq.*; CROWN PRACTICE, Vol. X., p. 28; TORT; and as to negligent navigation of the King's ships, see title SHIPPING AND NAVIGATION.

(*r*) See title CONSTITUTIONAL LAW, Vol. VI., p. 416.

(*s*) See title EVIDENCE, Vol. XIII., p. 588; *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, C. A.; *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53, C. A.

(*t*) See titles BARRISTERS, Vol. II., p. 394; SOLICITORS.

(*u*) See titles PUBLIC AUTHORITIES AND PUBLIC OFFICERS; TORT.

(*v*) See title TORT.

(*w*) This in each case depends on the particular circumstances; see also pp. 464 *et seq.*, *post*.

(*x*) As to the relationship of master and pupil, see title EDUCATION, Vol. XII., p. 123.

(*y*) See title MASTER AND SERVANT, Vol. XX., p. 132.

(*z*) See pp. 476, 479, 480, *post*.

(*a*) *Hammack* v. *White* (1862), 11 C. B. (N. S.) 588; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145; and see note (*e*), p. 363, *ante*. As to the exceptions to the rule, see pp. 436, 439, *post*. As to burden of proof in general, see title EVIDENCE, Vol. XIII., pp. 433 *et seq.*

(*b*) See p. 439, *post*.

SECT. 1. **Burden of Proof.**

the proof of some duty owed by the defendant to the plaintiff (*c*), some breach of that duty (*d*), and an injury to the plaintiff between which and the breach of duty a causal connection must be established (*e*). It is, therefore, insufficient for the plaintiff to prove a breach of duty without proving injury (*f*), or to prove injury without proving a breach of duty (*g*), or injury which may or may not be due to a breach of duty (*h*).

When burden shifted.

If, however, he proves injury due to facts which can only be reasonably explained by attributing negligence to the defendant (*i*), or which point *primâ facie* to negligence on the latter's part (*j*), the burden of proof is shifted, and it is then for the defendant to show that he has taken all reasonable precautions in order to avoid liability for the act complained of (*k*).

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(*c*) *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A., *per* BRETT, M.R., at p. 507; *O'Neil* v. *Everest* (1892), 61 L. J. (Q. B.) 453.

(*d*) *Toomey* v. *London, Brighton and South Coast Rail. Co.* (1857), 3 C. B. (N. S.) 146; *Cornman* v. *Eastern Counties Rail. Co.* (1859), 4 H. & N. 781, 786; *Welfare* v. *Brighton Rail. Co.* (1869), L. R. 4 Q. B. 693; *Cotton* v. *Wood* (1860), 8 C. B. (N. S.) 568.

(*e*) *Hanson* v. *Lancashire and Yorkshire Rail. Co.* (1872), 20 W. R. 297; *Smith* v. *Midland Rail. Co.* (1887), 57 L. T. 813; *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193.

(*f*) *Remorquage à Hélice* (*Société Anonyme de*) v. *Bennetts*, [1911] 1 K. B. 243.

(*g*) *Lovegrove* v. *London, Brighton and South Coast Rail. Co.* (1864), 16 C. B. (N. S.) 669, *per* WILLES, J., at p. 692.

(*h*) *Bird* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 3; *Smith* v. *Great Eastern Rail. Co.* (1866), L. R. 2 C. P. 4; *Czech* v. *General Steam Navigation Co.* (1867), L. R. 3 C. P. 14; *Bridges* v. *North London Rail. Co.* (1871), L. R. 6 Q. B. 377, Ex. Ch.; *Smith* v. *Midland Rail. Co.*, *supra* (the mere fact that cattle were found to be injured when unloaded from defendant's trucks, whereas they were sound when loaded, not sufficient to establish negligence, for the injuries might have been due to some other cause, such as the restiveness of the cattle); compare *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Woodcock* (1871), 25 L. T. 335; *Powell* v. *M'Glynn and Bradlaw*, [1902] 2 I. R. 154, 190, C. A.; *Daniel* v. *Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 216, 222; reversed on another point (1871), L. R. 5 H. L. 45; *Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157.

(*i*) *Czech* v. *General Steam Navigation Co.*, *supra*, disapproving *Great Western Rail. Co. of Canada* v. *Fawcett* (1863), 1 Moo. P. C. C. (N. S.) 101; *The Glendarroch*, [1894] P. 226, C. A.

(*j*) *Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390; compare *Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787; *Williams* v. *Great Western Rail. Co.*, *supra*; and see *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; *Paterson* v. *London, Tilbury, and Southend Railway* (1912), *Times*, 16th March, C. A.

(*k*) See cases cited in notes (*h*), (*i*), (*j*), *supra*. To establish negligence on the part of an employer at common law, it is not sufficient to show that a servant was injured by machinery which went wrong for some unexplained cause (*Macfarlane* v. *Thomson* (1884), 22 Sc. L. R. 179). The contrary had been decided in *Walker* v. *Olsen* (1882), 19 Sc. L. R. 708, but this case was doubted and distinguished in *Macfarlane* v. *Thomson*, *supra*. In *Ramage and Ferguson* v. *Forsyth* (1890), 28 Sc. L. R. 26, where the nature of the work (shipbuilding) rendered it necessary for certain manholes to be left open, it was stated that, in order to succeed, a servant, who was injured by falling through one of them, must prove how they could have been protected and fenced and the work still carried on; and see title MASTER AND SERVANT, Vol. XX., p. 130.

SECT. 1. Burden of Proof

Evidence equally balanced.

**745**. If the plaintiff only establishes facts which are equally consistent with the true cause of the accident being his own or the defendant's negligence, he cannot succeed (*l*), nor can he recover when the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the defendant's negligence (*m*). If, however, negligence on the part of the defendant which might have caused the injury is established, it may be sufficient for the plaintiff to prove facts which show a greater likelihood that the injury was due to the defendant's negligence than his own (*n*).

Statutory duty.

**746**. Where the plaintiff relies on the breach of a statutory duty as constituting negligence, he satisfies the burden which is on him by proving such breach, and the defendant in order to escape liability must show that he has taken all reasonable care that the duty should be duly and properly performed (*o*). Where the defendant is compelled by statute to rely on another person, such as a pilot, and is not responsible for that person's negligence (*p*), he may be liable if he or his servants were also negligent and contributed thereby to the plaintiff's injury (*q*).

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(*l*) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; compare *Pomfret* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K. B. 718, C. A.; *Reynolds* v. *Tilling (Thomas), Ltd.* (1903), 19 T. L. R. 539; *Morgan* v. *Sim, The London* (1857), 11 Moo. P. C. C. 307, 311; *Russell* v. *London and South Western Rail. Co.* (1908), 24 T. L. R. 548, C. A.; *Ramage and Ferguson* v. *Forsyth* (1890), 28 Sc. L. R. 26. Where the question whether the injured person was negligent depends upon his knowledge at the time of the accident (see p. 449, *post*) and, owing to his death, direct proof of such knowledge is impossible, the action will fail if the circumstances raise an inference that he knew or ought to have known of certain dangers or of precautions imposed in respect thereof, and that the accident happened by reason of his failure to act reasonably by the light of that knowledge (see *ibid.*, and cases there cited).

(*m*) *Muddle* v. *Stride* (1840), 9 C. & P. 380 (where the damage was suggested to be caused by perils of the sea; it was, however, pointed out that if those perils required a higher degree of care to be taken than was taken the plaintiff should succeed); compare *Powell* v. *M'Glynn and Bradlaw*, [1902] 2 I. R. 154, C. A.; see *Ellis* v. *Banyard* (1911), 28 T. L. R. 122, C. A., reversing (1911), 27 T. L. R. 417 (where, in the Divisional Court, different views were taken by the two judges as to the fact that cattle strayed from the defendant's field was *primâ facie* evidence of negligence).

(*n*) *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199; *Smith* v. *Midland Rail. Co.* (1887), 57 L. T. 813, applying *Harris* v. *Midland Rail. Co.* (1876), 25 W. R. 63; *Williams* v. *Great Western Rail. Co.* (1874), L. R. 9 Exch. 157.

(*o*) *Beaumont* v. *Huddersfield Corporation* (1902), 19 T. L. R. 97, C. A. (where the duty was to provide a fixed quantity of water daily); *Britannic Merthyr Coal Co., Ltd.* v. *David*, [1910] A. C. 74; *North Eastern Rail. Co. (Directors etc.)* v. *Wanless* (1874), L. R. 7 H. L. 12; *Brooks* v. *London and North Western Rail. Co.* (1884), 33 W. R. 167; *Solomons* v. *Stepney Borough Council* (1905), 69 J. P. 360; compare *Kearney* v. *London and Brighton Rail. Co.* (1871), L. R. 6 Q. B. 759, Ex. Ch. If the statutory duty is absolute, the defendant cannot escape liability for breach of it; see *Butler (or Black)* v. *Fife Coal Co., Ltd.*, [1912] A. C. 149; and see p. 424, *ante*.

(*p*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633; and see title SHIPPING AND NAVIGATION. As to the defence of reliance on others, see p. 479, *post*.

(*q*) *Clyde Navigation Co.* v. *Barclay* (1876), 1 App. Cas. 790, criticising the ruling of KINDERSLEY, V.-C., on this point in *The "Iona"* (1867), L. R. 1 P. C. 426. Where the defendant in such a case has proved that he has complied with the statutory obligation, and that the person so relied on has caused the injury, the plaintiff must prove that the defendant or his

SECT. 1. Burden of Proof.

**747.** If the defendant has by way of a contract introduced conditions that limit his liability, the burden is on him to prove that the facts of the case are such as enable him to claim the advantage of such conditions (*r*).

Proof of performance of conditions.

Proof that plaintiff was not negligent.

**748.** It is for the plaintiff to prove facts from which the proper inference is that the injury complained of was caused by the negligence of the defendant and not by his own (*s*). It is not, therefore, necessary for him in the first instance to prove that there was no negligence on his part (*t*), unless, from the other facts which he proves, the inference that he was negligent himself could as properly be drawn (*a*).

When burden subsequently placed on plaintiff.

The burden of proving that he was not negligent himself may, however, be subsequently placed on him by the evidence given on behalf of the defendant (*b*); and, if both parties were negligent, it is for the plaintiff to prove that the defendant could, by the exercise of reasonable care and diligence, have abstained from the act or omission which caused the injury (*c*). If the evidence shows that the plaintiff's negligence was subsequent to that of the defendant, the plaintiff can only succeed if he shows that his act did not so divert the natural consequences of the defendant's act as to prevent its being the effective cause of the injury (*d*), or that the defendant still had an opportunity the use of which, with the exercise of reasonable care and diligence, would have obviated the accident (*e*).

Master and servant.

**749.** In cases where it is sought to make a master liable for the negligence of one who is proved to have been acting as his servant, the burden of proving that the act complained of was within the scope of the servant's employment is not upon the plaintiff (*f*),

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servants by their negligence contributed to the injury, unless of course the defendant has in his evidence disclosed a *primâ facie* case against himself, when, in the event of his being unable to exonerate himself, he will be liable (*Clyde Navigation Co.* v. *Barclay* (1876), 1 App. Cas. 790); see also *The Indus* (1886), 12 P. D. 46, C. A.

(*r*) *Kent* v. *Midland Rail. Co.* (1874), L. R. 10 Q. B. 1; *The Glendarroch*, [1894] P. 226, 235, C. A.; see, for example, title CARRIERS, Vol. IV., p. 28, note (*b*). As to the introduction of such conditions, see pp. 427, 428, *ante*.

(*s*) *Bettany* v. *Waine* (1885), 1 T. L. R. 588, citing *Wakelin* v. *London and South Western Rail. Co.* (1884), [1896] 1 Q. B. 189, n., C. A., *per* BOWEN, L.J., at p. 193, n.

(*t*) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41, *per* Lord WATSON, at p. 47; see *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155.

(*a*) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41, *per* Lord HALSBURY, L.C., at p. 45.

(*b*) See p. 445, *post*.

(*c*) *Radley* v. *London and North Western Rail. Co.* (1876), 1 App. Cas. 754; *Reynolds* v. *Tilling* (*Thomas*), *Ltd.* (1903), 19 T. L. R. 539; *Butterly* v. *Drogheda Corporation*, [1907] 2 I. R. 134, C. A.; *Mills* v. *Armstrong*, *The "Bernina"* (1888), 13 App. Cas. 1, 5.

(*d*) *The Ovingdean Grange*, [1902] P. 208, C. A. As to effective cause, see pp. 378 *et seq.*, *ante*.

(*e*) *Radley* v. *London and North Western Rail. Co.*, *supra*, *per* Lord PENZANCE, at p. 759; *Cayzer* v. *Carron Co.* (1884), 9 App. Cas. 873; *H.M.S. Sans Pareil*, [1900] P. 267, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 287.

(*f*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; see title MASTER AND SERVANT, Vol. XX., p. 136.

unless the act is one which would not in the ordinary course be within the scope of the employment of servants of that class (*g*).

SECT. 1. Burden of Proof.

Principal and agent.

**750.** Where it is sought to make a principal liable for the negligence of his agent, the burden of proving that the act complained of was within the scope of the agent's authority is upon the plaintiff (*h*); but he may discharge the burden by proving that the act is a necessary consequence of some act expressly authorised by the principal, or is one of a class of acts within the apparent authority of the agent (*i*).

## SECT. 2.—*Presumption of Negligence: Res Ipsa Loquitur.*

In cases where established facts lead to inference of defendant's negligence.

**751.** An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff (*k*) occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence (*l*). To these cases the maxim *res ipsa loquitur* applies. Where, therefore, there is a duty upon the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance upon the defendant to disprove his liability (*m*). In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable (*n*), and this inference is strengthened if the

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(*g*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318; *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530, C. A.; see *Forsyth* v. *Manchester Corporation* (1912), *Times*, 23rd March; and see title MASTER AND SERVANT, Vol. XX., p. 136.

(*h*) See p. 435, *ante*; title AGENCY, Vol. I., pp. 211—214.

(*i*) *Ibid.*

(*k*) See title EVIDENCE, Vol. XIII., pp. 433 *et seq.*

(*l*) *Byrne* v. *Boadle* (1863), 2 H. & C. 722 (where a barrel of flour fell from an upper floor of the defendant's warehouse on the plaintiff, who was then passing on the highway beneath); compare *Briggs* v. *Oliver* (1866), 4 H. & C. 403 (a somewhat similar case, where, however, the court was divided, MARTIN, B., dissenting from the decision on the ground that without calling further evidence the inference that the defendant was negligent was insufficiently certain).

(*m*) *Ibid.*; *Burke* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1870), 22 L. T. 442 (where the plaintiff was injured by a train, in which he was travelling, running into stationary buffers); *Chapronière* v. *Mason* (1905), 21 T. L. R. 633, C. A. (where the presence of a stone in a bun was held to be *primâ facie* evidence of negligence, and to throw on the defendant the burden of rebutting it). The maxim *res ipsa loquitur* has no application to master and servant cases where negligence on the part of an employer must be proved affirmatively (*Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748, H. L.).

(*n*) *Carpue* v. *London and Brighton Rail. Co.* (1844), 5 Q. B. 747, as interpreted in *Hanson* v. *Lancashire and Yorkshire Rail. Co.* (1872), 20 W. R. 297; *Skinner* v. *London, Brighton and South Coast Rail. Co.* (1850), 5 Exch. 787. In these cases collisions occurred between trains belonging to the same railway company on the same line of rails. The principle was carried a step further in *Ayles* v. *South Eastern Rail. Co.* (1868), L. R. 3 Exch. 146, a collision case, where one of the trains belonged to a company

SECT. 2. **Presumption of Negligence Res Ipsa Loquitur.**

injurious agency is inanimate (*o*). If the surrounding circumstances are not wholly within the defendant's control (*p*), or the injurious agency is animate (*q*), there is frequently no certain inference, and the plaintiff will not have discharged the burden without proof of some negligent act or omission on the part of the defendant. Injuries to animals do not give rise to any certain inference if the facts are consistent with the animals having injured themselves (*r*).

In cases where cause of accident is unknown.

**752.** The cases in which the maxim *res ipsa loquitur* applies are to be distinguished from those in which the cause of the accident is unknown (*s*). In the one case further evidence is not required from the plaintiff because the inference is already clear; in the other case it is not required because it would be impossible to give it. The effect of the distinction is that, in the one case, the defendant

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having running powers over the line of the other company—the latter being considered to have control of both trains. A railway embankment which gave way owing to its being badly constructed (*Great Western Rail. Co. of Canada* v. *Braid* (1863), 1 Moo. P. C. C. (N. S.) 101), and running a train over a rail known to be defective (*Pym* v. *Great Northern Rail. Co.* (1861), 2 F. & F. 619), have been held to be matters so much within the defendant's control as to raise the presumption of its negligence.

(*o*) *Scott* v. *London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, Ex. Ch.; *Kearney* v. *London and Brighton Rail. Co.* (1871), L. R. 6 Q. B. 759, Ex. Ch.; compare *Higgs* v. *Maynard* (1866), Har. & Ruth. 581 (accident due to the fall of a ladder, where the plaintiff was nonsuited on the ground that the ladder was not shown to be in the defendant's control); *Crisp* v. *Thomas* (1890), 62 L. T. 810 (scholar injured by the fall of a blackboard).

(*p*) This must usually be the case in accidents upon a highway resulting from collision or running down (*Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652, C. A., *per* FLETCHER MOULTON, L.J., at p. 663; compare *Hammack* v. *White* (1862), 11 C. B. (N. S.) 588; *Cotton* v. *Wood* (1859), 8 C. B. (N. S.) 568). But it is not the case where the accident is due to inherent defects which were or should have been within the defendant's knowledge and power to control (*Christie* v. *Griggs* (1809), 2 Camp. 79; *Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390); or where the injury is done to a fixed object, such as a lamp-post, which is properly placed upon the highway (*Walton (Isaac) & Co., Ltd.* v. *Vanguard Motor Bus Co.* (1908), 72 J. P. 505; *Barnes Urban District Council* v. *London General Omnibus Co.* (1908), 73 J. P. 68). In the case of accidents on railways, collisions between trains on the same line of rails are *primâ facie* accidents which could have been controlled (see note (*n*), p. 439, *ante*), but where a collision is with cattle at a private level crossing there is no certain inference of negligence against the railway company (*Patchell* v. *Irish North Western Rail. Co.* (1871), 6 I. R. C. L. 117). Injury to a passenger from a train upon another line of rails (*Hanson* v. *Lancashire and Yorkshire Rail. Co.* (1872), 20 W. R. 297), or injury to a passenger due to his getting out before the carriage in which he is travelling is drawn up at the platform (*Bridges* v. *North London Rail. Co.* (1871), L. R. 6 Q. B. 377, Ex. Ch.; reversed (1874), L. R. 7 H. L. 213), does not raise a certain inference of negligence against a railway company.

(*q*) *Hammack* v. *White*, *supra*; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145; see *Cooper* v *Barton* (1810), 3 Camp. 5, n.; *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430; *Ellis* v. *Banyard* (1911), 28 T. L. R. 122, C. A.

(*r*) *Russell* v. *London and South Western Rail. Co.* (1908), 24 T. L. R. 548, C. A.; see *Cooper* v. *Barton*, *supra*; *Smith* v. *Midland Rail. Co.* (1887), 57 L. T. 813.

(*s*) *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72; see *The Calderon* (1912), *Times*, 26th March.

is liable if he does not produce sufficient evidence to counteract the inference; in the other case, the court is left to decide, upon such facts as are available, whether negligence on the part of the defendant is the more reasonable inference or not (*t*).

SECT. 2. **Presumption of Negligence: Res Ipsa Loquitur.**

In cases where the injury is caused by the use of tackle or machinery for which the defendant is responsible there is no immediate inference that the defendant is at fault (*a*), but if the injury is traced directly to some defect in the tackle or machinery it is not necessary for the plaintiff to show the precise nature of the defect, since the inference from the fact of the defect is sufficient to throw upon the defendant the burden of showing that the defect was one for which he was not to blame (*b*).

Injury caused by things for which defendant is responsible.

In cases where the facts relating to the alleged negligence are peculiarly within the knowledge of the defendant, the burden of disproving the inference alleged by the plaintiff to follow from them lies upon the defendant (*c*).

Facts peculiarly within defendant's knowledge.

**753.** The doctrine of *res ipsa loquitur* will not readily be applied to an accident where from the nature of things the probability that the accident is due to negligence is no greater than that it is due to some other cause (*d*). But it may be applicable where the probability that the accident is due to negligence is materially greater than that it is due to any other cause, and the circumstances directly contributing to the accident are such as should have been within the control of the defendant (*e*).

Application of doctrine to probabilities, equal and unequal.

## SECT. 3.—*Functions of Judge and Jury.*

**754.** In cases where the subject-matter of the action is negligence, the principle to be applied, in order to define the respective functions of the judge and jury, is that it is the province of the judge to decide

General principle.

(*t*) *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72; *Farrell* v. *Limerick Corporation* (1911), 45 I. L. T. 169; *Flannery* v. *Waterford and Limerick Rail. Co.* (1877), 11 I. R. C. L. 30, *per* PALLES, C.B.

(*a*) *Macfarlane* v. *Thomson* (1884), 22 Sc. L. R. 179.

(*b*) *Ibid.*; see *Walker* v. *Olsen* (1882), 9 R. (Ct. of Sess.) 946; *Fraser* v. *Fraser* (1882), 9 R. (Ct. of Sess.) 896; *Milne* v. *Townsend* (1892), 29 Sc. L. R. 747; *The Calderon* (1912), *Times*, 26th March.

(*c*) *Hibbs* v. *Ross* (1866), L. R. 1 Q. B. 534, *per* BLACKBURN, J., at p. 543; and see title EVIDENCE, Vol. XIII., p. 435.

(*d*) *Cotton* v. *Wood* (1860), 8 C. B. (N. S.) 568; *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115; but see *Clerk* v. *Petrie* (1879), 16 Sc. L. R. 626 (where it was held that a man was presumed to be negligent in running over, while driving, a foot-passenger crossing the road, there being nothing unusual in the circumstances and it being broad daylight).

(*e*) *Watson* v. *Weekes* (1887), unreported, but referred to in the judgment of SMITH, J., in *Tollhausen* v. *Davies* (1888), 57 L. J. (Q. B.) 392 (where the fact that a horse harnessed to a cart and without any driver was running away was held to be more consistent with negligence than with care); *Snee* v. *Durkie* (1903), 6 F. (Ct. of Sess.) 42; compare Lord YOUNG's dissenting judgment in *Smith* v. *Wallace & Co.* (1898), 35 Sc. L. R. 583; *Cox* v. *Burbidge* (1863), 13 C. B. (N. S.) 430 (where a horse was loose on a highway, but there was nothing to point to that being the fault of the defendant, and there was held to be no evidence of negligence); see also *Ellis* v. *Banyard* (1911), 28 T. L. R. 122, C. A.

SECT. 3. **Functions of Judge and Jury.**

whether or not there is evidence on which the jury can reasonably find negligence, either by direct proof (*f*) or by inference (*g*), and the province of the jury to say whether or not negligence is in fact established or ought to be inferred (*h*).

Preliminary questions.

In determining whether there is any reasonable evidence of negligence, the judge may have to decide some preliminary question of fact, or some questions of mixed fact and law, and it is his duty to determine any such questions by himself after hearing the evidence upon them when evidence is necessary (*i*). He may proceed upon the common knowledge and experience of mankind where simple operations or ordinary conditions are in question (*k*).

When plaintiff may be nonsuited, or case withdrawn from jury.

**755.** A judge may nonsuit or withdraw the case from the jury:—

(1) Where a *primâ facie* case is not made out, for example, (i.) where there is no evidence given on behalf of the plaintiff of negligence on the part of the defendant (*l*); (ii.) where there is a mere *scintilla* of evidence of negligence (*m*); (iii.) where the facts alleged by the plaintiff are at least equally (*n*) consistent with the injury having been caused by the plaintiff's negligence;

(*f*) *Flannery* v. *Waterford and Limerick Rail. Co.* (1877), 11 I. R. C. L. 30; see title EVIDENCE, Vol. XIII., p. 429.

(*g*) *Bridges* v. *North London Rail. Co.* (1874), L. R. 7 H. L. 213, reversing (1871), L. R. 6 Q. B. 377, Ex. Ch., as explained in *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193.

(*h*) See cases cited in note (*g*), *supra*; *Ryder* v. *Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.; compare *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317; and see *Wright* v. *Midland Rail. Co.* (1885), 1 T. L. R. 406, n., C. A. (where the principles laid down by the Divisional Court, in S. C. (1884), 51 L. T. 539, were approved, but the decision of that court as to the application of those principles reversed); see also *Brown* v. *Great Western Rail. Co.* (1885), 1 T. L. R. 406, where *Wright* v. *Midland Rail. Co.*, *supra*, was followed, and *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q. B. D. 70, C. A., held to be decided wrongly.

(*i*) See title EVIDENCE, Vol. XIII., pp. 421, 428; and see *Wright* v. *Midland Rail. Co.*, *supra*, in which case LINDLEY, L.J., at p. 411, n., dissented from the majority of the court only in applying the particular principles to the facts of that case.

(*k*) *Loughney* v. *Caledonian Rail. Co.* (1902), 39 Sc. L. R. 289 (where the alleged negligence consisted in failing to provide a crane or block and tackle to unload barrels from a platform on to a lorry of about the same height).

(*l*) *Metropolitan Rail. Co.* v. *Jackson*, *supra*; *Wright* v. *Midland Rail. Co.*, *supra*; *Curtin* v. *Great Southern and Western Rail. Co. of Ireland* (1887), 22 L. R. Ir. 219, C. A.; *Callender* v. *Carlton Iron Co.* (1894), 10 T. L. R. 366, H. L., affirming (1893), 9 T. L. R. 646, C. A.; compare *Dallas* v. *Great Western Rail. Co.* (1893), 9 T. L. R. 344, C. A. But on the case being opened he cannot at once nonsuit the plaintiff without his counsel's consent and without hearing the evidence tendered by him (*Fletcher* v. *London and North Western Rail. Co.*, [1892] 1 Q. B. 122, C. A.). In *Newman* v. *London and South Western Rail. Co.* (1890), 7 T. L. R. 138, a nonsuit was entered by STEPHEN, J., after verdict for plaintiff by the jury.

(*m*) *Toomey* v. *London, Brighton and South Coast Rail. Co.* (1857), 3 C. B. (N. S.) 146, *per* WILLIAMS, J., at p. 150; see *Doorman* v. *Jenkins* (1834), 2 Ad. & El. 256; *Abbott* v. *Freeman* (1876), 35 L. T. 783, C. A.

(*n*) *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; compare *Midland Rail. Co.* v. *Bromley* (1856), 17 C. B. 372; *Hull* v.

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(2) Where, although negligence on the part of the defendant is established, it would be unreasonable for any jury to find that it was the natural or effective cause of the injury (*o*), or where a complete answer, such as inevitable accident, is conclusively established by the defendant (*p*);

(3) Where on the undisputed facts of the case it appears that the accident was directly caused by the plaintiff's own negligence, although there may have been on these facts some negligence on the part of the defendant (*q*); but this power should not be exercised except in a very clear case, where the evidence is so strong that it would be wholly unreasonable for the jury to find that the plaintiff had not caused the accident by his own negligence (*r*).

*Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 289. This applies only to cases where, upon the facts alleged by the plaintiff, the inference that the injury is due to his own negligence is as natural as that it was due to the negligence of the defendant. It does not apply to cases where, after a *primâ facie* case is alleged by the plaintiff, there is contradictory evidence of fact (see *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155), or where there is a mere balance of testimony (*Smith* v. *South Eastern Rail. Co.*, [1896] 1 Q. B. 178, C. A.; see *Wakelin* v. *London and South Western Rail. Co.* (1884), reported [1896] 1 Q. B. 189, n., C. A., *per* BOWEN, L.J., at p. 196, n.).

(*o*) *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L. R. 4 C. P. 739. The law there laid down was approved in *Gee* v. *Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161, Ex. Ch., but the application of it to the particular facts was questioned; and see *Wright* v. *Midland Rail. Co.* (1885), 1 T. L. R. 406, n., C. A.; *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193.

(*p*) *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A.

(*q*) *Skelton* v. *London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631; compare *James* v. *Great Western Rail. Co.* (1886), L. R. 2 C. P. 634, n.; and see *Falkiner* v. *Great Southern and Western of Ireland Rail. Co.* (1871), 5 I. R. C. L. 213; *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 T. L. R. 561, C. A.; *Sayer* v. *Hatton* (1885), Cab. & El. 492; *Wright* v. *Midland Rail. Co.* (1884), 51 L. T. 539; compare S. C., 1 T. L. R. 406, n., C. A.; *Griffiths* v. *East and West India Dock Co.* (1889), 5 T. L. R. 371, C. A.; *Coyle* v. *Great Northern Rail. Co. of Ireland* (1887), 20 L. R. Ir. 409.

(*r*) *Griffiths* v. *East and West India Dock Co.*, *supra*. A different view was taken in *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q. B. D. 70, C. A., where it was laid down that the plaintiff must prove affirmatively that he had not contributed to the accident by his negligence, and if he failed to do this he could be nonsuited; but in *Wright* v. *Midland Rail. Co.* (1885), 1 T. L. R. 406, n., C. A., BRETT, M.R., at pp. 409, 410, stated that he regretted his decision in *Davey* v. *London and South Western Rail. Co.*, *supra*, although he remarked in *Wakelin* v. *London and South Western Rail. Co.*, *supra*, at p. 191, that he did not recede from the principles laid down in *Davey* v. *London and South Western Rail. Co.*, *supra*. However, in *White* v. *Barry Rail. Co.* (1899), 15 T. L. R. 474, 475, C. A., reversed on other grounds (1901), 17 T. L. R. 644, H. L., the court stated that the judgment of the majority in *Davey* v. *London and South Western Rail. Co.*, *supra*, was wrong. In *Holland* v. *North Metropolitan Tramways Co.* (1886), 3 T. L. R. 245, MANISTY, J., had previously expressed a similar view. In *Yarmouth* v. *France* (1887), 19 Q. B. D. 647, Lord ESHER, M.R., at p. 654, stated that a judge has no right to say that the evidence of contributory negligence on the part of the plaintiff was conclusive, but that it should be left to the jury to consider; but this was *obiter*, and, in so far as it conflicts with the cases cited in

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Cases which must not be withdrawn from jury.

A judge may not withdraw the case from the jury:—

(1) Where there is material evidence as to the actual facts, but such evidence is conflicting, even although the evidence may be very strong on one side and weak on the other (*s*);

(2) Where the material primary facts are undisputed, but two different inferences may be reasonably drawn by different minds from those facts (*t*);

(3) Whenever some ground exists on which a jury may reasonably find a verdict either way (*a*);

(4) Where, although negligence on the defendant's part is established, the defendant sets up a defence about which there is some conflict of evidence (*b*);

(5) Where contributory negligence is set up as a defence and the reasonableness of the plaintiff's conduct is called into question (*c*), or where there is a conflict as to whether the negligence of the plaintiff or the defendant was the direct and effective cause of the accident (*d*).

support of the principle stated in the text, *supra*, it is thought not to be law.

(*s*) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; see *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q. B. D. 440, C. A., where, although the action was one for malicious prosecution, BOWEN, L.J., at p. 456, dealt generally with the question; *Clayards* v. *Dethick* (1848), 12 Q. B. 439.

(*t*) *Wright* v. *Midland Rail. Co.* (1885), 1 T. L. R. 406, n., C. A.; compare *Bridges* v. *North London Rail. Co.* (1874), L. R. 7 H. L. 213; *Clarke* v. *Midland Rail. Co.* (1880), 43 L. T. 381; *Flannery* v. *Waterford and Limerick Rail. Co.* (1887), 11 I. R. C. L. 30.

(*a*) *Ruddy* v. *London and South Western Rail. Co.* (1892), 8 T. L. R. 658, C. A. In this case GRANTHAM, J., had entered judgment for defendants, notwithstanding a verdict of a jury in plaintiff's favour, on the ground that from plaintiff's own evidence it was clear that he had walked straight into the cart that injured him: the Court of Appeal held, however, that, as there was evidence that at the time of the impact the cart was going at a dangerous speed, it might be that the plaintiff, although he saw the cart coming, might reasonably not have expected it to be upon him so quickly, and that therefore the jury ought to have the opportunity of giving a decision; compare *Doorman* v. *Jenkins* (1834), 2 Ad. & El. 256; *Leishmann* v. *London, Brighton and South Coast Rail. Co.* (1871), 23 L. T. 712.

(*b*) *E.g.*, defence of inevitable accident, or *volenti non fit injuria* (*Whitby* v. *Brock & Co.* (1888), 4 T. L. R. 241, C. A.; see pp. 467, 476, *post*).

(*c*) *Robson* v. *North Eastern Rail. Co.* (1876), 2 Q. B. D. 85, C. A., explaining *Bridges* v. *North London Rail. Co.*, *supra*; *Walton* v. *London, Brighton and South Coast Rail. Co.* (1866), Har. & Ruth. 424; compare *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798 (where the court declined to lay down arbitrary rules, such as that there must be contributory negligence if the plaintiff rushes heedlessly into danger, or that there cannot be such negligence if he does so to save another's life); *Woolley* v. *Scovell* (1828), 3 Man. & Ry. (K. B.) 105; *Hawkins* v. *Cooper* (1838), 8 C. & P. 473 (where the defendant's cart was being driven carelessly and on the wrong side of the road, but there was some evidence that the plaintiff crossed the road in such a manner as to bring disaster on herself: it was held that the case was one for the jury to consider); compare *Leishmann* v. *London, Brighton and South Coast Rail. Co.*, *supra*.

(*d*) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, explaining *Bridges* v. *North London Rail. Co.*, *supra*. These cases put an end to a series of conflicting decisions as to the occasions, chiefly in connection with

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**756.** If the jury find special facts, it is then the judge's duty to decide what is the legal effect of their finding, and his ruling may be appealed from (*e*).

Finding of special facts.

**757.** If the judge fails to direct the jury on a particular point set up in the defence, a new trial will not be granted at the instance of the defendant if the facts are such that any verdict for the defendant would have been against the weight of evidence (*f*).

When new trial not granted.

A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find (*g*).

# Part VII.—Contributory Negligence.

A defence to a claim for

**758.** In an action for injuries arising from negligence it is a defence if the defendant proves that the plaintiff, by some negligence on his own part, directly contributed to the injury in the sense that it formed a material part of the effective cause thereof (*h*). When this is proved the plaintiff's negligence is said to be contributory (*i*).

"level crossing," "invitation to alight," and "slamming door" cases, in which the judge was right in withdrawing the case from a jury, *e.g.*, *Siner* v. *Great Western Rail. Co.* (1869), L. R. 4 Exch. 117, Ex. Ch.; *Cockle* v. *London and South Eastern Rail. Co.* (1872), L. R. 7 C. P. 321, Ex. Ch.; *Praeger* v. *Bristol and Exeter Rail. Co.* (1871), 24 L. T. 105, Ex. Ch.; *London, Brighton and South Coast Rail. Co.* (1868), 18 C. B. (N. S.) 225; *Fordham* v. *Brighton Rail. Co.* (1869), L. R. 4 C. P. 619, Ex. Ch.; *Ellis* v. *Great Western Rail. Co.* (1874), L. R. 9 C. P. 551, Ex. Ch.; *Finegan* v. *London and North Western Rail. Co.* (1889), 5 T. L. R. 598 (where it was held that, where the question is which of two drivers of vehicles is in fault, a nonsuit is not justified); *Fordham* v. *Brighton Rail. Co.*, *supra*; *North Eastern Rail. Co.* (*Directors etc.*) v. *Wanless* (1874), L. R. 7 H. L. 12.

(*e*) *Lloyd* v. *Woolland Brothers* (1902), 19 T. L. R. 32, C. A.; see *McCauley* v. *Great Northern, Piccadilly and Brompton Rail. Co.* (1909), *Times*, 30th April; and see, generally, title EVIDENCE, Vol. XIII., pp. 428 *et seq.*

(*f*) *Great Western Rail. Co. of Canada* v. *Braid* (1863), 1 Moo. P. C. C. (N. S.) 101; *Ford* v. *Lacey* (1861), 7 H. & N. 151; compare *Wakeman* v. *Robinson* (1823), 1 Bing. 213; and see title PRACTICE AND PROCEDURE.

(*g*) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; see *Cox* v. *English, Scottish, and Australian Bank*, [1905] A. C. 168, P. C.

(*h*) As to effective or proximate cause, see pp. 378 *et seq.*, *ante*.

(*i*) *Tuff* v. *Warman* (1858), 5 C. B. (N. S.) 573; *Walton* v. *London, Brighton and South Coast Rail. Co.* (1866), 14 L. T. 253; see *Marriott* v. *Stanley* (1840), 1 Man. & G. 568; *Butterfield* v. *Forrester* (1809), 11 East, 60, followed in *Bridge* v. *Grand Junction Rail. Co.* (1838), 3 M. & W. 244; *Witherley* v. *Regent Canal Co.* (1862), 12 C. B. (N. S.) 2; *Clayards* v. *Dethick* (1848), 12 Q. B. 439; *Coyle* v. *Great Northern Rail. Co. of Ireland* (1887), 20 L. R. Ir. 409; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; *Ellis* v. *Great Western Rail. Co.* (1874), L. R. 9 C. P. 551, approving

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Negligence on the part of the plaintiff which is only remote, and is not a substantial cause of the accident, does not properly come within the term—*causa proxima non remota spectatur* (*j*). It is ordinarily and properly applied only to cases in which both parties are alleged to have been negligent (*k*).

Mere negligence of plaintiff does not suffice.

**759.** The fact that there has been negligence on the part of the plaintiff which has contributed to cause the injury does not of itself give rise to the defence of contributory negligence so as to disentitle him from recovering (*l*). It is still open to the plaintiff to establish that, notwithstanding his (the plaintiff's) negligence, the defendant could by the exercise of ordinary care and diligence have avoided the injury which happened (*m*).

What must be proved.

In order that a plea of contributory negligence (*n*) may be successful, it must be shown either that there was negligence on the part of the plaintiff which contributed to the accident and that the defendant could not by using ordinary care have avoided the accident (*o*), or that, notwithstanding the defendant's negligence, the plaintiff could, by exercising ordinary

*Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258; *Holden* v. *Liverpool New Gas and Coke Co.* (1846), 3 C. B. 1.

(*j*) *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217; *Florence* v. *Mann* (1890), 28 Sc. L. R. 215; *M'Naughton* v. *Caledonian Rail. Co.* (1858), 21 Dunl. (Ct. of Sess.) 160; *Sills* v. *Brown* (1840), 9 C. & P. 601; *Dowell* v. *General Steam Navigation Co.* (1855), 5 E. & B. 195; see *Walters* v. *Pfeil* (1829), Mood. & M. 363 (where it was said that a defendant may be liable for injuring a neighbour's property by pulling down his own negligently, although the plaintiff may himself have failed to take precautions which he might have taken).

(*k*) See *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A., *per* BOWEN, L.J., at p. 697.

(*l*) *Tuff* v. *Warman* (1858), 5 C. B. (N. S.) 573; *Radley* v. *London and North Western Rail. Co.* (1876), 1 App. Cas. 754; considered in *Mitchell* v. *Caledonian Rail. Co.* (1909), 46 Sc. L. R. 517; compare *Raisin* v. *Mitchell* (1839), 9 C. & P. 613; see *Geeves* v. *London General Omnibus Co., Ltd.* (1901), 17 T. L. R. 249; compare *Bridge* v. *Grand Junction Rail. Co.* (1838), 3 M. & W. 244; *H.M.S. Sans Pareil*, [1900] P. 267, C. A.; for other cases relating to collisions at sea, see title SHIPPING AND NAVIGATION.

(*m*) *Springett* v. *Ball* (1865), 4 F. & F. 472; *M'Dermaid* v. *Edinburgh Street Tramways Co.* (1884), 22 Sc. L. R. 13. As to cases where the property injured is an obstruction to a highway, as, for example, an oyster bed in a navigable river, see *Colchester Corporation* v. *Brook* (1845), 7 Q. B. 339; *Dimes* v. *Petley* (1850), 15 Q. B. 276; compare *Lack* v. *Seward* (1829), 4 C. & P. 106 (barge left moored in river); *Petrie* v. *S.S. Rostrevor (Owners)*, [1898] 2 I. R. 556, C. A.

(*n*) In *Doyle* v. *Kinahan* (1869), 17 W. R. 679 (Ir. Ex.), it was held that by a plea of contributory negligence a defendant implies that he could not have avoided the accident; compare *Tuff* v. *Warman*, *supra*.

(*o*) *Tuff* v. *Warman*, *supra*; *Radley* v. *London and North Western Rail. Co.*, *supra*, at p. 759, where the law was thus stated: "The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident"; but this must be qualified by adding, "yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Compare *Cayzer, Irvine & Co.* v. *Carron Co.* (1884), 9 App. Cas. 873; *H.M.S. Sans Pareil*, *supra*; *Spaight* v. *Tedcastle*, *supra*; see also note (*q*), p. 447, *post*.

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The test to be applied.

care (*p*), have avoided the accident (*q*). Where, therefore, the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was the real direct and effective cause of the misfortune (*r*). When the acts of negligence alleged are not contemporaneous this test in general results in throwing the responsibility on that party who last had an opportunity of avoiding, by the exercise of ordinary care or skill, the effect of the negligence of the other, and who failed to do so (*s*). If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best only a matter of doubt, the defendant is liable (*t*).

(*p*) The degree of care to be taken by the plaintiff varies with the time, place, and surrounding circumstances (*Smith* v. *Browne* (1891), 28 L. R. Ir. 1; *Ramsey* v. *Thomson & Sons* (1881), 9 R. (Ct. of Sess.) 140); and see p. 360, *ante*.

(*q*) *Davies* v. *Mann* (1842), 10 M. & W. 546; *Bridge* v. *Grand Junction Rail. Co.* (1838), 3 M. & W. 244; *Walton* v. *London, Brighton and South Coast Rail. Co.* (1866), 14 L. T. 253; *Watson* v. *Ellis* (1885), 1 T. L. R. 317; *De Teyron* v. *Waring* (1885), 1 T. L. R. 414; *Lee* v. *Nixey* (1890), 63 L. T. 285; compare *Butterfield* v. *Forrester* (1809), 11 East, 60; see *Butterley* v. *Drogheda Corporation*, [1907] 2 I. R. 134, approving *Reynolds* v. *Tilling* (1903), 19 T. L. R. 539; *Dowell* v. *General Steam Navigation Co.* (1855), 5 E. & B. 195; compare *Marriott* v. *Stanley* (1840), 1 Man. & G. 568 (where it was held not to be a misdirection to ask the jury to say whether the plaintiff had been so deficient in reasonable and ordinary care that he had brought the injury on himself); and see *Ellis* v. *Great Western Rail. Co.* (1874), L. R. 9 C. P. 551; *Walker* v. *Midland Rail. Co.* (1886), 2 T. L. R. 450. In some of the older cases, *e.g.*, *Vanderplank* v. *Miller* (1828), 1 Mood. & M. 169; *Pluckwell* v. *Wilson* (1832), 5 C. & P. 375; *Vennall* v. *Garner* (1832), 1 Cr. & M. 21; *Luxford* v. *Large* (1833), 5 C. & P. 421; *Williams* v. *Holland* (1833), 6 C. & P. 23; *Woolf* v. *Beard* (1838), 8 C. & P. 373; *Raisin* v. *Mitchell* (1839), 9 C. & P. 613; *Martin* v. *Great Northern Rail. Co.* (1855), 16 C. B. 179; and to a certain extent in *Sills* v. *Brown* (1840), 9 C. & P. 601; *Dowell* v. *General Steam Navigation Co.*, *supra*; *Witherley* v. *Regent Canal Co.* (1862), 12 C. B. (N. S.) 2, the rule laid down, that a plaintiff who in any way contributed to the accident by his own negligence could not recover against the defendant, seems to have been inadequately stated, since it was not qualified by adding that if the defendant could reasonably have avoided the accident the plaintiff could still succeed, notwithstanding his negligence; see note (*o*), p. 446, *ante*. This qualification was first definitely stated in *Radley* v. *London and North Western Rail. Co.* (1876), 1 App. Cas. 754, though it had been substantially adopted in those cases, prior to 1876, which are cited in the first part of this note.

(*r*) In *Butterley* v. *Drogheda Corporation*, *supra*, Lord O'BRIEN, C.J., at p. 138, said that in his view the best questions to be left to the jury were: (1) Was the defendant guilty of negligence? (2) If so, was the defendant's negligence the real, direct and immediate cause of the misfortune? It was considered that these questions were less likely to confuse the jury than those usually left to them; compare *M'Evoy* v. *Waterford Steamship Co.* (1886), 18 L. R. Ir. 159; and see *Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc. L. R. 475.

(*s*) Compare *Walton* v. *London, Brighton and South Coast Rail. Co.*, *supra*; *Tuff* v. *Warman* (1858), 5 C. B. (N. S.) 573; *Davies* v. *Mann*, *supra*; *Morrison* v. *General Steam Navigation Co.* (1853), 8 Exch. 733; *Cayzer, Irvine Co.* v. *Carron Co.* (1884), 9 App. Cas. 873; *H.M.S. Sans Pareil*, [1900] P. 267, C. A.; *Avis* v. *Great Eastern Rail. Co.* (1892), 8 T. L. R. 693; *Smith* v. *Browne*, *supra*.

(*t*) *M'Martin* v. *Hannay* (1872), 10 Macph. (Ct. of Sess.) 411.

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Where, however, both by their negligence equally contribute to cause the injury the plaintiff cannot recover (*u*). Neither can he recover where there is contributory negligence by his servant (*v*) or by anyone else for whom he is responsible.

Effect of defendant's act as creating emergency or situation involving choice of course.

**760.** If the defendant by his negligence creates an emergency or a situation of unusual difficulty so as to cast on the plaintiff the burden of using more than ordinary care to avert an accident, the fact that the latter did not take such extraordinary care and so avoid the mishap does not by itself excuse the defendant (*a*).

Similarly, where the defendant's act places the plaintiff in such a situation as to involve the choice of one of two evils, the fact that he chooses that which turns out to be the only one which would have injured him does not of itself prevent his recovering against the defendant (*b*). If, however, the plaintiff's act resulted from a rash apprehension of a danger which was really non-existent, and his injury is attributable to that rashness and not to the defendant's negligence, he cannot recover (*b*).

(*u*) *Reynolds* v. *Tilling* (1903), 19 T. L. R. 539; *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199; see p. 437, *ante*.

(*v*) *The Egyptian* (1910), 102 L. T. 465, H. L. The same man was employed as night watchman by the plaintiff and was hired by the defendant to navigate his boat. While acting for the defendant he ran into and made a hole in the plaintiff's boat, which took in water. The servant then proceeded to act as night watchman, and owing to his negligence the leak was not discovered. As the vessel got lower in the water another hole came under water and she sank. It was held that the damage caused by the sinking was due to the contributory negligence of the plaintiff's servant, and was not therefore recoverable.

(*a*) *The Ovingdean Grange*, [1902] P. 208, C. A.; compare *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876.

(*b*) *Jones* v. *Boyce* (1816), 1 Stark. 493 (where owing to a defective rein the horses in a coach became ungovernable while going down a hill and ran into some piles, and the plaintiff chose to jump off the coach rather than run the risk of being overturned, it was held he could recover); *Chaplin* v. *Hawes* (1828), 3 C. & P. 554, followed in *Turley* v. *Thomas* (1837), 8 C. & P. 103; *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, *supra*. In *Flower* v. *Adam* (1810), 2 Taunt. 314, the facts were that the defendant's servants placed a large heap of lime rubbish in the highway; the dust from this frightened the plaintiff's horse, which ran towards a waggon; in avoiding the waggon the plaintiff pulled the horse round too much and collided with a heap of rubbish placed near by a third person: it was held that the plaintiff could not recover, as it was "owing to his not being a skilful charioteer" that he drove into the heap. It is thought that in a similar case nowadays the jury would be directed that if the defendant's negligence placed the driver in a difficulty he would not be disentitled by an error of judgment when in such a difficulty, nor would mere unskilfulness, under such circumstances, relieve the defendant from liability. In *Wilkinson* v. *Kinneil Cannel and Coking Coal Co., Ltd.* (1897), 34 Sc. L. R. 533, the plaintiff, together with his fellow-servant and his master's property, were placed in great danger by the negligence of defendant's servants; the plaintiff leapt out of danger, but without hesitation and in a moment of agitation he came back into it to save his fellow-servant and possibly his master's property: it was held that the

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**Contributory Negligence.**

Knowledge of plaintiff.

**761.** Knowledge by the plaintiff of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence; and it is a question of fact in each case whether such knowledge in the particular circumstances made it so unreasonable for the plaintiff to do what he did as to debar him from recovering (*c*).

Knowledge of dangers of railways and other public places.

**762.** The knowledge which a plaintiff has of the dangers of railways or other places where the public have rights of access, and of the precautions taken in respect of such dangers, may tend either to establish or to refute contributory negligence. On the one hand, the plaintiff must act reasonably with regard to the dangers which he knows, or ought to know, exist (*d*), and to any regulations or other precautions imposed for the purpose of avoiding them (*e*). On the other hand, he is entitled to rely on reasonable care and proper precautions being taken (*f*), and, in places to which the

jury must decide whether the plaintiff was doing what was right and reasonable, and whether his whole action was fairly attributable to the defendant's negligence; if so, defendant would be liable. Compare *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798.

(*c*) *E.g.*, *Smith* v. *Baker & Sons*, [1891] A. C. 325; and *Robertson* v. *Primrose & Co.* (1909), 47 Sc. L. R. 147 (servant working under a crane which was carrying stones); *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220 (knowledge of dangerous condition of steps in railway station and careful user of them when alternative route possible held not contributory negligence); *Stuart* v. *Evans* (1883), 49 L. T. 138; *Clayards* v. *Dethick* (1848), 12 Q. B. 439 (which can only be supported on the ground that the plaintiff was unaware of the danger (*Lax* v. *Darlington Corporation* (1879), 5 Ex. D. 28, C. A., *per* BRAMWELL, L.J., at p. 36)); *Thompson* v. *North Eastern Rail. Co.* (1860), 2 B. & S. 106; *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, 345; *Grant* v. *Drysdale* (1883), 20 Sc. L. R. 774; but compare *Dynen* v. *Leach* (1857), 26 L. J. (EX.) 221 (which appears inconsistent with the more recent decisions cited in this note in so far as it decided a judge might nonsuit); compare *Reney* v. *Kirkcudbright* (*Magistrates*), [1892] A. C. 264; *Ramage and Ferguson* v. *Forsyth* (1890), 28 Sc. L. R. 26 (servant falling through manhole while passing along an obviously dark and dangerous place).

(*d*) *Manning* v. *London and North Western Rail. Co.* (1907), 23 T. L. R. 222, C. A. (evidence admitted of platforms of equal depth at other stations); and see title CARRIERS, Vol. IV., p. 50; *Goldberg* v. *Glasgow and South Western Rail. Co.*, [1907] S. C. 1036 (passenger injured by starting of train); *The Highland Loch* (1912), 28 T. L. R. 213, H. L. (ketch injured by lying near launching place after warning).

(*e*) *Benson* v. *Furness Rail. Co.* (1903), 88 L. T. 268; *Drury* v. *North Eastern Railway*, [1901] 2 K. B. 322 (injury caused by shutting carriage door). Non-compliance with regulations which are habitually disregarded is not necessarily sufficient to establish negligence (*Dublin, Wicklow and Wexford Railway* v. *Slattery* (1878), 3 App. Cas. 1155).

(*f*) *Brown* v. *Great Western Rail. Co.* (1885), 52 L. T. 622; compare *Wilby* v. *Midland Rail. Co.* (1876), 35 L. T. 244 (where plaintiff chose to cross the line at a place where there was no crossing provided and tumbled into an excavation, and it was proved that a proper crossing was provided elsewhere; held that he could not recover. It seems that if there had been evidence that the defendants invited the plaintiff to go that way, or had habitually allowed persons to cross where they pleased, the defendants might have been liable); compare *Clarke* v. *Midland Rail. Co.* (1880), 43 L. T. 381 (where it was suggested that the plaintiff used a level crossing instead of a bridge because he said the defendants' servants were

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public have access, is entitled to assume the existence of such protection as the public have through custom become justified in expecting (*g*).

Illustrations.

Thus, to stand at the open door of a carriage while the train is slowing down and coming into the station (*h*), or to attempt to get into a train while in motion, although it may have been started while the passenger was opening the door (*i*), may amount to contributory negligence. But it is not necessarily contributory negligence to build a stack near to a railway line (*k*), nor yet to go upon private premises where there is a particular danger known to the owner, if the plaintiff is ignorant of its presence and no warning has been given (*l*), although under ordinary circumstances it is contributory negligence to wander about private premises in the dark (*m*); and persons who, without having business, go idly on to private premises where danger exists have only themselves to blame if they are injured (*n*).

Claims by servants.

**763**. Where a servant is injured by an accident due jointly to the negligence of third parties and to that of his employers, he

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accustomed to drive him off the latter); *Curtin* v. *Great Southern and Western Rail. Co. of Ireland* (1887), 22 L. R. Ir. 219, C. A.; *M'Donnell* v. *Great Southern and Western Rail. Co. of Ireland* (1888), 24 L. R. Ir. 369, C. A.; *Falkiner* v. *Great Southern and Western Rail. Co. of Ireland* (1871), 5 I. R. C. L. 213; and as to contributory negligence arising from a passenger leaning against the door of the carriage, see title CARRIERS, Vol. IV., p. 51; *Pickering* v. *Belfast Corporation*, [1911] 2 I. R. 224, C. A.; *Jenner* v. *South Eastern Rail. Co.* (1911), 27 T. L. R. 445; *London, Tilbury and Southend Rail. Co.* v. *Glasscock* (1903), 19 T. L. R. 305, H. L. (passenger alighting beyond platform); *Paterson* v. *London, Tilbury and Southend Rail. Co.* (1912), *Times*, 16th March, C. A.

(*g*) *Smith* v. *South Eastern Rail. Co.*, [1896] 1 Q. B. 178; *Dublin, Wicklow and Wexford Railway* v. *Slattery* (1878), 3 App. Cas. 1155; *Rosenbaum* v. *Metropolitan Water Board* (1910), 26 T. L. R. 510, *per* CHANNELL, J.; considered and new trial ordered on the question of danger (1911), 27 T. L. R. 103, C. A.

(*h*) *Folkes* v. *North London Rail. Co.* (1892), 8 T. L. R. 269.

(*i*) *Avis* v. *Great Eastern Rail. Co.* (1892), 8 T. L. R. 693.

(*k*) *Groom* v. *Great Western Rail. Co.* (1892), 8 T. L. R. 253; the reason given being that experience shows that trains run millions of miles with but few claims being made in respect of fires caused by them; compare *Dimmock* v. *North Stafford Rail. Co.* (1866), 4 F. & F. 1058.

(*l*) *Bird* v. *Holbrook* (1828), 4 Bing. 628; compare *Sarch* v. *Blackburn* (1830), 4 C. & P. 297 (plaintiff bitten by a dog).

(*m*) *Walker* v. *Midland Rail. Co.* (1886), 2 T. L. R. 450. See note (*h*), p. 390, *ante*; compare *Mackie* v. *Macmillan* (1898), 36 Sc. L. R. 137; *Fleming* v. *Eadie & Son* (1898), 35 Sc. L. R. 422; *Cairns* v. *Boyd* (1879), 6 R. (Ct. of Sess.) 1004; *Ramage and Ferguson* v. *Forsyth* (1890), 28 Sc. L. R. 26; and see note (*i*), p. 390, *ante*.

(*n*) *Smith* v. *Highland Rail. Co.* (1888), 26 Sc. L. R. 33; *Daly* v. *Arrol* (1886), 24 Sc. L. R. 150. Where a person bitten had no knowledge of the vicious nature of a dog it was said that even treading on its toes would not disentitle him from recovering (*Smith* v. *Pelah* (1747), 2 Stra. 1263 [1264]; but this cannot now be said to be law (*Charlwood* v. *Greig* (1851), 3 Car. & Kir. 46, 48); compare *Sarch* v. *Blackburn* (1830), 4 C. & P. 297, where it was held that a notice, "Beware of the dog," did not relieve the defendant from liability in respect of his dog biting a person on his premises, because the plaintiff was not able to read; and see note (*b*), p. 363, *ante*.

cannot recover against the former, as he cannot be in a better position in such a case than his employers (*o*).

Where a servant seeks to recover damages against his master the latter may set up contributory negligence as a defence (*p*), although the negligence complained of by the servant is the breach of a statutory duty (*q*).

Evidence.

It is *primâ facie* evidence of such contributory negligence if the servant continues in the service after being aware of the defect or negligence he complains of, but it is not conclusive (*r*), inasmuch as such knowledge does not necessarily disentitle him to recover, since the servant may have taken additional care on account of the known danger, or may have failed to appreciate the risk attached to his continuing to work (*s*). It is a question of fact in each case whether or not his continuing to work with such knowledge amounted to negligence (*t*).

Contributory negligence of third party.

**764.** A defendant cannot excuse himself for the consequences of his misconduct by proving that the plaintiff's injury was contributed to by the negligence of a third party (*a*). The plaintiff in such a

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(*o*) *Child* v. *Hearn* (1874), L. R. 9 Exch. 176 (where the servant of a railway company was injured in consequence of defendant's pigs straying on to the line through a fence which it was the company's duty to maintain). As to the doctrine of "identification," now obsolete, see p. 452, *post.*

(*p*) *Paterson* v. *Wallace* (1854), 1 Macq. 748; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 419. The master's duty to his servant is to take care that the latter is not induced to work under a notion that the tackle or machinery is staunch when the master knows or ought to know it is not so (*ibid.*); and, where the servant is put to work at dangerous machinery, to take care for the servant's safety (*Caswell* v. *Worth* (1856), 5 E. & B. 849; *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Exch. 130; *Clark* v. *Holmes* (1862), 7 H. & N. 937; see title MASTER AND SERVANT, Vol. XX., p. 131).

(*q*) *Caswell* v. *Worth* (1856), 5 E. & B. 849 (where it was held that the fact that the statute imposed a penalty for the breach of certain duties in fencing dangerous machinery made no difference, and that the servant could rely on the breach unless the injury suffered by him was really due to his own wrongful interference); *Iles* v. *Abercarn Welsh Flannel Co.* (1886), 2 T. L. R. 547, Div. Ct.; *Kelly* v. *Glebe Sugar Refining Co.* (1893), 30 Sc. L. R. 758; compare *Britton* v. *Great Western Cotton Co.*, *supra*, and *Groves* v. *Wimborne* (*Lord*), *supra*; and see cases cited in note (*c*), p. 424, *ante.*

(*r*) *Hoey* v. *Dublin and Belfast Junction Rail. Co.* (1870), 5 I. R. C. L. 206.

(*s*) *Clark* v. *Holmes*, *supra*; see title MASTER AND SERVANT, Vol. XX., p. 131

(*t*) *Clarke* v. *Holmes*, *supra*; *Kelly* v. *Glebe Sugar Refining Co.*, *supra* (where a boy of fifteen was injured by an unfenced shaft which he had approached unnecessarily while engaged in his own pursuits, it was held that it was for the jury to say whether in the circumstances the shaft was so manifestly dangerous to a boy of fifteen as to make him so much in fault in going near it as he did that he could not recover); and see p. 373, *ante.*

(*a*) *Abbott* v. *Macfie* (1863), 2 H. & C. 744; *Harrison* v. *Great Northern Rail. Co.* (1864), 3 H. & C. 231; *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Clarke* v. *Chambers* (1878), 3 Q. B. D. 327; *Rigby* v. *Hewitt* (1850), 5 Exch. 240, *per* POLLOCK, C.B., at p. 242; and see, generally, p. 380, *ante,*

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case can sue either of the persons who have been negligent, provided that his injury does not result from contributory negligence for which he is responsible (*b*). Accordingly, where a person travelling in a vehicle belonging to a third person is injured by the negligence of the defendant, he is entitled to recover against the latter notwithstanding that the driver of the vehicle in which the plaintiff is travelling may have been guilty of some negligence contributing to the accident (*c*). He is not identified with the negligence of the driver of the vehicle in which he is, merely because he is travelling in it (*d*). The proper test as to the liability in such a case is whether the negligence of the driver of the vehicle which collided with that in which the plaintiff was travelling wholly or in part caused the accident; if so, the plaintiff can recover, and the fact that there was negligence on the part of the driver of the vehicle in which the plaintiff was travelling makes no difference (*d*).

Effect of imminent danger justifying unusual course.

**765.** Where negligence on the part of the defendant is proved, an act which in ordinary circumstances would afford an answer to an action may be so justified by the imminence of the danger caused to the plaintiff, or some third party, that it will not afford an answer (*e*). It is a question of fact in each case (*f*), and the courts will not lay down any general principle that there cannot be contributory negligence even where the plaintiff's act was necessary to save life, although such necessity may often justify an act which would otherwise be unjustifiable

(*b*) *Greenland* v. *Chaplin* (1850), 5 Exch. 243. The defendant in that event cannot shelter himself behind the other negligent party, nor claim to share the damages with him; see *Devlin* v. *Belfast Corporation*, [1907] 2 I. R. 437, C. A. (compare *Illidge* v. *Goodwin* (1831), 5 C. & P. 190, *per* TINDAL, C.J., at p. 192, where it was held that, where a horsed vehicle was left unattended in the street and backed into a shop, the owner was liable whether or not the plaintiff's servant or a stranger had contributed to the accident by causing the horse to back); but see *Hayman* v. *Hewitt* (1798), Peake, Add. Cas. 170. In *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240, C. A., the responsibility of a master for the negligence of his servant was held to extend to a case in which, although the accident was immediately caused by a third person, yet that person's action arose from the servant's negligence, and was such that the servant might reasonably have foreseen. In that case *Illidge* v. *Goodwin*, *supra*, and *Lynch* v. *Nurdin* (1841), 1 Q. B. 29, were approved, and *Mann* v. *Ward* (1891), 8 T. L. R. 699, C. A., was doubted.

(*c*) *Mills* v. *Armstrong*, *The Bernina* (1888), 13 App. Cas. 1, overruling *Thorogood* v. *Bryan* (1849), 8 C. B. 115, and *Armstrong* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Exch. 47, in which the doctrine of identification was held to defeat the plaintiff's claim.

(*d*) *Mathews* v. *London Street Tramways Co.* (1888), 5 T. L. R. 3.

(*e*) *Roebuck* v. *Norwegian Titanic Co.* (1884), 1 T. L. R. 117. The ground of the decision apparently was that it was implied in the plaintiff's service that he should do anything he could to be of real use in saving his fellow-workman.

(*f*) *Wilkinson* v. *Kinneil Cannel and Coking Coal Co.* (1897), 34 Sc. L. R. 533.

(*g*) *Woods* v. *Caledonian Rail. Co.* (1886), 23 Sc. L. R. 798. As to the distinction between saving life and saving property, see *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295, C. A. (deviation on a voyage).

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Contributory negligence on the part of children.

**766.** A distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person (*h*), the reason being that the same standard of care cannot be expected from a child as from an adult (*i*). Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for itself at all (*k*), he cannot be said to be guilty of contributory negligence in regard to a matter beyond his appreciation; but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them (*l*).

Natural acts of children.

Where a child in doing an act which contributes to the accident is only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence (*m*); but the taking of reasonable precautions (*n*) by the defendant to protect a child against his own propensities, may afford evidence that the defendant was not negligent, and was therefore not liable (*o*).

(*h*) *Lynch* v. *Nurdin* (1841), 1 Q. B. 29, as explained in *Lygo* v. *Newbold* (1854), 9 Exch. 302; *Grizzle* v. *Frost* (1863), 3 F. & F. 622; *Crocker* v. *Banks* (1888), 4 T. L. R. 324 (girl aged seventeen omitting to wear protection mask); *Robinson* v. *Smith* (*W. H.*) (1901), 17 T. L. R. 423.

(*i*) *Lynch* v. *Nurdin*, *supra*; *Lay* v. *Midland Rail. Co.* (1875), 34 L. T. 30; *Forbes* v. *Aberdeen Harbour Commissioners* (1888), 15 R. (Ct. of Sess.) 323; *Frasers* v. *Edinburgh Street Tramways Co.* (1882), 20 Sc. L. R. 192; *Gardner* v. *Grace* (1853), 1 F. & F. 359; *Gibson* v. *Glasgow Police Commissioners* (1893), 30 Sc. L. R. 469 (where a child fell into unfenced water by a public playground).

(*k*) *Gardner* v. *Grace* (1858), 1 F. & F. 359 (child aged three and a half run over); *Campbell* v. *Ord and Maddison* (1873), 11 Sc. L. R. 54, and *M'Gregor* v. *Ross and Marshall* (1883), 20 Sc. L. R. 462 (see judgment of Lord YOUNG, at p. 468), in both of which cases a child of four was playing with a machine; and see *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, 236, 238, 241.

(*l*) *Frasers* v. *Edinburgh Street Tramways Co.*, *supra* (a boy of six accustomed to go to school alone every day knows that he must look out for traffic when crossing the road), distinguishing *Campbell* v. *Ord and Maddison*, *supra*, because in the latter case the child was injured by an unknown danger. In *Plantza* v. *Glasgow Corporation* (1910), 47 Sc. L. R. 688, a boy of five was held to be guilty of contributory negligence in walking into an obstruction on the footway; compare *Hughes* v. *Macfie* (1863), 2 H. & C. 744; *M'Lelland* v. *Johnstone* (1902), 39 Sc. L. R. 326; and see *Martin* v. *Ward* (1887), 24 Sc. L. R. 587..

(*m*) *Lynch* v. *Nurdin*, *supra* (children playing with an unattended horse and cart); *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A. (child climbing on to a rotten fence); compare *Jewson* v. *Gatti* (1886), 2 T. L. R. 441, decided on another ground; but see *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525, C. A. In *Mangan* v. *Atterton* (1866), L. R. 1 Exch. 239, the defendant, who had left unattended and unprotected a dangerous machine exposed for sale in a market place, was held not to be responsible for an injury received by a child in playing with it under very similar circumstances to those in *Lynch* v. *Nurdin*, *supra*; but MARTIN, B., and BRAMWELL, B., based their decisions on different grounds, and their ruling is questioned in *Clark* v. *Chambers* (1878), 3 Q. B. D. 327, 339.

(*n*) As to the precaution to be taken, see *Royan* v. *M'Lellans* (1889), 27 Sc. L. R. 79; *Ross* v. *Keith* (1888), 16 R. (Ct. of Sess.) 86; *Haughton* v. *North British Rail. Co.* (1892), 30 Sc. L. R. 111; and see p. 373, *ante*.

(*o*) *Bailey* v. *Neal* (1888), 5 T. L. R. 20; *McGregor* v. *Ross and Marshall*

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Negligence of person in control of child.

**767.** Where a child of tender years is under another person's control, that person's negligence, if it has contributed to the injury to the child, is a good defence to an action brought on behalf of the child (*a*).

Where the circumstances are such that it is impossible to take precautions for children different from those taken for adults, the negligent act of the person in charge of a child in allowing him to be present in such circumstances may be the real cause of the injury and may afford an answer to an action (*b*). Thus an action will not succeed where a child has been injured owing to the negligence of his parents or guardian in allowing him to go abroad alone, and so not preventing him from getting into danger (*c*).

# Part VIII.—Negligence Causing Death.

## SECT. 1.—*Civil Liability.*

No civil liability for death from negligence.

**768.** Apart from statutory provisions, there is no civil liability in tort for the death of a person as the result of negligence in cases where the cause of action is the wrong which caused the death (*d*). At common law such liability does not exist, since "*actio personalis moritur cum persona*" (*e*). Thus a husband cannot recover damages for the death of his wife (*f*), or a parent for that of his child (*g*), or

(1883), 20 Sc. L. R. 462; *Ross* v. *Keith* (1888), 26 Sc. L. R. 55; compare *Stiefsohn* v. *Brook, Bond & Co.* (1889), 5 T. L. R. 684.

(*a*) *Waite* v. *North Eastern Rail. Co.* (1859), E. B. & E. 728; and see note (*c*), *infra*.

(*b*) *Morran* v. *Waddell* (1883), 21 Sc. L. R. 28; *Grant* v. *Caledonian Rail. Co.* (1870), 9 Macph. (Ct. of Sess.) 258 (where a child was knocked down by a train at a level crossing). No doubt it would be unreasonable in these and other situations of similar danger to make defendants liable for not taking extraordinary precautions to protect young children; they ought not to be in such places by themselves; compare *Singleton* v. *Eastern Counties Rail. Co.* (1859), 7 C. B. (N. S.) 287. As to duty to take care where children are concerned, see, generally, p. 373, *ante*.

(*c*) *Schofield* v. *Bolton Corporation* (1910), 26 T. L. R. 230, C. A.; *Duff* v. *National Telephone Co.* (1889), 26 Sc. L. R. 512; *Morran* v. *Waddell, supra*; compare *Haughton* v. *North British Rail. Co.* (1892), 30 Sc. L. R. 111, and *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442 (where a child of over three years was injured while travelling with his mother and, although no ticket was taken for the child, he was held entitled to maintain an action; there was no negligence on the part of the mother which contributed to the accident); compare also *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655.

(*d*) *Jackson* v. *Watson*, [1909] 2 K. B. 193, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 202; see preamble to the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).

(*e*) *Baker* v. *Bolton* (1808), 1 Camp. 493; discussed in *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88; *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648, C. A.; *Jackson* v. *Watson, supra*; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 226.

(*f*) *Higgin* v. *Butcher* (1606), Yelv. 89; *Baker* v. *Bolton* (1808), 1 Camp. 493.

(*g*) *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648, C. A., dis-

a master for that of his servant (*h*). Nor in any such case can the cost of the funeral expenses be recovered (*i*).

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If, however, as a result of the negligence complained of, death does not immediately ensue, there may be liability for damages for loss of society or service during the period between the injury and the death, but the liability ceases to accrue at the moment of death (*k*).

Liability where death does not immediately ensue.

**769.** The personal representatives of one who is killed owing to an act of negligence cannot recover for the benefit of the estate for injuries to the deceased (*l*), even where the deceased has been put to expense thereby (*m*), but they can recover for injuries which have operated to the detriment of the real (*m*) or personal (*n*) estate of the deceased during the continuance of his lifetime (*o*).

Injuries to deceased's estate.

**770.** Where there is a cause of action independently of the wrong causing the death, such as a breach of contract, an action can be maintained and damage arising from the death may be included as an element of the damage (*p*).

Cause of action independent of tort.

SECT. 2.—*Civil Responsibility under the Fatal Accidents Acts* (*q*).

**771.** A person (which term includes a corporation) is liable (*r*) to an action for damages if another is killed by some wrongful

Who is responsible.

approving *Bedwell* v. *Golding* (1902), 18 T. L. R. 436; see *The Vera Cruz* (1884), 9 P. D. 88, 96.

(*h*) *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88.

(*i*) *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648, C. A., *per* Lord ALVERSTONE, C.J., at p. 658; compare *R.* v. *Vann* (1851), 21 L. J. (M. C.) 39.

(*k*) *Baker* v. *Bolton* (1808), 1 Camp. 493; *Osborn* v. *Gillett*, *supra*.

(*l*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408; *Pulling* v. *Great Eastern Rail. Co.* (1882), 9 Q. B. D. 110; *Lendon* v. *London Road Car Co.* (1888), 4 T. L. R. 448.

(*m*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2; *Jones* v. *Simes* (1890), 43 Ch. D. 607.

(*n*) Stat. (1330) 4 Edw. 3, c. 7, s. 4; stat. (1351) 25 Edw. 3, c. 5; *Tharpe* v. *Stallwood* (1843), 5 Man. & G. 760; *Twycross* v. *Grant* (1878), 4 C. P. D. 40, C. A.

(*o*) See, generally, title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 226, 227.

(*p*) *Jackson* v. *Watson*, [1909] 2 K. B. 193, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 201; see *Potter* v. *Metropolitan Rail. Co.* (1874), 32 L. T. 36; *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189; *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599 (cases in which the personal representative was held entitled to recover in respect of the death of the deceased, who was killed while travelling as a passenger on a railway); and see *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A.; *Jackson* v. *Watson*, *supra*.

(*q*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), commonly called Lord Campbell's Act, as amended by the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), and supplemented by the Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7), in this section of the title referred to together as "the Acts."

(*r*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 1.

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act (*s*), neglect or default (*t*) such as would have entitled the person injured (*a*), but for his death, to have maintained an action and recovered damages against such person in respect of it. This liability remains notwithstanding that the death was caused under such circumstances as amount to a felony (*b*).

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(*s*) This term includes direct acts of trespass to the person, as well as criminal acts of violence.

(*t*) Default assumes a duty and means "not doing what is reasonable under the circumstances" (*Re Young and Harston's Contract* (1885), 31 Ch. D. 168, C. A., *per* BOWEN, L.J., at p. 174).

(*a*) "The condition that the action could have been maintained by the deceased if death had not ensued has reference not to the nature of the loss or injury sustained but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default, complained of" (*Pym* v. *Great Northern Rail. Co.* (1862), 2 B. & S. 759, *per* COCKBURN, C.J., at p. 767; affirmed (1863), 4 B. & S. 396). Any defences, therefore, which would have been open to the defendant if the injured party had lived are available under the Acts (*Armsworth* v. *South Eastern Rail. Co.* (1847), 11 Jur. 758; *Coldrick* v. *Partridge, Jones & Co., Ltd.*, [1910] A. C. 77 (common employment)). Thus contributory negligence on the part of the deceased is a defence (*Tucker* v. *Chaplin* (1848), 2 Car. & Kir. 730; *Senior* v. *Ward* (1859), 1 E. & E. 385; *Coyle* v. *Great Northern Rail. Co. of Ireland* (1887), 20 L. R. Ir. 409); but a defendant is not allowed to succeed on this defence if his own tortious act placed the deceased in a dilemma in which, *in extremis*, he took a wrong course (*The George and Richard* (1871), L. R. 3 A. & E. 466). It is also an answer to an action that the deceased before death accepted or recovered compensation from the defendants in satisfaction of all claims in respect of the injury (*Read* v. *Great Eastern Rail. Co.* (1868), L. R. 3 Q. B. 555), though it is always open to the plaintiff to show that the deceased's mind did not go with the terms of the receipt which he gave and that he was unaware of its effect (*Rideal* v. *Great Western Rail. Co.* (1859), 1 F. & F. 706; *Huckle* v. *London County Council* (1910), 27 T. L. R. 112, C. A.), or that the receipt was obtained by fraud (*Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527; *Stewart* v. *Great Western Rail. Co.* (1865), 2 De G. J. & Sm. 319; *Hirschfeld* v. *London, Brighton and South Coast Rail. Co.* (1876), 2 Q. B. D. 1; see title EVIDENCE, Vol. XIII., p. 562). If a person is under the belief, in consequence of a representation made by the person asking him to sign a receipt in full discharge of all claims, that it will not prevent a further claim being preferred should the medical men be wrong in their estimate of the time necessary for his recovery, his mind could not be said to go with the receipt (*Lee* v. *Lancashire and Yorkshire Rail. Co.*, *supra*). If the conditions on a passenger's ticket are such as would prevent him from recovering damages if injured, no action can be brought successfully under the Acts should the passenger be killed (*Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (1883), 52 L. J. (Q. B.) 640, C. A.; compare *The Stella*, [1900] P. 161). Similarly, it is a defence that the deceased was working under a contract with his employer, at the time of the injury, by which he undertook to look to a certain fund alone for compensation in case of injury or death (*Griffiths* v. *Dudley* (*Earl*) (1882), 9 Q. B. D. 357). If, however, the person contracting on terms which prevent his recovering damages is an infant, the court will consider whether the contract was for his benefit, and, if considered to be otherwise, will not enforce it (*Stephens* v. *Dudbridge Ironworks Co., Ltd.*, [1904] 2 K. B. 225, C. A.); see title INFANTS AND CHILDREN, Vol. XVII., p. 72.

(*b*) It is thought that this provision defeats the defence by a principal that the agent was not authorised to commit a crime, and that, therefore, in so doing was acting outside the scope of his authority. There is no duty to prosecute before bringing a civil action where the death was caused by a felonious act (*Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88; compare *Appleby*

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Who benefits by such responsibility.

**772.** The action is to be brought for the benefit of the wife, husband, parent or child (*c*) of the deceased, and can be brought in all cases in which the injured person, if he had lived, could have maintained an action in British courts (*d*) against the persons responsible for the injury. Accordingly, relatives of a foreigner killed by a collision caused by the negligent navigation of a British ship on the high seas are entitled to bring an action in respect of his death (*e*). The right of action is not given merely to the relatives as a class, but to the individuals comprised in that class, and it is no defence to an action for the benefit of the relatives to say that the estate of the deceased passed to them, or some of them, undiminished, if it can be shown that a single member of the persons entitled under the Fatal Accidents Acts (*f*) has suffered pecuniary loss by the death of the person injured (*g*).

Particulars.

Particulars must be given of the persons for whose benefit the action is being brought, and their claims (*h*).

Within what time action must be brought.

**773.** An action under the Acts (*f*) must be commenced within twelve calendar months after the death of the person injured, and

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v. *Franklin* (1885), 17 Q. B. D. 93); see, generally, title ACTION, Vol. I., p. 27.

(*c*) Fatal Accident Act, 1846 (9 & 10 Vict. c. 93), s. 2. "Parent" includes grandparents and step-parents; "child" includes grandchildren and step-children (*ibid.*, s. 5; see title INFANTS AND CHILDREN, Vol. XVII., p. 45). An illegitimate child is not included (*Dickinson* v. *North Eastern Rail. Co.* (1863), 2 H. & C. 735; compare *Clarke* v. *Carfin Coal Co.*, [1891] A. C. 412), but a child *en ventre sa mère* is (*The George and Richard* (1871), L. R. 3 A. & E. 466; compare *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93, 109); in such a case the claim cannot be made on behalf of the child until it is born.

(*d*) As to the jurisdiction of the Admiralty Courts to try cases under the Fatal Accidents Acts, see *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59, H. L., overruling *The Franconia* (1877), 2 P. D. 163 (where it was held that proceedings *in rem* against the ship could not be brought in respect of damages under these Acts); but in certain events the Admiralty Courts may try cases under the Acts; compare *The Orwell* (1888), 13 P. D. 80; *Seward* v. "*Vera Cruz*," *supra*, at p. 64; see also *The Nereid* (1889), 14 P. D. 78; *Roche* v. *London and South Western Rail. Co.*, [1899] 2 Q. B. 502, C. A.

(*e*) *Davidsson* v. *Hill*, [1901] 2 K. B. 606, overruling *Adam* v. *British and Foreign Steamship Co.*, [1898] 2 Q. B. 430. As to the right of an alien to maintain an action for personal injuries, see *Cocks* v. *Purday* (1848), 5 C. B. 860, at p. 884; *The Guldfaxe* (1868), 19 L. T. 748; *The Explorer* (1870), L. R. 3 A. & E. 289.

(*f*) See note (*q*), p. 455, *ante*.

(*g*) *Pym* v. *Great Northern Rail. Co.* (1863), 4 B. & S. 396. As to what is included in "pecuniary loss," see p. 459, *post*.

(*h*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 4. If a person claims to be entitled and his name has been omitted from the particulars, he cannot, where the whole issue of liability and the amount of damages is pending, claim, as of right, to be made a party or to appear at the trial by solicitor and counsel (*Steele* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 96, C. A.), but where the only question is the distribution, among the persons entitled, of a sum of money paid into court, such a claimant has been allowed to appear and to tender evidence as to the amount of this share without being made a party (*Johnston* v. *G Northern Rail. Co. of Ireland* (1887), 20 L. R. Ir. 4).

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if brought against a public authority must be commenced within six months of the wrongful act (*i*). It must be brought in the name of the executor or administrator of the deceased (*k*), unless there be neither, in which case the action may be brought in the name of any or all of the relatives entitled to benefit under the Acts (*l*) at any time within the prescribed period after the death (*m*). If there is an executor or administrator, and he fails to bring the action within six months after the death, the right of action, after that time, passes to any or all of the relatives entitled to benefit (*n*). Where the action is brought in the name of any or all of the relatives, it must be for the benefit of the same persons as if it had been brought in the name of an executor or administrator (*n*).

One action for one injury.

**774.** Only one action lies in respect of the same subject-matter of complaint (*o*) under the Acts (*p*), and accordingly, if the deceased before death recovered compensation in an action for the injury which eventually caused his death, no further action can be brought (*q*). But if he only sued and recovered in respect of a portion of the damages sustained, leaving a separable and divisible portion which would have enabled him to bring a subsequent action for personal injuries (*r*), then an action under the Acts (*p*) may

When tainable.

(*i*) See title LIMITATION OF ACTIONS, Vol. XIX., p. 181; *ibid.*, note (*d*); and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*k*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2. The right is given to them in a representative capacity, and differs from an independent and personal right given in Canada to the relations, as to which see *Robinson* v. *Canadian Pacific Railway*, [1892] A. C. 481; *Miller* v. *Grand Trunk Railway*, [1906] A. C. 187.

(*l*) Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 1.

(*m*) *Holleran* v. *Bagnell* (1879), 4 L. R. Ir. 740. The relatives need not wait six months to see whether an executor or administrator will be appointed (*ibid.*).

(*n*) Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 1.

(*o*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 3. It is no bar to an action under the Acts for damages for pecuniary loss due to the decease of a stepmother that in another action, in which the same claimant's interest was inquired into and compensated, damages were obtained for loss due to the death of the father, who was killed at the time and in the same accident as the stepmother (*Johnston* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir 691). "One accident" in a policy of insurance was held to mean accident to one person, and not merely one occurrence which caused injury at the same time to many persons (*South Staffordshire Tramways Co., Ltd.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402); compare *Allen* v. *London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254 (driving accident policy).

(*p*) See note (*q*), p. 455, *ante*.

(*q*) *Read* v. *Great Eastern Rail. Co.* (1868), L. R. 3 Q. B. 555; compare *Wood* v. *Gray & Sons*, [1892] A. C. 576 (a case on Scottish law); and see note (*a*), p. 456, *ante*.

(*r*) *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A.; see *ibid.*, *per* BOWEN, L.J., at p. 151: "it certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine"; and see *ibid.*, *per* BRETT, M.R., at p. 146: "two actions may be brought in respect of the same facts where those facts give rise to two distinct causes of action." Compare *Roberts* v. *Eastern Counties Rail. Co.* (1859), 1 F. & F. 460.

be brought (*s*). Similarly, an action by the executors against a defendant under the Acts (*t*) is no bar to an action by them against the same defendant in respect of damages to their testator's personal estate arising out of the same injury (*u*), and a claimant who has already recovered in respect of the death of one person can maintain a second action in respect of the death of another person resulting from the same wrongful act (*a*).

Basis of claim is pecuniary loss arising from the death.

**775.** Mere proof of death by negligence is not sufficient to support a claim for even nominal damages (*b*). Compensation must be based, not only on the injury which causes the death, but on the pecuniary loss which arises in consequence of the death (*c*), and the damages recovered must be apportioned to the parties respectively for whose benefit the action is brought (*d*). It follows that damages cannot be recovered for the gravity of the injury to the deceased or as a solatium for the mental anguish or loss of society due to the death (*e*), nor yet for the cost of mourning (*f*), medical (*g*) or funeral expenses (*h*) occasioned by the injury and consequent death.

Pecuniary loss must be sustained by claimants.

**776.** In order to recover compensation there must be a pecuniary loss (*i*) sustained by the persons claiming, either actual or expected.

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(*s*) *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A.

(*t*) See note (*q*), p. 455, *ante*.

(*u*) *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189; followed in *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599. In the former case it was held that damages caused to the deceased's estate by his illness and consequent inability during his life to attend to business were distinct and could be sued upon, if arising from negligence in carrying out a contractual liability (see note (*e*), p. 427, *ante*), separately from damages under the Acts (*Barnett* v. *Lucas* (1872), 6 I. R. C. L. 247 (in which *Read* v. *Great Eastern Rail. Co.* (1868), L. R. 3 Q. B. 555, was distinguished); followed in *Daly* v. *Dublin, Wicklow and Wexford Rail. Co.* (1892), 30 L. R. Ir. 514; compare *Potter* v. *Metropolitan District Rail. Co.* (1874), 30 L. T. 765; affirmed on appeal (1875), 32 L. T. 36, in which it was held that, where, in consequence of an accident to a wife whose husband had paid for her railway ticket, the husband's estate suffered damage by reason of expenses due to illness and her inability to attend to assist in his business, and the husband died before bringing an action, an action in respect of such damage by the wife as executrix (after recovering for her personal injuries in a prior action against the defendants) was maintainable.

(*a*) *Johnston* v. *Great Northern Rail. Co. of Ireland* (1887), 20 L. R. Ir. 4.

(*b*) *Duckworth* v. *Johnson*, [1859] 4 H. & N. 653; *Hall* v. *Great Northern Rail. Co.* (1890), 26 L. R. Ir. 289.

(*c*) *Pym* v. *Great Northern Rail. Co.* (1862), 2 B. & S. 759; affirmed (1863), 4 B. & S. 396, Ex. Ch. A merely nominal loss is not sufficient (*Boulter* v. *Webster* (1865), 11 L. T. 598).

(*d*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2. See Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 2; and see p. 460, *post*.

(*e*) *Armsworth* v. *South Eastern Rail. Co.* (1847), 11 Jur. 758; *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93.

(*f*) *Dalton* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 296.

(*g*) *Boulter* v. *Webster*, *supra*.

(*h*) *Clark* v. *London and General Omnibus Co.*, [1906] 2 K. B. 648, C. A.; *Boulter* v. *Webster*, *supra*.

(*i*) A father, for instance, suffers no pecuniary damage by the death of a son who worked for him at full wages (*Sykes* v. *North Eastern Rail. Co.* (1875), 44 L. J. (C. P.) 191).

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Where actual loss can be proved, the claim is free from difficulty, but pecuniary loss may also be evidenced by proof of a reasonable expectation of pecuniary benefit (*k*); and, while appreciable pecuniary loss must be shown and damages proportional to the injury given, the damages are not given merely in respect of the loss of a legal right (*l*), inasmuch as they are to be distributed among relations only and not among all individuals sustaining the loss; and they should be calculated in reference to a reasonable expectation of pecuniary benefit as of right or otherwise from the continuance of the life (*m*).

**Reasonable expectation of pecuniary benefit sufficient to ground claim.**

**777.** As to what constitutes a reasonable expectation of pecuniary benefit sufficient to ground a claim for damages, it is not possible to lay down any general rule. It is an inference which a jury are entitled to draw only where the facts proved to their satisfaction afford them reasonable grounds for drawing such a conclusion (*n*); they at all events have to be satisfied on proper materials that the position of those claiming would have been less precarious but for the loss of the deceased (*o*). The loss of educational prospects and personal comfort which, but for the death of a person, might fairly have been expected to have been secured to the plaintiff (*p*), is sufficient to sustain a claim. So, also, services rendered or assistance given by the deceased, even if a child (*q*), can be

(*k*) *Pym* v. *Great Northern Rail. Co.* (1862), 2 B. & S. 759; affirmed (1863), 4 B. & S. 396, Ex. Ch.; *Springett* v. *Ball* (1865), 4 F. & F. 472, 474; *Hetherington* v. *North Eastern Rail. Co.* (1882), 9 Q. B. D. 160 (where a crippled parent, the plaintiff, had been helped in the past by his son (the deceased), although not for five years before death, and it was held that there was evidence of a reasonable expectation of further assistance which entitled the father to damages); *Jenkins* v. *Taff Vale Rail Co.* (1912), 132 L. T. Jo. 535, C. A. (where the deceased was a girl of sixteen, an apprentice: her parents both surviving her, the father being a colliery fireman, the mother keeping a small shop). For the general principles on which damages are to be estimated, see *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39.

(*l*) *Dalton* v. *South Eastern Rail. Co.* (1858), 4 C. B. (N. S.) 296, following *Franklin* v. *South Eastern Rail. Co.* (1858), 3 H. & N. 211; *Bramall* v. *Lees* (1857), 29 L. T. (O. S.) 111; compare *Weems* v. *Mathieson* (1861), 4 Macq. 215, H. L. (an analogous case in Scotch law).

(*m*) *Jenkins* v. *Taff Vale Rail. Co.*, *supra*; *Franklin* v. *South Eastern Rail. Co.*, *supra*, *per* POLLOCK, C.B., at p. 214.

(*n*) *Pym* v. *Great Northern Rail. Co.*, *supra*.

(*o*) *Johnston* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 691.

(*p*) *Pym* v. *Great Northern Rail. Co.* (1862), 2 B. & S. 759, *per* COCKBURN, C.J., at p. 767; affirmed (1863), 4 B. & S. 396; qualifying *Gillard* v. *Lancashire and Yorkshire Rail. Co.* (1848), 12 L. T. (O. S.) 356.

(*q*) *Bramall* v. *Lees* (1857), 29 L. T. (O. S.) 111 (child of twelve living at home who was expected in a year or two to help his parents); *Franklin* v. *South Eastern Rail. Co.*, *supra*; *Duckworth* v. *Johnson* (1859), 4 H. & N. 653 (boy of fourteen who contributed 4*s*. a week towards support of family); *Condon* v. *Great Southern and Western Rail. Co.* (1865), 16 I. C. L. R. 415 (where it was stated that though a child may not have directly earned wages he may have assisted his parents to do so, and the jury might estimate from the evidence what the pecuniary value of that assistance was and, using their general knowledge of life in the sphere in which the child was and considering the proved tendencies of the particular child, could form their own opinion as to what reasonable expectation there was of such benefit having continued if the child had lived). *Duckworth* v. *Johnson*, *supra*, and

taken into account if a pecuniary value can reasonably be put on them (*r*).

The expectation of pecuniary advantage must not be too remote (*s*), and if it is doubtful whether any profit would have ensued to the deceased if he had continued to live, or whether, if that profit were made, the plaintiff would have shared in it either as of right or from the bounty of the deceased, the plaintiff cannot succeed (*t*).

Must not be too remote.

**778.** Where the person claiming damages was entitled to an annuity from the deceased during their joint lives, the basis of the damages is the capitalised value of that annuity, after taking into consideration matters which affect the normal expectancy of life

Capitalisation in respect of loss of annuity.

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*Condon* v. *Great Southern and Western Rail. Co.* (1865), 16 I. C. L. R. 415, were considered in *Hull* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 289, where the second case was commented on and the first disapproved, on the ground that it left it open to the jury to speculate and did not clearly observe that the burden of proof was upon the plaintiff. If the plaintiff gives evidence of a set of circumstances consistent equally with pecuniary benefit or pecuniary loss, the case must be withdrawn from the jury (*ibid.*). In *Wolfe* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 548, it was held that the jury might estimate something based on evidence for the increasing advantage which would have been derived from the services of an active, healthy and intelligent child, who at the age of ten did housework for her parents. It is not necessary for the plaintiff to prove the cost of maintenance of the child unless defendants ask for it (*ibid.*). In *Hetherington* v. *North Eastern Rail. Co.* (1882), 9 Q. B. D. 160, it was stated that, where there is evidence that from time to time the deceased gave pecuniary assistance to the plaintiff, the jury must be asked to say whether there was a reasonable expectation that, if deceased had lived, there would be further assistance.

(*r*) *Jenkins* v. *Taff Vale Rail. Co.* (1912), 132 L. T. Jo. 535, C. A. It was suggested in *Bourke* v. *Cork and Macroom Rail. Co.* (1879), 4 L. R. Ir. 682, and held in *Holleran* v. *Bagnell* (1879), 6 L. R. Ir. 333, that in order to claim damages for a reasonable expectation of pecuniary advantage the plaintiff must show that the benefit had begun to accrue or existed at the time of the death; but this decision appears to be inconsistent with *Bramall* v. *Lees* (1857) 29 L. T. (o. s.) 111; and with *Jenkins* v. *Taff Vale Rail. Co.*, *supra*; and see p. 460, *ante*.

(*s*) Where a woman is living in adultery, apart from her husband, and there is no legal claim on him for maintenance, nor any actual help given by him, there is no case for damages, even though the wife give evidence to the effect that the husband appeared willing, a few days before his death, to condone her offence and take her back (*Stimpson* v. *Wood & Son* (1888), 57 L. J. (Q. B.) 484). In *Harrison* v. *London and North Western Rail. Co.* (1885), Cab. & El. 540, the plaintiff, aged fifty-nine, lived apart from and was unfriendly to his wife, aged fifty-six, and children, and contributed nothing to her support; the wife, who would have become entitled under a will to a large sum if she survived her mother, was killed, and it was held that the plaintiff had no reasonable probability of benefiting if his wife had not died: (1) because it was improbable that she would have done anything for him; (2) she might have predeceased the mother even if she had died naturally; (3) the plaintiff might have predeceased the wife; (4) it was improbable, even if the wife became entitled to the money and refused to help the husband, that a decree for the restitution of conjugal rights would have been made at his suit under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3 (5). The prospect that he might become a pauper and that his wife would be called on to support him was equally too remote.

(*t*) ***Bourke* v. *Cork and Macroom Rail. Co.*, *supra*.**

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and the risk of the deceased failing to earn money to pay the annuity (*u*), but exact arithmetical compensation in such a case should not be given (*v*), nor may the damages be so large as to make an investment which will produce the exact income lost (*a*).

**Deductions from damages.**

**779.** In assessing damages under the Acts (*b*), no deductions are to be made in respect of any sums received or payable on the death of the deceased under any contract of insurance (*c*), but some deduction may be made in respect of the premiums on a life insurance policy that would have had to be paid by the deceased had he lived (*d*).

**Apportionment and payment of damages.**

**780.** Damages, when recovered, are, after deducting any costs not recovered from the defendant, to be divided among the persons for whose benefit the action is brought (*e*) in such shares as the jury shall find (*f*). In cases where there is no jury, as, for example, where the defendant pays a sum into court (*g*) which satisfies the person or persons in whose name the action is brought, an order may be obtained for the settlement of the appropriation by a jury (*h*), or the court may apportion the shares into which the sum is to be

(*u*) *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221; see title DAMAGES, Vol. X., pp. 303, 304, 350.

(*v*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 C. P. D. 280, C. A., where BRETT, L.J., at p. 290, says that a jury must take into consideration many matters that cannot be expressed arithmetically; see *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 85; *per* JAMES, L.J., at p. 87, where *Rowley* v. *London and North Western Rail. Co.*, *supra*, was considered and applied.

(*a*) *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250.

(*b*) See note (*q*), p. 455, *ante*.

(*c*) Fatal Accidents Act, 1908 (8 Edw. 7, c. 7), s. 1. The Act, which came into force on the 1st August, 1908, is retrospective and applies to sums paid prior to its passing. It does away with so much of the decision of *Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.* (1857), 4 B. & S. 403, n., as laid down that such deductions were to be made in the case of sums received from accident insurance policies, unless the policies were effected with a company which had a private Act providing that such moneys need not be taken into consideration.

(*d*) *Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.*, *supra*; approved on this point in *Grand Trunk Rail. Co. of Canada* v. *Jennings* (1888), 13 App. Cas. 800, P. C. In the latter case it was held that any provision made by a husband for his widow is a matter for deduction in assessing damages as to her share, but, having regard to the Fatal Accidents Act, 1908 (8 Edw. 7, c. 7), s. 1, any such provision which is based on moneys paid or payable on the death under policies of insurance will not be deducted. The rule as to these deductions applies only to claims under the Acts (*Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.*, *supra*). As to the rule in case of accidents not resulting in death, see titles CARRIERS, Vol. IV., p. 59; INSURANCE, Vol. XVII., p. 566, note (*l*).

(*e*) See pp. 457, 458, *ante*.

(*f*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 2.

(*g*) A defendant may pay a sum into court as compensation to all persons entitled without specifying how it is to be divided Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 2). As to the position of a plaintiff as trustee where a settlement is arrived at, see *Condliff* v. *Condliff* (1874), 29 L. T. 831.

(*h*) *Kidd* v. *Midland Rail. Co.* (1877), *Times*, 27th March, cited in Yearly Practice of the Supreme Court, 1912, p. 287.

divided among the persons entitled to it (*i*), and direct the mode of investment (*j*) or payment of such shares (*k*).

SECT. 2. Civil Responsibility under the Fatal Accidents Acts.

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# Part IX.—Other Defences to Actions for Negligence.

## SECT. 1.—*Infancy.*

Infancy.

**781.** The infancy of the defendant does not afford a defence to an action for negligence (*l*), unless the duty alleged to have been negligently performed arises out of a contract on which the infant could not be sued (*m*), but such infancy may be relevant to the question whether the act or omission complained of was or was not negligent (*n*).

## SECT. 2.—*Defective Intelligence.*

Lunacy.

**782.** The lunacy of the defendant does not afford a defence to an action for negligence (*o*), unless the duty alleged to have been negligently performed arose out of a contract into which the lunatic was incapable of entering (*p*), or arose out of some obligation which the lunatic was, and was known to the party accepting it to be, by reason of his lunacy, incapable of undertaking (*q*).

(*i*) *Bulmer* v. *Bulmer* (1883), 25 Ch. D. 409. But it appears that all the parties who might have brought claims should be before the court. In distributing the sum the court will follow as far as practicable the rules laid down by the Statute of Distributions (see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*), and, accordingly, where a widow and children were entitled, the widow was given one-third and the remainder was divided between the children (*Sanderson* v. *Sanderson* (1877), 36 L. T. 847). In *Logan* v. *Great Northern Rail. Co. of Ireland* (1910), 44 I. L. T. 190, the court refused so to apportion the money paid in on the ground that the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 2, expressly reserved this for a jury.

(*j*) In *Shallow* v. *Vernon* (1875), 9 I. R. C. L. 150, a fund was allowed to be paid out of court on the terms that the widow invested a portion of it in her own name and that of a trustee in trust for certain infant children.

(*k*) See note (*i*), *supra*.

(*l*) *Jennings* v. *Randall* (1799), 8 Term Rep. 335; *Burnard* v. *Haggis* (1863), 14 C. B. (N. S.) 45; *Dixon* v. *Bell* (1816), 1 Stark. 287; *Marsh* v. *Loader* (1863), 14 C. B. (N. S.) 535; *Latt* v. *Booth* (1852), 3 Car. & Kir. 292.

(*m*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 74, 75. If the contract is not within the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), and is not prejudicial to the infant, a duty to take care may arise out of it (see title INFANTS AND CHILDREN, Vol. XVII., pp. 63—74), and may be binding on the infant (*Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482).

(*n*) Children of very tender years are not to have negligence imputed to them (Beven on Negligence, 3rd ed., p. 163; and see pp. 362, 363, *ante*).

(*o*) See titles LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 403; TORT.

(*p*) See title LUNATICS AND PERSONS OF UNSOUND MIND., Vol. XIX., p. 396.

(*q*) From the decision in *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, it

SECT. 3. Performance of Statutory Duties etc.

## SECT. 3.—*Performance of Statutory Duties or Exercise of Statutory Powers.*

Defences.

**783.** It is a defence to an action for negligently causing injury by doing a particular act to prove that that which was in fact done

(1) was required or authorised by statute (*r*); or

(2) was necessarily done in the execution of works which the defendants were required or authorised to execute by statute (*s*), or by a provisional order having statutory force (*t*); or

(3) was lawfully done by the defendants under and by virtue of the powers given to them by an Act of Parliament (*a*),

provided that in each of the above cases the statute does not expressly (*b*) nor impliedly (*c*) give a right of action in respect of the act so done (*d*); or

follows that, where the duty to take care arises from a contract, the lunatic is not liable for a failure to fulfil it to a party who knew that his lunacy incapacitated him from undertaking it, and there appears to be no reasonable ground for a different rule where the obligation was imposed on the lunatic as a result of any acts done with knowledge of the lunacy by or on behalf of the injured person.

(*r*) Strictly speaking, a defence of this nature can only arise when the statute directs the particular act and the method of doing it (*British Cast Plate Manufacturers* v. *Meredith* (1792), 4 Term Rep. 794; approved in *Sutton* v. *Clarke* (1815), 6 Taunt. 29, 43; compare *Leader* v. *Moxton* (1773), 3 Wils. 461; *R.* v. *Pease* (1832), 4 B. & Ad. 30). As to what constitutes compliance with statutory direction, see *Gray* v. *Thomsons* (1889), 27 Sc. L. R. 113; *London County Council* v. *Great Eastern Rail. Co.*, [1906] 2 K. B. 312; compare *Glossop* v. *Heston and Isleworth Local Board* (1878), 12 Ch. D. 102; *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, C. A.

(*s*) *Hammersmith Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; and see title TORT.

(*t*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; compare *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.

(*a*) The statute may affect the duty to take care which would otherwise be imposed on the persons carrying out the duty; compare *Snook* v. *Grand Junction Waterworks Co., Ltd.* (1886), 2 T. L. R. 308; and *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch., as to the effect of statutory duties and powers to supply water on the rule in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; and see p. 402, *ante*.

(*b*) When the statute provides a special remedy for injury caused by carrying it out, the act complained of must have been done in the intended exercise of the powers given by the statute (*Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264); and see note (*b*), p. 402, *ante*.

(*c*) No right to compensation will be implied unless the injury would have been the subject of a claim for damages if the statutory powers to do that which caused it had not been given (*Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175); see p. 422, *ante*; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 44, 45.

(*d*) The following are instances where a right of action is reserved by the statute for any damage caused in carrying out the powers conferred:—*Watkins* v. *Reddin* (1861), 2 F. & F. 629 (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 155, note (*e*)); compare *Powell* v. *Fall* (1880), 5 Q. B. D. 597; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217 (see title GAS, Vol. XV., pp. 322, 359); *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707 (provisional order); compare *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 309, C. A.; *Midwood & Co., Ltd.* v. *Manchester Corporation*, [1905] 2 K. B. 597, C. A. (see

(4) that the act was done by a subordinate body acting merely ministerially in the performance of statutory duties for the due performance of which it is answerable only to some higher authority (*e*).

SECT. 3. Performance of Statutory Duties etc.

Incidental act deemed to be authorised by statute.

**784.** The particular act may be held to be authorised by statute where it is one which is a natural incident (*f*) or effect (*g*) of the operation legalised under the statute, or is ordinarily necessary for carrying out the powers conferred by the statute in question

title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 563, 564, notes (*y*), (*b*)). The burden of proof is on those who contend that a right of action is taken away by statute (*Clowes* v. *Staffordshire Potteries Co.* (1872), 8 Ch. App. 125, *per* MELLISH, L.J., at p. 139). Where a special remedy is provided by the statute, that remedy is generally the only one available (*Ricket* v. *Metropolitan Rail. Co.* (1867), L. R. 2 H. L. 175; *Brierley Hill Local Board* v. *Pearsall* (1884), 9 App. Cas. 595; *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, C. A.; *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193). In *Colac Corporation* v. *Summerfield*, [1893] A. C. 187, P. C., it was held that where the statute provided for compensation to be paid for any damage "which may be sustained through the exercise of the powers conferred," such compensation included all such damage, and, as the powers had not been exceeded, it was therefore immaterial whether they were exercised properly or negligently; compare *Clothier* v. *Webster* (1862), 12 C. B. (N. S.) 790; *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 44. As to the test for the statutory remedy being the only one, see, generally, p. 422, *ante*; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; *East Freemantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.; *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. (N. S.) 336; and see title ACTION, Vol. I., p. 8. Where a statutory remedy has been provided but has become wholly inoperative, there may be a right to bring an action (*Bentley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891] 3 Ch. 222).

(*e*) *Bolton* v. *Crowther* (1824), 4 Dow. & Ry. (K. B.) 195; *Brennan* v. *Limerick Union Guardians* (1878), 2 L. R. Ir. 42; *Dunbar* v. *Ardee Union Guardians*, [1897] 2 I. R. 76; *Tozeland* v. *West Ham Guardians*, [1907] 1 K. B. 920, C. A., as explained in *Ching* v. *Surrey County Council*, [1909] 2 K. B. 762, 774; compare *Manley* v. *St. Helen's Canal and Rail. Co.* (1858), 2 H. & N. 840 (where the public company's powers were for their own profit); and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*f*) *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A. C. 381, P. C.; *Simkin* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 453, C. A.; *Hammersmith Rail. Co.* v. *Brand* (1868), L. R. 4 H. L. 171; *A.-G. and Hare* v. *Metropolitan Rail. Co.*, [1893] 1 Q. B. 384, C. A.

(*g*) *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626; *Hammersmith Rail. Co.* v. *Brand, supra*; *London, Brighton and South Coast Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45; *Cracknell* v. *Thetford Corporation* (1869), L. R. 4 C. P. 629; compare *Lambert* v. *Lowestoft Corporation*, [1901] 1 Q. B. 590; *Gedd's* v. *Bann Reservoir (Proprietors)* (1878), 3 App. Cas. 430; *Canadian Pacific Railway* v. *Roy*, [1902] A. C. 220; and see *Piggot* v. *Eastern Counties Rail. Co.* (1846), 3 C. B. 229.

(*h*) *R.* v. *Pease* (1832), 4 B. & Ad. 30, as explained in *Queen* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631 (where it was stated that if powers are conferred under circumstances in which they may be exercised without injury being caused, and new circumstances arise which render the exercise of them impossible without causing a nuisance, the persons causing it are

SECT. 3. **Performance of Statutory Duties etc.**

Thus the rule (*i*) that dangerous things brought on to land for the purposes of the owner and collected and kept there must be kept in at the peril of the owner, who, if they escape, is *primâ facie* answerable for all the damage which is the natural consequence of that escape, is excluded where the bringing, collecting, and keeping the dangerous thing is authorised by statute (*k*), except where by that statute a duty is imposed to keep it secure (*l*). Where the rule is excluded, in order to succeed, a person injured by the exercise of statutory powers must do more than prove that the dangerous thing escaped; he must show that it escaped owing to the negligence of the owner (*m*).

**Act done under discretionary power.**

**785.** The particular act may be held not to be authorised by statute when there is a merely discretionary power or permission given to a public authority enabling the act to be done or not to be done at the will of the authority (*n*), or where the power enables it

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liable); *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A. (where the defendants, although empowered to make an embankment and to do all acts ordinarily done on railways, were held to have exceeded their powers by cutting holes in the embankment to let off flood water in such a way as to injure the neighbouring property; see title NUISANCE, pp. 516 *et seq.*, 562 *et seq.*, *post;* compare *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279); *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733 (authorised railway by statute, but steam locomotives upon it not specially authorised: held that the defendants were liable for damage done by sparks from such engines; see, however, p. 405, *ante*); *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 (statute authorised the defendants to erect a fever hospital, but did not specifically authorise them to build it where it might interfere with the rights of others: held, that they must not put it where it would interfere with such rights); *A.-G. and Hare* v. *Metropolitan Rail. Co.*, [1893] 1 Q. B. 384, C. A.; and see *Price's Patent Candle Co.* v. *London County Council*, [1908] 2 Ch. 526.

(*i*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, affirming *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265; see p. 401, *ante*.

(*k*) *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.; *Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Snook* v. *Grand Junction Waterworks Co., Ltd.* (1886), 2 T. L. R. 308; *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626; *Green* v. *Chelsea Waterworks Co.* (1894), 10 T. L. R. 259; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Cos.*, [1902] A. C. 381, P. C.; *Lambert* v. *Lowestoft Corporation*, [1901] 1 Q. B. 590; compare *Blyth* v. *Birmingham Waterworks* (1856), 11 Exch. 781; *Whalley* v. *Lancashire and Yorkshire Rail. Co.*, *supra*; *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279.

(*l*) *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.; compare *Gilbert* v. *Trinity House Corporation* (1886), 17 Q. B. D. 795; compare *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, 750.

(*m*) See pp. 378, 402, *ante*, and cases cited in note (*p*), p. 467, *post;* and compare title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 564. Negligence does not mean failure to ransack science to find a possible means of preventing accidents, but denotes a failure to adopt or use precautions of known practical utility, or a failure to exercise proper care and skill; as to this, see cases cited in note (*k*), *supra;* and see pp. 364, 368, *ante*.

(*n*) *Metropolitan Asylum District* v. *Hill*, *supra* (where it was stated that where words are permissive it is a fair inference that the legislature intended that discretion should be exercised in strict conformity with private rights).

to be done by an alternative method which would not have caused injury (*o*).

SECT. 3. **Performance of Statutory Duties etc.**

**786.** Unless the particular act alleged to be negligent is authorised, statutory authority does not afford a defence where there is negligence (*p*), or want of proper precaution in doing the act which causes the injury (*q*). An action for negligence in the use of works authorised by statute is not precluded by the fact that construction and maintenance of the works are authorised by statute, even where the statute provides a special remedy for default in maintaining them (*r*).

Statutory authority no defence unless particular act authorised.

## SECT. 4.—*Inevitable Accident: Act of God.*

### SUB-SECT. 1.—*Definitions, Nature and Characteristics of the Terms.*

**787.** Where an accident takes place which could not have been obviated by any ordinary care, caution, and skill on the part of the party charged, the accident is said to be inevitable (*s*). It is said to

Inevitable accident distinguished from act of God.

(*o*) *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14, 22, C. A.

(*p*) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *Hammersmith Rail. Co.* v. *Brand* 1869), L. R. 4 H. L. 171; *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.; *Snook* v. *Grand Junction Waterworks Co., Ltd.* (1886), 2 T. L. R. 308; *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch. D. 626; *Lambert* v. *Lowestoft Corporation*, [1901] 1 Q. B. 590; *Hawthorn Corporation* v. *Kannuluik*, [1906] A. C. 105 P. C.; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393. In *Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430, Lord BLACKBURN, at p. 456, said that if the promoters by a reasonable exercise of the powers given to them by statute or enjoyed by them at common law could have obviated the damage, it was negligent not to make use of such powers; compare *Bligh* v. *Rathangan River Drainage Board*, [1898] 2 I. R. 205. As to misfeasance and nonfeasance, see pp. 375 *et seq.*, *ante*.

(*q*) *Blyth* v. *Birmingham Waterworks* (1856), 11 Exch. 781; *Fremantle* v. *London and North Western Rail. Co.* (1861), 10 C. B. (N. S.) 89; *Bagnall* v. *London and North Western Rail. Co.* (1862), 1 H. & C. 544; *Manchester South Junction Rail. Co.* v. *Fullarton* (1863), 14 C. B. (N. S.) 54; *Stapley* v. *London, Brighton and South Coast Rail. Co.* (1865), L. R. 1 Exch. 21; *Queen* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631; *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058; *Cliff* v. *Midland Rail. Co.* (1870), L. R. 5 Q. B. 258; *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; *Hanson* v. *Lancashire and Yorkshire Rail. Co.* (1872), 20 W. R. 297; *Oliver* v. *North Eastern Rail. Co.* (1874), L. R. 9 Q. B. 409; *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918; *Snook* v. *Grand Junction Waterworks Co., Ltd.*, *supra*; *Sadler* v. *South Staffordshire and Birmingham District Steam Trams Co.* (1889), 23 Q. B. D. 17; *South Eastern and Chatham Rail. Co.* v. *London County Council* (1901), 84 L. T. 632; *Wisely* v. *Aberdeen Harbour Commissioners* (1887), 24 Sc. L. R. 315; *Port-Glasgow and Newark Sailcloth Co., Ltd.* v. *Caledonian Rail. Co.* (1892), 29 Sc. L. R. 577; *Marshall* v. *Caledonian Rail. Co.* (1899), 36 Sc. L. R. 845; *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A.; compare *Drew* v. *New River Co.* (1834), 6 C. & P. 754.

(*r*) *Baron* v. *Portslade Urban District Council*, [1900] 2 Q. B. 588, C. A.

(*s*) *The Europa* (1850), 14 Jur. 627; *The Marpesia* (1872), L. R. 4 P. C. 212; approved in *The Merchant Prince*, [1892] P. 179, C. A., and *The Schwan*, [1892] P. 419, C. A. In the last case LOPES, J., at p. 434, said the same definition of the term applied without distinction to cases on land or at sea; compare *The William Lindsay* (1873), L. R. 5 P. C. 338; *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A.; *Pandorf* v. *Hamilton* (1886), 17 Q. B. D. 670, C. A.; and *Nitro Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503.

SECT. 4. Inevitable Accident: Act of God.

be distinguished from an act of God in that the latter term, although capable of being included within the definition of inevitable accident, is not applied to occurrences which to some extent have their origin in the agency of man and are not wholly dependent on the agency of natural forces (*t*).

When accident may be considered inevitable.

**788.** Extraordinary skill and diligence are in ordinary circumstances not required to be exercised (*u*). If the defendant, notwithstanding the exercise of ordinary care and skill, is unable to avoid the accident, the latter may be held to be inevitable (*a*). Where, however, the circumstances give rise to exceptional likelihood of danger, more than an ordinary degree of care may be required, and the absence of it may involve liability (*b*).

SUB-SECT. 2.—*Application of the Defence to Duties Created by Common Law.*

When defence available.

**789.** It is a defence to an action for negligence that the accident was inevitable (*c*), or was due to an act of God (*d*), provided that

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(*t*) *Nugent* v. *Smith* (1876), 1 C. P. D. 423, C. A., where MELLISH, L.J., at p. 444, says that an accident is to be regarded as the result of the act of God when "it is due to natural causes directly and exclusively without human intervention and such that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected." For the nature, characteristics, and application of the phrase "act of God," see title CONTRACT, Vol. VII., p. 428; *The Boucau*, [1909] P. 163 (where there was a combination of extraordinary conditions of tide, current, and winds); and see title CARRIERS, Vol. IV., pp. 8, 9, 15, 38, note (*n*). It is apprehended that the distinction referred to in the text, *supra*, although not altogether unimportant in dealing with negligence, is of importance in such cases as loss by common carriers, who are freed from their responsibility where the loss is due to an act of God, but not where it is due to inevitable accident (*Forward* v. *Pittard* (1785), 1 Term Rep. 27, 34).

(*u*) *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A. (evidence given that from a business point of view it was practically impossible to prevent such an accident as the slipping of the chain of a crane from a bale of goods); *Great Western Rail. Co. of Canada* v. *Braid* (1863), 1 Moo. P. C. C. (N. S.) 101 (where it was stated that the railway company was bound to bear in mind, in constructing their line, the risk of storms of unusual severity which were still not beyond the reasonable foresight of men and within the power of skilled engineers to resist); and see p. 364, *ante*.

(*a*) *The Europa* (1850), 14 Jur. 627; compare *Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379; and see *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

(*b*) *Ibid.*; and see p. 365, *ante*. As to how far a person is entitled to protect himself from a threatened danger with the result that he injures another (*e.g.*, in *Scott* v. *Shepherd* (1773), 3 Wils. 403; *Nield* v. *London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4), as compared with the transfer of an existing misfortune, see *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A.; *Greyvensteyn* v. *Hattingh*, [1911] A. C. 355, P. C.; and, as to the defence of imminent personal risk, see p. 479, *post*.

(*c*) *Weaver* v. *Ward* (1616), Hob. 134 (a case of trespass, *a fortiori* a defence to an action for negligence); *Davis* v. *Saunders* (1770), 2 Chit. 639; *Aston* v. *Heaven* (1797), 2 Esp. 533; *Wakeman* v. *Robinson*, (1823), 1 Bing. 213; *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Lack* v. *Seward* (1829), 4 C. & P. 106; *Goodman* v. *Taylor* (1832), 5 C. & P. 410; *The Shannon*

(*d*) For note (*d*) see next page.

SECT. 4. Inevitable Accident: Act of God.

there has been no want of care on the defendant's part (*e*), and that the damage for which it is sought to make him liable was not caused by his own act (*f*).

The inevitable accident, or the act of God relied on must be the effective cause of the occurrence complained of if it is to afford a defence (*g*).

Effective cause.

**790.** In order to establish a defence of inevitable accident (*h*) the defendant (*i*) must either show what was the cause of the accident and that the result of that cause was inevitable (*k*), or he must show all possible causes, one or other of which produced the effect, and with regard to each of such possible causes he must show that the result could not have been avoided (*l*).

Proof required for defence of inevitable accident.

**791.** The defence "act of God" (*m*) has been held to apply to the case of the escape of water, stored without negligence in artificial

When defence "act of God" applicable.

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(1842), 1 Wm. Rob. 463; *The Europa* (1850), 14 Jur. 627; *The William Lindsay* (1873), L. R. 5 P. C. 338; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145; *Douglas* v. *Gray* (1890), 27 Sc. L. R. 687; *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A.; see also cases cited in note (*s*), p. 467, *ante*.

(*d*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A., affirming L. R. 10 Exch. 265; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, 750; *Clark* v. *Glasgow Assurance Co.* (1854), 1 Macq. 668, H. L.; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Blyth* v. *Birmingham Waterworks* (1850), 11 Exch. 781.

(*e*) *Burt* v. *Victoria Graving Dock Co.* (1882), 47 L. T. 378, *per* FIELD, J., at p. 381; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *The William Lindsay*, *supra*; *The Britannia*, [1905] P. 98. If there is such want of care that an ordinary occurrence would have caused injury. the fact that the occurrence causing the injury was extraordinary is not a defence (*Steggles* v. *New River Co.* (1865), 13 W. R. 413).

(*f*) *Dixon* v. *Metropolitan Board of Works*, *supra* (where defendant's act in opening a sewer gate was the immediate cause of the accident); *Davis* v. *Garrett* (1830), 6 Bing. 716; *Siordet* v. *Hall* (1828), 4 Bing. 607 (severe frost caused steam pipe to burst, the boiler having been negligently left cold all night when full); *Hall* v. *Fearnley* (1842), 3 Q. B. 919; *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine's Docks Co.* (1878), 9 Ch. D. 503; compare *Great Western Rail. Co.* v. *Davies* (1879), 39 L. T. 475; *Smith* v. *Shepherd* (1795), Abbot on Shipping, 14th ed., p. 578; *Wakeman* v. *Robinson* (1823), 1 Bing. 213. If all that the defendant does is done to protect his land from an extraordinary occurrence he is not liable (*Greyvensteyn* v. *Hattingh*, [1911] A. C. 355, P. C.).

(*g*) See cases cited in note (*t*), p. 470, *post*; compare *Nichols* v. *Marsland*, *supra*. As to effective cause, see pp. 378 *et seq.*, *ante*.

(*h*) As to what must be proved to make out a defence of act of God, see title CONTRACT, Vol. VII., p. 428.

(*i*) As to the burden of proof, see *The Merchant Prince*, [1892] P. 179, C. A.

(*k*) *I.e.*, as defined p. 467, *ante*.

(*l*) *The Merchant Prince*, *supra*, *per* FRY, L.J., at p. 189. In *Burns* v. *Cork and Bandon Rail. Co.* (1863), 13 I. C. L. R. 543, the court held on demurrer that this defence was not made out on the part of carriers by showing that the accident was due to a defective crank-pin which, although examined by the defendants, was supplied by other persons about whose care or skill in the selection of the crank-pin there was no averment in the plea demurred to.

(*m*) "*Actus Dei nemini facit injuriam*" (2 Bl. Com. 122). For early

SECT. 4. **Inevitable Accident: Act of God.**

lakes, which burst the banks owing to swelling of the volume of water properly there by flood water caused by an extraordinary rainfall (*n*); and while the defence of inevitable accident does not apply to the escape of things likely to be dangerous if they escape, brought on land for purposes other than those connected with the natural user thereof (*o*), yet it may apply in circumstances where it is inevitable that risks should be incurred, as in conducting traffic by land or sea, where it is reasonable to infer that the plaintiff takes the risk of inevitable accident on himself (*p*).

When defence "inevitable accident" applicable.

**792.** The defence of "inevitable accident" has been held to be established where a bystander was injured by a ball slipping from the chain of a crane (*q*), or by a blow from a sledge hammer where the striker missed his aim (*r*); or where the injury arose, on a highway on land, from an unforeseen cause such as sudden and unavoidable fright of horses (*s*), or, at sea, from a cause which the defendant could not possibly prevent by the exercise of ordinary care, caution and skill (*t*).

instances of the application of the principle, see The Book of Assizes, 22 Ass. 41; Y. B. 40 Edw. 3, 5, pl. 11; *Mouse's Case* (1609), 12 Co. Rep. 63 (goods jettisoned by a carrier to save a barge); *Keighley's Case* (1610), 10 Co. Rep. 139 a, 140 (damage caused by sea water); *Bird* v. *Astock* (1615), 2 Bulst. 280 (where a carrier was held excused).

(*n*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A.; *Thomas* v. *Birmingham Canal Co.* (1879), 49 L. J. (Q. B.) 851.

(*o*) *Chalmers* v. *Dixon* (1876), 13 Sc. L. R. 299.

(*p*) *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265, *per* Lord BLACKBURN, at p. 286; affirmed *sub nom. Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; compare *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; see, generally, p. 364, *ante*, and see p. 476, *post*.

(*q*) *Fawkes* v. *Poulson & Son* (1892), 8 T. L. R. 725, C. A., where Dr. LUSHINGTON's definition of inevitable accident (see *The Virgil* (1843), 2 Wm. Rob. 201, 205; adopted in *The Marpesia* (1872), L. R. 4 P. C. 212) was applied.

(*r*) *Douglas* v. *Gray* (1890), 27 Sc. L. R. 687.

(*s*) *Aston* v. *Heaven* (1797), 2 Esp. 533; *Crofts* v. *Waterhouse* (1825), 3 Bing. 319; *Goodman* v. *Taylor* (1832), 5 C. & P. 410; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; *Manzoni* v. *Douglas* (1880), 6 Q. B. D. 145.

(*t*) *The Marpesia, supra*; *The Shannon* (1842), 1 Wm. Rob. 463 (darkness); *The Buckhurst* (1881), 6 P. D. 153 (where in consequence of a ship being blown from its mooring in a gale the rudder became damaged and the ship unmanageable); *Lack* v. *Seward* (1829), 4 C. & P. 106 (tides or current); *The Boucau*, [1909] P. 163; *Davis* v. *Saunders* (1770), 2 Chit. 639; *The William Lindsay* (1873), L. R. 5 P. C. 338 (defective buoy); *The London* (1863), 1 Mur. L. C. 398 (cable parting); compare *S.S. Toward* (*Owners*) v. *S.S. Turkistan* (*Owners*) (1885), 13 R. (Ct. of Sess.) 342. In *Mackenzie* v. *Stornoway Pier and Harbour Commission*, [1907] S. C. 435, there was no blame imputable to defendants, while in *S.S. Fulwood* v. *Dumfries Harbour Commissioners*, [1907] S. C. 456, the defendants had failed to keep the berth safe; See also *The Aimo* (1873), 2 Asp. M. L. C. 96 (prior collision); *The Peerless* (1860), Lush. 30 (where the chain caught in the windlass); *The Virgo* (1876), 3 Asp. M. L. C. 285 (steerage gear breaking); compare *The Merchant Prince*, [1892] P. 179, C. A.; and *The Turret Court* (1900), 69 L. J. (P.) 117 (steam steering gear jammed; collision held not due to inevitable accident since hand steering gear might have been in readiness for use); *The Calderon* (1912), *Times*, 26th March; *The Julia* (1861), Lush. 224, also reported as *Bland* v. *Ross* (1860), 14 Moo. P. C. C. 210 (effect of

SUB-SECT. 3.—*Application of the Defence to Duties Imposed by Statute*

SECT. 4.

**Inevitable Accident: Act of God.**

**Application depends on construction of statute.**

**793.** The defence may apply in the case of a failure to fulfil an obligation created by statute (*a*). Whether it does apply or not depends on the construction of the particular statute (*b*). In the case of a statute creating a duty and requiring the performance of it, or rendering the person liable for the non-performance of it, or for the consequences of such non-performance, the defence is as a rule no excuse (*c*). It is, however, generally otherwise if the statute merely refers to and confirms a duty already existing at common law and declares to whom it shall attach (*d*).

SECT. 5.—*Independent Contractor.*

**When liability may attach to independent contractor and not to employer.**

**794.** Where an act, which causes injury to another and is actionable on the ground of a failure to use proper care, is committed in the performance of a contract or of some term of a contract, that fact does not of itself render liable the person for whose benefit the contract enures (*e*). If the performance of the contract or of the particular term of it (*f*) does not, and in the natural course of things will not, involve or result in any particular duty, such as a duty towards an individual or class to use proper care to protect him or them from danger (*g*), and the performance is undertaken by an independent contractor (*h*), who acts as such and not as a servant

inevitable accident cause of collision with tug and tow); and see title SHIPPING AND NAVIGATION.

(*a*) For the consideration of the application to cases of obligation created by contract express or implied, see titles CONTRACT, Vol. VII., p. 431; SHIPPING AND NAVIGATION.

(*b*) *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743; compare *Re Richmond Gas Co. and Richmond (Surrey) Corporation*, [1893] 1 Q. B. 56; and, as to construction of statutes generally, see title STATUTES.

(*c*) *River Wear Commissioners* v. *Adamsom*, *supra*, at p. 750.

(*d*) *Ibid.*, at p. 766. Thus, where a statute required an appellant to quarter sessions to serve a notice on the respondent, it was held that the death of the latter dispensed with the necessity for serving the notice (*R.* v. *Leicestershire Justices* (1850), 15 Q. B. 88).

(*e*) See titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 316; TORTS.

(*f*) *Padbury* v. *Holliday and Greenwood* (1912), *Times*, 17th February (action discontinued against specified sub-contractor and successful against principal contractor).

(*g*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 136; MASTER AND SERVANT, Vol. XX., pp. 264, 265; and p. 474, *post*.

(*h*) As to the position of an independent contractor, see titles AGENCY, Vol. I., pp. 147, 148; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 136; MASTER AND SERVANT, Vol. XX., pp. 264; TORT. The real test for some purposes, as pointed out by COLERIDGE, J., in *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737, at p. 742, is "to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them the act of the one creates no liability in the other." A contractor is, therefore, said to be independent when he is recognised as exercising a distinct calling (*Milligan* v. *Wedge*, *supra*), and is subject to no control by the employer (*Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; *Martin* v. *Temperley* (1843), 4 Q. B. 298; *Burgess* v. *Gray* (1845), 1 C. B. 578; *Overton* v. *Freeman* (1852, 11 C. B. 867; *Peachey* v. *Rowland* (1853),

SECT. 5. **Independent Contractor.**

**Effect of controlling or interfering.**

or agent of the other party to the contract, the liability for a failure to use proper care may attach to such independent contractor and not to such other party. But if such other party retains in his own hands the control over or interferes with such performance, he may also be responsible (*i*).

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13 C. B. 182; *Innocent* v. *Peto* (1864), 4 F. & F. 8; *Pearson* v. *Cox* (1877), 2 C. P. D. 369; *Johnson* v. *Lindsay*, [1891] A. C. 371; *Ruth* v. *Surrey Commercial Dock Co.* (1891), 8 T. L. R. 116, C. A. It is sometimes doubtful whether the person doing the work for the employer is a contractor or a servant; if the latter, the master is liable, even though the act is only incidental to the employment (*Ruddeman & Co.* v. *Smith* (1889), 5 T. L. R. 417). For examples of this difficulty, see *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (1850), 5 Exch. 343; *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Wiggett* v. *Fox* (1856), 11 Exch. 832; *Abraham* v. *Reynolds* (1860), 5 H. & N. 143; *Blake* v. *Thirst* (1863), 2 H. & C. 20; *Warburton* v. *Great Western Rail. Co.* (1866), L. R. 2 Exch. 30; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P .D. 205; *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex. D. 341; *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Donovan* v. *Laing Wharton and Down Construction Syndicate* [1893] 1 Q. B. 629, C. A.; *Preston Corporation* v. *Biornstad*, [1898] A. C. 513; *Waldock* v. *Winfield*, [1901] 2 K. B. 596, C. A. A servant does not become an independent contractor merely by being given piecework (*Wiggett* v. *Fox*, *supra*; *Tucker* v. *Axbridge Highway Board* (1888), 5 T. L. R. 26; see title MASTER AND SERVANT, Vol. XX., p. 68).

(*i*) Whether or not control is exercised so as to render the employer liable is a question of fact (*Brady* v. *Giles* (1835), 1 Mood. & R. 494). The mere fact that a certain amount of supervision is exercised (*Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; *Cuthbertson* v. *Parsons* (1852), 12 C. B. 304 (modified control by servant of employee), or directions given as to the work to be done, not amounting to directions as to the manner in which it is to be done, will not as a rule give such control to the employer (*Steel* v. *South Eastern Rail. Co.* (1855), 16 C. B. 550; *Bennett* v. *Castle & Sons* (1898), 14 T. L. R. 288, C. A.; compare *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.); nor does it matter whether the agreement between the employer and the contractor is in writing or not (*ibid.*). In the following cases it was held that control was retained by the employer:—*M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48 (defendant urging hired postilions to do a wrongful act); *Burgess* v. *Gray* (1845), 1 C. B. 578 (entire control not abandoned over a contractor employed to connect a house with a sewer); *Ruth* v. *Surrey Commercial Dock Co.*, *supra* (dock labourers unloading by piecework and employing other labourers themselves); *Union Steamship Co., Ltd.* v. *Claridge*, [1894] A. C. 185, P. C. (contract providing for retention of control of crew assisting stevedore); *Jones* v. *Scullard*, [1898] 2 Q. B. 565 (driver jobbed by the owner of the vehicle, horse, harness, and livery); *Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A. (contractor engaged on work jointly with defendants); *Mileham* v. *St. Marylebone Borough Council* (1903), 1 L. G. R. 412 (a driver, jobbed with horse to defendants to drive water cart, was entrusted with the key of the defendants' watercock); compare, however, *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Perkins* v. *Stead* (1907), 23 T. L. R. 433 (purchaser of a motor car driven by vendors' driver to a place arranged for delivery to the purchaser). On the other hand, control was held not to have been retained in *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737 (licensed driver); compare *Martin* v. *Temperley* (1843), 4 Q. B. 298 (licensed waterman); *Allen* v. *Hayward* (1845), 7 Q. B. 960 (commissioners employing contractor to do drainage work); *Knight* v. *Fox* (1850), 5 Exch. 721 (contractor, employed to build a bridge, contracted for the erection of a scaffold); *Overton* v. *Freeman* (1852), 11 C. B. 867 (sub-contract by contractors, employed to pave streets, for doing a portion of the work, where there was no evidence that

SECT. 5. Independent Contractor.

**795.** Thus a principal is not liable for damage resulting from the casual or collateral (*k*) negligence of an independent contractor, or of the latter's servants (*l*), while doing the work contracted to be done (*m*).

Liability to third party.

**796.** Where a person employs another to do work which does, or in the natural course of things will, involve or result in a duty

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the contractors were present directing or sanctioning the act complained of); *Peachey* v. *Rowland* (1853), 13 C. B. 182 (sub-contractor employed to fill in drain and carry away refuse); *Gayford* v. *Nicholls* (1854), 9 Exch. 702 (contractor's servants, in building for the defendants, negligently and unnecessarily damaged the plaintiff's house); *Brown* v. *Accrington Cotton Spinning Co.* (1865), 3 H. & C. 511 (competent clerk of works employed to superintend contractor's men); *Murray* v. *Currie* (1870), L. R. 6 C. P. 24 (shipowner employing stevedore held not responsible to one of the latter's men where the stevedore controlled his own men); *Steel* v. *South Eastern Rail. Co.* (1855), 16 C. B. 550 (master bricklayer employed to do certain work under the orders of the defendants' surveyor, but not subject to his directions as to the way in which it was to be done); *Jones* v. *Liverpool Corporation* (1885), 14 Q. B. D. 890; *Bennett* v. *Castle & Sons* (1898), 14 T. L. R. 288, C. A. (contractor's servants doing an act with the employer's permission). Compare also the following cases decided on the question of common employment:—*Johnson* v. *Lindsay & Co.*, [1891] A. C. 371; *Cameron* v. *Nystrom*, [1893] A. C. 308; *McCallum* v. *North British Rail. Co.* (1893), 30 Sc. L. R. 427; *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co., Ltd.*, [1898] 2 Q. B. 588, C. A.; *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex. D. 341; and see title MASTER AND SERVANT, Vol. XX., pp. 67, 133.

(*k*) Negligence is said to be casual or collateral when it arises incidentally in the course of the performance of, and not directly from, the act authorised, such as a workman leaving a tool or barrow in a road (*Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488, *per* POLLOCK, C.B., at p. 497), or letting a stone fall from a bridge (*Reedie* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244), or building (*Crawford* v. *Peel and Carmichael* (1887), 20 L. R. Ir. 332) under construction (*Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q. B. 72, C. A., *per* A. L. SMITH, L.J., at p. 76). On the other hand, the negligence of the contractor in the following cases was held to be not casual:—where a plumber was engaged, on a highway, in connecting telephone wire tubes, and had to use a benzoline lamp of which the safety valve was known to be out of order and injury was caused to a passer-by owing to the lamp exploding (*Holliday* v. *National Telephone Co.*, [1899] 2 Q. B. 392, C. A.); where heaps of soil due to excavation in a highway were negligently left unguarded (*Penny* v. *Wimbledon Urban District Council, supra*; compare *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, C. A.; *Robinson* v. *Beaconsfield Urban District Council* (1911), 27 T. L. R. 319; affirmed, [1911] 2 Ch. 188, C. A.); leaving the movable derrick or platform used for working at an electric tram standard so near the lines as to injure a passenger on a tram (*Maxwell* v. *British Thompson Houston Co., Ltd.* (1902), 18 T. L. R. 278. *Butler* v. *Hunter* (1862), 7 H. & N. 826 (neighbour's house injured by pulling down the defendant's), which was commented on in *Hughes* v. *Percival* (1883), 8 App. Cas. 443, 447, is perhaps explainable on the ground that the injury arose, not from the act itself, but from the improper way in which it was done; and see, further, titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 136, 137; MASTER AND SERVANT, Vol. XX., pp. 264, 265.

(*l*) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Pearson* v. *Cox* (1877), 2 C. P. D. 369; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829.

(*m*) See *Penny* v. *Wimbledon Urban District Council, supra*, and see p. 475, *post*.

SECT. 6. Consent: Volenti Non Fit Injuria.

## SECT. 6.—*Consent: Volenti Non Fit Injuria.*

Nature of defence.

**798.** Where a plaintiff relies on the breach of some duty to take care (*b*), other than the direct breach of a statutory duty (*c*), owed by the defendant to him, it is a good defence that the plaintiff consented to that breach of duty, or, knowing of it, voluntarily incurred the whole risk entailed by it (*d*). In such a case the maxim "*volenti non fit injuria*" applies (*e*). This defence is to be distinguished from the defence of contributory negligence, seeing that a plaintiff may have voluntarily exposed himself to the risk of being injured while exercising the utmost care (*f*).

Distinguished from contributory negligence.

Proof required: (i.) perception;

**799.** In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this

plaintiff was injured by their collapse, it was held that as the sub-contractor's obligation was only to satisfy the principal contractor, and he had done so, he was not answerable to the plaintiff; compare *Earl* v. *Lubbock*, [1905] 1 K. B. 253, C. A. Where the employers are liable they may have a remedy over against the contractor under the contract; and a defendant may, apart from any contract of indemnity, have such a remedy against a contractor whose negligence has resulted in the defendant being liable in damages to others (*City of Birmingham Tramways Co., Ltd.* v. *Law*, [1910] 2 K. B. 965, where the plaintiffs, lessees of the tramway, recovered a sum which was properly paid as compensation to persons injured by an accident to a tram, derailed by the negligence of the contractors, who had undertaken with the owners, the corporation, to relay the tramway; the ground of the decision being that the plaintiffs, as lessees, were injured in their proprietary rights and in their right of passage along the highway). For an example of the contractor escaping liability while the employer was liable for the contractor's act, see *Ilford Gas Co.* v. *Ilford Urban District Council* (1903), 67 J. P. 365 (where the act causing damage was done by the direction of the defendants and was negligently conceived, the direction given having been properly carried out by the contractor).

(*b*) The defence may be available in other cases, *e.g.*, *Washborn* v. *Black* (1774), 11 East, 405, n.; see title TRESPASS; compare *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602, C. A.; *Blake* v. *Woolf*, [1898] 2 Q. B. 426, *per* WRIGHT, J., at p. 428.

(*c*) *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423, approving *dicta* to this effect in *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; compare *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Exch. 130; *Clarke* v. *Holmes* (1862), 7 H. & N. 937.

(*d*) *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 696; approved in *Yarmouth* v. *France* (1887), 19 Q. B. D. 647, *per* LINDLEY, L.J., at p. 659; and in *Smith* v. *Baker & Sons*, [1891] A. C. 325, 337; compare *Robertson* v. *Primrose & Co.* (1909), 47 Sc. L. R. 147.

(*e*) The doctrine of this maxim does not depend upon the relationship of employer and employed (see title MASTER AND SERVANT, Vol. XX., p. 120); it is of general application to all (*Smith* v. *Baker & Sons*, *supra*). The maxim is "*volenti*" and not "*scienti*." A man may know of a danger and be obliged to incur it (*Thrussell* v. *Handyside* (1888), 20 Q. B. D. 359; *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 696; *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179).

(*f*) *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 697; compare *Indermaur* v. *Dames* (1866), L. R. 2 C. P. 311; *Woodley* v. *Metropolitan Rail. Co.* (1877), 2 Ex. D. 384, 390. As to contributory negligence, see pp. 445 *et seq.*, *ante*.

alone would be insufficient (*g*), but also that he fully appreciated it (*h*) and voluntarily accepted the risk (*i*). The question whether the plaintiff's acceptance of the risk was voluntary is generally a question of fact; and the answer to it may be inferred from his conduct in the surrounding circumstances (*k*). The inference may more readily be drawn in cases where it is proved that the plaintiff knew of the danger and comprehended it (*l*), as, for example, where the danger is apparent, or proper warning is given of it (*m*), and there is nothing to show that he was obliged to incur it (*n*), than in

(ii.) appreciation; and (iii.) acceptance of risk.

(*g*) *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685, C. A.; *Smith* v. *Baker & Sons*, [1891] A. C. 325. It is necessary that the plaintiff should be shown to have notice of the danger; thus, where a trespasser was injured by a concealed danger of which there was no notice given, the maxim did not apply (*Bird* v. *Holbrook* (1828), 4 Bing. 628; compare *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220).

(*h*) *Thomas* v. *Quartermaine*, *supra*. The risk must be such as can be comprehended by the plaintiff in spite of Lord ESHER's comment in *Yarmouth* v. *France* (1887), 19 Q. B. D. 647, at p. 657, that this gives an advantage to a man of slow comprehension (*Sarch* v. *Blackburn* (1830), 4 C. & P. 297; *Cowley* v. *Sunderland Corporation* (1861), 6 H. & N. 565; compare *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 304; *Giles* v. *London County Council* (1903), 2 L. G. R. 326; *Torrance* v. *Ilford Urban District Council* (1909), 25 T. L. R. 355, C. A.). In *Cowley* v. *Sunderland Corporation*, *supra*, a dangerous drying machine was provided by the defendants in a public washhouse: the plaintiff was injured while using it, and the defence was held not to be established, as the danger was not one likely to be understood by persons of the class—the poor and the ignorant—for whom the washhouse was provided. In *Giles* v. *London County Council*, *supra*, a cricketer was injured by a dangerous sign, one of many placed to mark off different cricket pitches: held, that it was an obvious danger which he could appreciate. It appears that the result would have been different had the ground been provided for children; compare *Harrold* v. *Watney*, [1898] 2 Q. B. 320; and consider p. 373, *ante*.

(*i*) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338, C. A.; *Dynen* v. *Leach* (1857), 26 L. J. (EX.) 221; *Smith* v. *Baker and Sons*, *supra*; and see cases cited in note (*k*), *infra*.

(*k*) There must, however, be a finding of fact to this effect (*Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220, *per* WILLS, J., at pp. 223, 224, following the view expressed in *Yarmouth* v. *France*, *supra*, by Lord ESHER, M.R., at p. 657; compare *Membery* v. *Great Western Rail. Co.* (1887), 4 T. L. R. 504, *per* BOWEN, L.J., at p. 505; *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas., 179, *per* Lord HALSBURY, at p. 186.

(*l*) See *Thomas* v. *Quartermaine*, *supra*, *per* BOWEN, L.J., at p. 696; *Bolch* v. *Smith* (1862), 7 H. & N. 736; *Giles* v. *London County Council*, *supra*.

(*m*) See cases cited in note (*n*), *infra*; *Ilott* v. *Wilkes*, *supra*; *Williams* v. *Clough* (1858), 3 H. & N. 258; compare *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; *Griffiths* v. *London and St. Katharine's Docks Co.* (1884), 13 Q. B. D. 259, C. A.

(*n*) *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179, *per* Lord HALSBURY, at p. 185; *Webster* v. *Brown* (1892), 29 Sc. L. R. 631 (where it was held that a person who had for some months knowingly used defective and dangerous doorsteps must take the consequences of so doing); *McEvoy* v. *Waterford Steamship Co.* (1886), 18 L. R. Ir. 159 (where the plaintiff unnecessarily stood at a dangerous place when he could have worked equally well elsewhere); *Torrance* v. *Ilford Urban District Council* (1909), 25 T. L. R. 355, C. A. (a carter saw and had the opportunity of

SECT. 6. Consent: Volenti Non Fit Injuria.

cases where he had knowledge that there was danger but not full comprehension of its extent, or where, while taking an ordinary and reasonable course, he had not an adequate opportunity of electing whether he would accept the risk or not (*o*). The defence is perhaps most frequently made use of in cases where the relationship of master and servant exists (*p*).

Risks incident to games.

**800**. A person engaged in playing a lawful game (*q*) takes upon himself the risks incident to being a player, and has no remedy by action for injuries received in the course of the game unless they be due to some unfair act or foul play (*r*).

Unlawful games.

If the game is unlawful, the fact that the plaintiff was himself participating in an illegal act is a bar to his recovering damages in respect of any injury arising out of it (*s*), but the mere fact that the plaintiff consented to join in an illegal game does not necessarily debar him from recovering damages for injuries he received while playing it. The circumstances may be such that the plaintiff can establish a cause of action against the defendant without any reference to the illegal transaction in which they were engaged, and that the defendant, having on him the burden of establishing the consent of the plaintiff, may be unable to do so without at the same time establishing the illegal nature of the game, in which case the consent is not available to him as a defence (*a*).

appreciating the danger involved in driving over a road which the defendant had covered with a large quantity of granite, yet drove on with the result that his horse was injured: held, that he elected to take the risk): in *Abbott* v. *Freeman* (1877), 35 L. T. 783, the plaintiff stood were he knew horses were tried by being trotted up and down and was injured by a horse swerving when whipped: held that he could not recover; compare *Church* v. *Appleby* (1888), 5 T. L. R. 88; *Skipp* v. *Eastern Counties Rail. Co.* (1853), 9 Exch. 223; *Brooks* v. *Courtney* (1869), 20 L. T. 440; *Breslin* v. *Dublin United Tramway Co.* (1911), 45 I. L. T. 220, C. A.

(*o*) *Clayards* v. *Dethick* (1848), 12 Q. B. 439; *Thompson* v. *North Eastern Rail. Co.* (1860), 2 B. & S. 106; *Osborne* v. *London and North Western Rail. Co.* (1888), 21 Q. B. D. 220 (passenger using dangerous steps at a station). In *Wing* v. *London General Omnibus Co., Ltd.*, [1909] 2 K. B. 652, C. A., FLETCHER MOULTON, L.J., at p. 667, stated that the election by the plaintiff to take the risk of travelling in a class of vehicle, which is in certain circumstances likely to become unmanageable, throws upon the plaintiff the burden of proving that the particular vehicle is defective.

(*p*) Questions then arise whether the servant contracted to incur the risk; see *Smith* v. *Baker & Sons*, [1891] A. C. 325; compare *Holmes* v. *Worthington* (1861), 2 F. & F. 533; *Wallace* v. *Culter Mills* (1892), 29 Sc. L. R. 784; and see title MASTER AND SERVANT, Vol. XX., pp. 120, 131.

(*q*) As to what constitutes a game, as being lawful or unlawful, see title GAMING AND WAGERING, Vol. XV., pp. 284 *et seq.*

(*r*) *Reid* v. *Mitchell* (1885), 22 Sc. L. R. 748: *Boulter* v. *Clerk* (1747), Buller, Nisi Prius, 16, confines the application of the maxim to lawful games; compare *Matthew* v. *Ollerton* (1693), Comb. 218; see *R.* v. *Latimer* (1886,) 17 Q. B. D. 359; *R.* v. *Coney* (1882), 8 Q. B. D. 534; compare *Stanley* v. *Powell*, [1891] 1 Q. B. 86; and as to persons, not playing, who are injured when a game is in progress, see *Ward* v. *Abraham* (1910), 47 Sc. L. R. 252; and see pp. 395 *et seq.*, *ante*; and title TRESPASS.

(*s*) See titles EQUITY, Vol. XIII., p. 73; GAMING AND WAGERING, Vol. XV., p. 271.

(*a*) If a man license another to beat him such a licence is void because it is against the peace (*Boulter* v. *Clerk*, *supra*).

## SECT. 7.—*Imminent Personal Risk.*

7. **Imminent Personal Risk.**

Act done for self-preservation.

Choice of one of two evils.

**801.** It is a defence to an action for negligence that the defendant did the act complained of in an emergency, in response to his instinct for self-preservation (*b*), provided that his action was what a reasonable man might well have done under the circumstances (*c*). Thus no blame is attached to a person who, when a lighted squib is thrown at him, throws it away and inflicts damages on another (*d*); nor to a person who loses his presence of mind by reason of some wrongful act of another (*e*); nor to a person who is forced by another's negligence to choose one of two evils and who acts reasonably and honestly in adopting a course believed to be the lesser of the two evils (*f*).

## SECT. 8.—*Reliance on Others.*

In respect of persons employed.

**802.** The duty owed by the defendant to the plaintiff, whether it arose from contract (*g*) or from statutory provisions (*h*), may be a duty to employ competent persons to do the class of acts out of which the injury arose (*i*) without any correlative duty to insure that the persons so employed will use that degree of care and skill which a person competent to do such acts might reasonably be expected to use (*k*). In such a case, if a reasonably competent

(*b*) *The Khedive* (1880), 5 App. Cas. 876; *Scott* v. *Shepherd* (1773), 1 Smith, L. C., 11th ed., 454; 3 Wils. 403; compare *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261; compare *Gibbons* v. *Pepper* (1695), 4 Mod. Rep. 404. In *Hall* v. *Fearnley* (1842), 3 Q. B. 919, WIGHTMAN, J., at p. 922, explained that *Wakeman* v. *Robinson* (1823), 1 Bing. 213, laid down that an involuntary act might be a defence on the general issue.

(*c*) *Jones* v. *Boyce* (1816), 1 Stark. 493; approved in *Wilson* v. *Newport Dock Co.* (1866), L. R. 1 Exch. 177, *per* MARTIN, B., at p. 187; compare *R.* v. *Pitts* (1842), Car. & M. 284 (where it was said that it is murder, though the deceased has voluntarily jumped into a river, if he has risked that as the only escape from a violent man; see *Adams* v. *Lancashire and Yorkshire Rail. Co.* (1869), L. R. 4 C. P. 739, *per* BRETT, J., at p. 744; *The City of Lincoln* (1889), 15 P. D. 15, C. A.; *The Industrie*, [1894] P. 58, C. A.); and see p. 366, *ante*.

(*d*) *Scott* v. *Shepherd*, *supra*.

(*e*) *Jones* v. *Boyce*, *supra*; *Woolley* v. *Scovell* (1828), 3 Man. & Ry. (K. B.) 105; *The Khedive*, *supra* (where, however, the common law rule stated was held not to apply, seeing that under the Merchant Shipping Acts a law was framed to meet the very emergency that arose); compare *Wakeman* v. *Robinson*, *supra* (where a driver who pulled the wrong rein in an emergency was under the particular circumstances held liable).

(*f*) *The Highland Loch* (1912), 28 T. L. R. 213, H. L.; and see note (*r*), p. 367, *ante*.

(*g*) *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A.

(*h*) As to the responsibility of a master or shipowner for the negligence of a qualified pilot where the latter's employment is compulsory, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 683; and title SHIPPING AND NAVIGATION.

(*i*) Thus the duty of a hirer of a horse which becomes ill may be only to call in a veterinary surgeon, and if so he is not answerable for the medicines the surgeon may administer (*Dean* v. *Keate* (1811), 3 Camp. 4; see *ibid.*, *per* Lord ELLENBOROUGH).

(*k*) *Ibid.* *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160; *Hillyer*

SECT. 8. **Reliance on Others.**

man is employed by the defendant and is negligent, the defendant is not responsible (*l*).

In respect of goods supplied.

**803.** Such a defence may be available where the circumstances are such as to cast no duty to take care on the defendant (*m*), as in the case of a dealer in goods, bought from a manufacturer of repute, when there is no implied warranty and nothing in the condition of the goods to put the dealer on his guard (*n*), or where the defendant has been relieved of a duty to take care by some agreed provision, as where plant or tackle is to be supplied to the approval of certain persons, and the required approval having been obtained, those supplying the plant are free from liability if it fails in the purpose for which it has been so approved (*o*).

v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 820, C. A. ; see titles MASTER AND SERVANT, Vol. XX., p. 266, note (*m*); MEDICINE AND PHARMACY, Vol. XX., p. 334.

(*l*) *Hall* v. *Lees*, [1904] 2 K. B. 602, C. A. (where the duty of the defendants, who were the committee of an association which from philanthropic motives supplied skilled nurses to persons needing them, was stated to be to find and supply nurses in selecting whom they had employed all reasonable care and skill in order to ensure their being competent and efficient); compare *Leaver* v. *Pontypridd Urban District Council* (1911), 56 Sol. Jo. 32, H. L. (where a tramcar driver, going cautiously past an obstruction, was directed by a person in charge of the obstruction, who was better able to see than the driver, to proceed and damage resulted). As to when time begins to run in such a case, see title LIMITATION OF ACTIONS, Vol. XIX., p. 51.

(*m*) *Daniel* v. *Metropolitan Rail. Co.* (1871), L. R. 5 H. L. 45 ; compare *Palmer* v. *Bateman*, [1908] 2 I. R. 393; see note (*n*), p. 474, *ante*; *M'Inulty* v. *Primrose* (1897), 34 Sc. L. R. 334, where the servant of the defendant, a contractor, was injured because of a defective staircase erected by another contractor: held, no duty upon the defendant; similarly in *Dalziel* v. *Osborne* (1857), 20 Dunl. (Ct. of Sess.) 55, a defendant who sold poison in mistake for medicine was held not liable, as he agreed to procure it from elsewhere; compare *Thomas* v. *Winchester* (1852), 6 New York Rep. 397 (where on appeal it was held that the manufacturer of a drug who labels as harmless what in fact is a deadly drug is liable to anyone who subsequently is injured in consequence: the intermediate sellers were found by the jury to be guilty of no negligence, and the Court of Appeals did not decide whether this was correct or not); but see *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, C. A., *per* BRETT, M.R., at p. 514. An independent duty arises where there is an invitation to the plaintiff (see pp. 388 *et seq.*, *ante*), even although in the case of defective premises someone else owes a duty to keep safe the particular part in respect of which complaint is made (*The Bearn*, [1906] P. 48, C. A. : *The Moorcock* (1889), 14 P. D. 64, C. A. ; compare *Edwards* v. *Hutcheon* (1889), 26 Sc. L. R. 550).

(*n*) *Gordon* v. *M'Hardy* (1903), 41 Sc. L. R. 129 ; *Dalziel* v. *Osborne*, *supra* ; and see pp. 407, 408, *ante*.

(*o*) *Wood & Co.* v. *Mackay* (1906), 43 Sc. L. R. 458 ; *M'Gill* v. *Bowman* (1890), 28 Sc. L. R. 144 ; compare *Kiddle* v. *Livett* (1885), 16 Q. B. D. 605 ; *Campbell* v. *Morrison* (1891), 29 Sc. L. R. 251 ; *Cramb* v. *Caledonian Rail. Co.* (1892), 29 Sc. L. R. 869. In *Burns* v. *Cork and Bandon Rail. Co.* (1863), 13 I. C. L. R. 543, it was held that carriers, for whom the standard of care was high, and who purchased their rolling stock from manufacturers, are responsible for defects in that stock due to the negligence of those from whom they purchase; see *Sharp* v. *Grey* (1833), 9 Bing. 457, *per* ALDERSON, J., at p. 459; and see, generally, title CARRIERS, Vol. IV., pp. 44, 45.

# Part X.—Damages.

## SECT. 1.—*In General.*

SECT. 1. In General.

**804.** In order to entitle a plaintiff to maintain an action for negligence he must have suffered some temporal loss or injury (*p*) which must be directly due to the act complained of (*q*). In order to compensate him for such loss, damages are awarded him, and these should, as nearly as possible, place him in the same position as that in which he would have been but for the injury or wrong sustained (*a*), provided that the injuries for which compensation is sought are such as in the ordinary course of things result from the act complained of (*b*). Conversely a defendant is liable for all the consequences of his negligent act provided they directly and naturally flow from that act (*c*).

Compensation for temporal loss or injury.

Injury must result from act complained of.

**805.** The principle that damages will be given for the consequences naturally and probably flowing from a proved act of negligence is of equal application whether the act constitutes or involves a breach of contract or not, but some difference may arise in estimating the measure of damages (*d*). Where there is a breach

Measure of damages in respect of breach of contractual

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(*p*) *Williams* v. *Morland* (1824), 2 B. & C. 910; approved in *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141, C. A., *per* BOWEN, L.J., at p. 150. Where the defendants had been negligent, but the plaintiffs had suffered no damage, the defendants were held entitled to the costs of the action (*Cole and Others* v. *Christy, Manson and Woods* (1910), 26 T. L. R. 469). As to the possibility of recovering nominal damages, see *The Mediana*, [1900] A. C. 113, *per* Lord HALSBURY, L.C., at p. 117; *Columbus Co.* v. *Clowes*, [1903] 1 K. B. 244.

(*q*) *Remorquage à Hélice (Société Anonyme de)* v. *Bennetts*, [1911] 1 K. B. 243; and see p. 378, *ante*.

(*a*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; 5 C. P. D. 280, C. A.; see *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39; compare *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66; affirmed 43 Ch. D. 316, C. A., but varied [1892] A. C. 166. In estimating prospective loss of income it is right to take all circumstances, such as the accidents of life, into account (*Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250, C. A.).

(*b*) *The Argentino* (1889), 14 App. Cas. 519; *The Notting Hill* (1884), 9 P. D. 105, C. A., applying as far as possible the rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341; compare *American Braided Wire Co.* v. *Thomson* (1890), 44 Ch. D. 274, 280, C. A.; see p. 378, *ante*.

(*c*) *The Argentino, supra; The Notting Hill, supra;* compare *Scott* v. *Shepherd* (1773), 3 Wils. 403; 1 Smith, L. C., 11th ed., p. 454; *Rigby* v. *Hewitt* (1850), 5 Exch. 240, *per* POLLOCK, B., at p. 243; *Sharpe* v. *Powell* (1872), L. R. 7 C. P. 253; compare *Caffrey* v. *Darby* (1801), 6 Ves. 488; *Byrne* v. *Wilson* (1862), 15 I. C. L. R. 332; *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; *The George and Richard* (1871), L. R. 3 A. & E. 466; *De la Bere* v. *Pearson, Ltd.*, [1907] 1 K. B. 483.

(*d*) *The Notting Hill, supra, per* BRETT, M.R., at p. 113, citing Mayne on Damages, 3rd ed., p. 39; *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797, C. A.; *The Argentino* (1888), 13 P. D. 191, C. A., *per* BOWEN, L.J., at p. 201; *Cobb* v. *Great Western Rail. Co.*, [1893] 1 Q. B. 459, C. A., *per* [illegible], L.J., at p. 464; *Salvesen* v. *Nordstjernan*, [1905] A. C. 302;

SECT. 1. In General.

of a duty which arises out of a contract, the measure of damages whether they are to be arrived at either on the basis of an express provision in the contract or on the basis of what may reasonably be supposed to have been in the minds of the parties when the contract was made, may be susceptible of more precise calculation than where the duty does not so arise (*e*).

Measure of damages for breach of duty not arising from contract.

Where the duty does not arise out of a contract, the measure of damages, in any action which can be maintained (*f*) for the breach of it, may involve the consideration of all the actual consequences of the proved act of negligence, which have been ascertained and determined (*g*) to be natural (*g*), whether they might reasonably be supposed to have been, at the time of the negligent act or omission, within the contemplation of the negligent person, or not (*h*).

General damages.

**806.** In an action for negligence those damages are called "general damages" which follow in the ordinary course, naturally and directly, from the act or omission complained of, or which the law will assume to flow from such act or omission. They may include damages on which an exact money value cannot be placed or supported by direct proof (*i*).

Special damages.

Those damages which are not presumed by law to be the direct, natural or probable consequence of the act or omission complained of, but which do in fact result in the circumstances of the particular case from such act or omission so as to be capable of being recovered in addition to the "general damages," are called "special damages" (*k*).

Special damages must be claimed and proved.

Special damages must be claimed specially and proved strictly. When so claimed and proved, they may be recovered if they in fact resulted from the negligent act or omission complained of, notwithstanding that they were not within the contemplation of the parties to the action (*l*).

*Ströms Bruks Aktie Bolag* v. *Hutchison*, [1905] A. C. 515, *per* Lord MACNAGHTEN, at p. 525.

(*e*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; see title DAMAGES, Vol. X., pp. 313 *et seq.*

(*f*) If the consequences are such that they could not, by any amount of care and forethought reasonably to be expected, have been foreseen, the action only is maintainable if the duty to guard against the injury was an absolute one; see pp. 371, 372, 405, 406, 468, *ante*.

(*g*) Consequences which are due to an altogether foreign and independent cause may be determined not to be material (*Isitt* v. *Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504, *per* WILLS, J., at p. 512).

(*h*) *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; *Ströms Bruks Aktie Bolag* v. *Hutchison*, *supra*, *per* Lord MACNAGHTEN, at p. 526; *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

(*i*) See title DAMAGES, Vol. X., pp. 303, 308 *et seq.*; *M'Laurin* v. *North British Rail. Co.* (1892), 29 Sc. L. R. 291; *The Mediana*, [1900] A. C. 113, 117. Particulars may be ordered of a specific loss claimed (*Watson* v. *North Metropolitan Tramways Co.* (1886), 3 T. L. R. 273); but not of the amount claimed for general damages (*London and Northern Bank* v. *Newnes* (*George*), *Ltd.*, (1900), 16 T. L. R. 433, C. A.).

(*k*) See title DAMAGES, Vol. X., p. 304; and *Ströms Bruks Aktie Bolag* v. *Hutchison*, *supra*, at p. 526.

(*l*) See title DAMAGES, Vol. X., p. 304; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524, C. A., *per* BOWEN, L.J., at p. 528.

SECT. 1. In General.

Nature of damages for personal injury.

**807.** Where personal injury results from a negligent act, general damages are given for bodily pain and suffering (*m*), injury to health (*n*), and for personal inconvenience (*o*). Such damages cannot be a perfect compensation, but must be arrived at by a reasonable consideration of the circumstances of the plaintiff and by making allowances for the ordinary chances of life (*p*). In addition, special damage may be recovered for pecuniary loss sustained (*q*), whether it be for expenses properly incurred in medical or nursing attendance, or for loss of earnings in the plaintiff's ordinary avocation (*q*) which he has been prevented from earning owing to his injuries, and in respect of the time during which he will be likely to remain unable to earn them (*a*), or in respect of his incapacity to earn an increasing income in future (*b*), or for any other loss or injury actually suffered which follows in the ordinary course of things from the negligent act (*c*).

Aggravated damages.

**808.** Where an act is complained of as negligent, there may be accompanying circumstances which tend to aggravate the damages beyond the actual pecuniary loss sustained (*d*). Circumstances relied on in aggravation of damages should be pleaded (*e*).

(*m*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A.; 5 C. P. D. 280, C. A.; and see note (*c*), *infra*. As to remoteness of damage, see pp. 486 *et seq.*, *post*.

(*n*) *The Greta Holme*, [1897] A. C. 596, *per* Lord HALSBURY, L.C., at p. 601; *Fair* v. *London and North Western Rail. Co.* (1869), 21 L. T. 326 (personal injury may involve damages for physical incapacity to enjoy life).

(*o*) *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, which was adversely commented on in *McMahon* v. *Field* (1881), 7 Q. B. D. 591, C. A., because of the application of the principle laid down to the particular facts; compare *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408.

(*p*) *Phillips* v. *London and South Western Rail. Co.*, *supra*; compare *Potter* v. *Metropolitan Rail. Co.* (1873), 28 L. T. 735.

(*q*) *The Greta Holme*, *supra*, *per* Lord HALSBURY, L.C., at p. 601.

(*a*) *Phillips* v. *London and South Western Rail. Co.*, *supra*; *Rowley* v. *London and North Western Rail. Co.* (1873), L. R. 8 Exch. 221; *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112; *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K. B. 250.

(*b*) *Fair* v. *London and North Western Rail. Co.* (1869), 21 L. T. 326; *M'Laurin* v. *North British Rail. Co.* (1892), 29 Sc. L. R. 291; and see title DAMAGES, Vol. X., p. 324.

(*c*) This includes damages which result from nervous shock causing physical injury, whether the incident creating the shock was accompanied by physical impact or not, and whether the injury results directly from the shock or from a cause of action induced by the shock (*Jones* v. *Boyce* (1816), 1 Stark. 493; *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669; see pp. 487, 488, *post*; title CARRIERS, Vol. IV., p. 59).

(*d*) *Emblen* v. *Myers* (1860), 30 L. J. (EX.) 71. In *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287, WILLES, J., at p. 307, approving *Emblen* v. *Myers*, *supra*, said exemplary damages were proper, because the railway company had acted wrongly with a high hand, in plain violation of an Act of Parliament, and had persisted in its conduct in order to destroy the plaintiff's business and secure gain to itself: BYLES, J. (*ibid.*, at p. 308), agreed that where a wrongful act was accompanied by "words of

(*e*) For note (*e*) see next page.

SECT. 1. **In General.**

**Diminished damages.**

A defendant may, in order to diminish the damages, show that the plaintiff has not done his best to minimise his loss (*f*), or that the loss has been increased or affected by the conduct of the plaintiff, or diminished by some act or conduct of the defendant (*g*), or that part of the loss would have been sustained in any event even if there had been no negligence on his part (*h*).

**Insufficient grounds.**

He cannot, however, diminish the damages by showing that the plaintiff has obtained compensation for the injury under a policy of insurance (*i*), or that the plaintiff is a wealthy man (*k*), or that the damages sought to be recovered were partly caused by the plaintiff's own act, if such act was reasonably done for the purpose of avoiding the consequences of the defendant's negligence (*l*); for the plaintiff's negligence cannot affect the question of damages (*m*). Nor where goods are injured by the defendant's negligence does it affect the question of damages that the plaintiff has only a qualified property in the goods injured (*n*), or is only the bailee of the

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contumely and abuse," exemplary damages could be given. See *Cooley* v. *Edinburgh and Glasgow Rail. Co.* (1845), 8 Dunl. (Ct. of Sess.) 288 (where it was held that, even where liability was admitted, the plaintiff could show how in fact the accident occurred, since it might have a bearing on the damages); and see *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25, *per* Lord BLACKBURN, at p. 39; compare *Forde* v. *Skinner* (1830), 4 C. & P. 239 (where a pauper complained of an assault in cutting off his hair by force, and the jury were directed that if it were done not for cleanliness, but to take down the pauper's pride, the damages would be aggravated); see *Whitham* v. *Kershaw* (1885), 16 Q. B. D. 613, C. A., *per* BOWEN, L.J., at p. 618.

(*e*) See title DAMAGES, Vol. X., p. 346.

(*f*) *American Braided Wire Co.* v. *Thomson* (1890), 44 Ch. D. 274, 288, C. A.; *Roth & Co.* v. *Taysen, Townsend & Co.* (1896), 1 Com. Cas. 306; and see title DAMAGES, Vol. X., p. 335.

(*g*) See title DAMAGES, pp. 325, 346; and as to the necessity of pleading such circumstances see *ibid.*, p. 346; compare *Dodd* v. *Holme* (1834), 1 Ad. & El. 493.

(*h*) *Nitro Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, C. A. (where it was said that some part of the damage was caused by act of God, and would have occurred even if the defendants had performed their duty); see *Workman* v. *Great Northern Rail. Co.* (1863), 32 L. J. (Q. B.) 279. In *Dodd* v. *Holme* (1834), 1 Ad. & El. 493, the fact that the plaintiff's house, which was injured by the defendant's negligence, was in such a ruinous condition that it must have soon fallen of its own accord, was allowed to affect the damages; compare *Dawson & Co.* v. *Bingley Urban Council*, [1911] 2 K. B. 149, C. A., reversing S. C., 27 T. L. R. 46 (where a portion of the damage caused by a fire was attributable to the defendant's neglect to indicate correctly the position of fire-plugs as required by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 66).

(*i*) *Mason* v. *Sainsbury* (1782) 3 Doug. (K. B.) 60; *Cullen* v. *Butler* (1816), 5 M. & S. 461; *Yates* v. *Whyte* (1838), 4 Bing. (N. C.) 272; *Bradburn* v. *Great Western Rail. Co.* (1874), L. R. 10 Exch. 1; and see *Jebsen* v. *East and West India Dock Co.* (1875), L. R. 10 C. P. 300; see also the Fatal Accidents (Damages) Act, 1908 (8 Edw. 7, c. 7), and p. 462, *ante*.

(*k*) *Phillips* v. *London and South Western Rail. Co.* (1879), 5 Q. B. D. 78, C. A., and again, on another appeal, 5 C. P. D. 280, C. A.

(*l*) *The Industrie* (1871), L. R. 3 A. & E. 303.

(*m*) If the plaintiff's act directly contributes to the accident the defendant must succeed; if it only contributes indirectly it must be left out of consideration altogether in assessing damages (*Florence* v. *Mann* (1890), 28 Sc. L. R. 215).

(*n*) *Whittingham* v. *Bloxham* (1831), 4 C. & P. 597.

thing damaged, and that the conditions of the bailment are such as do not make him responsible to the owner for the loss sustained (*o*).

Measure of damages to chattels.

**809.** Where a chattel has been injured owing to a negligent act, the cost of repairing it (*p*), the difference in value between the former worth and that of the chattel when repaired (*q*), and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable (*r*). Loss of profits may also be recovered if it can be shown that they follow directly from the wrongful act (*s*), but not otherwise (*t*). As a rule, damages are not given for the depreciation of the value of an article owing to a fall in the market price during the period of delay occasioned by the defendant's negligence (*a*).

(*o*) *The Winkfield*, [1902] P. 42, C. A., overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422; see *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405, 410; compare *Giles* v. *Grover* (1832), 1 Cl. & Fin. 72; and see *City of Birmingham Tramways Co., Ltd.* v. *Law*, [1910] 2 K. B. 965. But liability must depend on whether the act complained of is the cause from which such damage naturally and directly follows; see note (*s*), *infra*.

(*p*) *The Greta Holme*, [1897] A. C. 596.

(*q*) *Hughes* v. *Quentin* (1838), 8 C. & P. 703 (horse injured); *The Greta Holme*, *supra* (collision at sea), the rule being the same for collisions both on land and sea; see *The Argentino* (1889), 14 App. Cas. 519, affirming 13 P. D. 191; title SHIPPING AND NAVIGATION.

(*r*) *The Argentino*, *supra*; *The Greta Holme*, *supra*; *The Mediana*, [1900] A. C. 113; *The Marpessa*, [1906] P. 14, 95, C. A.; affirmed, [1907] A. C. 241; *The Astrakhan*, [1910] P. 172; compare *Re Trent and Humber Co.*, *Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112, *per* Lord CAIRNS, at p. 117.

(*s*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; compare *The Notting Hill* (1884), 9 P. D. 105, C. A. Thus in *Buckmaster* v. *Great Eastern Rail. Co.* (1870), 23 L. T. 471, where the plaintiff lost business through being late for market owing to the defendant's negligence, it was held that he could recover in respect of such loss.

(*t*) For an example of loss of profits not allowed, see *The Parana* (1877), 2 P. D. 118; compare *The Notting Hill*, *supra*; *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N. S.) 632; *The Bodlewell*, [1907] P. 286 (contingent profit of ship being worked at a loss). Loss of profits must be distinguished from loss of earnings of the article damaged or depreciation of its value; see *Fletcher* v. *Tayleur* (1855), 17 C. B. 21; *The Argentino*, *supra*; and see title DAMAGES, Vol. X., pp. 317, 318. For the rules applicable in Admiralty cases as to the division of loss between parties to a collision, see *The Milan* (1861), 31 L. J. (ADM.) 105; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, C. A.; Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 1; *The Rosalia*, [1912] P. 109; title SHIPPING AND NAVIGATION.

(*a*) *Smeed* v. *Foord* (1859), 1 E. & E. 602 (neglect to supply a thrashing machine on a certain day, in consequence of which corn was damaged by rain, and had to be stacked specially and dried in a kiln: during the delay caused in consequence the market price fell, but, although the plaintiff recovered damages for the expense of stacking, drying, and the deterioration of the grain, he could not recover for the difference in the market price); compare *Collard* v. *South Eastern Rail. Co.* (1861), 7 H. & N. 79 (where in a case of non-delivery of goods by a carrier the loss of the fall in price was recovered); and see *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211.

SECT. 1. In General.

Measure of damages to land and buildings.

**810.** Where injury to land results from a negligent act the measure of damages is, as a rule, when the plaintiff is in possession, the cost of making good the damage done as far as possible, and the depreciation, if any, in the value of the property injured (*b*). Where, however, the result of the defendant's negligence is the total demolition of the plaintiff's house, so that a new house has to be built, the plaintiff is not entitled to a sum equivalent to the cost of building the new house, but only to the value of the old one (*c*), seeing that the benefit that the plaintiff will receive in having a new house must be taken into consideration (*d*). A reversioner can only recover damages for such injury where it is of such a permanent character as to affect the property after it falls into his possession (*e*). Where such an injury exists the measure of damage is the injury to the reversion (*f*), and is estimated by considering the depreciation of the selling value of the reversioner's interest (*g*).

Solicitors.

Where, owing to the negligence of a solicitor in investigating the title to land which his client purports to purchase, the client is wrongfully in possession and is evicted by the true owner, the damages to be recovered by the client from his solicitor include the sum required to obtain a title, with interest (*h*).

Measure of damages in contractual relations.

**811.** The measure of damages for negligence on the part of persons in the contractual or *quasi*-contractual relation, already dealt with in this title, is stated in the several titles there referred to (*i*).

The measure of damages under the Fatal Accidents Acts is dealt with elsewhere (*k*).

## SECT. 2.—*Remoteness of Damage.*

Distinguished from proximate cause.

**812.** The question of remoteness of damage must be distinguished from that of effective cause. For while the latter term is employed where the inquiry is whether or not a negligent act is the effective or real cause of loss or injury to the plaintiff (*l*), the former, strictly speaking, is confined to the inquiry

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(*b*) *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, 520, C. A.; *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113 (both cases are instances of land injured by flood brought about by the negligence of the defendant).

(*c*) *Lukin* v. *Godsall* (1795), Peake, Add. Cas. 15; compare *Hide* v. *Thornborough* (1846), 2 Car. & Kir. 250; and see title DAMAGES, Vol. X., p. 341.

(*d*) *Lukin* v. *Godsall, supra.*

(*e*) *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Docks Co., supra,* approving *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72; *Mumford* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34; *Simpson* v. *Savage* (1856), 1 C. B. (N. S.) 347.

(*f*) *Whitham* v. *Kershaw* (1885), 16 Q. B. D. 613, C. A.

(*g*) *Johnstone* v. *Hall* (1856), 2 K. & J. 414; compare *Dobson* v. *Blackmore* (1847), 9 Q. B. 991; and see title DAMAGES, Vol. X., p. 341.

(*h*) *Allen* v. *Clark* (1863), 7 L. T. 781.

(*i*) See titles AGENCY, Vol. I., pp. 191, 192, 195; BAILMENT, Vol. I., pp. 546, 560, 564; CARRIERS, Vol. IV., pp. 17, 21.

(*k*) See pp. 459 *et seq., ante.*

(*l*) As to effective or proximate cause, see pp. 378 *et seq., ante.* Thus, for

SECT. 2. **Remoteness of Damage.**

whether or not some or any of the consequences of that injury are so remote as to prevent damages being recoverable therefor (*m*).

Remoteness of damage depends on absence of sequence of facts.

**813.** Remoteness of damage in cases of negligence does not depend on whether or not the consequences of the negligent act could have been reasonably foreseen (*n*), nor on the length of time intervening between the negligent act and the injury and its consequences (*o*), but it does depend on whether or not there is an absence of direct, necessary and natural sequence between them (*p*), and to this extent the inquiry is similar, though subsequent, to that of whether the negligent act is the effective cause of the

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example, in *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419, the plaintiff complained that he was robbed owing to the defendants negligently permitting the compartment, in which he was, to become overcrowded: in the absence of any allegation or evidence that the company's servants knew that the persons crowding in were thieves, it was held that there was no connection establishing liability between the overcrowding and the robbery; compare *Glover* v. *London and South Western Rail. Co.* (1867), L. R. 3 Q. B. 25.

(*m*) See, for example, *Re United Service Co., Johnson's Claim* (1871), 6 Ch. App. 212 (where, a bank having been negligent in leaving the plaintiff's securities in the unchecked control of the manager, the plaintiff, who had successfully brought actions against persons to whom his securities had been transferred, was not allowed, on the ground that the loss was too remote, to recover against the bank the costs of such suits which had been disallowed); *Watson* v. *Ambergate, Nottingham and Boston Rail. Co.* (1851), 15 Jur. 448; *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, which was commented on in *McMahon* v. *Field* (1881), 7 Q. B. D. 591; see also *Hughes* v. *Quentin* (1838), 8 C. & P. 703 (where although damages were given for the cost of curing and the depreciation in value of a horse injured by negligence, yet they were not given for the hire of another while it was being cured). As to this last point, see *The Greta Holme*, [1897] A. C. 596. The term "remoteness of damage" is sometimes used in a loose sense to denote the absence of causal connection between the injury or loss, and the negligent act complained of, as in *Hoey* v. *Felton* (1861), 11 C. B. (N. S.) 142; *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253; *Cattle* v. *Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453; followed in *Remorquage à Hélice (Société Anonyme de)* v. *Bennetts*, [1911] 1 K. B. 243.

(*n*) In *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, the suggested test for remoteness, that the inquiry should be as to whether the consequences could be reasonably anticipated, was rejected: "if negligence is once established it would be no answer that it did more damage than was expected" (*ibid.*, *per* BLACKBURN, B., at p. 22, and also *per* KELLY, C.B., at p. 20). It was also stated that the question whether the defendant could be expected reasonably to have foreseen danger or not is only important in determining whether he was negligent; compare *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559.

(*o*) *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669, *per* KENNEDY, J., at pp. 676 *et seq.*; *M'Intyre* v. *Gallacher* (1883), 21 Sc. L. R. 58.

(*p*) *Smith* v. *London and South Western Rail. Co.*, *supra*; *Dulieu* v. *White & Sons*, *supra*; *Shoreditch Borough Council* v. *Bull* (1904), 19 T. L. R. 64, C. A.; affirmed (1904), 20 T. L. R. 254, H. L.; compare *Gilbertson* v. *Richardson* (1848), 5 C. B. 502. When the consequences of the negligent act cease to operate, the liability for them ceases also (*The Douglas* (1882), 7 P. D. 151, C. A.; and see p. 380, *ante*). In *Cattle* v. *Stockton Waterworks Co.*, *supra*, where the plaintiff, a contractor, was put to extra expense owing to the defendants' negligence in allowing water to leak into the land upon which the contractor was working, he was not able to recover; and see *Remorquage à Hélice (Société Anonyme de)* v. *Bennetts*, *supra*.

SECT. 2. **Remoteness of Damage.**

injury (*a*). It is for the judge to decide whether or not the damage is too remote (*b*).

Illustrations.

Damages cannot be recovered for mental pain or anxiety unattended by any physical injury (*c*); but they may be recovered in cases of nervous shock resulting in physical injury (*d*), where the shock is due to apprehension (*e*) of physical injury to the claimant (*f*) or to false news of a bereavement affecting the claimant (*g*), but not where it is due to horror at the sight of injury to another (*h*). It is immaterial whether there was actual impact at the time of the shock or not (*i*), or whether the physical injury resulted directly from the shock (*i*) or indirectly from a course of action induced by the shock (*k*). Thus where animals, frightened owing

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(*a*) As to the effect of the intervention of the conscious act of another, independent volition, see p. 380, *ante*; and as to measure of damages, see pp. 481 *et seq.*, 484, *ante*.

(*b*) *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, *per* BLACKBURN, J., at p. 122.

(*c*) *Lynch* v. *Knight* (1861), 9 H. L. Cas. 577, *per* Lord WENSLEYDALE, at p. 598; *Allsop* v. *Allsop* (1860), 5 H. & N. 534; *The Rigel*, [1912] P. 99 (where it was held that the plaintiffs, who had recovered damages for injury done to their ship by collision, could not recover from the defendants, whose ship was at fault, a sum adjudged to be paid by the plaintiffs to an employee as statutory compensation for nervous shock produced by the imminence of the collision); see Beven on Negligence, 3rd ed., pp. 67, 68. As to the possibility of nervous shock being a "physical" injury, see *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669, *per* KENNEDY, J., at p. 677. As to similar questions relating to injury resulting from an accident within an accident insurance policy, see *Scarr and General Accident Insurance Co.*, [1905] 1 K. B. 387, and cases there cited.

(*d*) *Dulieu* v. *White & Sons*, *supra*; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57; *Byrne* v. *Great Southern and Western Rail. Co.* (1884), C. A. (Ir.), unreported, but cited and followed in *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 428; *Cooper* v. *Caledonian Rail. Co.* (1902), 4 F. (Ct. of Sess.) 880; *Gilligan* v. *Robb*, [1910] S. C. 856. In *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, where the respondent had suffered a shock from narrowly escaping a collision at a level crossing, owing to the negligence of the appellants' servant, the Privy Council held that damages could not be recovered if they arose from mere terror unaccompanied by any physical injury, but occasioning a nervous or mental shock; but, as is pointed out in *Dulieu* v. *White & Sons*, *supra*, by KENNEDY, J., at p. 678, that decision confuses mental with nervous shock, and the decision itself has been frequently disapproved; see *Pugh* v. *London, Brighton and South Coast Rail. Co.*, [1896] 2 Q. B. 248, *per* Lord ESHER, M.R., at p. 250; *Bell* v. *Great Northern Rail. Co. of Ireland*, *supra*, *per* PALLES, C.B., at p. 439; *Wilkinson* v. *Downton*, *supra*, *per* WRIGHT, J., at p. 60.

(*e*) As to the necessity of the apprehension being reasonable, see *Cooper* v. *Caledonian Rail. Co.*, *supra*; *Holmes* v. *Mather* (1875), L. R. 10 Exch. 261 (whether the apprehension was reasonable or not is a question of fact).

(*f*) *Bell* v. *Great Northern Rail. Co. of Ireland*, *supra*; *Cooper* v. *Caledonian Rail. Co.*, *supra*; *Gilligan* v. *Robb*, *supra*.

(*g*) *Wilkinson* v. *Downton*, *supra*.

(*h*) *Smith* v. *Johnson & Co.* (1897), not reported, but cited in *Wilkinson* v. *Downton*, *supra*, *per* WRIGHT, J., at p. 61; *Dulieu* v. *White & Sons*, *supra*, *per* KENNEDY, J., at p. 675.

(*i*) *Dulieu* v. *White & Sons*, *supra*, *per* KENNEDY, J., at p. 677.

(*k*) *Jones* v. *Boyce* (1816), 1 Stark. 493; *Harris* v. *Mobbs* (1878), 3 Ex. D. 268; *Wilkins* v. *Day* (1883), 12 Q. B. D. 110; see *The Bywell Castle* (1879), 4 P. D. 219, C. A., *per* JAMES, L.J., at p. 223. The damage which

to the defendant's negligence, come to some harm (*l*) or, while frenzied, are enabled, by reason of some third person's negligence, to do or suffer injury, the loss sustained is recoverable from the defendant (*m*).

Damage resulting from a crowd.

**814.** Damage caused to a plaintiff by the collection and conduct of a crowd due to some act of the defendant is too remote, unless such collection and conduct is a natural and probable consequence of the defendant's act (*n*). The collection of a crowd has been held to be the natural and probable consequence of a boxing contest (*o*) or of a pigeon-shooting match conducted near a highway

Difficulty in assessment.

**815.** The mere fact that there is difficulty in arriving at or assessing damages is not a ground for holding that they are too remote (*q*), although it is otherwise when they are so entirely dependent on chance as to be altogether incapable of assessment (*r*).

Liability of insurer of defendant.

**816.** Where the person whose negligent act causes an injury is insured, and, on an action being brought, the insurance company under the terms of its policy defends the action in his name but without his consent, the company, if it is unsuccessful, is liable for the costs of the action (*s*).

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immediately results from an act may really be the result not of the act but of a fright, which rendered the act involuntary, and, therefore, ought to be regarded as the direct and immediate cause of the damage (*Wilkinson* v. *Downton*, [1897] 2 Q. B. 57, *per* WRIGHT, J., at p. 61).

(*l*) *Harris* v. *Mobbs* (1878), 3 Ex. D. 268. In the case of a claim for damage to an animal through fright, the damage will almost necessarily result from a course of action induced by the fright.

(*m*) *Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1875), 1 Q. B. D. 42, C. A. (cattle, frightened owing to defendant's negligence, got out of control and broke through a defective fence, and so on to the defendants' main line, where some were killed); *Hill* v. *New River Co.* (1868), 9 B. & S. 303 (horses, frightened by a spout of water in the roadway caused by the defendant's negligence, fell into an unfenced excavation made by other persons); and see title ANIMALS, Vol. I., pp. 363 *et seq.*

(*n*) *Scott's Trustees* v. *Moss* (1889), 27 Sc. L. R. 30; *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308; compare *O'Kelly* v. *Harvey* (1883), 14 L. R. Ir. 105, C. A.; *Guille* v. *Swan* (1822) (N. Y.), 19 Johnson, 381. In *Scholes* v. *North London Rail. Co.* (1870), 21 L. T. 835, damage, done by a crowd which assembled in the plaintiff's garden to see an engine which had fallen there owing to the defendant's negligence, was held too remote; and see notes (*o*), (*p*), *infra*.

(*o*) *Bellamy* v. *Wells* (1890), 60 L. J. (CH.) 156; compare *Barber* v. *Penley*, [1893] 2 Ch. 447; *Betterton's Case* (1695), Holt (K. B.), 538; *R.* v. *Carlile* (1834), 6 C. & P. 636.

(*p*) *R.* v. *Moore* (1832), 3 B. & Ad. 184 (where the defendant objected to the presence of such persons); followed in *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25; *Bellamy* v. *Wells*, *supra*; and *Barber* v. *Penley*, *supra*.

(*q*) *Chaplin* v. *Hicks*, [1911] 2 K. B. 786, C. A. In *Watson* v. *Ambergate, Nottingham and Bristol Rail. Co.* (1851), 15 Jur. 448, the point was not decided as to whether or not damages were recoverable for the loss of the chance of winning a prize when the article had been lost owing to the defendant's negligence; compare *Sapwell* v. *Bass*, [1910] 2 K. B. 486.

(*r*) *Sapwell* v. *Bass*, *supra*, at p. 493.

(*s*) *Allen* v. *London Guarantee and Accident Co.* (1912), 28 T. L. R. 254.

SECT. 2. Remoteness of Damage. — Costs.

Where an action is properly brought against two defendants for negligence and damages are recovered against one, but not against the other, the costs given to the successful defendant may be included in those awarded to the plaintiff against the unsuccessful defendant (*t*).

(*t*) *Bullock* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, C. A.; see *Sargeant* v. *London General Omnibus Co.* (1912), *Times*, 19th March.

# NEGOTIABLE INSTRUMENTS.

*See* BANKERS AND BANKING; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

# NEUTRALITY.

*See* CRIMINAL LAW AND PROCEDURE; PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.

# NEW TRIAL.

*See* COUNTY COURTS; MAYOR'S COURT, LONDON; PRACTICE AND PROCEDURE.

# NEWSPAPERS.

*See* COPYRIGHT AND LITERARY PROPERTY; CRIMINAL LAW AND PROCEDURE; LIBEL AND SLANDER; PRESS AND PRINTING.

# NEXT FRIEND.

*See* INFANTS AND CHILDREN.

# NEXT OF KIN.

*See* DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; WILLS.

# NEXT PRESENTATION

*See* ECCLESIASTICAL LAW.

# NIGHT.

*See* CRIMINAL LAW AND PROCEDURE; TIME.

# NISI PRIUS.

*See* COURTS; PRACTICE AND PROCEDURE.

# NOBILITY.

*See* PEERAGES AND DIGNITIES.

# NOLLE PROSEQUI.

*See* CRIMINAL LAW AND PROCEDURE.

# NOMINATION.

*See* ECCLESIASTICAL LAW; ELECTIONS.

# NON COMPOS MENTIS.

*See* LUNATICS AND PERSONS OF UNSOUND MIND.

# NONCONFORMISTS.

*See* ECCLESIASTICAL LAW; HUSBAND AND WIFE.

# NONFEASANCE.

*See* NEGLIGENCE; TORT.

# NONSUIT.

*See* COUNTY COURTS; PRACTICE AND PROCEDURE.

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## SECT. 1.—*Definition and History.*

**817.** A notary public is a duly appointed officer whose public office it is, amongst other matters, to draw, attest, or certify, usually under his official seal, deeds and other documents, including conveyances of real and personal property, and powers of attorney relating to real and personal property situate in England, the British dominions beyond the seas, or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents; to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships. **Definition of notary and his office.**

His office, which is one of great antiquity (*a*), is recognised in all

(*a*) In ancient times notaries recorded matters of judicial importance as well as important private transactions or events where an officially authenticated record or a document drawn up with professional skill or knowledge was necessary or advisable. An interesting history of the origin and development of the office of notary will be found in Brooke, Office and Practice of a Notary of England, 6th ed., by Cranstoun. In later times up to the reign of Henry VIII., the Popes of Rome issued faculties which had force in England. Under such faculties, notaries were appointed and authorised to practise. In 1534, by stat. (1533-4) 25 Hen. 8, c. 21, s. 22, the right of the Pope to exercise such jurisdiction was formally ended, and any person applying to the Court of Rome for a faculty became liable to the penalty specified in the Act of Provisions and Præmunire, 1393-4 (16 Ric. 2, c. 5). Since 1534 all faculties appointing

SECT. 1. Definition and History.

civilised countries, and by the law of nations his acts have credit everywhere (*b*).

## SECT. 2.—*Classification and Appointment.*

### SUB-SECT. 1.—*Ecclesiastical Notaries.*

Who may be appointed.

**818**. The office of ecclesiastical notary is held by the registrars of the ecclesiastical courts (*c*). The secretary of a bishop, or any person necessarily created a notary in order to hold any ecclesiastical office, may be appointed as an ecclesiastical notary. An ecclesiastical notary need not serve an apprenticeship, but is appointed if personally fit as a matter of course. He must not allow his name to be used improperly (*d*); nor can he have or retain an apprentice to serve him (*e*).

Powers and liabilities.

**819**. The provisions of the statutes hereinafter referred to (*f*) relating to apprenticeship and other matters do not apply to ecclesiastical notaries except as to penalties for allowing the name of the ecclesiastical notary to be used improperly (*g*).

By whom appointed.

**820**. Ecclesiastical notaries are appointed by the Master of the Faculties (*h*).

### SUB-SECT. 2.—*General Notaries.*

General notaries.

**821**. A general notary is a notary holding a faculty (*i*) entitling him to practise in all places in England, including the area under the jurisdiction of the ancient Company of Scriveners of the City of London (*k*), or entitling him to practise in all places in England outside that area.

Appointment.

**822**. General notaries are appointed pursuant to statute (*l*).

notaries to practise in England have, under the provisions of the above-mentioned stat. (1533-4) 25 Hen. 8, c. 21, been issued by the Archbishop of Canterbury, whose chief officer is known as the Master of the Faculties. He presides in the Court of Faculties, and exercises jurisdiction over the appointment of notaries (see the text, *infra*, and pp. 496, 497, *post*), and their removal (see p. 498, *post*) from the roll of notaries. The stat. (1533-4) 25 Hen. 8, c. 21, was repealed by stat. (1554) 1 & 2 Ph. & Mar. c. 8, s. 10; but revived by stat. (1558) 1 Eliz. c. 1, s. 8. See also Burn, Ecclesiastical Law, Vol. III., p. 2, and title ECCLESIASTICAL LAW, Vol. XI., p. 510.

(*b*) *Hutcheon* v. *Mannington* (1802), 6 Ves. 823, *per* Lord ELDON, L.C., at p. 824; and see note (*m*), p. 501, *post*.

(*c*) There are few ecclesiastical notaries besides the registrars of ecclesiastical courts.

(*d*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 14; *Norwich Notaries*, *Eaton* v. *Watson*, *Same* v. *Hansell*, [1904] W. N. 24.

(*e*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 2.

(*f*) See p. 496, *post*.

(*g*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 14; *Norwich Notaries*, *Eaton* v. *Watson*, *Same* v. *Hansell*, *supra*.

(*h*) See note (*a*), p. 493, *ante*; title ECCLESIASTICAL LAW, Vol. XI., p. 510.

(*i*) See pp. 495, 496, 497, *post*; title ECCLESIASTICAL LAW, Vol. XI., pp. 510, note (*l*), 540 *et seq*.

(*k*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 13; and see title COMPANIES, Vol. V., p. 750. The jurisdiction extends over the City of London, the liberties of Westminster, the borough of Southwark and the area within a circuit of three miles of the City (*ibid.*).

(*l*) Public Notaries Acts, 1801 (41 Geo. 3, c. 79); and 1843 (6 & 7 Vict. c. 90).

SECT. 2. Classification and Appointment.

The faculty or instrument by which a notary is certified of his appointment and authorised to practise issues from the Court of Faculties (*m*), and is countersigned by the registrar. This faculty is granted subject to the express provision that it is registered and subscribed by the Clerk of the Crown in Chancery (*n*) before it is available (*o*).

Grant and registration of faculty.

**823.** No person in England is permitted to act as a public notary, or do any notarial act, unless he has been duly sworn, admitted and enrolled in the court wherein notaries have been accustomarily sworn, admitted and enrolled (*p*).

Qualification to practise.

Admission.

In order to be thus admitted the applicant must previously have been bound by a contract in writing or by indenture of apprenticeship to serve as clerk and apprentice to a practising notary for not less than seven years (*q*), reduced to five years if the applicant desires to practise only outside the area under the jurisdiction of the Scriveners' Company (*r*).

Qualification for admission.

Service.

**824.** Provision is made for transferring the apprentice in the event of the death of the notary to whom he is apprenticed and in other events (*s*).

Transfer of apprentice.

**825.** Before the apprentice can be enrolled as a notary, he must make and file an affidavit of due service (*t*), which must be service in the proper business of a notary (*u*). If, however, the master is a solicitor as well as a notary, the apprentice will not be disqualified by having served a clerkship to his master or his partner as a solicitor at the same time as that of his apprenticeship (*a*); provided such apprentice does not intend to practise within the area under the jurisdiction of the Scriveners' Company.

Affidavit of service.

**826.** If the apprentice applies for a faculty enabling him to practise within the area under the jurisdiction of the Scriveners'

Qualification to practise within area of Scriveners' Company.

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(*m*) Public Notaries Acts, 1801 (41 Geo. 3, c. 79), ss. 3, 10; and 1843 (6 & 7 Vict. c. 90), ss. 7, 8.

(*n*) See title CONSTITUTIONAL LAW, Vol. VI., p. 330; Vol. VII., pp. 11 *et seq.*

(*o*) Stat. (1533-4) 25 Hen. 8, c. 21, s. 4.

(*p*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 1.

(*q*) *Ibid.*, s. 2. None of the provisions as to apprenticeship (see the text, *infra*) apply to ecclesiastical notaries; see p. 494, *ante*.

(*r*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), ss. 3, 6. Within three months from the date of the contract of apprenticeship an affidavit, stating the date and parties thereto, must be made by one of the subscribing witnesses of the execution of the contract, and must be filed by the Master of the Faculties or his surrogate, who makes memorandum on the contract of apprenticeship of the date of filing of such affidavit (Public Notaries Act, 1801 (41 Geo. 3, c. 79), ss. 2, 4). The affidavit must be produced and read before the applicant is enrolled as a public notary (*ibid.*, s. 3). The officer filing the affidavit is, at a fee of 5*s.*, to enter the substance of the facts in a book, which is open to inspection on payment of a fee of 1*s.* (*ibid.*, s. 5).

(*s*) *Ibid.*, s. 8.

(*t*) *Ibid.*, s. 9.

(*u*) *R.* v. *Scriveners' Co.* (1830), 10 B. & C. 511; *R.* v. *Scriveners' Co.* (1842), 3 Q. B. 939, Ex. Ch., as reported *sub nom. Scriveners' Co.* v. *R.*, 12 L. J. (EX.) 492.

(*a*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 1.

SECT. 2. Classification and Appointment.

Company (*b*), he must take up the freedom of the Scriveners' Company according to its rules, and obtain a certificate of the clerk of the company to that effect and produce it to the Master of the Faculties, before such a faculty can issue (*c*).

Powers of Master of Faculties as to qualification.

**827.** In respect of the appointment of notaries admitted to practise outside the area under the jurisdiction of the Scriveners' Company, either in England or elsewhere in the British Dominions, the Master of the Faculties has power to make rules requiring evidence as to the competency of the applicant and may admit or reject an applicant at his discretion (*d*).

SUB-SECT. 3.—*District Notaries.*

District notaries.

**828.** A district notary is a notary admitted to practise in a particular district. A solicitor who resides more than ten miles from the Royal Exchange, London, may be admitted by the Master of the Faculties to practise as a district notary outside the City of London, the liberties of Westminster, the borough of Southwark and outside a circuit of ten miles from the Royal Exchange, London (*e*). The faculty describes the area within which the solicitor is authorised to practise as a notary (*f*).

Qualification.

**829.** No service as an apprentice is required previous to the issue of the faculty. The applicant presents a memorial to the Master of the Faculties and produces a certificate of personal fitness

Appointment.

signed by two notaries. His application must be supported by bankers, merchants and others residing in the district.

Caveat.

A caveat may be entered, if the application is opposed by other notaries practising in the district, to whom, if two or more in number, notice of the application must be given by the applicant.

Grounds of appointment.

The Master of the Faculties must be satisfied of the fitness of the applicant, and that for the due convenience and accommodation of the public the number of notaries in the district in question is insufficient (*g*).

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(*b*) As to the limits of this area, see note (*k*), p. 494, *ante*.

(*c*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 13. Under the powers of their charter and according to their rules, the Scriveners' Company require a person, taking up the freedom of the company for the purpose of practising as a notary in the area under their jurisdiction, to pass an examination in (amongst other subjects) mercantile law, the law of real and personal property, the practice of a notary's office, as well as in the language of one of the foreign European States.

(*d*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 4.

(*e*) Public Notaries Act, 1833 (3 & 4 Will. 4, c. 70), ss. 2, 3.

(*f*) *Ibid.*, ss. 1, 2; see the observations of the Master of the Faculties in *Bailleau* v. *Victorian Society of Notaries*, [1904] P. 180, 183; *Graham* v. *Smart* (1863), 9 Jur. (N. S.) 387; *Birmingham Notaries, Tunbridge* v. *Mathews, Colmore* v. *Same, Clarke* v. *Same*, [1903] W. N. 158; *Norwich Notaries, Eaton* v. *Watson, Same* v. *Hansell*, [1904] W. N. 24.

(*g*) Public Notaries Act, 1833 (3 & 4 Will. 4, c. 70), ss. 1, 2; *Graham* v *Smart, supra; Birmingham Notaries, Tunbridge* v. *Mathews, Colmore* v. *Same, Clarke* v. *Same, supra; Norwich Notaries, Eaton* v. *Watson, Same* v. *Hansell, supra;* Rules of the Court of Faculties, dated 19th November, 1833; Rules of the Court of Faculties, dated 23rd February, 1838 (see Brooke, Office and Practice of a Notary of England, 6th ed., by Cranstoun, pp. 54 *et seq.*). There is a rule of practice that the Court of Faculties will appoint a second

SUB-SECT. 4.—*Notaries practising in British Dominions beyond the Seas.*

SECT. 2. Classification and Appointment.

**830.** The Master of the Faculties has power to issue a faculty to any person to practise as a notary in the British Dominions or Colonies beyond the seas (*h*).

Notaries in British Dominions and Colonies.

No service of apprenticeship is required previous to the issue of the faculty, nor need the applicant for such a faculty be a solicitor; but the applicant must satisfy the Master of the Faculties that he is competent to practise as a notary. In issuing the faculty the Master of the Faculties is guided mainly by considerations of public convenience (*i*).

Appointment.

SUB-SECT. 5.—*British Diplomatists and Consuls acting as Notaries in Foreign Countries.*

**831.** Every British ambassador (*j*), envoy, minister, chargé d'affaires, and secretary of embassy or legation in any foreign country, and every British consul-general (*j*), consul, vice-consul, acting consul, pro-consul, and consular agent, acting consul-general, acting vice-consul, and acting consular agent, may do any notarial act which any notary public may do within the United Kingdom, and every oath, affidavit, and notarial act done by or before such person is as effectual as if done by or before any lawful authority in any part of the United Kingdom (*k*).

Diplomatic and consular officers acting as notaries.

SECT. 3.—*Stamp Duties and Fees.*

**832.** Stamp duties are payable in respect of (1) articles of apprenticeship to a notary, (2) a faculty admitting a notary to practise in England, (3) the annual certificate which a notary practising in England must take out, and (4) every notarial act including a protest of a bill of exchange or promissory note (*l*).

Stamp duties and fees.

notary in a town in which only one notary is practising (*Re Rochdale Notaries*, *Hudson* v. *Boutflower*, [1910] W. N. 228).

(*h*) Stat. (1533-4) 25 Hen. 8, c. 21, s. 2.

(*i*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 4; *Bailleau* v. *Victorian Society of Notaries*, [1904] P. 180; *Fay* v. *Society of Notaries for the State of Victoria*, [1909] P. 15.

(*j*) As to these officials, see title CONFLICT OF LAWS, Vol. VI., pp. 428, 434.

(*k*) Commissioners for Oaths Acts, 1889 (52 & 53 Vict. c. 10), s. 6; 1891 (54 & 55 Vict. c. 50), s. 2. In order that any document may be admitted in evidence, it is not necessary to prove the seal or signature of such a person or his official character (*ibid.*); and see title EVIDENCE, Vol. XIII., pp. 497, 628.

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 25, 43, 44, 47, and Sched., *sub nom.* Apprenticeship; Faculty; Certificate; Notarial Act. If the articles of apprenticeship are executed out of London the Master of the Faculties issues a summons to the surrogate of the place where the articles are stated to have been executed, and the execution of the articles is there sworn to; see note (*r*), p. 495, *ante*. The affidavit and articles are returned to the Court of Faculties. The stamp duty on the instrument of apprenticeship is 2*s*. 6*d*. The stamp duty payable on every faculty admitting a notary to practise in England is £30. The stamp duty on a certificate is £9 if the notary practises within ten miles of the General Post Office, and £6 if he practises only beyond such limit, but only one-half of the fees is payable during the first three years after admission, enrolment, or of practice. The stamp duty on a notarial act is 1*s*., except in the case of a protest of a bill of exchange or promissory note where the duty on the bill or note does not exceed 1*s*., in which case the duty on the protest is the same as on the bill or note (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched.; see *Eglington's (Earl) Trustees* v. *Inland Revenue Commissioners* (1865), 3 H. & C. 871); the duty may be denoted by an adhesive stamp (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 90).

CT. 3. **Stamp Duties and Fees.**

A solicitor who is also a notary is only liable to take out one certificate (*m*), but the certificate must be registered at the office of the Master of the Faculties (*n*). A notary who practises within the jurisdiction of the Scriveners' Company must take up the freedom of that company (*o*).

Special provisions.

Position of apprentice.

**833.** The position of an apprentice is not affected by the omission of the notary to renew his certificate (*p*).

### SECT. 4.—*Refusal to Appoint.*

Refusal to appoint.

**834.** If the grant of the faculty is refused by the Master of the Faculties complaint may be made to the Lord Chancellor, who may (by writ) require that the reason for such refusal should be signified to the Crown in the Court of Chancery, and provision is made for allowing such reason or for granting a faculty if the reason is held to be insufficient (*q*).

### SECT. 5.—*Striking Notary off the Roll.*

Striking notary off the roll.

**835.** The Master of the Faculties has jurisdiction to strike a notary off the roll of notaries for misconduct as a notary or for other good cause (*r*). If there is any defect in the apprenticeship articles, or their registration, or in the service or admission, application to strike the notary off the roll must be made within twelve months from his enrolment, unless there has been fraud, when the application can be made at any time (*s*).

Any notary allowing his name to be used for the benefit of an unqualified person may be struck off the roll (*t*).

Any solicitor admitted as a notary to practise in a particular district may be struck off the roll of notaries if he practises

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 45.

(*n*) For this a fee of 1*s*. is payable. The certificate should be taken out on the 16th November in each year. One month's grace is, however, allowed, so that if the certificate is taken out within such month it relates back to the 16th November and bears that date (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 48 (b)). Charges for work done by a notary up to the 16th December are recoverable if the certificate is taken out on or before that date. But if the certificate is taken out after that date, charges for work done during the month of grace cannot be recovered at law (*ibid.*, s. 43); compare *Re Sweeting*, [1898] 1 Ch. 268; *Kent* v. *Ward* (1894), 70 L. T. 612, C. A.

(*o*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 13. The fees payable to the Scriveners' Company for admission by servitude or patrimony are £6 16*s*. 6*d*. (including a duty of £1), or for admission by redemption £14 14*s*. (including a stamp duty of £3).

(*p*) Solicitors (Clerks) Act, 1844 (7 & 8 Vict. c. 86), s. 4.

(*q*) Stat. (1533-4) 25 Hen. 8, c. 21, s. 11; Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 5.

(*r*) *Re Champion* (*Charles Noble*), [1906] P. 86; *Re Prior*, *Ex parte Incorporated Society of Provincial Notaries Public of England and Wales*, [1908] W. N. 193; *Re Terrill*, *Ex parte Incorporated Society of Provincial Notaries Public of England and Wales*, [1908] W. N. 194. Where a solicitor who is also a notary has been struck off the roll of solicitors (see title SOLICITORS), the Court of Faculties will follow the finding of fact by the Divisional Court, but will admit proof of further facts, if any, since that decision (*Re a Notary Public* (1908), *Times*, 19th December).

(*s*) Public Notaries Act, 1843 (6 & 7 Vict. c. 90), s. 9.

(*t*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 10.

outside the district mentioned in the faculty or within the city of London, the liberties of Westminster, the borough of Southwark, or a circuit of ten miles from the Royal Exchange in London (*u*).

SECT. 5. Striking Notary off the Roll.

## SECT. 6.—*Functions.*

**836.** A notary is entitled to prepare deeds, agreements and wills relating to real and personal property situate in England; to prepare deeds and other documents intended to take effect in the British dominions beyond the seas and in foreign States in such form and language as may conform to the law of the place where such deed or document is intended to operate; to verify, authenticate, and attest by his official seal the execution of deeds or other documents, contracts, and powers of attorney; to prepare bottomry and respondentia bonds, average agreements and other mercantile documents (*a*); and to translate and verify the translation of documents in any foreign language into the English language, and *vice versâ*.

Preparation of legal documents.

Mercantile documents.

Translations.

**837.** A notary is frequently employed to present an inland or foreign bill of exchange for acceptance or payment. The clerk of the notary usually presents the bill.

Presentation of bills of exchange.

If the bill is not accepted or paid, the notary "notes" the bill. Subsequently the notary amplifies, or, as it is commonly called, "extends" the noting by preparing and signing the protest (*b*).

"Noting."

**838.** Another important branch of a notary's practice deals with the noting and drawing up of "ships' protests" (*c*).

Ships' protests.

The object of the protest is to exonerate the master and mariners or person making the protest from any charge of improper, illegal, or negligent conduct, when damage or injury has happened to a ship or her cargo during a voyage, and to record formally any facts or circumstances relating to disputes or other matters which it is thought desirable to authenticate formally in order to exculpate the master or mariners from any charge or complaint of illegal or improper action.

Object of protest.

A "note" of the protest is made in a book of the notary, setting forth the date, the name of the ship, the name of her master, and the voyage, and protests against the perils of the seas causing damage. The note may be amplified or "extended." The document, which is under the seal of the notary, sets out a full statement of the material facts relating to any accident, collision, disaster, or difficulty either to the ship or her cargo.

Noting.

Protest.

Protests are frequently drawn up which deal with the conduct of any person having business relations or duties in connection with the ship or her cargo for the purpose of putting on record in an authentic form all material facts; and they are laid before

Purposes for which protests prepared.

(*u*) Public Notaries Act, 1833 (3 & 4 Will. 4, c. 70), s. 4.

(*a*) As to which see title SHIPPING AND NAVIGATION.

(*b*) As to noting and protesting bills, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 535—539. For forms of protests and notarial act of honour, see Encyclopædia of Forms and Precedents, Vol. II., pp. 521—523.

(*c*) As to shipping generally, see title SHIPPING AND NAVIGATION.

SECT. 6. Functions.

underwriters, average adjusters, and merchants for the purpose of adjusting losses on policies of marine insurance and settling disputes between shipowner and cargo-owner, and for other business purposes.

Drawing bonds for payment.

**839.** In connection with the raising of money by foreign States or corporations on the security of an issue of numbered bonds, which are redeemable at certain dates fixed at the time of issue by drawings, a notary is frequently employed to superintend the drawing by lot of the bond or bonds to be redeemed. He certifies the numbers of the bonds drawn.

Administering oaths and taking declarations.

**840.** From a very early period notaries have exercised, and still exercise, the right of administering oaths, and they are in the daily practice of preparing and taking affidavits for various purposes. They are also authorised to take declarations in lieu of oaths (*d*). In particular they take declarations and affidavits relating to stamp and other duties (*e*). They may also take declarations in actions pending in any of the British dominions beyond the seas relating to a debt, where one of the parties is resident in Great Britain or Ireland, or relating to real property situate in such dominions (*f*).

A notary may take a declaration by the attesting witness of a will or deed or other competent person to prove the due execution thereof (*g*). In certain cases it is the practice of the Bank of England to accept a declaration made before a notary (*h*).

### SECT. 7.—*Admissibility in Evidence of Notarial Acts.*

Proof by production of document under seal of notary.

**841.** The mere production of a certificate or protest, under the hand or seal of an English notary (*i*), relating to matters taking place or occurring in England, is not of itself in an English court of justice evidence of the matters set forth in the certificate or protest; thus, the production of a protest under the seal of a notary is not of itself admissible to prove that a foreign bill has been presented for payment in England (*k*). To prove such presentation the notary or his clerk, who actually made the presentation, must be called,

English notaries.

but if the notary or the clerk has died, the entries as to the presentment and dishonour of the bill made by such notary or

(*d*) Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), s. 18.

(*e*) Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38), s. 24; Revenue Act, 1898 (61 & 62 Vict. c. 46), ss. 7 (6).

(*f*) Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), ss. 15, 18.

(*g*) *Ibid.*, ss. 16, 18. For form of certificate of notary to document for use abroad, see Encyclopædia of Forms and Precedents, Vol. I., p. 365.

(*h*) For example, the bank, pursuant to the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), s. 14, accepts a declaration so made in lieu of an affidavit to prove the identity or the death of a proprietor of stock, or relating to the loss, mutilation, or defacement of a bank-note.

(*i*) A notarial act means "either the act of authenticating or certifying a document, indorsement, certificate, or entry, by a written instrument under the signature or official seal of a notary; or an instrument, attestation or certificate, made or signed by a notary in the execution of the duties of his office" (Brooke, Office and Practice of a Notary of England, 6th ed., p. 61).

(*k*) *Chesmer* v. *Noyes* (1815), 4 Camp 129; *Nye* v. *Macdonald* (1870), L. R. 3 P. C. 331, *per* Lord CAIRNS, at p. 343; and see title EVIDENCE, Vol. XIII., p. 497.

clerk are admissible to prove the presentment and dishonour of the bill (*l*).

SECT. 7. Admissibility in Evidence of Notarial Acts.

Foreign notaries

**842.** Greater weight is given to the protests and notarial acts of foreign notaries and of notaries practising in the British dominions beyond the seas (*m*); thus the dishonour of a foreign bill presented abroad may be proved by producing a protest under the seal of a notary (*n*).

A notary public in Scotland, Ireland, or the Channel Islands, or in any of the British dominions beyond the seas has power to swear and take examinations, affidavits, declarations, affirmations, and attestations of honour in all actions or matters depending in the Supreme Court, as well as acknowledgments required to enrol any deed in the Central Office, and judicial notice is taken of the seal or signature of the notary public (*o*).

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(*l*) *Sutton* v. *Gregory* (1797), Peake, Add. Cas. 150; *Poole* v. *Dicas* (1835), 1 Bing (N. C.) 649; see title EVIDENCE, Vol. XIII., p. 465.

(*m*) Judicial notice is taken of the seal of a notary verifying an affidavit sworn abroad (*Cole* v. *Sherard* (1855), 11 Exch. 482), or a power of attorney executed abroad (*Hayward* v. *Stephens* (1866), 36 L. J. (CH.) 135), or in the colonies (*Re Goss's Estate* (1866), 12 Jur. (N. S.) 595; *Hutcheon* v. *Mannington* (1802), 6 Ves. 823; *Ex parte Worsley* (1798), 2 Hy. Bl. 275; *Omealy* v. *Newell* (1807), 8 East, 364), but when an affidavit is taken abroad before a notary authorised to administer oaths, then his signature must be verified (*Re Davis's Trusts* (1869), L. R. 8 Eq. 98); but the rule has been relaxed where the fund was small; see *Mayne* v. *Butter* (1864), 13 W. R. 128; compare *Brooke* v. *Brooke* (1881), 17 Ch. D. 833; and see cases cited in title EVIDENCE, Vol. XIII., pp. 497, 628. As to colonial notaries, see also title EVIDENCE, Vol. XIII., p. 497.

(*n*) *Chesmer* v. *Noyes* (1815), 4 Camp. 129.

(*o*) R. S. C., Ord. 38, r. 6; Yearly Practice of the Supreme Court, 1912, p. 534. Where several pieces of paper appear to constitute one document which is notarially verified it is not essential that each separate piece should be initialled (*Hamel* v. *Panet* (1876), 46 L. J. (P. C.) 5). See, further, title EVIDENCE, Vol. XIII., p. 496.

# NOTICE, CONSTRUCTIVE.

*See* CHOSES IN ACTION; EQUITY; FRAUDULENT AND VOIDABLE CONVEYANCES; MORTGAGE.

# NOTICE OF DISHONOUR.

*See* BANKERS AND BANKING; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS; GUARANTEE.

# NOTICE TO QUIT.

*See* AGRICULTURE; ALLOTMENTS; LANDLORD AND TENANT.

# NOVATION.

*See* BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; CONTRACT; GUARANTEE.

# NUISANCE.


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# Part I.—Definition and Classification.

## SECT. 1.—*Definition and Description.*

**843.** The term "nuisance" as used in law is not a term capable of exact definition (*a*). It has been used with meanings **Definition.**

(*a*) *Bamford* v. *Turnley* (1862), 3 B. & S. 62. 66. Ex. Ch., *per* POLLOCK, C.B., at p. 79.

SECT. 1. Definition and Description.

varying in extent by the old writers (*b*), and even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort (*c*).

Nuisances may be broadly divided into (1) acts not warranted by law or omissions to discharge a legal duty, which acts or omissions obstruct or cause inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects (*d*); (2) acts or omissions which have been designated or treated as nuisances by statute (*e*); (3) acts or omissions connected with the user or occupation of land which cause damage to another person in connection with the latter's user or occupation of land.

The first two divisions include acts and omissions of great variety, which hardly admit of classification. The third division also includes many acts or omissions of different kinds, such as (a) interference with the specific rights of property known to our law as easements or servitudes (*f*); (b) interference with natural rights to the use and enjoyment of property arising out of the management and use of neighbouring property (*g*); (c) user of property in such a way that injury is caused to individuals exercising rights as members of the public (*h*).

Nuisance and trespass distinguished.

**844.** Some varieties of nuisance closely resemble acts which are classed under the head of trespass (*i*). The distinction between is that in trespass the immediate act itself which constitutes the offence occasions a prejudice or an injury to the sufferer's person or property or amounts to dispossession, whereas in the case of nuisance the act itself often does not directly affect the person or property of another, but the consequences of such act become or are prejudicial to his person or property (*k*).

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(*b*) For definitions as given by the old writers, see Jacob's Law Dictionary, *voce* "Nusance"; Bac. Abr., tit. "Nuisances"; 16 Vin. Abr., tit. "Nusance"; 3 Bl. Com., p. 216. The last-named says: "Nusance, nocumentum, or annoyance signifies anything that worketh hurt, inconvenience, or damage." This, however, is inadequate as a definition of legal nuisance, since there are many instances in which hurt, inconvenience, or damage is caused for which the sufferer has no remedy in law; see pp. 508, note (*h*), 511, *post*.

(*c*) For the general principles of tort, see title TORT.

(*d*) Stephen's Digest of the Criminal Law, 6th ed., p. 140. These are public nuisances. For examples, see pp. 511, 512, *post*.

(*e*) For examples, see pp. 536 *et seq.*, 540, *post*.

(*f*) See titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 330; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 151 *et seq.*; WATERS AND WATERCOURSES; p. 534, *post*. Some authors do not class these under the head of nuisance, *e.g.*, Salmond on the Law of Torts, 2nd ed., p. 228.

(*g*) For examples, see pp. 524 *et seq.*, *post*.

(*h*) For examples, see pp. 515, 524, 532, 534, 541, *post*.

(*i*) See title TRESPASS.

(*k*) *Reynolds* v. *Clarke* (1725), 1 Stra. 634; *Weeton* v. *Woodcock* (1839), 5 M. & W. 587, 594; *Haward* v. *Bankes* (1760), 2 Burr. 1113; *Kine* v. *Jolly*, [1905] 1 Ch. 480, C. A., *per* VAUGHAN WILLIAMS, L.J., at pp. 487, 488; see also *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; 1 Smith, L. C., 11th ed., 454, 455, 456, 459. The distinction has ceased to be of practical importance since the time when pleadings were highly technical. The following acts have been held to be trespass:—the actual pouring of water on to a neighbour's land (*Preston* v. *Mercer* (1656), Hard. 60, as explained in *Reynolds* v. *Clarke*, *supra*); injuring a person on the highway by throwing logs at him (*Reynolds* v. *Clarke*, *supra*). On

SECT. 1. Definition and Description.

**845.** Again, some of the matters which are considered in this title are sometimes dealt with under the head of negligence (*l*) or under special heads (*m*). The distinction between nuisance and negligence, broadly speaking, is that in the acts or omissions which are classed as nuisances the duty on the part of the wrongdoer is an absolute one, and if damage be proved liability arises (*n*), while, in the omissions which fall within the sphere of negligence, liability always depends upon the failure to use the degree of care which was necessary to be used in the particular circumstances.

Nuisance and negligence distinguished.

It is only by way of exception that considerations as to the existence of negligence enter within the sphere of the law of nuisance. The presence of negligence sometimes converts what would otherwise be a lawful act into an unlawful one, as in the case of negligence in the exercise of statutory powers (*o*), or where a person having exercised a legitimate right of user is warned of the existence of danger in a continuance of such exercise and ignores the warning (*p*), or where negligence in the otherwise legitimate user of a house causes a nuisance (*q*); or where prejudice is caused to a mine-owner by the negligent working of an adjoining mine (*r*).

Effect of negligence on an otherwise lawful act.

**846.** It is the better view that the word "nuisance," when used in a covenant between lessee and lessor, should not be construed in the narrow sense of the word so as to exclude everything which does not amount to a nuisance in law, but that consideration must be given to the fact that the object of the covenant may be and usually is to obtain for the covenantee a protection more extensive than that which the law gives him apart from the covenant (

"Nuisance" in covenants

the other hand the following acts were held or considered to be nuisance and not trespass:—overburdening a floor whereby it fell and did damage to the goods of another in his cellar beneath (*Edwards* v. *Halinder* (1594), Poph. 46); diverting the water of a river by digging trenches in the defendant's own ground (*Levridge* v. *Hoskins* (1709), 11 Mod. Rep. 257); fixing a spout to defendant's house whereby water was poured on to the plaintiff's land (*Reynolds* v. *Clarke* (1725), 1 Stra. 634); so working a mine as to cause water to flow through other mines into those of the plaintiff (*Haward* v. *Bankes* (1760), 2 Burr. 1113); logs left by one party to lie in the highway to the personal injury of another (*Reynolds* v. *Clerk*, *supra*, *per* FORTESCUE, J., at p. 635).

(*l*) See title NEGLIGENCE, pp. 357 *et seq.*, *ante*.

(*m*) For example, injuries to neighbouring owners are sometimes classed in text-books apart from nuisances, *e.g.*, Pollock, Law of Torts, 8th ed., p. 338.

(*n*) See pp. 522, 528, *post*.

(*o*) See p. 518, *post*.

(*p*) *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468, where defendant ignored the warnings of neighbours that his haystack was steaming and might ignite, and it did so ignite, and damage was caused by the consequential fire to his neighbour's property: he was held liable. The action was based on negligence, but might also have been framed in nuisance under the principle *sic utere tuo ut alienum non lædas*; see p. 528, *post*.

(*q*) See *May* v. *Stoop* (1909), 25 T. L. R. 262, where it was held that there was no nuisance in the using of a house as a crèche, but that a nuisance might possibly be caused by the negligence of the nurses in allowing the babies to cry.

(*r*) *Smith* v. *Kenrick* (1849), 7 C. B. 515; and see other cases cited in note (*s*), p. 525, *post*.

(*s*) *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, C. A., *per* LINDLEY, L.J., at p. 95. In this case the decision of BACON, V.-C., in *Harrison* v. *Good* (1871), L. R. 11 Eq. 338, was questioned. In *Harrison* v. *Good*, *supra*, the covenant restrained purchasers of certain lots of land from doing anything which should

SECT. 1. **Definition and Description.**

"Nuisance" in statutes.

**847.** The term "nuisance," when used in statutes, generally bears the strict meaning of legal nuisance. Its interpretation, however, is governed by the purpose and context of the statute itself (*t*). Thus, in the Public Health Acts (*u*) the word generally bears its ordinary legal meaning, but when it is used for the purpose of the provisions relating to methods of summary abatement or punishment of nuisances (*a*), it is limited in its application to such nuisances as affect the health and permanent comfort of the neighbourhood (*b*). Again, to constitute a nuisance for the purpose of these provisions, it is not necessary that the matter complained of should be injurious to health if it is substantially offensive to the senses (*c*).

## SECT. 2.—*Essential Factors.*

### SUB-SECT. 1.—*In General.*

Essentials.

**848.** In order to constitute a nuisance in law it is essential that there should exist either actually or impliedly (1) *injuria* or wrongful act constituting or causing damage, and (2) *damnum* or damage, loss, or inconvenience. The latter alone—*damnum absque injuriâ*—gives no right of action (*d*).

### SUB-SECT. 2.—*Injuria or Wrongful Act.*

*Injuria* as an essential.

**849.** In order to constitute an actionable nuisance the act complained of must be *injuria*, that is, the violation of some

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be a nuisance to the occupiers of adjoining property, and BACON, V.-C., held that the establishment of a national school was not a nuisance within the meaning of the covenant, because it was not a nuisance in law, although it would probably cause "annoyance" in the popular sense of the term. In *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, C. A., the covenant was wider, including besides the expression "nuisance" the words "annoyance or grievance," and it was held that the latter words covered the establishment of a hospital for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, and eye, fistula and other diseases. See also *Doe* d. *Bish* v. *Keeling* (1813), 1 M. & S. 95 (the establishment of a school held a breach of covenant not to carry on a trade or business, this being an annoyance such as the covenant contemplated); *Wickenden* v. *Webster* (1856), 6 E. & B. 387 (to the same effect, under a similar covenant, extended to a prohibition against using premises for a purpose other than a private dwelling-house); *Kemp* v. *Sober* (1851), 15 Jur. 458 (the establishment of a school held a breach of covenant not to use premises for trade, business, or calling, or to the annoyance of other houses); *Collins* v. *Slade*, [1874] W. N. 205 (a covenant against "annoyance or damage" held to be broken by converting a part of a factory into a place of entertainment); *Errington* v. *Birt* (1911), 105 L. T. 373 (the user of premises as a fried fish shop held to be breach of covenant not to do anything on the premises which should or might be a nuisance, annoyance or inconvenience). As to covenants generally, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 441, 475—496; LANDLORD AND TENANT, Vol. XVIII., p. 517.

(*t*) As to the interpretation of statutes, see, generally, title STATUTES.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76); see p. 536, *post*.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91—111; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 1—15; as to which see pp. 537 *et seq.*, *post*.

(*b*) *Great Western Rail. Co.* v. *Bishop* (1872), L. R. 7 Q. B. 550; see, further, p. 537, *post*.

(*c*) *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138; see p. 537, *post*.

(*d*) See titles ACTION, Vol. I., p. 7; DAMAGES, Vol. X., p. 308; TORT; and see the text, *infra*.

right which another possesses. There must, therefore, be a right existing in the complainant, and a corresponding duty on the part of the alleged wrongdoer not to interfere with that right (*e*). Absence of the right or of the duty, or of the violation of the duty, prevents the act complained of from being actionable (*f*).

Act wrongful *per se*.

**850.** The act or omission causing or constituting an alleged nuisance is unlawful *per se* when, apart from its consequences, it is of itself a violation of statutory provisions or of private common law rights.

Presumption of damage.

In such cases the law presumes damage to exist (*g*). This presumption is based, in the case of private nuisances, on the ground that, by a continuance of the illegal act, a wrongdoer might be able to gain a right to continue it (*h*). In the case of public nuisances the presumption cannot be based upon this ground, because no prescriptive right to commit a public nuisance can be obtained (*i*), but it is the duty of the Attorney-General to protect the public against an illegal act of a public nature, and for this purpose it is not necessary to prove actual or prospective damage (*k*).

Act wrongful on account of manner or circumstances.

**851.** An act which is in ordinary circumstances innocent may under particular conditions become an actionable nuisance.

Whether such an act does constitute a nuisance must be determined, not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case (*l*), including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the

(*e*) See *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch., BRAMWELL, B., at p. 49; and see title ACTION, Vol. I., p. 9.

(*f*) See cases cited at pp. 525, 526, 563, *post*; and see titles NEGLIGENCE, pp. 360 *et seq.*, *ante*; TORT.

(*g*) See *Baten's Case* (1610), 9 Co. Rep. 53 b; *Ashby* v. *White* (1703), 2 Ld. Raym. 938; 3 Ld. Raym. 320; 1 Smith, L. C., 11th ed., 240, 284; *Hobson* v. *Todd* (1790), 4 Term Rep. 71; *Pindar* v. *Wadsworth* (1802), 2 East, 154; *Barker* v. *Green* (1824), 2 Bing. 317; *Williams* v. *Morland* (1824), 2 B. & C. 910; *Fay* v. *Prentice* (1845), 1 C. B. 828; *Pryce* v. *Belcher* (1847), 4 C. B. 866; *Embrey* v. *Owen* (1851), 6 Exch. 353; *Sampson* v. *Hoddinott* (1857), 1 C. B. (N. S.) 590; *Norbury* (*Earl*) v. *Kitchin* (1867), 15 L. T. 501; *Bickett* v. *Morris* (1866), L. R. 1 Sc. & Div. 47; *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301; *McCartney* v. *Londonderry and Lough Swilly Railway*, [1904] A. C. 301.

(*h*) See *Hobson* v. *Todd*, *supra*, at p. 74; *Pindar* v. *Wadsworth*, *supra*; *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43; *McCartney* v. *Londonderry and Lough Swilly Railway*, *supra*.

(*i*) See pp. 512, 563, *post*.

(*k*) *A.-G.* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172; *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch. D. 752; *A.-G.* v. *London and North Western Railway*, [1899] 1 Q. B. 72; see *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212.

(*l*) *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, 865, C. A.; *Rushmer* v. *Polsue and Alfieri*, *Ltd.*, [1906] 1 Ch. 234, C. A.; affirmed, [1907] A. C. 121; *Colls* v. *Home and Colonial Stores*, *Ltd.*, [1904] A. C. 179, 185; *Clarke* v. *Clark* (1865), 1 Ch. App. 16; *Broder* v. *Saillard* (1876), 2 Ch. D. 692; *Christie* v. *Davey*, [1893] 1 Ch. 316; *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; *Luscombe* v. *Steer* (1867), 17 L. T. 229.

SECT. 2. Essential Factors.

reasonable exercise of rights; and the effects of its commission, that is, whether those effects are transitory or permanent, occasional or continuous (*m*); so that the question of nuisance or no nuisance is one of fact (*n*).

Effect of motive or intention.

**852.** An act which is otherwise lawful, and which a person has a right to perform in the ordinary enjoyment of his property and rights, does not become unlawful merely because the doer is actuated by motives of malice or the like (*o*).

SUB-SECT. 3.—*Loss or Damage Caused.*

Damage as an essential.

**853.** Damage, actual or prospective, is one of the essentials of actionable nuisance. Its existence must be proved (*a*), except in those cases in which it is presumed by law to exist (*b*).

The damage need not consist of pecuniary loss (*c*), but it must be material or substantial (*d*); that is, it must not be merely sentimental, speculative, or trifling (*e*), nor such as is merely temporary, fleeting, or evanescent (*f*); but nothing can be

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(*m*) *Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, 79, Ex. Ch.; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Scott* v. *Firth* (1864), 4 F. & F. 349; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304, 339; *Brand* v. *Hammersmith and City Rail. Co.* (1867), L. R. 2 Q. B. 223, 246, Ex. Ch.; see also *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111; compare *City of Montreal* v. *Montreal Street Railway*, [1903] A. C. 482, P. C.; and see, generally, title TORT.

(*n*) *R.* v. *Tindall* (1837), 6 Ad. & El. 143; *R.* v. *Betts* (1850), 16 Q. B. 1022; *R.* v. *Train* (1862), 2 B. & S. 640, 646; *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409, 413; *R.* v. *Burt* (1870), 11 Cox, C. C. 399; *Fleming* v. *Hislop* (1886), 11 App. Cas. 686; *Bantwick* v. *Rogers* (1891), 7 T. L. R. 542.

(*o*) See *Bradford Corporation* v. *Pickles*, [1895] A. C. 587; *Allen* v. *Flood*, [1898] A. C. 1; *Quinn* v. *Leathem*, [1901] A. C. 495, 509. An example is where a landowner diverts and appropriates underground water for the purpose of compelling a water authority to buy him out (*Bradford Corporation* v. *Pickles*, *supra*). "It is the act, not the motive for the act, that must be regarded" (*ibid.*, *per* Lord MACNAGHTEN, at p. 601); see also *Simmons* v. *Lillystone* (1853), 8 Exch. 431; and title TORT.

(*a*) *R.* v. *Betts* (1850), 16 Q. B. 1022; *A.-G.* v. *Kingston-on-Thames Corporation* (1865), 34 L. J. (CH.) 481; *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705. As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*; and as to proof of damage, see *ibid.*, pp. 346 *et seq.*

(*b*) See p. 509, *ante*.

(*c*) *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

(*d*) *R.* v. *Shepard* (1822), 1 L. J. (O. S.) (K. B.) 45; *R.* v. *Tindall*, *supra*; *R.* v. *Russell* (1854), 3 E. & B. 942; *Scott* v. *Firth* (1864), 4 F. & F. 349; *R.* v. *Leprue* (1866), 30 J. P. 723; S. C., *sub nom.*, *R.* v. *Lepine*, 15 L. T. 158, *R.* v. *Lepille*, 15 W. R. 45; *Smith* v. *Thackerah* (1866), L. R. 1 C. P. 564 (but see this case commented on in *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301); *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166; *Luscombe* v. *Steer* (1867), 17 L. T. 229; *A.-G.* v. *Gee* (1870), L. R. 10 Eq. 131; *Kine* v. *Jolly*, [1905] 1 Ch. 480, 489, C. A.; *R.* v. *Bartholomew*, [1908] 1 K. B. 554, C. C. R. As to what amount of damage will justify the grant of an injunction, see p. 560, *post*; and title INJUNCTION, Vol. XVII., p. 206.

(*e*) See *Fleming* v. *Hislop*, *supra*, *per* Lord SELBORNE, at p. 690; *St. Helen's Smelting Co.* v. *Tipping*, *supra*; *Salvin* v. *North Brancepeth Coal Co.*, *supra*; *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8.

(*f*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400, *per* BRETT, J., at p. 407; see *Taylor* v. *Bennett* (1836), 7 C. & P. 329. As to what is temporary, see *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 389; compare *R.* v. *Moore* (1832), 3 B. & Ad. 184, and *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25;

so deemed which results in substantial damage, and regard is to be had, therefore, not merely to the duration of the thing complained of in point of time, but to the effect of the act or omission upon the plaintiff (*g*). SECT. 2. Essential Factors.

The mere fact that an act causes loss or depreciation in value to another does not make that act a nuisance in law (*h*).

## SECT. 3.—*Classification.*

### SUB-SECT. 1.—*Common Law and Statutory Nuisances.*

**854.** Nuisances are divisible into common law and statutory nuisances. Common law and statutory nuisances.

A common law nuisance is one which, apart from statute, violates the principles which the common law lays down for the protection of the public and of individuals in the exercise and enjoyment of their rights. Common law nuisance.

A statutory nuisance is one which, whether or not it constitutes a nuisance at common law, is made a nuisance by statute, either in express terms or by implication. Statutory nuisance.

### SUB-SECT. 2.—*Public and Private Nuisances.*

**855.** Nuisances may also be divided into those which are public, general, or common, and those which are private (*i*). Public and private nuisances.

A public nuisance is one which inflicts damage, injury, or inconvenience upon all the King's subjects, or upon all who come within the sphere of its operation. It may, however, affect some to a greater extent than others (*k*). Public nuisance.

*R.* v. *Burt* (1870), 11 Cox, C. C. 399; *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539; *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; compare *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707.

(*g*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, *per* FRY, J., at p. 556.

(*h*) *Harrison* v. *Good* (1871), L. R. 11 Eq. 338; see *Simpson* v. *Savage* (1856), 1 C. B. (N. S.) 347; *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539; *Fishmongers' Co.* v. *East India Co.* (1752), 1 Dick. 163. Examples are the establishment of a school in competition with an existing one (*Gloucester Grammar School (Masters) Case* (1410), Y. B. 11 Hen. 4, fo. 47, pl. 21, cited in *Keeble* v. *Hickeringill* (1706), 11 East, 574, n., 576); the noise of music lessons and practice in a neighbouring house (*Christie* v. *Davey*, [1893] 1 Ch. 316); the establishment of a large school near a residence (*Harrison* v. *Good, supra*); the occasional discomfort caused by a neighbour burning his weeds, emptying cesspools, or repairing his house (*Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, 83, Ex. Ch.); the setting up of a decoy for ducks which attracts the birds from another's decoy (*Keeble* v. *Hickeringill, supra*); the building of a bridge over a river to the destruction of the trade of a ferry (*Hopkins* v. *Great Northern Rail. Co.* (1877), 2 Q. B. D. 224, C. A.; *Dibden* v. *Skirrow*, [1908] 1 Ch. 41, C. A.; see title FERRIES, Vol. XIV., p. 561). As to protecting property from floods, see cases cited in notes (*u*), p. 563, and (*a*), p. 564, *post*; see also title WATERS AND WATERCOURSES.

(*i*) See Jacob's Law Dictionary, *sub voce* "Nusance"; 16 Vin. Abr., tit. "Nusance"; 2 Roll Abr. 83. The distinction made by the old writers between a common nuisance and a public nuisance (see the argument in *R.* v. *White and Ward* (1757), 1 Burr. 333) is of no practical importance.

(*k*) *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133, 142. Where a noise caused by a tinman plying his trade affected three houses only, it was held that this was a private nuisance and not an indictable one (*R.* v. *Lloyd* (1802), 4 Esp. 200). Whether the overheating of a church so as to be injurious to health was a public nuisance was doubted, but not decided, in *Woodman* v. *Robinson* (1852), 2 Sim. (N. S.) 204.

SECT. 3. Classification.

Private nuisance.

**856.** A private nuisance is one which affects those persons who are immediately within the scope of its operation, but does not injure or inflict inconvenience upon others who are further removed from it. It may be even advantageous or pleasurable to those who are at a distance, as in the case of church bells (*l*).

Distinctions between public and private nuisances: (i.) As to remedies;

**857.** The importance of the division of nuisances into public and private lies chiefly in the difference of the remedies applicable to each (*m*), and in the fact that a private individual has no right of action in respect of a public nuisance, unless he can show that he has sustained some special damage over and above that inflicted upon the community at large (*n*).

(ii.) as to defences.

**858.** A further important distinction is that, whilst a private nuisance may be justified upon the ground that the right to commit it has been acquired by prescription, no amount of time will afford a like defence in the case of a public nuisance (*o*), and that the Crown cannot grant to a person a right to commit a public nuisance (*p*); nor can a local authority legalise an obstruction or encroachment in a highway or public right of navigation (*q*), unless it is authorised by statute to give its consent to what, without statutory powers, would be a nuisance (*r*); nor, in the case of navigable rivers, which in law are a species of highway (*s*), can conservators authorise a construction which is a public nuisance to the navigation (*t*).

*Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133, 143.

(*m*) See pp. 547, 550, 552, 574, *post*.

(*n*) See pp. 547 *et seq.*, 553, *post*.

(*o*) *R.* v. *Cross* (1812), 3 Camp. 224; *Dewell* v. *Sanders* (1618), Cro. Jac. 490; *Vooght* v. *Winch* (1819), 2 B. & Ald. 662; *A.-G.* v. *Barnsley Corporation*, [1874] W. N. 37; *Blackburne* v. *Somers* (1879), 5 L. R. Ir. 1; *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395; *Harvey* v. *Truro Rural Council*, [1903] 2 Ch. 638; and see title FISHERIES, Vol. XIV., pp. 589, 592.

(*p*) *A.-G.* v. *Burridge* (1822), 10 Price, 350; and as to the inability of the Crown to make grants interfering with the public right of navigation or fishing in navigable rivers, at least subsequent to the commencement of the reign of Edward I., see *ibid.*; *A.-G.* v. *Parmeter* (1822), 10 Price, 378; *Williams* v. *Wilcox* (1838), 8 Ad. & El. 314; *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; *Malcomson* v. *O'Dea* (1863), 10 H. L. Cas. 593; *Gann* v. *Whitstable Free Fishers* (1865), 11 H. L. Cas. 192; *Simpson* v. *A.-G.*, [1904] A. C. 476; and see titles CONSTITUTIONAL LAW, Vol. VII., p. 113; FISHERIES, Vol. XIV., pp. 576, 588.

(*q*) *R.* v. *Grosvenor* (*Lord*) (1819), 2 Stark. 511; *Kearns* v. *Cordwainers' Co.* (1859), 6 C. B. (N. S.) 388; *R.* v. *United Kingdom Electric Telegraph Co., Ltd.* (1862), 31 L. J. (M. C.) 166, but see 2 B. & S. 647, n.; *A.-G.* v. *Thames Conservators* (1862), 1 Hem. & M. 1; *R.* v. *Train* (1862), 2 B. & S. 640; *Hawkins* v. *Robinson* (1872), 36 J. P. 756; *Preston Corporation* v. *Fulwood Local Board* (1885), 53 L. T. 718; *A.-G.* v. *Barker* (1900), 83 L. T. 245; *A.-G.* v. *Mayo County Council*, [1902] 1 I. R. 13; *Harvey* v. *Truro Rural Council*, [1903] 2 Ch. 638.

(*r*) *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282.

(*s*) *R.* v. *Hammond* (1717), 10 Mod. Rep. 382; *Ball* v. *Herbert* (1789), 3 Term Rep. 253; *Anon.* (1808), 1 Camp. 517, n.; *Rose* v. *Miles* (1815), 4 M. & S. 101; *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Gann* v. *Whitstable Free Fishers*, *supra*; *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839; *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713; *The Swift*, [1901] P. 168; and see, as to navigable rivers generally, title WATERS AND WATERCOURSES.

(*t*) *R.* v. *Grosvenor* (*Lord*), *supra*; see *R.* v. *Hollis* (1819), 2 Stark. 536.

# Part II.—Nuisances in respect of Particular Matters.

## SECT. 1.—*Animals.*



### SUB-SECT. 1.—*At Common Law.*

Keeping of animals.

**859.** The keeping of any animals (*a*) in such a position or in such circumstances as to cause material discomfort or annoyance to the public in general or to a particular person is a nuisance. If it affects the public generally, it is a public nuisance, and may be punished by indictment or restrained by proceedings taken by the Attorney-General; if it violates private rights only, it is actionable by the individual who is thereby injured. Thus, to keep swine near a public place in a town has been held to be an indictable nuisance (*b*); and injunctions have been granted against keeping animals in such circumstances as to cause discomfort or annoyance to neighbours (*c*).

Savage animals.

So, if an animal is by nature savage, or, not being savage by nature, is known to its owner to be vicious or of a mischievous disposition, or if it is infected with disease, it can only be kept at the risk of the owner, who will be liable for damage caused by it (*d*).

### SUB-SECT. 2.—*Statutory.*

Keeping of animals in general.

**860.** The keeping of any animal so as to be a nuisance or injurious to health is a nuisance capable of being abated or punished by summary proceedings (*e*). It is not necessary that the annoyance should amount to injury to health (*f*).

Provisions as to urban districts and London.

**861.** In urban districts it is an offence to keep (*g*) any swine or pig-stye in a dwelling-house, or so as to be a nuisance to any person, whether the nuisance arises from the character of the

(*a*) As to damage caused by animals, see title ANIMALS, Vol. I., pp. 372 *et seq.*; and, as to diseased animals, see *ibid.*, pp. 419 *et seq.*

(*b*) *R.* v. *Wigg* (1705), 2 Ld. Raym. 1163.

(*c*) See *Ball* v. *Ray* (1873), 8 Ch. App. 467; *Broder* v. *Saillard* (1876), 2 Ch. D. 692 (horses in stables adjoining private property); *A.-G.* v. *Squire* (1906), 5 L. G. R. 99 (a large number of pigs in premises adjoining a village street).

(*d*) See title ANIMALS, Vol. I., pp. 372 *et seq.* As to the misdemeanour of bringing a diseased animal into a public place, see *ibid.*, p. 420.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (3); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (c); and see p. 538, *post*. As to procedure, see p. 565, *post*.

(*f*) See *Banbury Sanitary Authority* v. *Page* (1881), 8 Q. B. D. 97; *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138.

(*g*) The "keeping" may be of a temporary character, and the bringing of swine on to premises during the day in the course of business, pending their being sent away in the evening by train or otherwise, may amount to "keeping," although the animals are not fed on the premises nor kept overnight (*Steers* v. *Manton* (1893), 57 J. P. 584).

SECT. 1. Animals.

place in which the animals are kept or from the manner in which they are kept (*h*). Original and continuing penalties may be imposed, and the urban authority must have such nuisance abated and may recover the expenses thereof from the occupier of the premises on which the nuisance exists (*i*). Similar but more stringent provisions are made for London (*k*), whereby premises within 40 yards of a street or public place are declared unfit for the purpose (*l*), and the user of premises for such purpose may be prohibited (*m*).

Provisions under Town Police Clauses Act.

**862.** In urban districts, and in any other district affected by any Act with which the Town Police Clauses Act, 1847 (*n*), is incorporated, penalties are imposed upon any person who, in any street, to the annoyance or danger of the residents or passengers, keeps any pig-stye to the front of any street, not being shut off from the street by a sufficient wall or fence, or who keeps any swine in or near a street, so as to be a common nuisance (*o*).

Bye-laws.

**863.** Urban authorities (*p*) may make bye-laws (*a*) for the prevention of the keeping of animals on any premises so as to be injurious to health (*b*).

Sanitary authorities in London have a similar power of making bye-laws (*c*).

SECT. 2.—*Bridges.*

Non-repair.

**864.** The non-repair of a public bridge constitutes a nuisance for which the persons responsible for its repair are liable either to statutory proceedings or to indictment at common law (*d*).

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(*h*) *Digby* v. *West Ham Local Board of Health* (1858), 22 J. P. 304.
(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 47.
(*k*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 17.
(*l*) *Ibid.*, s. 17 (4).
(*m*) *Ibid.*, s. 18.
(*n*) 10 & 11 Vict. c. 89.
(*o*) *Ibid.*, s. 28, incorporated as to urban districts with the Public Health Act, 1875 (38 & 39 Vict. c. 55), by *ibid.*, s. 171.

(*p*) As to these, see title LOCAL GOVERNMENT, Vol. XIX., p. 262. Rural authorities may obtain the power of making such bye-laws; see *ibid.*, pp. 331, 332

(*a*) As to bye-laws, generally, see titles METROPOLIS, Vol. XX., pp. 460 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44. A bye-law against keeping pigs in a borough, without any qualification as to its being a nuisance, has been held bad (*Everett* v. *Grapes* (1861), 25 J. P. 644, a case under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 90); and so has a bye-law prohibiting the keeping of pigs in a rural district within 50 feet of a dwelling-house (*Heap* v. *Burnley Union* (1884), 12 Q. B. D. 617); but a bye-law forbidding the keeping of pigs within 100 feet of a dwelling-house in an urban district has been held good (*Wanstead Local Board of Health* v. *Wooster* (1873), 55 L. T. Jo. 81; see also *Lutton* v. *Doherty* (1885), 16 L. R. Ir. 493, in which case the limit of 21 feet was held reasonable; and see *Steers* v. *Manton* (1893), 57 J. P. 584). It is not necessary to prove that a nuisance has in fact arisen in order to secure a conviction for breach of the bye-law (*Tony Street Local Board* v. *Seed* (1874), 39 J. P. 278).

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (1) (c); see title METROPOLIS, Vol. XX., pp. 460 *et seq.*

(*d*) As to bridges generally, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 184 *et*

## SECT. 3.—*Dangerous Property.*

### SUB-SECT. 1.—*Public Nuisance.*

SECT. 3. **Dangerous Property.**

**865.** Property which of itself, apart from the use to which it is put (*e*), is dangerous may be a public or a private nuisance according to circumstances. If it is so near to a public place, whether land or water, as to deter persons from using that place, or to make such user dangerous or inconvenient, it is a public nuisance (*f*), and none the less so because the danger consists in the risk of the passenger accidentally deviating from the public place, provided that the danger substantially affects the public place (*g*), which is a question of law and not of fact (*h*). But a highway may have been dedicated with a cause of danger on or near it (*i*), in which case there is no obligation on the adjoining owner to fence his dangerous property, so long as he does not do anything to increase the risk (*k*).

Danger in or near public place.

**866.** Similarly, a building or fence so ruinous as to be likely to fall and to injure persons using a highway is an indictable nuisance, and the occupier thereof, even though only a tenant-at-will, is liable, the quantum of his interest in the property, and his liability to repair it under any agreement or covenant, being immaterial so far as the public are concerned (*l*).

Ruinous buildings and fences.

### SUB-SECT. 2.—*Private Nuisance.*

**867.** When the danger from such property does not affect the public, the liability of the owner or occupier of the property for

Danger on private property.

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(*e*) As to user of property for dangerous purposes, see p. 530, *post*.

(*f*) *Barnes* v. *Ward* (1850), 9 C. B. 392; *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301; *White* v. *Phillips* (1863), 15 C. B. (N. S.) 245 (a navigable river made dangerous by an improper campshed); *Harrold* v. *Watney*, [1898] 2 Q. B. 320, C. A. (rotten fence adjoining highway); *Jewson* v. *Gatti* (1886), 2 T. L. R. 381; *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199; *Silverton* v. *Marriott* (1888), 52 J. P. 677; and see cases cited in titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 126; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 115, 151 *et seq.*; NEGLIGENCE, pp. 397 *et seq.*, *ante*; TORT; WATERS AND WATERCOURSES.

(*g*) *Barnes* v. *Ward*, *supra*; *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (1859), 4 H. & N. 67; *Hounsell* v. *Smyth* (1860), 7 C. B. (N. S.) 731.

(*h*) *Hardcastle* v. *South Yorkshire Railway and River Dun Co.*, *supra*; *Hounsell* v. *Smyth*, *supra*. Cases in which the danger was held not to be sufficiently near are *Blithe* v. *Topham* (1607), 1 Roll. Abr. 88; *Binks* v. *South Yorkshire Railway and River Dun Co.* (1862), 3 B. & S. 244.

(*i*) *R.* v. *Dant* (1865), Le. & Ca. 567; *Stone* v. *Jackson* (1855), 16 C. B. 199; *Fisher* v. *Prowse*, *Cooper* v. *Walker* (1862), 2 B. & S. 770; *Hardcastle* v. *South Yorkshire Railway and River Dun Co.*, *supra*; *Binks* v. *South Yorkshire Railway and River Dun Co.*, *supra*; see *Coupland* v. *Hardingham* (1813), 3 Camp. 398, explained in *Cornwell* v. *Metropolitan Commissioners of Sewers* (1855), 10 Exch. 771, 775; *Jarvis* v. *Dean* (1826), 3 Bing. 447, explained in *Fisher* v. *Prowse*, *Cooper* v. *Walker*, *supra*; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 156, 157.

(*k*) *R.* v. *Dant*, *supra*; *Hardcastle* v. *South Yorkshire Railway and River Dun Co.*, *supra*; *Binks* v. *South Yorkshire Railway and River Dun Co.*, *supra*; *Cornwell* v. *Metropolitan Commissioners of Sewers*, *supra*; *Hounsell* v. *Smyth*, *supra*.

(*l*) *R.* v. *Watts* (1703), 1 Salk. 357; S. C., *sub nom.* *R.* v. *Watson*, 2 Ld. Raym. 856; *Harrold* v. *Watney*, *supra*; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 126.

SECT. 3. Dangerous Property.

damage arising depends upon the relation between him and the person damnified, and the duty existing between them (*m*).

## SECT. 4.—*Electrical Supply.*

### SUB-SECT. 1.—*Escape of Electricity.*

Statutory provisions.

**868.** The Acts or orders under which electrical undertakings are authorised invariably provide that the undertakers are not to be exonerated from indictment, action, or other proceedings for nuisance caused or permitted by them. Under such conditions the undertakers are liable for damage done by the escape of electricity on the principle (*n*) that a person, who brings into being or collects on his premises an agent likely to do damage if it escapes, is liable for the consequences of such escape (*o*).

### SUB-SECT. 2.—*Overhead Wires.*

Over private property.

**869.** The stretching of wires over real property of occupiers or owners, though without being attachment to the property, is unlawful if done without their consent, and may constitute a nuisance which they can abate or for which they have a right of action if damage results (*p*).

Over streets.

Apart from any special circumstances of danger, the existence of wires across public streets at a proper height, so as not to obstruct the user of the streets, does not constitute a public nuisance, nor give a right of action for an injunction to the local authority in whom the streets are vested (*q*). But various statutes require the consent of local authorities before wires can be carried over streets (*r*), and in certain circumstances (*s*) local authorities have power to make bye-laws for the prevention of danger and obstruction from such wires (*t*).

## SECT. 5.—*Exercise of Special Statutory Powers.*

### SUB-SECT. 1.—*In General.*

#### (i.) *Rules of Construction.*

Burden of proof.

**870.** Acts which would otherwise be wrongful may be justified as being authorised by statute. Whether or not the legislature has

(*m*) See pp. 524, 550 *et seq.*, *post*; see also titles NEGLIGENCE, pp. 426 *et* 33 *et seq.*, *ante*; TORT.

(*n*) See p. 528, *post*.

(*o*) As to the responsibilities of undertakers for nuisance, generally, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 563 *et seq.*

(*p*) See *Pickering* v. *Rudd* (1815), 4 Camp. 219; *Reynolds* v. *Clarke* (1725), 1 Stra. 634; *Fay* v. *Prentice* (1845), 1 C. B. 828; *Corbett* v. *Hill* (1870), L. R. 9 Eq. 671; see also *Kenyon* v. *Hart* (1865), 6 B. & S. 249, 252; and see, further, title TELEGRAPHS AND TELEPHONES.

(*q*) *Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, C. A.; *Finchley Electric Light Co.* v. *Finchley Urban Council*, [1902] 1 Ch. 866.

(*r*) As to wires of electrical undertakings, see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 571; as to telegraph wires, see title TELEGRAPHS AND TELEPHONES.

See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 260.

*Ibid.* In London the whole matter is dealt with by the London Overhead Wires Act, 1891 (54 & 55 Vict. c. lxxvii.). See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

SECT. 5. Exercise of Special Statutory Powers.

authorised interference with private rights depends upon the construction of the statute (*u*) under which the powers are exercised. The burden of proof of the authority of Parliament to do the act complained of rests upon those who claim the right to do it, and they are bound to show, with sufficient clearness, that the statute under which they act does take away ordinary private rights (*a*).

Construed strictly.

**871.** Statutes which confer a special authority affecting the property and rights of individuals must be construed strictly against the parties to whom the authority is given, and in favour of persons affected (*b*), and for the due exercise of such authority it is essential that all conditions precedent must have been complied with and the prescribed means followed (*c*), though their fulfilment will be presumed after a long lapse of time (*d*).

Site prescribed.

**872.** The fact that the statute relied upon limits the operation of the statutory powers to a particular site does not of itself determine the question as to the character of the works authorised on the site (*e*).

Absence of compensation clauses.

**873.** The absence from a statute of any compensation clauses is an important consideration in determining whether or not the statute confers absolute powers to interfere with private rights; but such consideration is not conclusive either way, though the absence

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(*u*) As to the construction of statutes, generally, see title STATUTES.

(*a*) *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, 189; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125, 139; *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, 208, 213; see *Truman* v. *London, Brighton and South Coast Rail. Co.* (1885), 29 Ch. D. 89, 108, C. A.; reversed (1885), 11 App. Cas. 45.

(*b*) *R.* v. *Croke* (1774), 1 Cowp. 26; *Scales* v. *Pickering* (1828), 4 Bing. 448; see *Demerara Electric Co.* v. *White*, [1907] A. C. 330, P. C.

(*c*) *Liverpool and North Wales Steamship Co., Ltd.* v. *Mersey Trading Co., Ltd.*, [1909] 1 Ch. 209, C. A. (deviation from plans); *A.-G.* v. *Mid-Kent Rail. Co. and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100 (deviation from conditions); *Ferrand* v. *Bradford Corporation* (1856), 21 Beav. 412 (defendants restrained from diverting a stream without first paying compensation or making the statutory deposit); *Staffordshire Canal Co.* v. *Hallen* (1827), 6 B. & C. 317 (plaintiffs not entitled to recover for damage done to their banks unless their statutory obligation to keep the banks in repair was proved to have been discharged); *R.* v. *Great North of England Rail. Co.* (1846), 9 Q. B. 315; *R.* v. *Scott* (1842), 3 Q. B. 543; *Liverpool Corporation* v. *Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852, C. A. (prescribed means not followed); *Brownlow* v. *Metropolitan Board of Works* (1863), 13 C. B. (N. S.) 768; affirmed (1864), 16 C. B. (N. S.) 546, Ex. Ch.; *Saunby* v. *London (Ont.) Water Commissioners*, [1906] A. C. 110, P. C.; *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498; *Roberts* v. *Gwyrfai District Council*, [1899] 2 Ch. 608, C. A. (interference with flow of a stream without first obtaining consent as required by statute); *Burnley Co-operative Society* v. *Pickles* (1898), 77 L. T. 803 (building bridge less than statutory span); *A.-G.* v. *Furness Rail. Co.* (1878), 38 L. T. 555 (the like facts). Where, however, the plaintiff did not allege any right of ownership in the soil of the river obstructed, but relied upon a public right of passage, it was held that it was not necessary for the defendants to prove the fulfilment of preliminary conditions (*Abraham* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 586). As to the obstruction of rivers, see, further, title WATERS AND WATERCOURSES.

(*d*) *Clippens Oil Co.* v. *Edinburgh and District Water Trustees*, [1904] A. C. 64; compare title EVIDENCE, Vol. XIII., p. 506.

(*e*) See *Jordeson* v. *Sutton Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614,

SECT. 5. **Exercise of Special Statutory Powers.**

of a provision for compensation will generally be found to indicate that private rights are not to be affected (*f*).

(ii.) *Duties Absolute and Discretionary.*

Effect of distinction.

**874.** A distinction must be drawn between duties which are absolute and those which are discretionary (*g*). In the former case liability arises upon breach of the duty without proof of negligence (*h*); in the latter, negligence or misfeasance must be shown (*i*).

(iii.) *Scope of the Powers.*

Powers under provisional orders.

**875.** Acts done under powers granted by persons to whom Parliament has delegated authority to grant such powers, for example, under provisional orders of the Board of Trade, are regarded as having been done under statutory authority (*k*).

Powers for specified purposes.

**876.** Where authorities are given general powers to effect certain specified purposes, the powers will ordinarily be construed to

(*f*) See *London and North Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16, 29, C. A.; *Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, 215; *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1883), 32 W. R. 134, C. A.; *Consett Waterworks Co.* v. *Ritson* (1889), 43 W. R. 122, C. A.; *Bradford Corporation* v. *Pickles*, [1895] 1 Ch. 145, 152, C. A.; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614, 621. For a case where there were no means of obtaining compensation, see *Kennet and Avon Navigation Co.* v. *Witherington* (1852), 18 Q. B. 531; and no provision for awarding it, *East Freemantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.; and see, further, titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 31, 32, 55, 56; CORPORATIONS, Vol. VIII., pp. 388, 389; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 578 *et seq.*; NEGLIGENCE, p. 360, *ante*.

(*g*) See *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45.

(*h*) *Holborn Union Guardians* v. *St. Leonard's, Shoreditch, Vestry* (1876), 2 Q. B. D. 145; *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694; *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453; and see title NEGLIGENCE, p. 377, *ante*; see also title CORPORATIONS, Vol. VIII., pp. 389, 391.

(*i*) *Hammond* v. *St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A. (injunction against pollution refused on the ground that the defendants had done no act to create or increase the pollution, but had only failed in their duty to provide sufficient system of drainage); *A.-G.* v. *Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A., a similar case; *Bateman* v. *Poplar District Board of Works* (No. 2) (1887), 37 Ch. D. 272; *Fleming* v. *Manchester Corporation* (1881), 44 L. T. 517; *Gibraltar Sanitary Commissioners* v. *Orfila* (1890), 15 App. Cas. 400, P. C.; *A.-G.* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527 (following *Glossop* v. *Heston and Isleworth Local Board*, *supra*); *Ogilvie* v. *Blything Union Rural Sanitary Authority* (1891), 65 L. T. 338; *Stretton's Derby Brewery Co.* v. *Derby Corporation*, [1894] 1 Ch. 431; *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, C. A.; *Evans* v. *Liverpool Corporation*, [1906] 1 K. B. 160; *Queens of the River Steamship Co.* v. *Easton, Gibb & Co.* (1907), 96 L. T. 901; see also *Wilson* v. *Halifax Corporation* (1868), L. R. 3 Exch. 114; *Ohrby* v. *Ryde Commissioners* (1864), 5 B. & S. 743; *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; *Whitehouse* v. *Birmingham Canal Co.* (1857), 27 L. J. (EX.) 25; *Snook* v. *Grand Junction Waterworks Co., Ltd.* (1886), 2 T. L. R. 308; *Green* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547, C. A.; *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590; *Lingke* v. *Christchurch Corporation* (1912), 132 L. T. Jo. 418.

(*k*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; and as to provisional orders, see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8—11; ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 552, 556 *et seq.*; GAS, Vol. XV., pp. 312 *et seq.*; PARLIAMENT, pp. 727 *et seq.*, *post*; RAILWAYS AND CANALS; STATUTES; TRAMWAYS AND LIGHT RAILWAYS; SUPPLY.

cover any method of effecting those purposes (*l*), although such method may not have been known nor have been in existence at the time when the powers were originally granted (*m*).

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**877.** An authority to do specific works includes all things reasonably necessary for the execution of those works (*n*); but an act which does injury to others cannot be justified as necessary, within the meaning of a statute empowering undertakers to do all other acts necessary for making and maintaining the authorised works, merely because it is more convenient or more economical from the point of view of the undertakers. The act must also be judged by the effect it has upon the accommodation and convenience of those whose rights are sought to be interfered with (*o*).

Authority for specific works.

SUB-SECT. 2.—*Where the Exercise is Compulsory or the Nuisance Inevitable.*

**878.** Where the legislature has authorised the exercise of the powers (*p*) under consideration and has expressly or impliedly directed the manner (*q*) and place in which, and the purpose for which, the powers are to be exercised, or where, without such directions, the inevitable or natural result of the proper exercise by the undertakers of such powers is the creation or causing of a nuisance, no liability arises in respect of it

General principle.

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(*l*) *Bishop* v. *North* (1843), 11 M. & W. 418; see also *Dand* v. *Kingscote* (1840), 6 M. & W. 174.

(*m*) *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282.

(*n*) *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; *Saunby* v. *London (Ont.) Water Commissioners*, [1906] A. C. 110, P. C.; *Manser* v. *Northern and Eastern Counties Rail. Co.* (1841), 2 Ry. & Can. Cas. 380; *Ricket* v. *Metropolitan Rail. Co. (Directors etc.)* (1867), L. R. 2 H. L. 175. As to building a temporary bridge, see *Priestley* v. *Manchester and Leeds Rail. Co.* (1840), 4 Y. & C. (EX.) 63; see *A.-G.* v. *Eastern Counties and Northern and Eastern Rail. Cos.* (1842), 2 Ry. & Can. Cas. 823; and see, further, title CORPORATIONS, Vol. VIII., p. 358.

(*o*) *Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544; *R.* v. *Wycombe Rail. Co.* (1867), L. R. 2 Q. B. 310; *Pugh* v. *Golden Valley Rail. Co.* (1879), 12 Ch. D. 274; affirmed (1880), 15 Ch. D 330, C. A., distinguishing *A.-G.* v. *Ely, Haddenham, and Sutton Rail. Co.* (1869), 4 Ch. App. 194; *Tilling (T.), Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562.

(*p*) As to waiver of powers conferred for the public good, see title CORPORATIONS, Vol. VIII., p. 360; *Re South Eastern Railway and Wiffin's Contract*, [1907] 2 Ch. 366.

(*q*) An obligation to put down wood-paving does not justify the use of wood soaked in creosote which is detrimental to adjoining property (*West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A.).

(*a*) Thus, a railway company authorised to construct a line within prescribed limits is not liable for nuisance occasioned by the proximity of the railway to a highway (*R.* v. *Pease* (1832), 4 B. & Ad. 30); or for damage done by sparks from engines, if the company is authorised to use such engines and has taken every reasonable precaution and the best scientific means to prevent such injury and has not been negligent in the management of its engines (*Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *Dimmock* v. *North Staffordshire Rail. Co.* (1866), 4 F. & F. 1058; *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14; *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Rail. Co.*, [1893] W. N. 29, H. L.; *Shaftesbury (Earl)* v. *London and South Western Rail. Co.* (1895), 11 T. L. R. 269, C. A.; *Canadian Pacific Railway* v. *Roy*, [1902] A. C. 220, P. C.; but as to the statutory liability of a railway company to compensate for damage to agricultural land and crops caused by sparks from engines, see Railway Fires Act, 1905 (5 Edw. 7, c. 11); titles AGRICULTURE, Vol. I., pp. 278 *et seq.*; RAILWAYS AND CANALS); or for damage caused by

SECT. 5. SUB-SECT. 3.—*Where the Exercise is Permissive only.*

**Exercise of Special Statutory Powers.**

Principles for exercise of powers.

**879.** Where persons, whether for the purpose of profit or for the benefit of the public (*b*), are authorised by statute to effect a

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vibration during the proper working of the railway (*Hammersmith etc. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171; *A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q. B. 384, C. A.); or the noise and inconvenience of working (*London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45); but the company is liable for nuisance caused by smoke from its engines, since the emission of smoke is prohibited and penalised by statute (*Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 26 W. R. 10; and see p. 545, *post*), where there is negligence in the use of its engines (*Freemantle* v. *London and North-Western Rail. Co.* (1860), 2 F. & F. 337; on appeal (1861), 10 C. B. (N. S.) 89; *Bliss* v. *London and North-Western Rail. Co.* (1860), 2 F. & F. 341; *Longman* v. *Grand Junction Canal Co.* (1863), 3 F. & F. 736); or where the company has no power to use steam locomotives (*Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733); or where, having used properly equipped engines in a proper manner, it has negligently left combustible matter along its banks likely to be ignited by sparks (*Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14). As to burden of proof, see *Piggot* v. *Eastern Counties Rail. Co.* (1846), 3 C. B. 229; *Aldridge* v. *Great Western Rail. Co.* (1841), 3 Man. & G. 515. Other instances in which injury has been justified under statutory powers are:—restriction of access to premises by altering a roadway (*British Cast Plate Manufacturers (Governor etc.)* v. *Meredith* (1792), 4 Term Rep. 794; *Boulton* v. *Crowther* (1824), 2 B. & C. 703; *East Freemantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.); damage to premises consequent on the opening of flood-gates (*Whitehouse* v. *Birmingham Canal Co.* (1857), 27 L. J. (EX.) 25; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; distinguished in *Price's Patent Candle Co., Ltd.* v. *London County Council*, [1908] 2 Ch. 526, C. A.); pollution of a stream after satisfying the statutory requirements to use the best known process of purifying before discharging the effluent (*Lea Conservancy Board* v. *Hertford Corporation* (1884), 48 J. P. 628; for a case of pollution in which it was held that there was no statutory protection, see *A.-G.* v. *Hackney Local Board* (1875), L. R. 20 Eq. 626); interference with a telephone or telegraph system by an electric tramway (*National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381, P. C.); insertion of poles for tramways in the subsoil (*Escott* v. *Newport Corporation*, [1904] 2 K. B. 369; *Fareham Local Board and Fareham Electric Light Co.* v. *Smith*, [1891] W. N. 76); obstruction of ancient lights by erecting buildings (*Bedford (Duke)* v. *Dawson* (1875), L. R. 20 Eq. 353; *Wigram* v. *Fryer* (1887), 36 Ch. D. 87; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 283); flooding of mines by the making of a canal caused by owners of the former working in the ordinary way (*Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch.); annoyance caused by things reasonably necessary for the execution of the authorised works (*Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; compare *Knight* v. *Isle of Wight Electric Light and Power Co.* (1904), 73 L. J. (CH.) 299; *Ash* v. *Great Northern, Piccadilly, and Brompton Rail. Co.* (1903), 19 T. L. R. 639; *Allison* v. *City and South London Rail. Co.* (1892), *Times*, 24th February; and see p. 522, *post*); obstruction of navigation by constructing a pier and floating wharf (*Jolliffe* v. *Wallasey Local Board* (1873), L. R. 9 C. P. 62), or railway embankment (*Abraham* v. *Great Northern Rail. Co.* (1851), 16 Q. B. 586); and see and compare titles CORPORATIONS, Vol. VIII., p. 389; ELECTRIC LIGHTING AND POWER, Vol. XII., p. 583; GAS, Vol. XV., p. 359; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 152; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 578, 580; WATERS AND WATERCOURSES.

(*b*) *Ruck* v. *Williams* (1858), 3 H. & N. 308; *Southampton and Itchin Bridge Co.* v. *Southampton Local Board* (1858), 8 E. & B. 801; *Whitehouse* v. *Fellowes* (1861), 10 C. B. (N. S.) 765; *Coe* v. *Wise* (1866), L. R. 1 Q. B. 711, Ex. Ch.; *Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279; *Winch* v. *Thames Conservators* (1874), L. R. 9 C. P. 378, Ex. Ch.; see *Broadbent* v. *Imperial Gas Co.* (1857), 7 De G. M. & G. 436, 462; *Bradford Corporation* v. *Pickles*, [1895] 1 Ch. 145, 152, C. A.

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particular object, and are granted powers in that behalf, they are bound to exercise their powers, whether in the original construction or in the subsequent maintenance of the authorised works, with due regard to the common law rights of others (*c*), but not necessarily to provide for every possible contingency (*d*).

Powers not to be exercised oppressively.

The powers must not be exercised in an oppressive manner when that can be avoided, nor must unnecessary injury be caused (*e*).

Illustrations.

The right to commit a nuisance in the exercise of permissive powers has been negatived in the following cases: in providing public urinals (*f*); in providing hospitals under the directions of the Local Government Board, where the provision was not made compulsory (*g*); in irrigating lands by the compulsory diversion of streams and running the water off through adjacent lands (*h*); in taking water for a canal from a stream, when that stream had become polluted, thus creating a public nuisance (*i*); in the running of tramways, as by using brine to keep the road clear of snow (*k*), or by using raised rails during reconstruction (*l*), or by noise and smells from stables (*m*), or by not taking reasonable care in attending to the lines (*n*) or in driving the cars (*o*); in

(*c*) See *Geddis* v. *Bann Reservoir* (*Proprietors*) (1878), 3 App. Cas. 430, *per* Lord BLACKBURN at pp. 455, 456; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125; *Arnold* v. *Furness Rail. Co.* (1874), 22 W. R. 613; *Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544; *Boughton* v. *Midland and Great Western Railway of Ireland* (1873), 7 I. R. C. L. 169; *Bligh* v. *Rathangan Drainage Board*, [1898] 2 I. R. 205; *Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1903), 87 L. T. 732, following *East Freemantle Corporation* v. *Annois*, [1902] A. C. 213, P. C.; *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 840; *Wiggins* v. *Boddington* (1828), 3 C. & P. 544; *A.-G.* v. *Furness Rail. Co.* (1878), 38 L. T. 555.

(*d*) The power to provide a bridge for ordinary traffic as then existing does not import a duty to provide in the future a bridge for extraordinary weights (*R.* v. *East and West India Dock Co.* (1888), 60 L. T. 232). As to extraordinary traffic, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 172 *et seq.*

(*e*) See *Coats* v. *Clarence Rail. Co.* (1830), 1 Russ. & M. 181; *Biscoe* v. *Great Eastern Rail. Co.* (1873) L. R. 16 Eq. 636.

(*f*) *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.; see *Biddulph* v. *St. George, Hanover Square, Vestry* (1863), 33 L. J. (CH.) 411, C. A.; *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q. B. D. 928; *Parish* v. *London Corporation* (1901), 67 J. P. 55; *Leyman* v. *Hessle Urban District Council* (1902), 76 J. P. 56.

(*g*) *Metropolitan Asylum District* v. *Hill*, *supra* (erection of a hospital for infectious diseases so as to be a nuisance to private owners), approved in *Canadian Pacific Railway* v. *Parke*, [1899] A. C. 535, P. C.; *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146 (pollution of a stream by drainage from the asylum); see *A.-G.* v. *Birmingham Borough Council* (1858), 4 K. & J. 528.

(*h*) *Canadian Pacific Railway* v. *Parke*, *supra*.

(*i*) *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631.

(*k*) *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111.

(*l*) *Tilling* (*T.*), *Ltd.* v. *Dick Kerr & Co., Ltd.*, [1905] 1 K. B. 562.

(*m*) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, C. A.

(*n*) *Sadler* v. *South Staffordshire and Birmingham District Steam Tramways Co.* (1889), 23 Q. B. D. 17, C. A.

(*o*) *Rattee* v. *Norwich Electric Tramway Co.* (1902), 18 T. L. R. 562, C. A.

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repairing roads by using heavy steam rollers (*p*); in using locomotives on a railway so as to cause a nuisance by smoke from the engines (*q*); in granting a licence to erect an embankment which obstructed the right of access of riparian owners, when the statute under which the licence was granted gave the power of granting the licence so only as to justify an obstruction of public navigation (*a*); in the discharge of sewage (*b*).

Proviso preserving remedies for nuisance.

**880.** An express proviso contained in a statute that in the event of a nuisance being caused the rights of action of third parties in respect thereof shall remain unprejudiced, amounts to a permission to exercise the powers conferred by the statute, but if in doing so the undertakers occasion a nuisance they must bear the consequences, whether the nuisance has been caused by their negligence or otherwise (*c*). Thus, statutes which allow the use of locomotives on highways subject to certain conditions being fulfilled, preserving all liability for nuisances caused, do not exempt from liability a person so using locomotives, even though he has fulfilled all the requirements of the statutes or all the requirements imposed by bye-laws made under the statutes (*d*), and has not been guilty of negligence in the construction or user of the engines (*e*), unless there are words in the statute expressly or impliedly limiting liability to a specific class of acts or omissions (*f*); statutes which impose upon a local authority the duty of effectually draining its district and confer upon it power to drain into the sea, rivers and streams, with a proviso against committing a nuisance thereby, do not authorise or justify the pollution of such waters (*g*);

(*p*) *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Chichester Corporation* v. *Foster*, [1906] 1 K. B. 167.

(*q*) *Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 26 W. R. 10.

(*a*) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662.

(*b*) See cases cited in note (*g*), *infra*.

(*c*) See also title CORPORATIONS, Vol. VIII., p. 389; GAS, Vol. XV., p. 359; as to negligence generally, see title NEGLIGENCE, pp. 357 *et seq.*, *ante*.

(*d*) *Powell* v. *Fall* (1880), 5 Q. B. D. 597, C. A. (sparks from an engine); *Galer* v. *Rawson* (1889), 6 T. L. R. 17, C. A.; *Bantwick* v. *Rogers* (1891), 7 T. L. R. 542; *Jeffery* v. *St. Pancras Vestry* (1894), 63 L. J. (Q. B.) 618; *Watkins* v. *Reddin* (1861), 2 F. & F. 629 (frightening horses). As to whether and when a motor vehicle used on a public road is a nuisance by means of its liability to skid, see *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652, C. A.; *Walton (Isaac) & Co.* v. *Vanguard Motorbus Co.*, *Gibbons* v. *Same* (1908), 25 T. L. R. 13. As to traffic on streets, see, generally, title STREET AND AERIAL TRAFFIC; *Parker* v. *London General Omnibus Co., Ltd.* (1909), 101 L. T. 623, C. A.

(*e*) *Chichester Corporation* v. *Foster*, *supra* (locomotive so heavy as to break underground pipes); *Armagh Union Guardians* v. *Bell*, [1900] 2 I. R. 371, C. A.; see also *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry*, *supra*; *A.-G.* v. *Scott*, [1904] 1 K. B. 404, C. A.

(*f*) *E.g.* in *Brocklehurst* v. *Manchester, Bury, Rochdale and Oldham Steam Tramways Co.* (1886), 17 Q. B. D. 118, where the liability was limited to damage caused by the act or default of the defendants or their servants, in which case the defendants were held not liable for a pure accident caused by a horse shying at a tramcar.

(*g*) *Oldaker* v. *Hunt* (1854), 19 Beav. 485; *A.-G.* v. *Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *A.-G.* v. *Birmingham Borough Council* (1858), 4 K. & J. 528; *Manchester, Sheffield etc. Rail. Co.* v. *Worksop Board*

nor do statutes with a similar proviso empowering bodies of persons to supply electricity or gas protect undertakers from liability for nuisance (*h*).

SECT. 5. Exercise of Special Statutory Powers.

SUB-SECT. 4.—*Where the Mode of Exercise is Discretionary.*

General principles.

**881.** Where public bodies are given a discretion in the exercise of powers conferred upon them by statute, the courts will not interfere with the exercise of that discretion so long as it is exercised *bonâ fide* and reasonably (*i*); and in exercising their discretionary statutory powers local authorities are under no obligation in the proper exercise of those powers to protect the interests of individuals which are affected by such exercise unless there is something in the statute by which the powers are conferred to impose that obligation (*k*).

SECT. 6.—*Gasworks.*

Statutory provisions.

**882.** Statutes and provisional orders authorising the making and supplying of gas almost invariably incorporate the provisions of the Gasworks Clauses Act, 1847 (*l*), or contain a similar express

*of Health* (1856), 23 Beav. 198; *Bidder* v. *Croydon Local Board of Health* (1862), 6 L. T. 778; *A.-G.* v. *Metropolitan Board of Works* (1863), 9 L. T. 139; *A.-G.* v. *Kingston-on-Thames Corporation* (1865), 34 L. J. (CH.) 481; *Cator* v. *Lewisham Board of Works* (1864), 5 B. & S. 115, 127, Ex. Ch.; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349, 352; *A.-G.* v. *Richmond* (1866), L. R. 2 Eq. 306; *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; *A.-G.* v. *Leeds Corporation* (1870), 5 Ch. App. 583; *A.-G.* v. *Dorchester Corporation* (1905), 93 L. T. 290; *Harrington* (*Earl*) v. *Derby Corporation*, [1905] 1 Ch. 205; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Owen* v. *Faversham Corporation* (1908), 72 J. P. 404; affirmed, 73 J. P. 33, C. A.; *Price's Patent Candle Co., Ltd.* v. *London County Council*, [1908] 2 Ch. 526, C. A. As to drainage generally, see title SEWERS AND DRAINS. As to pollution of water, see, further, title WATERS AND WATERCOURSES.

(*h*) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A. (vibration and noise from machinery); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A. (withdrawal of support and obstruction of ancient lights); *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707 (vibration from new machinery); *Demerara Electric Co.*, v. *White*, [1907] A. C. 330, P. C. (noise and vibration); *Midwood & Co., Ltd.* v. *Manchester Corporation*, [1905] 2 K. B. 597, C. A. (damage by explosion); *A.-G.* v. *Gaslight and Coke Co.* (1877), 7 Ch. D. 217 (nuisance alleged to be inevitable if gas of the statutory standard was to be manufactured); *Wise* v. *Metropolitan Electric Supply Co.* (1894), 10 T. L. R. 446; *Knight* v. *Isle of Wight Electric Light and Power Co.* (1904), 73 L. J. (CH.) 299; and see titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 560 *et seq.*; GAS, Vol. XV., pp. 322, 359 *et seq.*

(*i*) *Biddulph* v. *St. George's, Hanover Square, Vestry* (1863), 33 L. J. (CH.) 411, C. A.; *Forbes* v. *Lee Conservancy Board* (1879), 4 Ex. D. 116; *Vernon* v. *St. James, Westminster, Vestry* (1880), 16 Ch. D. 449, C. A.; *Chaplin* (*W. H.*) *& Co., Ltd.* v. *Westminster Corporation*, [1901] 2 Ch. 329; *Westminster Corporation* v. *London and North Western Railway*, [1905] A. C. 426; *Mayo* v. *Seaton Urban District Council* (1903), 68 J. P. 7; *Wilkinson* v. *Hull etc. Railway and Dock Co.* (1882), 20 Ch. D. 323, C. A. The court will give the public body credit for being the best judge of its requirements (*A.-G.* v. *Great Eastern Rail. Co.* (1871), 6 Ch. App. 572).

(*k*) *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, C. A.

(*l*) 10 & 11 Vict. c. 15.

SECT. 6. Gasworks.

provision preserving the liability of the undertakers to indictment or other legal proceeding for nuisance caused in the making and supplying of gas (*m*). There are also numerous statutory provisions for the protection of water from pollution by gas washings and the like (*n*).

## SECT. 7.—*Highways.*

Nuisance on highways.

**883.** Any unlawful interference with, or obstruction of, a highway which materially renders it less commodious or safe for ordinary uses by the public is a nuisance.

The interference or obstruction cannot be justified on the ground of sanction by the highway or other local authority, unless it has statutory power to give such sanction; nor on the grounds that notwithstanding the interference or obstruction sufficient room for passage has been left, or that the part obstructed is not metalled or made up or is not habitually or ordinarily used by the public for passage, or that the interference or obstruction complained of is or will result in a great benefit to many of the public (*o*).

## SECT. 8.—*Neighbouring Owners.*

### SUB-SECT. 1.—*In General.*

Principles governing exercise of rights.

**884.** Every person is required by law to exercise his rights, whether over his own or public property, with due regard to the co-existing rights of others, and an unreasonable, excessive, or extravagant exercise of his rights to the damage of others constitutes a nuisance in law. Thus, a person is guilty of a nuisance who, in the exercise of his right of access to his premises either on a public highway (*p*), or a public navigable river (*q*), acts so unreasonably as to have no regard to the similar rights of access possessed by his neighbours; or who, during building operations, uses excessively one passage when he might reduce the inconvenience to his neighbours by using others which are available (*a*); or who uses an exceptionally heavy traction engine on the highway so as to break underground pipes (*b*); or who carries on disturbing building operations during the night without any real necessity (*c*).

(*m*) See Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 29.
(*n*) See title GAS, Vol. XV., pp. 359 *et seq.*
(*o*) See generally, on this subject, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49, 151 *et seq.*
(*p*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400; *A.-G.* v. *Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276, C. A.; see title HIGHWAYS, STREETS, AND BRIDGES, Vol., XVI., pp. 60, 61, 155.
(*q*) *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713; see title WATERS AND WATERCOURSES.
(*a*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542.
(*b*) *Chichester Corporation* v. *Foster*, [1906] 1 K. B. 167; see *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.
(*c*) See, on the one hand, *Webb* v. *Barker*, [1881] W. N. 158; *Beaumont* v. *Emery*, [1875] W. N. 106, C. A.; *Howland* v. *Dover Harbour Board* (1898), 14 T. L. R. 355, C. A.; *Lipman* v. *Pulman (George) & Sons, Ltd.* (1904), 91 L. T. 132; on the other, *Clark* v. *Lloyd's Bank, Ltd.* (1910), 79 L. J. (CH.) 645, following *Browning and Heseltine* v. *Harrod's Stores* (1902), *Times*, 13th August, and *Stump* v. *Byewater* (1902), *The Builder Newspaper*, 16th August; *Ash* v.

SUB-SECT. 2.—*Injury to Property.*

SECT. 8. Neighbouring Owners.

(i.) *In General.*

When action able; when justifiable.

**885.** Any material damage, actual or prospective, to the corporeal hereditament of a person by another in the management of his own property amounts to an actionable nuisance, unless it can be justified as the natural result of a reasonable use of his property (*d*), or as having been authorised by statute (*e*), or as having been done under agreement, express or implied, between himself and the person affected (*f*), or as being due to some act or default of the person affected, or to *vis major*, or the act of God, or to the act of a stranger (*g*).

Illustrations.

**886.** Instances of injury to property, or interference with rights in respect of property (*h*), are most commonly found to arise from excavations causing subsidence (*i*), from vibration in the execution of works (*k*), from the escape of water or noxious fumes (*l*), or animals (*m*), from the use of property for dangerous purposes (*n*), from interference with light and air (*o*), or rights of access (*p*) or rights of way (*q*), or from an excessive or extravagant exercise of rights (*r*).

(ii.) *Ordinary User of Property.*

Extent of right of user: (i.) Of land;

**887.** Owners or occupiers of land are legally entitled to use or occupy their land for any purpose for which it may in the ordinary and natural course of the enjoyment of land be used or occupied, and they are not responsible for damage sustained by the property of others through natural agencies operating as a consequence of such ordinary and natural user or occupation (*s*).

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*Great Northern, Piccadilly and Brompton Rail. Co.* (1903), 19 T. L. R. 639; compare *Roberts* v. *Charing Cross, Euston, and Hampstead Rail. Co.* (1903), 87 L. T. 732.

(*d*) See the text, *infra*.

(*e*) See p. 519, *ante*.

(*f*) See title TORT. As to a prescriptive right to commit the act, see p. 563, *post*.

(*g*) See p. 564, *post*; and see titles NEGLIGENCE, pp. 467 *et seq.*, *ante*: TORT.

(*h*) As to interference with easements generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 330 *et seq.*

(*i*) As to this, see EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 319 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 570 *et seq.*

(*k*) See *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.

(*l*) See pp. 528, 529, *post*.

(*m*) See p. 513, *ante*.

(*n*) See p. 530, *post*.

(*o*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 297 *et seq.*

(*p*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 59, 60—61.

(*q*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 295 *et seq.*

(*r*) See p. 524, *ante*; and see p. 527, *post*.

(*s*) See *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, *per* Lord CAIRNS, L.C., at p. 338; *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 782, C. A., *per* BRETT, L.J., at p. 787; *Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822. Thus, no liability arises when, by the ordinary working of mines, subterranean water is tapped so as to dry up a well or the under stratum in adjoining property (*Acton* v. *Blundell* (1843), 12 M. & W. 324, Ex. Ch.; *Popplewell* v. *Hodkinson* (1869), L. R. 4 Exch. 248, Ex. Ch.; see also *Smith* v. *Fletcher* (1874), L. R. 9 Exch. 64, Ex. Ch.); or is liberated so as to flow by natural gravitation into adjoining mines (*Smith* v. *Kenrick* (1849), 7 C. B. 515;

SECT. 8. **Neighbouring Owners.**

(ii.) of neighbouring premises.

So in the case of adjoining or neighbouring buildings or premises, each of the respective owners or occupiers is entitled to the full use and enjoyment of his property in the ordinary manner of its use and for the ordinary purposes for which premises are designed, and, so long as he confines himself to such user and exercises such user and enjoyment in a reasonable manner, having regard to surrounding circumstances, he is not guilty of committing a nuisance (*t*).

What is not ordinary user.

**888.** As a general rule, no act can be justified as an ordinary user of premises which in fact results in a state of things amounting to a substantial interference with the ordinary use and enjoyment of property by other persons (*a*); and a person who injures the property of another or disturbs him in his legitimate enjoyment of it cannot justify that injury or disturbance as being the natural result of the exercise of his own rights of enjoyment, if he exercises

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*Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376), even though the defendant knows what the consequences of such working will be (*ibid.*); or is penned back so as to flood an adjoining mine (*Lomax* v. *Stott* (1870), 39 L. J. (CH.) 834); or when the effect of such working is to admit a river which may flood the mines of plaintiff and defendant (*Crompton* v. *Lea* (1874), L. R. 19 Eq. 115), or to cause a subsidence and cracks in the defendant's land through which rain collects and escapes into the defendant's, and thence into the plaintiff's, mine (*Smith* v. *Fletcher* (1874), L. R. 9 Exch. 64, Ex. Ch.; *Wilson* v. *Waddell* (1876), 2 App. Cas. 95); or when, by draining or excavating in his property, a person withdraws the subterranean water which supports the neighbouring land (*Popplewell* v. *Hodkinson* (1869), L. R. 4 Exch. 248, Ex. Ch.; compare *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217, C. A., where running silt was withdrawn; *Fletcher* v. *Birkenhead Corporation*, [1906] 1 K. B. 605); or dries up the sources of supply to a stream (*Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349); or when, by draining his gravel pits, the defendant prevents a riparian owner lower down the stream from growing his watercress so well as formerly (*Weeks* v. *Heward* (1862), 10 W. R. 557); or when an owner refrains from cutting thistles which have grown naturally on his land and the seeds of which have consequently been carried by the wind to his neighbour's fields (*Giles* v. *Walker* (1890), 24 Q. B. D. 656); see, further, titles AGRICULTURE, Vol. I., p. 295; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 312; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 589—591; NEGLIGENCE, p. 396, *ante*.

(*t*) Thus it has been held a justifiable user of premises, for which no liability arises for the inconvenience caused, when a person has pulled down the wall of a vault in ignorance of the existence of an adjoining vault (*Chadwick* v. *Trower* (1839), 6 Bing. (N. C.) 1, Ex. Ch.); when he has stored timber on the roof of his building whereby his neighbour's chimneys were caused to smoke (*Bryant* v. *Lefever* (1879), 4 C. P. D. 172, C. A.); when he has used a lower floor of premises for manufacture with a heating apparatus, ignorant of the fact that the business on the upper floor was sensitive to heat, the heat from below not being such as to cause inconvenience or personal discomfort to the persons working above (*Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A.); or when he has used his dwelling-house for music and singing lessons (*Christie* v. *Davey*, [1893] 1 Ch. 316), or a crèche (*Moy* v. *Stoop* (1909), 25 T. L. R. 262); compare cases cited in note (*k*), p. 528, *post*.

(*a*) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; *Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, Ex. Ch.; *Cavey* v. *Ledbitter* (1863), 13 C. B. (N. S.) 470 (brick burning near dwelling-houses); *Bostock* v. *North Staffordshire Rail. Co.* (1852), 5 De G. & Sm. 584 (attracting to a reservoir large crowds of persons, who trespassed upon and damaged plaintiff's property); see also *Chase* v. *London County Council* (1898), 62 J. P. 184; *Stockport Waterworks Co.* v. *Potter* (1861), 7 H. & N. 160 (polluting water in the course of carrying on business); *Bartlett* v. *Marshall* (1896), 60 J. P. 104; *A.-G.* v. *Cole & Son*, [1901] 1 Ch. 205 (fat-melting business); *Knight* v. *Isle of Wight Electric Light and Power Co.* (1904), 73 L. J. (CH.) 299 (interference with ordinary comfort by vibration etc.). As to damage caused by poisonous or overhanging trees, see p. 530, *post*.

his rights in an excessive and extravagant manner (*b*), or, it seems, if the inconvenience or injury resulting from the exercise of rights might easily be avoided (*c*), or if the user is extraordinary (*d*) or dangerous (*e*). Moreover, an owner of property who suffers his property to become and remain a place of depôsit for refuse and filth, is responsible for any nuisance that arises in consequence (*f*).

(iii.) *Extraordinary User of Property.*

Owner cannot restrict rights of neighbour.

**889.** A person cannot, by applying his property to special or extraordinary uses or purposes, whether for business or pleasure, restrict the right of his neighbour in the ordinary and legitimate enjoyment of his property (*g*), or impose upon his neighbour burdens which, in the ordinary course of things, he is not called upon to bear (*h*).

What constitutes extraordinary user.

**890.** Extraordinary user may consist of the interference with the course of natural agencies, the alteration or use of premises for unusual or non-natural purposes, the use of them for purposes which are noxious, the bringing of matter on to premises which is likely to do damage if it escapes, or the use of property for dangerous purposes (*i*).

Interference with natural or normal conditions.

**891.** Liability arises when damage is occasioned by an owner or occupier who, by his active agency, interferes with natural conditions or the normal state of the premises, if by such interference a new or a heavier burden is imposed on his neighbour (*j*).

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(*b*) See p. 524, *ante*; and see the text, *infra*.

(*c*) *Beardmore* v. *Tredwell* (1862), 3 Giff. 683; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; see *Vaughan* v. *Menlove* (1837), 3 Bing. (N. C.) 468; and see p. 524, *ante*.

(*d*) *Ball* v. *Ray* (1873), 8 Ch. App. 467, and *Broder* v. *Saillard* (1876), 2 Ch. D. 692 (stables contiguous to dwelling-house); *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71 (room over offices used for dancing); *Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, Ex. Ch.; *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315 (brick burning near dwellings). As to extraordinary user of property, see, further, the text, *infra*.

(*e*) See p. 530, *post*.

(*f*) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A.; *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.

(*g*) *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A.; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381, P. C. (defendants held not liable for escape of minute quantities of electricity which affected the plaintiffs' apparatus by reason only of the manner in which it had been constructed); see also *Weeks* v. *Heward* (1862), 10 W. R. 557; and note (*c*), p. 529, *post*.

(*h*) See the text, *infra*.

(*i*) See the text, *infra*, and p. 530, *post*.

(*j*) *West Cumberland Iron and Steel Co.* v. *Kenyon* (1879), 11 Ch. D. 782, C. A. Instances of this are found where an owner or occupier erects a cornice so as to overhang his neighbour's property (*Fay* v. *Prentice* (1845), 1 C. B. 828); or where, having a right to have his rainwater fall from his roof on to his neighbour's land, he causes damage by erecting a spout to collect and discharge the water in a volume (*Reynolds* v. *Clarke* (1725), 1 Stra. 634); or where a railway company, in making a cutting, removed an impervious stratum of soil without taking precautions to prevent flood-water soaking through the exposed stratum (*Bagnall* v. *London and North Western Rail. Co.* (1861), 7 H. & N. 423; affirmed (1862), 1 H. & C. 544, Ex. Ch.); or where a mine shaft was sunk and subsequently abandoned without being properly protected (*Re Groucott* v. *Williams* (1863), 4 B. & S. 149); or where water which had collected

SECT. 8. **Neighbouring Owners.**

Conversion to unusual or unsuitable purposes.

**892.** The conversion of premises from their original and usual purposes to purposes which are unusual and unsuitable, having regard to the neighbourhood and the surrounding circumstances, is an extraordinary user, and the person so using the premises is guilty of nuisance if in fact substantial annoyance or injury be thereby caused (*k*).

Non-natural purposes.

**893.** Similarly, the use of premises for purposes which may be considered non-natural, such as the use of a building estate for burning bricks, is an extraordinary user and unjustifiable if damage results (*l*).

Storage of matter lia to escape : do injury.

**894.** A person who for his own purposes creates, collects, or brings on to his property anything which has a tendency to escape beyond his control, and, if it does escape, is likely to do injury to his neighbours, must keep it at his peril, and he is liable for the damage caused by its escape (*m*). It is immaterial that the thing escapes without his wilful act or default or neglect (*n*), or that he has no knowledge of its existence (*o*). In the event of its escape he can only excuse himself by showing that the escape was due to some act or default of the person injured (*p*), or to *vis major* or act of God (*q*), or to the act of a stranger which there was no duty on the part of the defendant to foresee and guard against (*r*), or that he had a prescriptive or contractual right to discharge it as against the person affected (*s*), or that the matter was collected or stored on the premises for the benefit or at the

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by natural agencies was pumped to a higher level, whence it escaped into an adjoining mine (*Baird* v. *Williamson* (1863), 15 C. B. (N. S.) 376); or where defendants had diverted a stream from which water escaped into surface hollows, caused by the ordinary working of a mine, and through them escaped into and flooded plaintiff's mine (*Smith* v. *Musgrave* (1877), 47 L. J. (Q. B.) 4, H. L.; S. C. *sub nom. Fletcher* v. *Smith* (1877), 2 App. Cas. 781); or where an artificial mound was raised which collected and discharged water to the damage of adjoining premises (*Broder* v. *Saillard* (1876), 2 Ch. D. 692; *Brine* v. *Great Western Rail. Co.* (1862), 2 B. & S. 402; *Hurdman* v. *North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A.; *Fitzsimons* v. *Inglis* (1814), 5 Taunt. 534); or where land was overstocked with game to the damage of the neighbours (*Farrer* v. *Nelson* (1885), 15 Q. B. D. 258); and compare the cases cited in note (*s*), p. 525, *ante*.

(*k*) *Ball* v. *Ray* (1873), 8 Ch. App. 467 (converting into stables the front part of a house in a residential street in the west end of London); *Reinhardt* v. *Mentasti* (1889), 42 Ch. D. 685 (converting room into a kitchen with a stove not occupying the site of the fireplace); *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd., and G. D'Allesandri*, [1900] 2 Ch. 373 (a similar case); and compare cases cited in notes (*t*), (*a*), p. 526, *ante*.

(*l*) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; *Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, Ex. Ch.; *Cavey* v. *Ledbitter* (1863), 13 C. B. (N. S.) 470.

(*m*) See the cases cited in note (*b*), p. 529, *post*. For cases relating to the pollution of air, see p. 532, *post*; for cases relating to the escape of noxious fumes, see p. 529, *post*; and as to the escape of animals, see p. 513, *ante*; title ANIMALS, Vol. I., pp. 375 *et seq.*

(*n*) *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330; 1 Smith, L. C., 11th ed., 810; *Humphries* v. *Cousins* (1877), 2 C. P. D. 239.

(*o*) *Humphries* v. *Cousins*, *supra*.

(*p*) See title TORT.

(*q*) See p. 564, *post*.

(*r*) See title NEGLIGENCE, pp. 467 *et seq.*, *ante*; p. 564, *post*.

(*s*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 243 *et seq.*; and see p. 563, *post*.

request, express or implied, of the person damnified (*t*), or, it seems, that the presence of the matter on the premises was a natural and ordinary user of the premises (*a*), or that there was statutory authority for storing it and there was no negligence in its escape (*b*).

Escape of noxious fumes.

**895.** The escape of noxious fumes is wholly indefensible, even though the effect of the noxious element would not be felt but for the delicate character of the property affected (*c*). Nor is it any

(*t*) *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217 (water cistern used by tenants of upper and lower floors); *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D 602, C. A. (a case similar in facts); *Blake* v. *Woolf*, [1898] 2 Q. B. 426 (a similar case); *Gill* v. *Edouin* (1894), 71 L. T. 762; affirmed (1895), 72 L. T. 579, C. A. (a case of common benefit); compare *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661 (where the sink from which water escaped was wholly used and controlled by defendant); *Blake* v. *Land and House Property Corporation* (1887), 3 T. L. R. 667 (a similar case of a water-closet); *Ruddiman & Co.* v. *Smith* (1889), 60 L. T. 708, and *Abelson* v. *Brockman* (1889), 54 J. P. 119 (cases of negligence in the user of water apparatus); *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318.

(*a*) See judgment in *Blake* v. *Woolf*, *supra*. As to natural and ordinary user of land, see p. 525, *ante*.

(*b*) The principle of *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, does not apply to persons properly exercising their statutory powers (*Green and Hayden* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547, C. A., in which case it was unsuccessfully sought to make the defendants liable, in the absence of any negligence, for damage done by the bursting of one of their water mains); see *Snook* v. *Grand Junction Waterworks Co.* (1886), 2 T. L. R. 308; *Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453; *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42, Ex. Ch. As to the exercise of special statutory powers, see pp. 516 *et seq.*, *ante*. Liability has been held to exist upon the above-mentioned principle when damage has resulted from a person having lighted a bonfire on his premises whence it has spread to his neighbour's (*Tubervil* v. *Stamp* (1697), 1 Salk. 13; see *Filliter* v. *Phippard* (1847), 11 Q. B. 347, 354); from the escape of sewage (*Tenant* v. *Golding* (1704), 1 Salk. 21, 360 ("he whose dirt it is must keep it that it may not trespass"), explained fully in *Fletcher* v. *Rylands* (1866), L. R. 1 Exch. 265, 282—284, Ex. Ch.; *Humphries* v. *Cousins* (1877), 2 C. P. D. 239 (where the existence of the leaking drain was not even known); *Alston* v. *Grant* (1854), 3 E. & B. 128); from the escape of water from artificial reservoirs, although constructed with skill and care by a competent contractor (*Rylands* v. *Fletcher*, *supra*, affirming *Fletcher* v. *Rylands*, *supra*); from the decay of a wire fence (*Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254); from the escape of moisture oozing from an artificial mound (*Broder* v. *Saillard* (1876), 2 Ch. D. 692; *Hurdman* v. *North Eastern Rail. Co.* (1878), 3 C. P. D. 168, C. A.); from the escape of water which had been allowed to collect in a cellar (*Snow* v. *Whitehead* (1884), 27 Ch. D. 588); from the escape by natural percolation of sewage matter which had been discharged into a disused well (*Ballard* v. *Tomlinson* (1885), 29 Ch. D. [illegible], C. A.); from the creation of an electric current and the discharge thereof into the earth beyond the control of defendants (*National Telephone Co.* v. [illegible] [1893] 2 Ch. 186; compare *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381, P. C., cited in note (*g*), p. 527, *ante*); from the use, for the paving of a public street, of wood blocks soaked in creosote (*West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14, C. A.).

(*c*) *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166 (noxious fumes doing damage to plaintiff's goods by reason of the delicate nature of their manufacture); compare *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, C. A. (where the cause of the damage was heat in the legitimate carrying on of a business). For other cases of noxious fumes, see *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; *R.* v. *Garland* (1851), 15 J. P. 260; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Bankart* v. *Houghton* (1860), 27 Beav. 425; *Shotts Iron Co.* v. *Inglis* (1882), 7 App. Cas. 518; *Doré* v. *Pecorini* (1887), 31 Sol. Jo. 726 (noxious fumes from a restaurant). As to hospitals for infectious diseases, see pp. 534, 561, *post*. As to the acquisi-

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defence to say that the fumes arise from a trade which is carried on in a locality devoted to the carrying on of similar trades (*d*).

(iv.) *User of Property Fraught with Danger.*

Property dangerous in itself or its user.

**896**. It is an unreasonable and unlawful use of property by the owners or occupiers to allow premises to become or remain in a ruinous or dangerous condition (*e*), or to be applied to or for dangerous purposes (*f*) or operations (*g*), so as to occasion, or to be likely to occasion, serious injury or damage to the persons or property of others whilst lawfully exercising their rights.

(v.) *Damage Caused by Trees.*

Poisonous or overhanging trees.

**897**. A person who plants poisonous shrubs on his property, or allows his trees to overhang his neighbour's boundary, is liable to an action for nuisance if damage results to his neighbour's cattle (*h*), provided that they are not trespassing (*i*), or to his neighbour's crops (*j*).

SUB-SECT. 3.—*Injury to Health and Comfort.*

(i.) *In General.*

Principles of mutual enjoyment.

**898**. Apart from any limit to the enjoyment of his property which may have been acquired against him by contract (*k*), grant, or

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tion of the right to send impure air over a neighbour's property, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 327; and see, further, p. 532, *post*.

(*d*) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642.

(*e*) See *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377 (ruinous building); *R.* v. *Probert* (1799), 2 East, P. C. 1030 (person setting fire to his own house, when in a situation likely to cause danger to others, liable to an indictment); *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314 (dangerous lamp overhanging public footway); see also *Chauntler* v. *Robinson* (1849), 4 Exch. 163; *London Corporation* v. *Bolt* (1799), 5 Ves. 129 (conversion of old houses in London for a purpose that made them dangerous to the public). As to the respective liabilities of landlord and tenant to third persons in respect of want of repair, see title LANDLORD AND TENANT, Vol. XVIII., pp. 504, 505.

(*f*) *R.* v. *Taylor* (1742), 2 Stra. 1167 (storing of gunpowder in large quantities, to the danger of buildings held an indictable nuisance); *R.* v. *Lister and Biggs* (1857), Dears. & B. 209, C. C. R. (storing of highly inflammable substances held indictable, although the utmost care was taken to avoid accident); *Hepburn* v. *Lordan* (1865), 2 Hem. & M. 345 (storing of jute in large quantities); *Crowder* v. *Tinkler* (1816), 19 Ves. 617 (gunpowder factory).

(*g*) *R.* v. *Mutters* (1864), Le. & Ca. 491, C. C. R. (blasting); *Arnold* v. *Furness Rail. Co.* (1874), 22 W. R. 613 (blasting); *Banister* v. *Bigge* (1865), 34 Beav. 287 (ball practice at rifle range); *Hawley* v. *Steele* (1877), 6 Ch. D. 521 (using a common for rifle practice).

(*h*) See title AGRICULTURE, Vol. I., p. 296; such liability being based on the principle of *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330. For similar injuries, but based on the breach of obligation to fence, see *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274; *Firth* v. *Bowling Iron Co.* (1878), 3 C. P. D. 254; and see title BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., pp. 129 *et seq.*

(*i*) See title AGRICULTURE, Vol. I., p. 297.

(*j*) *Ibid.*, p. 296.

(*k*) See *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A. C. 476, P. C., where it was held that a tenant could not complain of noise and vibration caused by the landlord using the adjoining building for the purpose and in the manner contemplated by them both when making the lease. As to the effect of the covenant "for quiet enjoyment," see title LANDLORD AND TENANT, Vol. XVIII., pp. 523 *et seq.*

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prescription (*l*), every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him whether for pleasure or business. In deciding whether in any particular case this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people (*m*). It is also necessary to take into account the circumstances and character of the locality in which the complainant is living, and the similar annoyances which previously existed there (*n*).

(ii.) *Noise and Vibration.*

Nuisance by noise or vibration.

**899.** The making or causing to be made such a noise or vibration as materially interferes (*o*) with the comfort of the neighbouring inhabitants, when judged by the standard above stated (*p*), is an actionable nuisance, and one for which an injunction will be granted (*q*), and it is no excuse to affirm that the place where it is made is situate in a noisy neighbourhood if the nuisance complained of is a material addition to the noise already existing (*r*), or to say that the best known means have been taken to prevent or reduce the noise complained of (*s*), or that the cause of the nuisance is the exercise of a trade in a reasonable and proper manner and in a reasonable place (*t*).

Surrounding circumstances.

The question of nuisance or no nuisance is one of degree (*a*), and depends upon the circumstances of the case (*b*).

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(*l*) As to prescriptive rights, see p. 563, *post*, and generally, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 243 *et seq.*

(*m*) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315, *per* KNIGHT BRUCE, V.-C., at p. 322.

(*n*) *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Polsue and Alfieri, Ltd.* v. *Rushmer*, [1907] A. C. 121.

(*o*) Injunctions were refused, on the ground that the noise was not sufficient materially to interfere with comfort, in *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8 (noise from a factory alleged to disturb domestic comfort); *Fanshawe* v. *London and Provincial Dairy Co.* (1888), 4 T. L. R. 694 (noise from a dairy business); *Heath* v. *Brighton Corporation* (1908), 98 L. T. 718 (humming noise from electrical generating station alleged to disturb worshippers in a church); *Hardman* v. *Holberton*, [1866] W. N. 379 (church bells); *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409 (noise of pumps in sinking a shaft); *Lyass* v. *Bettam* (1885), 2 T. L. R. 88. As to the jurisdiction of the court in nuisance cases, see title INJUNCTION, Vol. XVII., p. 232.

(*p*) See the text, *supra*.

(*q*) *Bradley* v. *Gill* (1688), 1 Lut. 69; *Styan* v. *Hutchinson* (1799), 2 Selwyn, Law of Nisi Prius, 13th ed., 1068; and see p. 560, *post*. As to a prescriptive right to make a noise, see *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, C. A.; title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 240, note (*d*); and see p. 563, *post*.

(*r*) *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409; *Rushmer* v. *Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234, C. A.; affirmed, [1907] A. C. 121.

(*s*) *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25; *Rushmer* v. *Polsue and Alfieri, Ltd.*, *supra*, [1906] 1 Ch. 234, C. A.; affirmed, [1907] A. C. 121.

(*t*) *Scott* v. *Frith* (1864), 4 F. & F. 349; *Gaunt* v. *Fynney*, *supra*.

(*a*) *Gaunt* v. *Fynney*, *supra*.

(*b*) Injunctions have been granted, or may in proper cases be granted, in

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(iii.) *Pollution of Air* (*c*).

Smoke; fumes; smells.

**900.** Smoke (*d*), fumes (*e*), or smells, either together or singly, which materially interfere with the ordinary comfort, physically, of human existence, when judged by the standard previously stated (*f*), constitute a nuisance in law. They need not be actually noxious or injurious to health (*g*); and it is immaterial that there are other sources of discomfort in the neighbourhood, if the one complained of is a material addition thereto (*h*). The fact that the nuisance

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respect of noise or vibration arising from factories in a manufacturing town (*Crump* v. *Lambert* (1867), L. R. 3 Eq. 409; *White* v. *Cohen* (1852), 1 Drew. 312; *Baxter* v. *Bower* (1875), 44 L. J. (CH.) 627, C. A.; *Heather* v. *Pardon* (1877), 37 L. T. 393; *Rushmer* v. *Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234, C. A.; affirmed, [1907] A. C. 121; *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; *Manser* v. *Bowers*, [1872] W. N. 163); steam-saws (*Gort* (*Viscountess*) v. *Clark* (1868), 16 W. R. 569; *Husey* v. *Bailey* (1895), 11 T. L. R. 221; *Gilling* v. *Gray* (1910), 27 T. L. R. 39); steam-hammers (*Goose* v. *Bedford* (1873), 21 W. R. 449; *Eaden* v. *Firth* (1863), 1 Hem. & M. 573; *Roskell* v. *Whitworth* (1871), 19 W. R. 804); mortar-mills (*Fenwick* v. *East London Rail. Co.* (1875), L. R. 20 Eq. 544; *Sander* v. *Manley and Rogers*, [1878] W. N. 181); electric generating stations (*Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.; *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707; *Knight* v. *Isle of Wight Electric Light and Power Co.* (1904), 73 L. J. (CH.) 299); fêtes and disorderly people attending them (*Bostock* v. *North Staffordshire Rail. Co.* (1852), 5 De G. & Sm. 584; *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25); roundabouts and steam organs (*Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388; *Winter* v. *Baker* (1887), 3 T. L. R. 569; *Phillips* v. *Thomas* (1890), 62 L. T. 793; *Lambton* v. *Mellish*, *Lambton* v. *Cox*, [1894] 3 Ch. 163; *Becker* v. *Earl's Court, Ltd.* (1911), 56 Sol. Jo. 73); the stabling of horses close to dwelling-houses (*Ball* v. *Ray* (1873), 8 Ch. App. 467; *Broder* v. *Saillard* (1876), 2 Ch. D. 692); blacksmith's forges (*Gullick* v. *Tremlett* (1872), 20 W. R. 358; *Bradley* v. *Gill* (1688), 1 Lut. 69); bell-ringing (*Soltau* v. *De Held* (1852), 2 Sim. (N. S.) 133; see *Martin* v. *Nutkin* (1725), 2 P. Wms. 266); rifle-firing at open ranges (*Hawley* v. *Steele* (1877), 6 Ch. D. 521), and in rifle galleries (*Winter* v. *Baker*, *supra*); the use of a pestle and mortar in a confectioner's business (*Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, C. A.); noise from cans in a dairy business (*Tinkler* v. *Aylesbury Dairy Co.* (1888), 5 T. L. R. 52); dancing in rooms over business premises (*Jenkins* v. *Jackson* (1888), 40 Ch. D. 71); noisy crowds and whistling for cabs at night at a proprietary club (*Bellamy* v. *Wells* (1890), 63 L. T. 635); in connection with an exhibition (*Germaine* v. *London Exhibitions, Ltd.* (1896), 75 L. T. 101); the playing of musical instruments discordantly and loudly for the purpose of annoying a neighbour (*Christie* v. *Davey*, [1893] 1 Ch. 316); noise from persons attending on Sundays a racecourse in a residential neighbourhood (*Dewar* v. *City and Suburban Racecourse Co.*, [1899] 1 I. R. 345); the giving of singing lessons in a house adjoining business premises (*Motion* v. *Mills* (1897), 13 T. L. R. 427); the use of premises as a skittle and bowling alley (*Barham* v. *Hodges*, [1876] W. N. 234); noise from unloading, keeping, and driving cattle at a railway goods station (*London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45). As to carrying on of building operations by night, see p. 524, *ante*.

(*c*) As to the right to light, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 297 *et seq.*; and as to the right to air, see *ibid.*, pp. 326, 327. As to the pollution of water, see p. 546, *post*; title WATERS AND WATERCOURSES.

(*d*) See, further, p. 541, *post*.

(*e*) As to injury to property by noxious fumes, see p. 529, *ante*,

(*f*) See p. 531, *ante*.

(*g*) *R.* v. *White and Ward* (1757), 1 Burr. 333; *Banbury Sanitary Authority* v. *Page* (1881), 8 Q. B. D. 97; *A.-G.* v. *Keymer Brick and Tile Co.* (1903), 67 J. P. 434.

(*h*) *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705. As to joint nuisance, see p. 558, *post*.

existed long before the complainant occupied his premises does not relieve the offender (*i*), unless he can show that, as against the complainant, he has acquired the right to commit the annoyance complained of (*j*).

Surrounding circumstances.

The question of nuisance or no nuisance is in these cases pre-eminently one of degree, and no specific rules can be laid down. Circumstances and the locality must also be considered, for that which would be a nuisance in one district may be tolerated in another (*k*).

Fumes etc. from commercial operations.

**901.** Apart from fumes and stinks arising from trades held to be offensive (*l*), the vitiation of the atmosphere has been or may be held to be a nuisance and capable of being restrained by injunction when it arises from the burning of bricks (*m*), manure works (*n*), glass works (*o*), cement works (*p*), chemical works (*q*), smoke from railway engine sheds (*r*), the staleing of horses left standing in a street opposite business premises for an unreasonable time (*s*), gasworks (*t*), the smelting of ore (*u*), a blacksmith's shoeing-forge (*b*), smoke from factory engines (*c*), the discharge and deposit of manure at a railway siding (*d*), the burning of mineral refuse (*e*), coke-ovens (*f*), stables (*g*), deposit of house and street

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(*i*) *Bliss* v. *Hall* (1838), 4 Bing. (N. C.) 183. As to the defence of coming to the nuisance, see also p. 565, *post*.

(*j*) As to a prescriptive right to pollute air, see *Harvie* v. *Robertson* (1903), 5 F. (Ct. of Sess.) 338, and title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 327.

(*k*) See *A.-G.* v. *Cole & Son*, [1901] 1 Ch. 205; *Reinhardt* v. *Mentasti* (1889), 42 Ch. D. 685.

(*l*) See pp. 534, 535, *post*.

(*m*) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; *Pollock* v. *Lester* (1853), 11 Hare, 266; *Cleeve* v. *Mahany* (1861), 9 W. R. 882; *Beardmore* v. *Tredwell* (1862), 3 Giff. 683; *Bamford* v. *Turnley* (1862), 3 B. & S. 66, Ex. Ch.; *Cavey* v. *Ledbitter* (1863), 13 C. B. (N. S.) 470; *Luscombe* v. *Steer* (1867), 17 L. T. 229; *Roberts* v. *Clarke* (1868), 18 L. T. 49; *Bareham* v. *Hall* (1870), 22 L. T. 116; *Dunston* v. *Neal*, *Seely* v. *Neal* (1885), 1 T. L. R. 462.

(*n*) *Knight* v. *Gardner* (1869), 19 L. T. 673.

(*o*) *Savile* v. *Kilner* (1872), 26 L. T. 277.

(*p*) *Umfreville* v. *Johnson* (1875), 10 Ch. App. 580; *A.-G.* v. *Francis* (1874), 1 Seton, Judgments and Orders, 6th ed., 605.

(*q*) *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24, C. A.; *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166; *Barlow* v. *Bailey*, [1871] W. N. 95; *Brooke* v. *Wigg* (1878), 8 Ch. D. 510, C. A.; *R.* v. *White and Ward* (1757), 1 Burr. 333.

(*r*) *Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 37 L. T. 224.

(*s*) *Benjamin* v. *Storr* (1874), L. R. 9 C. P. 400.

(*t*) *Broadbent* v. *Imperial Gas Co.* (1857), 7 De G. M. & G. 436.

(*u*) *Tipping* v. *St. Helen's Smelting Co.* (1865), 1 Ch. App. 66; *Blankart* v. *Houghton* (1860), 27 Beav. 425; see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 592, 593.

(*b*) *Gullick* v. *Tremlett* (1872), 20 W. R. 358.

(*c*) *Sampson* v. *Smith* (1838), 8 Sim. 272; *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409.

(*d*) *Swaine* v. *Great Northern Rail. Co.* (1864), 4 De G. J. & Sm. 211, C. A.

(*e*) *Fleming* v. *Hislop* (1886), 11 App. Cas. 686, 691.

(*f*) *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705.

(*g*) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, C. A.

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refuse (*h*), a cooking stove (*i*), the manufacture of fish guano and fish oil (*j*), the carrying on of a fried fish shop (*k*).

Hospital.

A hospital for infectious diseases is not necessarily a nuisance (*l*), nor is it an offensive business (*m*) under the Public Health Acts (*n*).

(iv.) *Interference with Prospect or View.*

Destruction of privacy or prospect.

**902.** Apart from the infringement of a right to light, and assuming that the act complained of is otherwise lawful (*o*), no action lies for the invasion of privacy by the opening of windows, nor for the obstruction of a view or prospect (*p*), even though the value of a house or premises may be diminished thereby (*q*).

## SECT. 9.—*Offensive Trades.*

At common law.

**903.** Though the carrying on of offensive trades (*r*) is largely regulated by statute, and nuisances arising therefrom may be dealt with summarily under statutory provisions (*s*), the common law liability remains, and a person is guilty of a misdemeanour who, in the carrying on of any trade or occupation, makes loud noises, or offensive or unwholesome smells (*t*), in such places and in such

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(*h*) *A.-G.* v. *Keymer Brick and Tile Co.* (1903), 67 J. P. 434.

(*i*) *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd. and G. D'Allessandri*, [1900] 2 Ch. D. 373.

(*j*) *A.-G.* v. *Plymouth Fish Guano and Oil Co., Ltd.* (1911), 76 J. P. 19.

(*k*) *Errington* v. *Birt* (1911), 105 L. T. 373.

(*l*) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *A.-G.* v. *Rathmines and Pembroke Hospital Board*, [1904] 1 I. R. 161, C. A.

(*m*) *Withington Local Board of Health* v. *Manchester Corporation*, [1893] 2 Ch. 19, C. A. As to an injunction in such a case, see p. 561, *post*.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to the Public Health Acts generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) If the act causing the interference with the prospect or view is itself illegal, any loss arising from the interference may be recovered as damages. Where a council obstructed plaintiff's windows by unlawfully erecting a stand in the public street, whereby plaintiff lost the profit she would otherwise have made by letting the windows to view a procession, she was held entitled to receive such loss as special damage from the council (*Campbell* v. *Paddington Corporation*, [1911] 1 K. B. 869).

(*p*) *Aldred's Case* (1610), 9 Co. Rep. 57 b; *Knowles* v. *Richardson* (1670), 1 Mod. Rep. 55; *Fishmongers' Co.* v. *East India Co.* (1753), 1 Dick. 163, *per* Lord HARDWICKE, L.C.; *A.-G.* v. *Doughty* (1752), 2 Ves. Sen. 453; *Chandler* v. *Thompson* (1811), 3 Camp. 80, *per* LE BLANC, J.; *Wells* v. *Ody* (1836), 7 C. & P. 410, *per* PARKE, B.; *Re Penny and South Eastern Rail. Co.* (1857), 7 E. & B. 660 (no compensation for being overlooked from railway); *Turner* v. *Spooner* (1861), 1 Drew. & Sm. 467; *Johnson* v. *Wyatt* (1863), 2 De G. J. & Sm. 18, C. A., *per* TURNER, L.J., at p. 27; *Tapling* v. *Jones* (1865), 11 H. L. Cas. 290, *per* Lord WESTBURY, L.C., at p. 305; *Smith* v. *Owen* (1866), 35 L. J. (CH.) 317 (bringing forward adjoining shop front); *Butt* v. *Imperial Gas Co.* (1866), 2 Ch. App. 158 (gas meter blocking view of business premises); *Potts* v. *Smith* (1868), L. R. 6 Eq. 311; *Buccleuch (Duke)* v. *Metropolitan Board of Works* (1870), L. R. 5 Exch. 221, 237, Ex. Ch.; *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 798, 824; *Foli* v. *Devonshire Club* (1887), 3 T. L. R. 706 (obstructing view of a procession by erecting a stand); compare *Campbell* v. *Paddington Corporation*, *supra*; see note (*o*), *supra*.

(*q*) *Re Penny and South Eastern Rail. Co.*, *supra*.

(*r*) As to trades generally, see title TRADE AND TRADE UNIONS.

(*s*) See titles METROPOLIS, Vol. XX., p. 494; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*t*) Which need not be injurious to the health if offensive to the senses (*R.* v.

circumstances as to annoy any considerable number of the public (*u*) in the exercise of their common rights, as by the emission of noisome stinks (*v*), smells from a slaughter-house (*w*), or tannery (*a*), or the emission of poisonous fumes (*b*).

Certain trades and occupations, when carried on in populous places, have, by reason of the effluvia from them, been held to be nuisances at common law, for example, a tallow-chandler's (*c*), a lime-kiln and dye-house (*d*), fat-melting works (*e*), a slaughter-house (*f*), a tallow melter's (*g*), a tan pit (*h*), a tanner's (*i*), soap works (*k*), horse-flesh boilers (*l*), a varnish maker's (*m*), the keeping of swine (*n*), or a brewhouse (*o*), but this last is not of necessity a nuisance (*p*).

## SECT. 10.—*Open Spaces and Commons.*

Common law nuisances.

**904**. A violation of rights of common may amount to a nuisance for which the commoner has his remedy at common law (*q*).

Statutory nuisances.

Conservators of commons, and persons responsible for the management of open spaces and recreation grounds, are empowered by statute to make bye-laws and regulations for the prevention of nuisances in such places (*r*).

## SECT. 11.—*Public Health, Comfort, and Safety.*

### SUB-SECT. 1.—*At Common Law.*

Common law liability.

**905**. Whilst there are many statutory provisions (*s*) which enable nuisances affecting public health and comfort to be dealt with

*Neil* (1826), 2 C. & P. 485; see *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138; *Malton Board of Health* v. *Malton Manure Co.* (1879), 4 Ex. D. 302).

(*u*) See *R.* v. *White and Ward* (1757), 1 Burr. 333; *R.* v. *Pappineau* (1726), 1 Stra. 686; *R.* v. *Davey* (1805), 5 Esp. 217.

(*v*) *R.* v. *White and Ward*, *supra*; and see pp. 532, 533, *ante*.

(*w*) *R.* v. *Watts* (1826), 2 C. & P. 486.

(*a*) *R.* v. *Pappineau*, *supra*.

(*b*) *R.* v. *Garland* (1851), 5 Cox, C. C. 165.

(*c*) *Bliss* v. *Hall* (1838), 4 Bing. (N. C.) 183.

(*d*) See *Aldred's Case* (1610), 9 Co. Rep. 57 b.

(*e*) *A.-G.* v. *Cole & Son*, [1901] 1 Ch. 205; *R.* v. *Watts*, *supra*.

(*f*) *Jones* v. *Powell* (1628), Palm. 536, 539.

(*g*) *Morley* v. *Pragnel* (1638), Cro. Car. 510.

(*h*) *Jones* v. *Powell*, *supra*.

(*i*) *R.* v. *Pappineau*, *supra*.

(*k*) *R.* v. *Pierce* (1683), 2 Show. 327.

(*l*) *Grindley* v. *Booth* (1865), 3 H. & C. 669.

(*m*) *R.* v. *Neil* (1826), 2 C. & P. 485.

(*n*) *Aldred's Case*, *supra*.

(*o*) *R.* v. *Cross* (1826), 2 C. & P. 483.

(*p*) *A.-G.* v. *Cleaver* (1811), 18 Ves. 211, 218; *Gorton* v. *Smart* (1822), 1 Sim. & St. 66.

(*q*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 514 *et seq.*

(*r*) See titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 603, 607, 608, 611, 612; OPEN SPACES AND RECREATION GROUNDS, pp. 587, 591, 594, 597, 599, *post*.

(*s*) See titles METROPOLIS, Vol. XX., p. 465; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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summarily, the common law liability remains, and every person commits an indictable nuisance who does anything which endangers the lives, health, or property of the public (*t*).

Injurious food.

The public exposure for sale of food known to be unfit for consumption and the mixing of unwholesome ingredients in food are acts constituting criminal nuisances, as being dangerous to the lives and health of the public, but such offences are usually dealt with under special statutory provisions (*a*).

SUB-SECT. 2.—*Under Statute.*

Summary powers for abatement of certain nuisances.

**906.** The Public Health Act, 1875 (*b*), gives to municipal and to urban and rural district councils (*c*), and the Public Health (London) Act, 1891 (*d*), gives to metropolitan borough councils and the Common Council of the City of London (*e*), in their respective districts, special powers to deal summarily with certain classes of nuisances which the health of the community requires to be dealt with speedily (*f*). These powers, however, are in addition to any powers under other statutes or at law or in equity, subject to the limitation that no person is to be punished for the same offence both under the provisions of the Public Health Acts (*g*) and any other law or enactment (*h*); and the local authorities are empowered, if they think the statutory remedies are inadequate, to take other legal proceedings in respect of the nuisances summarily abatable, and to pay the expenses thereof out of the funds and rates applicable by them to the general

(*t*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 554 *et seq.* Examples are: the keeping of a corpse unburied (*R.* v. *Vann* (1851), 2 Den. 325, 331, C. C. R.), provided the person charged has the means for paying for its burial (*ibid.*; and see title BURIAL AND CREMATION, Vol. III., p. 404); the exposure in a public place of a person infected with small-pox (*R.* v. *Vantandillo* (1815), 4 M. & S. 73), but it would be a defence to an indictment if it could be shown that there was lawful and sufficient excuse for so doing (*R.* v. *Burnett* (1815), 4 M. & S. 272; see *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, *per* Lord BLACKBURN, at p. 204); the keeping of explosives or highly inflammable matter in a manner calculated to terrify the neighbourhood or to do damage to neighbouring property (*R.* v. *Lister and Biggs* (1857), Dears. & B. 209, C. C. R.; *R.* v. *Taylor* (1742), 2 Stra. 1167; *R.* v. *Bennett* (1858), Bell, C. C. 1; for statutes now regulating the keeping of explosives, see title EXPLOSIVES, Vol. XIV., p. 356); going about a public street armed so as to terrify the public (*R.* v. *Meade* (1903), 19 T. L. R. 540).

(*a*) See title FOOD AND DRUGS, Vol. XV., p. 35.

(*b*) 38 & 39 Vict. c. 55.

(*c*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 262, 293, 329, 385.

(*d*) 54 & 55 Vict. c. 76.

(*e*) See title METROPOLIS, Vol. XX., p. 465.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91—111; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 2—14. As to the jurisdiction over ships for these purposes, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 110; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 110; see titles METROPOLIS, Vol. XX., p. 466; PUBLIC HEALTH AND LOCAL ADMINISTRATION; as to port sanitary authorities, see title LOCAL GOVERNMENT, Vol. XIX., p. 292.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to the Public Health Acts generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 111; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 138.

purposes of the Public Health Acts (*i*), but such proceedings must be taken in the name of the Attorney-General (*k*).

It is the duty of the authorities above mentioned to cause inspection to be made of their districts for the detection of nuisances summarily abatable, and to employ their statutory powers to abate

Duty of authorities.

**907.** The nuisances which are summarily abatable under the Public Health Acts (*i*) are those which constitute a nuisance, that is, a nuisance to the public generally, or those which are injurious [or dangerous (*m*)] to health (*n*), that is, private nuisances of this character (*o*).

General description of nuisances summarily abatable.

The public nuisance here referred to must be such as to affect the health or comfort of the neighbourhood. It does not include such a nuisance as arises from the dripping of water from a bridge on to the highway (*o*). But it is not necessary that the nuisance should cause injury to health if it interferes with the personal comfort of the public

Meaning of "public nuisance."

**908.** The following are the nuisances summarily abatable under the Public Health Acts (*i*) :—

Specific nuisances summarily abatable.

(1) Any premises in such a state as to be a nuisance or injurious [or dangerous (*m*)] to health (*n*). This refers to the condition of the premises themselves (*q*). It does not extend to all premises on which there is a nuisance, and, therefore, does not affect nuisances arising from the sewage works or sewers of a local authority (*r*), nor a nuisance arising from the use to which premises are put (*s*).

Unwholesome premises.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 107; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 13.

(*k*) See pp. 550, 552, *post*.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 92; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 1. As to the methods of compelling the authorities to perform this duty, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 277, 291, 338, 375; METROPOLIS, Vol. XX., p. 465; PUBLIC HEALTH AND LOCAL ADMINISTRATION. For the general duty imposed on local authorities to enforce any law relating to nuisances, see Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 7, but this is repealed as to London (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142).

(*m*) In London only.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (1); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (a).

(*o*) *Great Western Rail. Co.* v. *Bishop* (1872), L. R. 7 Q. B. 550, *per* COCKBURN, C.J., at p. 552.

(*p*) *Malton Board of Health* v. *Malton Manure Co.* (1879), 4 Ex. D. 302; *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138; *Houldershaw* v. *Martin* (1885), 49 J. P. 179.

(*q*) *R.* v. *Parlby* (1889), 22 Q. B. D. 520, *per* WILLS, J., at p. 525.

(*r*) *R.* v. *Parlby*, *supra*; *Fulham Vestry* v. *London County Council*, [1897] 2 Q. B. 76.

(*s*) Such a user may be restrained by injunction; see *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, and cases cited in notes (*f*), (*g*), p. 530, *ante*; *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A. (where an owner was restrained from allowing his vacant land to become the repository of filth and refuse); *A.-G.* v. *Brown* (1898), *Times*, 23rd July (where gipsies were restrained from occupying land as an encampment without previously making satisfactory

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Pools, ditches etc.

(2) Any pool, ditch (*t*), gutter, watercourse [cistern, water-closet, earth closet (*a*)], privy, urinal, cesspool, drain (*b*) [dung-pit (*a*)], or ashpit so foul or in such a state as to be a nuisance or injurious [or dangerous (*a*)] to health (*c*); and, where the Public Health Acts Amendment Act, 1907 (*d*), is applied (*e*), any gutter, drain, shoot, stack-pipe, or down-spout in such a condition as to cause damp to a building (*f*), and any cistern for domestic water supply so placed, constructed, or kept as to render the water liable to contamination at the risk of health (*g*).

Keeping of animals.

(3) Any animal so kept as to be a nuisance or injurious [or dangerous (*a*) to health] (*h*).

Accumulation or deposit.

(4) Any accumulation or deposit which is a nuisance or injurious [or dangerous (*a*)] to health, except when necessary for the effectual carrying on of any business or manufacture, and the court is satisfied that it has not been kept longer than necessary, and that the best available means have been taken to prevent injury to the public health (*i*); and, where the Public Health Acts Amendment Act, 1907 (*k*), is applied (*l*), any deposit of material which renders a building so damp as to be dangerous or injurious to health (*m*).

Over-crowding.

(5) Any house (*n*) or part of a house so overcrowded as to be

sanitary arrangements); *A.-G.* v. *Stone* (1895), 60 J. P. 168 (where a landowner was restrained from letting his land to gipsies when it was shown that the occupation of the land by them was dangerous to the health of the neighbourhood).

(*t*) As to the power of local authorities to deal with offensive ponds, pools, ditches, and the like, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; and see note (*t*), p. 540, *post*.

(*a*) In London only.

(*b*) See title SEWERS AND DRAINS.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (2); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (b).

(*d*) 7 Edw. 7, c. 53.

(*e*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 35.

(*g*) *Ibid.*

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (3); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (c); see also p. 513, *ante*, and title ANIMALS, Vol. I., p. 372.

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (4), and proviso; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (d), (2) (i); *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.* (1882), 10 Q. B. D. 138 (deposit of cinders etc. giving off objectionable but not injurious fumes); see also *Smith* v. *Waghorn* (1863), 27 J. P. 744 (accumulation of dung); *Margate Pier (Proprietors)* v. *Margate Town Council* (1869), 33 J. P. 437 (accumulation of seaweed); *Draper* v. *Sperring* (1861), 10 C. B. (N. S.) 113 (sheep droppings in a market-place; and see title MARKETS AND FAIRS, Vol. XX., p. 22, note (*n*)); *Great Northern Rail. Co.* v. *Lurgan Town Commissioners*, [1897] 2 I. R. 340 (the loading and unloading of manure at a railway station held to be no nuisance within this provision).

(*k*) 7 Edw. 7, c. 53.

(*l*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 35.

(*n*) This includes a building used by a philanthropic association as a night shelter for the destitute (*R.* v. *Mead, Ex parte Gates* (1895), 59 J. P. 150); and the superintendent of the association is the proper defendant (*ibid.*). The tenant and not the landlord was held liable in *Home* v. *Kelso Local Authority* (1876), 3 Couper, 239. It also includes a day school where there are neither

dangerous or injurious to the health of the inmates (*o*), whether or not members of the same family (*p*). If there are two convictions within three months the petty sessional court may order the closing of the house for such period as the court thinks necessary (*q*). In London, if the medical officer of health certifies to such overcrowding, the sanitary authority must take summary proceedings (*r*) to abate the nuisance (*s*). A warrant to enter any house alleged to be overcrowded may be obtained (*t*).

Unwholesome factories etc.

(6) Any factory, workshop, or workplace not covered by the definition of "factory" (excluding "domestic factory") in the Factory and Workshop Act, 1901 (*u*), which is not kept in a cleanly state, free from effluvia, properly ventilated, and free from overcrowding. In London, where a dwelling-house is used as such factory, workshop, or workplace, or such factory is used as a dwelling-house, the court must have regard to such circumstances when considering the question of nuisance from overcrowding (*a*).

Smoke.

(7) Smoke nuisances as hereafter described (*b*).

Absence of water fittings (in London).

(8) In London, the absence from premises of water fittings as prescribed (*c*) under statutory powers (*d*), and any occupied house without a proper and sufficient supply of water (*e*).

Refuse destructors (in London)

(9) Premises in London used by a metropolitan borough council for the treatment and disposal of street or house refuse which are a nuisance or injurious or dangerous to health (*f*).

Extensions of list of nuisances summarily abatable.

**909.** Various statutes have extended the provisions of the Public Health Act, 1875 (*g*), relating to nuisances summarily abatable, to unfenced shafts and side entrances of mines which have been abandoned and discontinued (*h*), to certain unfenced shafts or side

boarders nor resident staff (*Wimbledon Urban District Council* v. *Hastings* (1902), 67 J. P. 45); and as regards London, see definition of "house" in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141.

(*o*) The temporary occupants of a night shelter are inmates (*R.* v. *Slade, Ex parte Robinson* (1896), 60 J. P. 358).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (5); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (e).

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 109; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 7.

(*r*) See p. 566, *post*.

(*s*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (3) (c).

(*t*) *Ibid.*, s. 115 (6).

(*u*) 1 Edw. 7, c. 22.

(*a*) See title FACTORIES AND SHOPS, Vol. XIV., pp. 436 *et seq.*

(*b*) See p. 541, *post*.

(*c*) That is, prescribed under the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), ss. 27—33; see title WATER SUPPLY.

(*d*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 2 (1) (f). This absence of fittings renders the premises unfit for human habitation unless the contrary is shown (*ibid.*, s. 4 (3) (d)).

(*e*) *Ibid.*, s. 48 (1). If it is a dwelling-house the absence of this supply renders it unfit for human habitation.

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 22 (2). In this case the county council must take the summary proceedings (*ibid.*).

(*g*) 38 & 39 Vict. c. 55, ss. 91—111.

(*h*) Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 26, 37 (which come into operation on the 1st July, 1912); see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 603; and titles BOUNDARIES, FENCES, AND PARTY WALLS,

SECT. 11. Public Health, Comfort, and Safety.

entrances of metalliferous mines (*i*), to unfenced quarries (*k*), to tents, vans, sheds, or similar structures used for human habitation, which are in such a state as to be a nuisance or injurious to health, or which are so overcrowded as to be injurious to the health of the inmates, whether or not members of the same family (*l*).

Penalised nuisances.

**910.** Apart from nuisances made summarily abatable (*m*), and those which are specially mentioned elsewhere (*n*), there are others in respect of which proceedings in courts of summary jurisdiction may be taken for the recovery of penalties or for the suppression of the nuisance, or in respect of which bye-laws may be made with consequential penalties summarily recoverable (*o*).

Bye-laws.

**911.** An urban authority—that is, a borough council or urban district council (*p*)—has power to make bye-laws (*q*) for the prevention of nuisances arising from snow, filth, dust, ashes, and rubbish (*r*), and sanitary authorities in London may make bye-laws in respect of tents, vans, and sheds used for human habitation (*s*).

Boundary ditches etc.

**912.** Offensive watercourses or ditches lying near to or forming the boundary of districts of local authorities may be dealt with by taking summary proceedings against the neighbouring authority and obtaining an order for the execution of works necessary for the purpose of removing the nuisance (*t*); and it is no defence to

Vol. III., p. 130; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI. p. 169; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 585.

(*i*) Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77), s. 13; see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 628.

(*k*) Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 3; see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 634, 635.

(*l*) Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 9; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 95 (1). Tents etc. of His Majesty's naval or military forces are expressly exempted (*ibid.*, s. 95 (4)).

(*m*) See pp. 536, 537, *ante*.

(*n*) See, as to animals, p. 513, *ante*; as to offensive trades, p. 534, *ante*; as to sanitary conveniences, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; as to smoke, p. 541, *post*; as to water, see p. 546, *post*; title WATERS AND WATERCOURSES.

(*o*) See p. 565, *post*. As to proceedings in courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 6; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 20; see title LOCAL GOVERNMENT, Vol. XIX., pp. 262, 292, 293, 302.

(*q*) As to bye-laws generally, see *ibid.*, p. 328; titles METROPOLIS, Vol. XX., pp. 460, 467; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 44; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 256. The like power exists in London in respect of the same matters in streets (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 16 (1) (a)); see title METROPOLIS, Vol. XX., pp. 461, 462. As to similar bye-laws in respect of the keeping of animals, see p. 514, *ante*; and in respect of other matters, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. For the effect of such a bye-law, see *London, Brighton, and South Coast Rail. Co.* v. *Hayward's Heath Urban District Council* (1899), 80 L. T. 266.

(*s*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 95 (2).

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48. As to the general powers to deal with offensive ditches, pools etc., given to parish councils and to metropolitan sanitary authorities, see titles LOCAL GOVERNMENT, Vol. XIX., p. 248; METROPOLIS, Vol. XX., pp. 456, 467, 468; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

say that the order cannot be complied with without committing a trespass (*a*).

## SECT. 12.—*Public Morality.*

Public nuisances.

**913.** The following are public nuisances liable to be punished criminally, either at common law or under the statutes specially relating to them: disorderly houses (*b*), which include bawdy houses (*c*) and unlicensed places of entertainment (*d*), gaming houses (*e*); betting houses (*f*); lotteries (*g*); obscene publications (*h*); betting in streets (*i*); acts of public indecency (*k*); disgusting exhibitions (*l*).

## SECT. 13.—*Smoke.*

### SUB-SECT. 1.—*In General.*

When smoke amounts to nuisance.

**914.** Smoke, even when unaccompanied by noise or noxious vapours, and although not injurious to health, may constitute an actionable nuisance (*m*), or be the subject of indictment (*n*), provided that the annoyance produced is such as materially to interfere with the ordinary comfort of human existence. The fact that the smoke issues from premises in a manufacturing town does not affect the question of nuisance or no nuisance, if it can be shown that the annoyance otherwise caused has been materially increased (*o*).

Chimney fires.

**915.** In urban districts the wilfully setting on fire or causing to be set on fire any chimney renders the offender liable to a penalty; but this provision does not exempt him from liability to be indicted for felony (*p*).

(*a*) *Woburn Sanitary Authority* v. *Newport Pagnell Sanitary Authority* (1887), 51 J. P. 356.

(*b*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 541 *et seq.*; INTOXICATING LIQUORS, Vol. XVIII., pp. 136 *et seq.*

(*c*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 542; INTOXICATING LIQUORS, Vol. XVIII., p. 128.

(*d*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 543.

(*e*) *Ibid.*, pp. 545 *et seq.*; GAMING AND WAGERING, Vol. XV., pp. 287 *et seq.*; INTOXICATING LIQUORS, Vol. XVIII., pp. 138, 139.

(*f*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 548 *et seq.*; GAMING AND WAGERING, Vol. XV., pp. 294 *et seq.*

(*g*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 547, 548.

(*h*) *Ibid.*, pp. 538, 539.

(*i*) *Ibid.*, p. 551.

(*k*) *Ibid.*, p. 537.

(*l*) *Ibid.*, p. 537.

(*m*) *Aldred's Case* (1610), 9 Co. Rep. 57 b; see *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409; affirmed on appeal, 17 L. T. 133; *Savile* v. *Kilner* (1871), 26 L. T. 277; *Umfreville* v. *Johnson* (1875), 10 Ch. App. 580; *Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 37 L. T. 224; *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588, C. A.; *Lambton* v. *Mellish*, *Lambton* v. *Cox*, [1894] 3 Ch. 163; *Husey* v. *Bailey* (1895), 11 T. L. R. 221; *Sanders-Clark* v. *Grosvenor Mansions Co., Ltd., and G. D'Allessandri*, [1900] 2 Ch. 373.

(*n*) See *R.* v. *White and Ward* (1757), 1 Burr. 333; *R.* v. *Dewsnap* (1812), 16 East, 194.

(*o*) See *Crump* v. *Lambert*, *supra*.

(*p*) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 30, incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*ibid.*, s. 171). As to arson, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 770.

SECT. 13. Smoke.

Accidental chimney fires render the occupier in urban districts liable to a penalty of 10*s*., unless it can be shown that there has been no omission, neglect, or carelessness on the part of himself or his servant (*q*).

SUB-SECT. 2.—*Smoke from Fireplaces and Furnaces of Works etc.*

(i.) *Capable of Summary Abatement* (*r*).

When summarily abatable.

**916**. Any fireplace or furnace used for working engines by steam, or in any mill, factory, dye-house, brewery, bakehouse, or gasworks, or in any manufacturing or trade process whatever, which does not, as far as practicable (*s*), consume the smoke arising from the combustible used therein, is a nuisance liable to be dealt with summarily under statutory provisions (*t*), unless the justices are satisfied that such fireplace or furnace is constructed in such manner as to consume as far as practicable (*a*), having regard to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having charge thereof (*b*).

The question of the efficiency of the construction, or of any alteration, of the fireplace or furnace is one of fact for the justices (*c*).

Black smoke from trade chi

**917**. Any chimney (*d*), not being a chimney of a private dwelling-house (*e*), sending forth black smoke in such quantity as to be a nuisance is capable of being dealt with summarily (*f*) under statutory provisions (*g*), and in such case the offence is completed

Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 31.

(*r*) For proceedings for summary abatement, see pp. 565, 566, *post*.

(*s*) See *Cooper* v. *Woolley* (1867), L. R. 2 Exch. 88, a case under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108 (see note (*t*), *infra*, and note (*f*), p. 545, *post*), which decided that the words "as far as possible," used in a local Act incorporating it, meant as far as was possible consistent with carrying on the trade in which the furnace was employed.

(*t*) Public Heath Act, 1875 (38 & 39 Vict. c. 55), s. 91 (7); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 24. Similar provisions imposing penalties for infringement are found in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 108, which is not incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55), but is commonly incorporated with private or local Acts.

(*a*) See note (*s*), *supra*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 24.

(*c*) *Higgins* v. *Northwich Union Guardians* (1870), 34 J. P. 806.

(*d*) The funnel of a steamboat is a chimney (*Tough* v. *Hopkins*, [1904] 1 K. B 804; see also *Walker* v. *Evans* (1859), 2 E. & E. 356). As to the non-applicability of the provisions as to smoke of a local Act to vessels trading direct with foreign ports, see *Macaulay* v. *Moss Steamship Co., Ltd.* (1910), 102 L. T. 887.

(*e*) The term "private dwelling-house" is strictly interpreted. It has been held not to include a West End London Club, consisting of 750 members, with the usual accommodation for members, and a staff of servants resident on the premises (*McNair* v. *Baker*, [1904] 1 K. B. 208); nor a large building consisting of residential flats (*Queen Anne Residential Mansions and Hotel Co.* v. *Westminster City Council* (1901), 46 Sol. Jo. 70).

(*f*) See pp. 565, 566, *post*.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91 (7); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 24.

by the emission of the smoke without considering the construction of the furnace (*h*).

Relief in favour of certain industries.

**918.** The above-mentioned provisions cannot be enforced in such a way as to interfere with or to obstruct the efficient working of mines (*i*), or the processes of the smelting of ores and minerals (*k*), or the calcining, puddling, and rolling of iron and other metals, or the conversion of pig iron into wrought iron (*l*). The owner of a coal mine is thus protected if, but only if, he can show that the smoke nuisance could not be prevented without interference with the efficient working of the mine (*m*). But the saving provision (*n*) does not relieve the owners of mines or of the processes named from liability for a public nuisance in a suit brought by the Attorney-General for its abatement (*o*), nor from their common law liability to a person whose property is affected by it (*p*).

Power of entry.

**919.** Power is given to local authorities, or any of their officers' to enter into any premises for the purpose of enforcing the provisions of any statute in force in the district requiring the consumption by fireplaces and furnaces of their own smoke. The entry may be made at any time between 9 a.m. and 6 p.m., or, in the case of a nuisance arising in respect of any business, at any hour when such business is in progress or is usually carried on (*q*).

Nuisance or no nuisance depends on circumstances.

**920.** The question of nuisance or no nuisance is one of fact (*r*), and the justices are entitled to have regard to the circumstances of the case, including the nature of the district and the nature of the industries carried on there. It is not necessary to prove annoyance to any particular person, or injury to any particular property, in order to secure a conviction (*r*), nor is it necessary to prove that the smoke is sufficient to be injurious to health if it is sufficient to cause annoyance or discomfort (*s*).

Liability of employer.

**921.** Under the Public Health Act, 1875 (*t*), the master is liable for the nuisance caused by his servant, even though the furnaces

(*h*) *Weekes* v. *King* (1885), 49 J. P. 709; see *Ex parte Schofield*, [1891] 2 Q. B. 428, C. A.

(*i*) The question of what is a mine within this provision is a question of fact for the justices (*R.* v. *Dunsford* (1835), 2 Ad. & El. 568).

(*k*) The corresponding provision of the repealed Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), s. 44, was held to prevent the application of that Act to manufacturers of the produce of ores and minerals, so that justices had no power to order the abatement of a smoke nuisance arising from a bichrome manufactory (*Norris* v. *Barnes* (1872), L. R. 7 Q. B. 537).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 334; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 593. As to the general effect of this provision, see *Re Dudley Corporation* (1881), 8 Q. B. D. 86, 95, 96, C. A.

(*m*) *Patterson* v. *Chamber Colliery Co.* (1892), 56 J. P. 200.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 334; see the text, *supra*.

(*o*) As to proceedings in which the Attorney-General is a necessary party, see p. 552, *post*.

(*p*) *A.-G.* v. *Logan*, [1891] 2 Q. B. 100.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 102.

(*r*) *South London Electric Supply Corporation* v. *Perrin*, [1901] 2 K. B. 186.

(*s*) *Gaskell* v. *Bayley* (1874), 38 J. P. 805.

(*t*) 38 & 39 Vict. c. 55.

SECT. 13. Smoke.

are properly constructed, and the owners have exercised reasonable and proper supervision over the persons in charge of the furnaces, and the nuisance has arisen through the neglect of stokers and not of the owners or their responsible foreman (*a*).

Daily offences.

**922.** Each daily emission of black smoke constitutes a separate offence, and separate summonses may be issued simultaneously in respect of breaches of the statute on separate days, and separate costs on each summons may be awarded (*b*).

Nuisance from several chimneys

**923.** When a person is charged with allowing black smoke to issue from certain chimneys on his premises so as to constitute a nuisance, and this is shown to have been caused by his act or default, the fact that there are several chimneys together, each used for a separate purpose, does not invalidate the summons because it is not shown from which of the chimneys the smoke issued. The justices must hear the evidence and make their order as to one or more of the chimneys (*c*).

Contents of notice to abate.

**924.** When giving notice to abate (*d*) a smoke nuisance, it is not necessary to specify what works and things are to be done for the purpose of abatement (*e*).

(ii.) *Other Statutory Provisions.*

Trade furnaces in London.

**925.** In London, the furnaces employed in the working of engines by steam and in buildings used for the purpose of trade or manufacture must be constructed so as to consume or burn the smoke arising from such furnaces. Penalties are imposed on owners or occupiers of the premises or their foremen, or other persons employed by such owners or occupiers, who use furnaces not so constructed, or negligently use any furnace so that the smoke is not consumed effectually, or carry on any trade or business occasioning noxious or offensive effluvia or other annoyance without using the best practicable means for preventing or counteracting the effluvia or annoyance.

Steam vessels on the Thames.

Penalties are also imposed upon the owner or master of a steam vessel on the Thames, either above London Bridge or plying to and fro between London Bridge and any place on the river westward of the Nore light, if the engine or furnace of the vessel is not

(*a*) *Niven* v. *Greaves* (1890), 54 J. P. 548; see *Barnes* v. *Akroyd* (1872), L. R. 7 Q. B. 474; compare *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736; *Willcock* v. *Sands* (1868), 32 J. P. 565. In these cases an element of the statutory offence was the "negligent" user of a furnace, so that where negligence on the part of the owner and his foreman was negatived or not alleged, it was held that the master was not responsible, but that the stoker whose negligence caused the nuisance was alone liable to the penalty; see title MASTER AND SERVANT, Vol. XX., pp. 258 *et seq.*

(*b*) *R.* v. *Waterhouse* (1872), L. R. 7 Q. B. 545.

(*c*) *Barnes* v. *Norris* (1876), 41 J. P. 150.

(*d*) See pp. 548, 566, *post.*

(*e*) *Millard* v. *Wastall*, [1898] 1 Q. B. 342; *Central London Rail. Co.* v. *Hammersmith Metropolitan Council* (1904), 68 J. P. 217.

constructed effectually to consume its own smoke, or, being so constructed, is wilfully or negligently used so as not to do so (*f*).

SUB-SECT. 3.—*On Railways.*

Liability for not consuming smoke.

**926.** Every locomotive steam engine used on a railway must be constructed on the principle of consuming, and so as to consume, its own smoke (*g*); and in the event of proceedings being taken on account of an engine not consuming its own smoke, a penalty of £5 for every day during which the engine is used on the railway may be imposed, if the justices find that the engine is not so constructed as required (*h*), or if, being so constructed, it has failed to consume its own smoke, as far as practicable (*i*), at the time charged in the complaint, either through the default of the company or of any servant in the employment of the company (*k*).

Nuisance a question of fact.

**927.** It is a question of fact for the justices to decide whether in the circumstances the engine has consumed its own smoke as far as practicable. Where, in a properly constructed engine, smoky coal only is used and black smoke is emitted for more than three minutes, it may be that, in the absence of any explanation by the company, there is sufficient evidence to justify a conviction (*l*); but where defective construction and negligent management of the engine are negatived, and dark smoke is emitted for a short time on two occasions in the course of about an hour, the coal used being a bituminous but a good hard steam coal, a refusal to convict may be justified, even though, if other coal twice as costly had been used, there would have been less smoke (*m*).

(*f*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 23 (1), (2), (3). The words "consume or burn the smoke" do not mean that all the smoke must be consumed. The court may remit any fine if of opinion that the furnace has been so constructed as to consume as far as possible, consistently with the carrying on of the trade (*Cooper* v. *Woolley* (1867), L. R. 2 Exch. 8; see note (*s*), p. 542, *ante*), all the smoke arising from it, and the owner or occupier has carefully attended to the same, and has caused the smoke to be consumed as far as possible (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 23 (4)). No proceedings under *ibid.*, s. 23, can be taken except under the direction of a sanitary authority (*ibid.*, s. 23 (5)). Powers of entry are given (*ibid.*, s. 23 (6); and see *ibid.* ss. 10, 115, 116; and pp. 572, 573, *post*). In the port of London the port sanitary authority takes proceedings (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 21 (7); see title METROPOLIS, Vol. XX., p. 411); see *Walker* v. *Evans* (1859), 2 E. & E. 356; and as to the general liability of owners or masters of vessels, see title SHIPPING AND NAVIGATION. As to the obligation imposed on water companies to construct their furnaces etc. on the most effectual principle for consuming their own smoke, see title WATER SUPPLY.

(*g*) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114.

(*h*) *Ibid.*

(*i*) See note (*f*), *supra*, and note (*s*), p. 542, *ante*.

(*k*) Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19, bringing this offence within the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 114. As to railway companies generally, see title RAILWAYS AND CANALS. As to light railways, see title TRAMWAYS AND LIGHT RAILWAYS.

(*l*) *South Eastern and Chatham Rail. Co.* v. *London County Council* (1901), 65 J. P. 568.

(*m*) *London County Council* v. *Great Eastern Railway*, [1906] 2 K. B. 312.

SECT. 13. Smoke.

SUB-SECT. 4.—*On Highways.*

(i.) *Heavy Locomotives.*

Liability for not consuming smoke.

**928.** Every locomotive (*n*), other than a light locomotive (*o*), used on a highway must be constructed on the principle of consuming its own smoke; and any person using a locomotive not so constructed, or not consuming, so far as practicable (*p*), its own smoke, is liable to a fine of £5 for every day during which the locomotive is so used on the highway (*q*). The burden of proof is discharged by the prosecutor when he has proved that black smoke has issued; and it then rests on the defendant to negative that evidence by showing that the engine did consume its own smoke as far as practicable (*r*). To establish the commission of the offence it is not necessary to show that the engine was on the highway for an entire day (*s*).

Emission of vapour due to lubrication.

The above provision (*t*) does not apply to a heavy motor vehicle constructed to consume its own smoke, where the smoke nuisance alleged is due to the driver negligently lubricating his machine so as to cause the emission of visible vapour (*u*).

(ii.) *Light Locomotives.*

Definition.

**929.** A light locomotive is a vehicle, propelled by mechanical power, under five tons (*v*) in weight unladen, not used for the purpose of drawing more than one vehicle (such vehicle with its locomotive not exceeding in weight unladen six and a half tons (*v*)), and so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause (*w*). The failure of the last requirement brings the locomotive within the provisions above stated relating to heavy locomotives (*x*).

SECT. 14.—*Waters and Waterways.*

Nuisance in respect of water.

**930.** Any unlawful interference with the rights of the public or of owners of land in connection with water and waterways may be a nuisance (*y*).

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(*n*) That is, any locomotive propelled by steam or by other than animal power (Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 38).

(*o*) See the text, *infra*. Light locomotives are excepted from the above provision by the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1) and Schedule.

(*p*) As to the meaning of these words, see note (*s*), p. 542, *ante*; see also *London County Council* v. *Great Eastern Railway*, [1906] 2 K. B. 312.

(*q*) Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 30, as amended by the Statute Law Revision Acts, 1894 (57 & 58 Vict. c. 56), and 1898 (61 & 62 Vict. c. 22).

(*r*) *Pitt Rivers* v. *Glasse* (1891), 55 J. P. 663.

(*s*) See *Smith* v. *Stokes* (1863), 4 B. & S. 84, decided under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 70.

(*t*) See note (*q*), *supra*.

(*u*) *R.* v. *Wilbraham, Ex parte Rowcliffe* (1907), 71 J. P. 336; *Star Omnibus Co. (London), Ltd.* v. *Tagg* (1907), 71 J. P. 352. As to motor traffic generally, see title STREET AND AERIAL TRAFFIC.

(*v*) Increased from three to five tons and four to six and a half tons respectively by the Heavy Motor Car Order, 1904, Art. III., made under powers conferred by the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 12 (1).

(*w*) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1 (1).

(*x*) See the text, *supra*.

(*y*) See titles COUNTY COURTS, Vol. VIII., pp. 680 *et seq.*; EASEMENTS AND

# Part III.—Remedies.

## SECT. 1.—*In General.*

SECT. 1. In General.

**931.** There are four classes of remedies for nuisance, namely: abatement without recourse to legal proceedings; civil proceedings for damages or injunction; summary proceedings for penalties or abatement; and criminal proceedings by indictment (*z*). Classes of remedies.

## SECT. 2.—*Abatement.*

### SUB-SECT. 1.—*By Private Persons.*

#### (i.) *Where the Right Exists.*

**932.** By abatement is meant the summary removal or remedy of a nuisance by the party injured without having recourse to legal proceedings. It is not a remedy which the law favours, and is not usually advisable (*a*), and its exercise destroys any right of action in respect of the nuisance (*b*). The right certainly exists when the nuisance is caused by an act of commission (*c*). Nuisance arising from acts of commission.

**933.** Where the nuisance arises merely from omission on the part of the offender, it is not clear whether it admits of abatement (*d*), except in the case of the cutting of boughs overhanging the public highway or private property, when abatement is clearly lawful (*e*). It would seem that the term "abatement" is hardly the proper expression for an act which supplies the omitted duty (*f*). Nuisance arising from omissions.

**934.** If the nuisance is a public one, a private individual cannot of his own authority abate it, unless it does him some special injury over and above that suffered by the rest of the public (*g*). In case of public nuisance.

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PROFITS À PRENDRE, Vol. XI., pp. 310 *et seq.*; FISHERIES, Vol. XIV., pp. 589, 619, 628; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 592; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

(*z*) As to abatement, see the text, *infra*; as to civil proceedings, see pp. 550 *et seq.*, *post*; as to summary proceedings, see pp. 565 *et seq.*, *post*; as to criminal proceedings by indictment, see p. 574, *post*.

(*a*) *Lonsdale* (*Earl*) v. *Nelson* (1823), 2 B. & C. 302, *per* BEST, J., at p. 312; *Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518, C. A., *per* COLLINS, L.J., at p. 524.

(*b*) *Baten's Case* (1610), 9 Co. Rep. 53 b.

(*c*) *Penruddock's Case* (1598), 5 Co. Rep. 100 b; *James* v. *Hayward* (1630), Cro. Car. 184; *R.* v. *Rosewell* (1699), 2 Salk. 459; *Raikes* v. *Townsend* (1804), 2 Smith, K. B. 9; *Lonsdale* (*Earl*) v. *Nelson*, *supra*; *Sutcliffe* v. *Sowerby Highways Surveyors* (1859), 1 L. T. 7.

(*d*) See *Lonsdale* (*Earl*) v. *Nelson*, *supra*, at p. 311; *Campbell Davys* v. *Lloyd*, *supra*, and see the *dictum* of BEST, J., in *Lonsdale* (*Earl*) v. *Nelson*, *supra*, commented on in *Lemmon* v. *Webb*, [1895] A. C. 1, 9.

(*e*) *Lemmon* v. *Webb*, *supra*; see *Morrice* v. *Baker* (1616), 3 Bulst. 196; *Lonsdale* (*Earl*) v. *Nelson*, *supra*; and see title AGRICULTURE, Vol. I. p. 296.

(*f*) *Campbell Davys* v. *Lloyd*, *supra*.

(*g*) *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Bateman* v. *Bluck* (1852), 18 Q. B. 870. Previous authorities stated that anyone might abate a public nuisance (*James* v. *Hayward*, *supra*; *R.* v. *Wilcox* (1690), 2 Salk. 458). A general pardon after conviction only discharges the penalty and not an order for abatement. The latter

SECT. 2. **Abatement.**

Power of abatement.

**935.** The injured party need not wait until he has suffered actual injury before exercising his power of abatement (*h*), but he cannot justify the removal of the scaffolding or foundations of a building on the ground that when finished it may constitute a nuisance by blocking his ancient lights (*i*).

When notice necessary.

**936.** It has been established that no notice is necessary before abating a nuisance which consists of overhanging boughs, when they can be lopped by the person aggrieved from his own property and without entry on his neighbour's land (*k*). There is also authority for saying that, without notice, a nuisance may be abated on the land of another in cases of emergency, and in order to protect life or property (*l*). It has further been held that abatement without notice may be justified, although involving entry on the land of another, where he is the original wrongdoer bringing into existence the nuisance (*m*), and, possibly, where the nuisance arises from a default in the performance of some legal duty imposed upon the wrongdoer (*n*). The trend of later judicial opinion, however, has been to require notice in all cases, except those of emergency, when the abatement involves entry on the land of another (*o*). On the authorities, notice is certainly necessary where the person complained of is not the original wrongdoer but continues a nuisance (*p*), and, so far as abatement is available at all, in all cases, except those of emergency, where the nuisance arises from omissions (*q*), and where the premises affected are at the time inhabited (*r*).

Who may abate.

**937.** The right of abatement exists in any person whose rights or whose property are damnified by the nuisance, including a lessee

is not the punishment of the party, but the removal of a public grievance (*R.* v. *Wilcox* (1690), 2 Salk. 458).

(*h*) *Penruddock's Case* (1598), 5 Co. Rep. 100 b.

(*i*) *Morrice* v. *Baker* (1616), 3 Bulst. 196; S. C., *sub nom. Norris* v. *Baker* (1616), 1 Roll. Rep. 393.

(*k*) *Lemmon* v. *Webb*, [1894] 3 Ch. 1, C. A.; affirmed, [1895] A. C. 1; see titles AGRICULTURE, Vol. I., p. 296; EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 331.

(*l*) *Jones* v. *Williams* (1843), 11 M. & W. 176; accepted to this extent by the Court of Appeal and the House of Lords in *Lemmon* v. *Webb*, *supra*; see also *Lonsdale* (*Earl*) v. *Nelson* (1823), 2 B. & C. 302, *per* BEST, J., at p. 312.

(*m*) *Penruddock's Case*, *supra*; *Winsmore* v. *Greenbank* (1745), Willes, 577, 583; *Lonsdale* (*Earl*) v. *Nelson*, *supra*, *per* BEST, J., at pp. 311, 312; *Jones* v. *Williams*, *supra* (where this seemed to be treated as beyond doubt).

(*n*) *Jones* v. *Williams*, *supra*.

(*o*) See the judgments in *Lemmon* v. *Webb*, *supra*, both in the Court of Appeal and the House of Lords; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 331.

(*p*) *Penruddock's Case*, *supra*, and the cases cited in notes (*l*), (*m*), *supra*.

(*q*) *Ibid.*

(*r*) *Perry* v. *Fitzhowe* (1846), 8 Q. B. 757; *Davies* v. *Williams* (1851), 16 Q. B. 546; *Jones* v. *Jones* (1862), 1 H. & C. 1; and see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 296.

(*s*) *Penruddock's Case*, *supra*. As to the right of a commoner to abate a nuisance on a common, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 515, 516.

Public nuisances.

**938.** In abating a public nuisance, a private individual can only interfere with it so far as it causes special injury to him, and so far as may be necessary to enable him to exercise his public rights, and he is not justified in doing damage to the property of the person creating the nuisance if he is able to exercise his rights with reasonable convenience and without doing such damage (*t*).

Private nuisances.

**939.** In the case of a private nuisance, the person injured by it may justify its abatement and the entry on his neighbour's land for that purpose (*a*), provided that the abatement is not effected in circumstances specially calculated to lead to a breach of the peace (*b*); that no more than the offending portion is removed (*c*); that no unnecessary damage is done (*d*); that, where there are two ways of abating the nuisance, the less mischievous is followed, unless it would inflict some wrong on an innocent third party or the public (*e*); and that previous notice is given when necessary (*f*). In the case of a nuisance arising merely from omission, even if the remedy by abatement exists, it will not justify the entry on private lands to effect the purpose (*g*).

SUB-SECT. 2.—*By Local Authorities.*

Rights at common law.

**940.** So far as their own property is concerned, local authorities have the same right to abate nuisances in respect of it and its enjoyment as is possessed by private individuals.

Such local authorities as possess or succeed to the duties and powers of highway surveyors (*h*) have at common law the right to abate nuisances on the highway without taking legal proceedings, but they do so at their own risk (*i*). A similar power of abatement

(*t*) *James* v. *Hayward* (1630), Cro. Car. 184; *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Bateman* v. *Bluck* (1852), 18 Q. B. 870; *R.* v. *Richmond Justices* (1860), 24 J. P. 422; *Bayshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220, 224. In *Lodie* v. *Arnold* (1697), 2 Salk. 458, it was said that the abatement need not be effected in an orderly manner and with as little hurt as possible; but there is no other case in which such a view is taken.

(*a*) *Raikes* v. *Townsend* (1804), 2 Smith, K. B. 9; 1 Hawk. P. C. c. 75, s. 12, and cases cited in notes (*l*), (*m*), p. 548, *ante*.

(*b*) *Perry* v. *Fitzhowe* (1846), 8 Q. B. 757 (abatement held not justified while the plaintiff and his family were in the house during its demolition); commented on in *Burling* v. *Read* (1850), 11 Q. B. 904; and see, *contra*, *Davies* v. *Williams* (1851), 16 Q. B. 546, the difference being that in this last case notice had been previously given and the occupier refused to remove the offending structure.

(*c*) *Cooper* v. *Marshall* (1757), 1 Burr. 259; *Greenslade* v. *Halliday* (1830), 6 Bing. 379 (where the defendant was held not to be justified in removing a board which the plaintiff had fastened to stakes to form a means for crossing a stream, although the defendant might have justified the removal of the stakes only).

(*d*) *Colchester Corporation* v. *Brooke*, *supra*; *Perry* v. *Fitzhowe*, *supra*; *Dimes* v. *Petley* (1850), 15 Q. B. 276; *R.* v. *Richmond Justices* (1860), 24 J. P. 422.

(*e*) *Roberts* v. *Rose* (1865), L. R. 1 Exch. 82, Ex. Ch.

(*f*) See p. 548, *ante*.

(*g*) *E.g.*, to erect a permanent bridge in place of one which the person liable has neglected to repair (*Campbell Davys* v. *Lloyd*, [1901] 2 Ch. 518, C. A.).

(*h*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 25, note (*b*).

(*i*) *Reynolds* v. *Presteign Urban District Council*, [1896] 1 Q. B. 604; *Harris*

SECT. 2. Abatement.

possessed by any authority which represents the public in the matter affected by the nuisance.

Under statute.

Power is given by statute to various local authorities to abate nuisances (*j*).

Limitations: (i.) Common law;

**941**. So far as the exercise of the common law right of abatement is concerned, local authorities are governed by the same principles as those which regulate abatement by private individuals (*k*).

(ii.) statutory.

The statutes which confer a right of abatement in special circumstances sometimes impose restrictions upon its exercise by defining the period when it may be exercised, as in the case of lopping trees overhanging a highway (*l*), or by requiring previous notice from the authority, and in some cases imposing the condition of previous default in obeying an order of a justice or justices (*m*).

## SECT. 3.—*Civil Proceedings.*

### SUB-SECT. 1.—*In General.*

Actions.

**942**. Civil proceedings to restrain the commission or continuation of acts constituting a nuisance, or to recover damages, whether brought by or in the name of the Attorney-General or by a private individual or local body, take the form of an action in the Chancery Division or the King's Bench Division of the High Court; or, where the damages claimed do not exceed £100, in the county court (*n*).

Tribunal.

### SUB-SECT. 2.—*Parties.*

#### (i.) *Who may Sue.*

##### (a) *Reversioners.*

When reversioner may sue.

**943**. In order to give a right of action in respect of a nuisance to an owner of property, as a reversioner, the injury complained of must be such that from its permanent character or otherwise it is necessarily prejudicial to the reversion (*o*), that is to say, it must be something which will continue to the time when the reversion will come into possession, or something which operates as a denial

v. *Northamptonshire County Council* (1897), 61 J. P. 599; *Keane* v. *Reynold* (1853), 2 E. & B. 748, *per* Lord CAMPBELL, C.J.; *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418; *Mill* v. *Hawker* (1875), L. R. 10 Exch. 92, Ex. Ch.; *Bagshaw* v. *Buxton Local Board of Health* (1875), 1 Ch. D. 220, 224; *Louth District Council* v. *West* (1896), 65 L. J. (Q. B.) 535.

(*j*) As to nuisances in respect of highways, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 161 *et seq.*; in respect of animals, see p. 513, *ante*; in respect of public health, see pp. 535, 537, *ante*; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) See p. 547, *ante*.

(*l*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 113, 165.

(*m*) See p. 572, *post*.

(*n*) See titles COUNTY COURTS, Vol. VIII., p. 428; INJUNCTION, Vol. XVII., p. 199; PRACTICE AND PROCEDURE. As to whether an action is excluded where a statutory remedy is given, see titles ACTION, Vol. I., p. 8; TORT.

(*o*) *Jackson* v. *Pesked* (1813), 1 M. & S. 234. "Permanent" means that which will continue indefinitely until something is done to remove it (*Jones* v. *Llanrwst Urban District Council*, [1911] 1 Ch. 393, *per* PARKER, J., at p. 404).

of right of the reversioner (*a*). The question whether there is damage to the reversion is a question of fact (*b*).

(b) *Occupiers and Persons in Possession.*

Occupiers.

**944.** A person who is in lawful occupation of premises is entitled to be protected against any interference with his rights as such occupier (*c*). Thus, the occupation of oyster-beds within the limits of a several fishery gives the occupier a right of action against third persons who pollute the beds (*d*), but the mere

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(*a*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508; *Alston* v. *Scales* (1832), 9 Bing. 3; and see the cases cited *infra*. A reversioner has, therefore, been held to have a right of action when his property was injured by vibration (*Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, C. A.; *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707); or his trees damaged by smoke or fumes (*Walter* v. *Selfe* (1851), 4 De G. & Sm. 315); or his buildings affected by damp from an artificial mound (*Broder* v. *Saillard* (1876), 2 Ch. D. 692); or the ancient lights of his premises obstructed by the erection of a permanent structure (*Jesser* v. *Gifford* (1767), 4 Burr. 2141; *Wilson* v. *Townend* (1860), 1 Drew. & Sm. 324; *Metropolitan Association* v. *Petch* (1858), 5 C. B. (N. S.) 504; *Shadwell* v. *Hutchinson* (1829), 3 C. & P. 615), and in such a case the reversioner may bring another action for damages in respect of a further period of continuance (*Shadwell* v. *Hutchinson* (1830), 4 C. & P. 333); or a right of way belonging to him has been obstructed by a permanent structure (*Bower* v. *Hill* (1835), 1 Scott, 526; see *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287), or by locking a gate across it under such circumstances as to amount to a denial of his right (*Kidgill* v. *Moor* (1850), 9 C. B. 364); or where damage has been done by the destruction of trees owing to flooding (*Bedingfield* v. *Onslow* (1685), 3 Lev. 209; compare *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72); see also *Jones* v. *Llanrwst Urban District Council*, [1911] 1 Ch. 393, 404. On the other hand, it has been held that a reversioner has no right of action for nuisances caused by noise or smoke affecting the comfort of tenants, even to the extent of compelling them to leave, since such nuisances may cease at any moment (*Cooper* v. *Crabtree* (1881), 19 Ch. D. 193; affirmed (1882), 20 Ch. D. 589, C. A.; *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539; *House Property and Investment Co.* v. *H. P. Horse Nail. Co.* (1885), 29 Ch. D. 190; *Simpson* v. *Savage* (1856), 1 C. B. (N. S.) 347; *Mumford* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34; *Broder* v. *Saillard*, *supra*); for an entry on land in possession of a tenant in exercise of an alleged right of way (*Baxter* v. *Taylor* (1832), 4 B. & Ad. 72; and see *Damper* v. *Bassett*, [1901] 2 Ch. 350; compare *Kidgill* v. *Moor*, *supra*), because such entry would not be evidence against the reversioner (*Bower* v. *Hill*, *supra*, at p. 528); for obstruction of his tenant's access to premises (*Dobson* v. *Blackmore* (1847), 9 Q. B. 991; *Mott* v. *Shoolbred* (1875), L. R. 20 Eq. 22); for damage done by flooding where the damage was not such as would last to the end of the term (*Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113, C. A.); for neglect to repair a road over which there was a right of way (*Hopwood* v. *Schofield* (1837), 2 Mood. & R. 34); for the wrongful raising of a wall and the placing of timber thereon overhanging a yard, the alleged injury being the loss of the user of the original wall and the discharge of rain-water into the yard (*Jackson* v. *Pesked* (1813), 1 M. & S. 234).

(*b*) *Tucker* v. *Newman* (1839), 11 Ad. & El. 40; *Young* v. *Spencer* (1829), 10 B. & C. 145; *Jones* v. *Llanrwst Urban District Council*, *supra*, at p. 404.

(*c*) *Aldred's Case* (1610), 9 Co. Rep. 57 b. As to the right of an undischarged bankrupt in possession to sue without joining the trustee, see *Semple* v. *London and Birmingham Rail. Co.* (1838), 9 Sim. 209. As to the general position of licensees, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 340; LANDLORD AND TENANT, Vol. XVIII., pp. 337 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 567 *et seq.*; REAL PROPERTY AND CHATTELS REAL; TRESPASS.

(*d*) *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; see

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depositing of oysters where the public have a right of fishing does not suffice to give the occupier a right of action (*e*).

Occupation of pasturage under demise from a local authority which had no power to demise it does not give sufficient occupation upon which to base an action (*f*); neither has the wife of a tenant of premises such occupation (*g*). A tenant under a building agreement who, under and for the purpose of that agreement, has a right of entry on the foreshore cannot maintain an action against a person for taking shingle or placing bathing tents thereon (*h*), but a contractor who was damnified by interference with a dam which he had made with the consent of the owner of the soil has been held to have sufficient possession to give him a right of action (*i*).

Tenants.

**945**. A tenant is none the less entitled to be protected from a nuisance because he is only a yearly (*k*) or weekly (*l*) tenant, but the fact that his term is a short one may be a circumstance to be considered when an injunction is claimed (*m*), and the injunction may be limited to the continuance of his tenancy (*n*).

Possessory title.

**946**. A possessory title may suffice to enable a person to maintain an action, as where a corporation was found, without deciding its right as against the Crown, to be in possession of a foreshore upon which the defendant was causing a nuisance, and an injunction was granted (*o*).

(ii.) *When the Attorney-General is a Necessary Party.*

In case of public nuisances.

**947**. Subject to certain exceptions (*p*), all civil proceedings brought in respect of public nuisances must be brought with the sanction and in the name of the Attorney-General (*a*). This rule applies whether it is an individual or the local authority who seeks to proceed. Where there is an excessive exercise of statutory powers (*b*)

*Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; title FISHERIES, Vol. XIV., p. 589. As to the joinder of several occupiers in respect of a discomfort which would be a nuisance to each of them, see *Hudson* v. *Maddison* (1841), 12 Sim. 416 (where it was held that they could not sue together).

(*e*) *Truro Corporation* v. *Rowe*, [1902] 2 K. B. 709, C. A.; see title FISHERIES, Vol. XIV., pp. 575, 626, note (*k*).

(*f*) *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104, C. A.

(*g*) *Malone* v. *Laskey*, [1907] 2 K. B. 141, C. A.

(*h*) *Laird* v. *Briggs* (1881), 19 Ch. D. 22, C. A.

(*i*) *Dyson* v. *Collick* (1822), 5 B. & Ald. 600.

(*k*) *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388. See *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539.

(*m*) *Jacomb* v. *Knight* (1863), 3 De G. J. & Sm. 533, C. A.; see title INJUNCTION, Vol. XVII., p. 232.

(*n*) *Simper* v. *Foley* (1862), 2 John. & H. 555.

(*o*) *Hastings Corporation* v. *Ivall* (1874), L. R. 19 Eq. 558.

(*p*) See p. 553, *post*.

(*a*) *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q. B. 353, C. A.; see *Baines* v. *Baker* (1752), Amb. 158 (small-pox hospital); *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212; *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204 (right of way); *Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277; *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; *Watson* v. *Hythe Borough Council* (1906), 70 J. P. 153.

As to the exercise of special statutory powers, see pp. 516 *et seq.*, *ante*,

which does not cause private injury, the Attorney-General alone can take proceedings, and it is his duty to do so if the interests of the public are affected (*c*).

Relators.

**948.** Any person, whether affected by the nuisance or not, may act as relator in proceedings by the Attorney-General (*d*), and so may a local authority (*e*), but a relator is not essential and the Atttorney-General may proceed by an *ex-officio* information, there being no difference in the two proceedings except in the matter of costs (*f*), for which the relator renders himself liable (*g*), though otherwise he is not a party to the action (*g*).

Joinder of plaintiffs — Attorney General.

**949.** A local authority or a private individual having a valid right of action in respect of the special injury sustained through a public nuisance (*h*) may join as plaintiffs in the proceedings of the Attorney-General in respect of their special injury (*i*).

Private action on public nuisances.

**950.** A private individual may bring an action in his own name in respect of a public nuisance when, and only when, he can show that he has suffered some particular, direct (*k*), and substantial damage over and above that sustained by the public at large (*l*), or when the interference with the public right involves a violation of some private right of his own (*m*), or when a statute has given him a special protection or benefit which is being invaded (*n*).

Proceedings by local authorities alone.

**951.** Local authorities may take civil proceedings in their own names in respect of public nuisances when they have sustained or are threatened with damage to property of which they are the actual owners (*o*), or when they are seeking to enforce a contract

(*c*) *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212; but see *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498 (in which case a declaration was made and an injunction granted, although no actual damage was proved: it was, however, alleged that the result of deviating from the statutory conditions deprived the plaintiff of material benefits secured by the Act); see also *A.-G.* v. *London and North Western Railway*, [1899] 1 Q. B. 72 (proceedings to compel the defendants to comply with the provisions of a statute as to the speed of trains); and see p. 509, *ante*.

(*d*) See *A.-G.* v. *Logan*, [1891] 2 Q. B. 100.

(*e*) *A.-G.* v. *Logan*, *supra*.

(*f*) See *A.-G.* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172, 176; *A.-G.* v. *Logan*, *supra*.

(*g*) See *A.-G.* v. *Logan*, *supra*.

(*h*) See p. 506, *ante*, and the text, *infra*.

(*i*) *A.-G.* v. *Logan*, *supra*; *A.-G.* v. *Lonsdale* (*Earl*) (1868), L. R. 7 Eq. 377; *A.-G.* v. *Cockermouth Local Board*, *supra*; *A.-G.* v. *Gee* (1870), L. R. 10 Eq. 131; *A.-G.* v. *Birmingham Borough Council* (1858), 4 K. & J. 528.

(*k*) *Paine* v. *Partrich* (1690), Carth. 191.

(*l*) *Williams's Case* (1592), 5 Co. Rep. 72 b; *Marys's* (*Robert*) *Case* (1612), 9 Co. Rep. 111 b, 113 a; see *A.-G.* v. *Forbes* (1836), 2 My. & Cr. 123; *Bell* v. *Quebec Corporation* (1879), 5 App. Cas. 84, P. C.; *Whelan* v. *Hewson* (1871), 6 I. R. C. L. 283.

(*m*) *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109.

(*n*) *Devonport Corporation* v. *Plymouth, Devonport, and District Tramways Co.* (1884), 52 L. T. 161, C. A.

(*o*) *A.-G.* v. *Logan*, *supra* (where the local board was held entitled to join in proceedings as plaintiffs in respect of injury to the trees of its park, which were damaged by fumes); *Sheringham Urban District Council* v. *Holsey*

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involving rights of property (*p*); or when they are complaining of the breach of statutory conditions imposed by an enactment which gives them special protection or benefit (*q*); or when they have an express or an implied statutory power to take proceedings (*r*). The fact that the Public Health Act, 1875 (*s*), gives local authorities the right to cause proceedings to be taken in the High Court in respect of nuisances made summarily abatable (*a*) does not, in the absence of a particular interest in them, justify them in proceeding in their own names, and the presence of the Attorney-General is then necessary (*b*).

(iii.) *Who is Liable to be Sued.*

(a) *The Person Creating or Continuing a Nuisance.*

Rule of liability.

**952.** Any person is liable for a nuisance who either creates or causes it, or continues its existence or allows it to continue, or who authorises its creation or continuance.

Creating or causing a nuisance.

**953.** A person is liable as having created or caused a nuisance when he does an act, or is guilty of an omission, which directly gives rise to the nuisance (*c*); when he authorises such act or

(1904), 20 T. L. R. 402 (action in respect of a post belonging to the council and put up to protect a pathway from being used for carriages); compare *Stoke Parish Council* v. *Price*, [1899] 2 Ch. 277; *A.-G. and Spalding Rural Council* v. *Garner*, [1907] 2 K. B. 480; *Exeter Corporation* v. *Devon* (*Earl*) (1870), L. R. 10 Eq. 232.

(*p*) *Nuneaton Local Board* v. *General Sewage Co.* (1875), L. R. 20 Eq. 127, as explained in *Wallasey Local Board* v. *Gracey* (1887), 36 Ch. D. 593, 598.

(*q*) *Devonport Corporation* v. *Plymouth, Devonport, and District Tramways Co.* (1884), 52 L. T. 161, C. A.

(*r*) *E.g.*, where a statute places the mode and control of testing gas in the hands of a council and an action is brought in respect of such mode of testing (*London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A.).

(*s*) 38 & 39 Vict. c. 55, s. 107; see p. 536, *ante*, and p. 565, *post*.

(*a*) See pp. 565, 566, *post*.

(*b*) *Wallasey Local Board* v. *Gracey*, *supra*; *Tottenham Urban District Council* v. *Williamson & Sons*, [1896] 2 Q. B. 353, C. A.; see *Bermondsey Vestry* v. *Brown* (1865), L. R. 1 Eq. 204.

(*c*) *Corby* v. *Hill* (1858), 4 C. B. (N. S.) 556 (defendant held liable for injury caused by obstructing a private road with building material, put there with the consent of the owner); *King* v. *Ford* (1816), 1 Stark. 421 (schoolmaster permitting scholar to let off fireworks); *Ex parte Liverpool Corporation* (1857), 22 J. P. 562 (corporation held liable for the nuisance from the drainage of a gaol it had built, and not the justices having management of the gaol); *St. Helens Chemical Co.* v. *St. Helens Corporation* (1876), 1 Ex. D. 196 (appellants held liable for nuisance caused by their chemicals combining in a sewer with other chemicals also discharged by them into the sewer; as to joint nuisances, see p. 558, *post*); *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111 (sweeping snow into heaps and melting it with salt); *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631; *A.-G.* v. *Bradford Canal Proprietors* (1866), L. R. 2 Eq. 71 (continuing to exercise right of abstracting water after the source had become polluted); *Hall* v. *Norfolk* (*Duke*), [1900] 2 Ch. 493 (owner of minerals held not liable for subsidence caused by the working of his predecessor in title, although the damage did not arise until defendant came into possession); *Young* v. *Fosten* (1893), 69 L. T. 147 (building contractor held liable under a statute for nuisance caused by bad repair of sanitary apparatus): *Riddell* v. *Spear* (1879), 40 L. T. 130 (tenant cutting sewer made without his consent by his landlord through the demised land); and see title SEWERS AND DRAINS.

omission (*d*); when without any intention or expectation of committing a nuisance he does or authorises an act, from which a nuisance arises as a natural and probable consequence (*e*); or when, being an owner or occupier of property, he grants a licence or gives an order to another to do acts upon it which are likely to cause a nuisance, and such licensee or person receiving the order in so acting commits a nuisance (*f*).

Continuing a nuisance.

**954.** A person is liable for the continuance of a nuisance when he directly continues it or authorises its continuance (*g*); when he has originally erected a nuisance which in the nature of things is likely to be continued and is continued, although he has ceased to be in possession of, or interested in, the land on which the nuisance exists, and has no power to remove it without being guilty of a trespass (*h*); or when he purchases the reversion of premises let to a tenant upon which there exists a nuisance for which the original reversioner would have been liable, even though he has no opportunity of putting an end to the existing tenancy, or of abating the nuisance (*i*).

But apart from active interference, or original authorisation or adoption of the nuisance, a person is not liable for its continuance without his authority or consent, at least when he receives no

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(*d*) *R.* v. *Longton Gas Co.* (1860), 2 E. & E. 651 (householder held liable for authorising disturbance of a street in order to effect a connection with a gas main for which there was no statutory authority); compare *Igoe* v. *Eveleigh* (1870), 4 I. R. C. L. 238.

(*e*) *R.* v. *Moore* (1832), 3 B. & Ad. 184; *Bostock* v. *North Staffordshire Rail. Co.* (1852), 5 De G. & Sm. 584; *Walker* v. *Brewster* (1867), L. R. 5 Eq. 25 (causing crowds to collect by attractions); see also *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388; compare *Chase* v. *London County Council and Leslie & Co.* (1898), 62 J. P. 184; see *Chibnall* v. *Paul & Son* (1881), 29 W. R. 536 (arranging urinal so as to induce nuisance); *Smith* v. *London and South Western Rail. Co.* (1870), L. R. 6 C. P. 14, Ex. Ch. (leaving hedge trimmings by side of railway which became ignited); *Brown* v. *Bussell* (1868), L. R. 3 Q. B. 251 (making drain to discharge contents into open ditch); *St. Helens Chemical Co.* v. *St. Helens Corporation* (1876), 1 Ex. D. 196 (discharging matter into a sewer by different drains, which matter on meeting caused chemical nuisance); *Gibbings* v. *Hungerford*, [1904] 1 I. R. 211, C. A. (local authority held liable for nuisance caused by a third person draining sewage through the authority's pipes on to the land of plaintiff who had given the authority leave to discharge surface water).

(*f*) *Draper* v. *Sperring* (1861), 10 C. B. (N. S.) 113 (owner of market held liable for nuisance from sheep droppings in pens let to third persons); *White* v. *Jameson* (1874), L. R. 18 Eq. 303 (permission to burn bricks on defendant's land); *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71 (letting room over offices for dancing); *Phillips* v. *Thomas* (1890), 62 L. T. 793; *Howland* v. *Dover Harbour Board* (1898), 14 T. L. R. 355, C. A.; and see title LANDLORD AND TENANT, Vol. XVIII., p. 504, note (*u*).

(*g*) *Brent* v. *Haddon* (1619), Cro. Jac. 555 (lessee continuing an obstructive bank); *Ryppon* v. *Bowles* (1615), Cro. Jac. 373 (lessee of house with a nuisance); *Thompson* v. *Gibson* (1841), 7 M. & W. 456 (defendant lessor of obstructive buildings); *Dimes* v. *Petley* (1850), 15 Q. B. 276 (defendant occupier); *A.-G.* v. *Basingstoke Corporation* (1876), 45 L. J. (CH.) 726 (flow of sewage); *Broder* v. *Saillard* (1876), 2 Ch. D. 692 (defendant occupier); *Silverton* v. *Marriott* (1888), 52 J. P. 677.

(*h*) *Thompson* v. *Gibson*, *supra*; *Roswell* v. *Prior* (1702), 12 Mod. Rep. 635.

(*i*) *R.* v. *Pedly* (1834), 1 Ad. & El. 822.

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benefit from it (*k*), though he may be liable if he takes no steps to prevent the continuance of a public nuisance caused by third parties on his property (*l*).

(b) *Landlords and Tenants.*

Occupier *primâ facie* liable.

**955**. *Primâ facie* the occupier of premises is the person liable to third parties for a nuisance existing on or arising from the premises (*m*).

Where landlord liable.

The landlord is not liable for any nuisance caused by the tenant by reason of the manner in which the premises are used by the latter (*n*), but, apart from a nuisance caused in that way, the landlord is liable for the existence of a nuisance upon premises which are in the occupation of his tenant in the following cases, namely: where he has let the premises with a nuisance existing upon them of the existence of which he knew or ought to have known (*o*); where he re-lets the premises after the user of them has created a nuisance upon them (*p*); where he has undertaken the repairs of the premises and a nuisance arises from his breach of duty to repair (*q*);

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(*k*) *Saxby* v. *Manchester and Sheffield Rail. Co.* (1869), L. R. 4 C. P. 198.

(*l*) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560, C. A. (defendant held liable for a continuing public nuisance upon a piece of vacant land owing to persons throwing refuse on to it).

(*m*) *Walker* v. *Goe* (1859), 4 H. & N. 350, Ex. Ch.; *Pickard* v. *Smith* (1861), 10 C. B. (N. S.) 470; *Cheetham* v. *Hampson* (1791), 4 Term Rep. 318; *Chauntler* v. *Robinson* (1849), 4 Exch. 163; *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401 (defective coal plate, tenant liable for repairs); *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Hadley* v. *Taylor* (1865), L. R. 1 C. P. 53; *A.-G.* v. *Kirk* (1896), 12 T. L. R. 514, C. A. (builder whose building agreement had been cancelled, but who was regarded as being in possession of the premises). As to what suffices to constitute occupation, see *Hadley* v. *Taylor*, *supra*. As to the liability when the tenant is insolvent and the lease is delivered to the landlord, see *Bishop* v. *Bedford Charity Trustees* (1859), 1 E. & E. 697, where the judges in the Queen's Bench were equally divided. As to the liability of the landlord to his tenant or his tenant's visitors, see *Lane* v. *Cox*, [1897] 1 Q. B. 415, C. A.; *Robbins* v. *Jones* (1863), 15 C. B. (N. S.) 221, 240; *Malone* v. *Laskey*, [1907] 2 K. B. 141, C. A.; *Cavalier* v. *Pope*, [1906] A. C. 428; *Keates* v. *Cadogan* (*Earl*) (1851), 10 C. B. 591; and see titles LANDLORD AND TENANT, Vol. XVIII., pp. 505, 507; NEGLIGENCE, pp. 382, 383, *ante*.

(*n*) *Cheetham* v. *Hampson*, *supra*; *Rich* v. *Basterfield* (1847), 4 C. B. 783 (use of smoking chimneys); *Russell* v. *Shenton* (1842), 3 Q. B. 449 (neglect to cleanse drains).

(*o*) *Alston* v. *Grant* (1854), 2 C. L. R. 933 (letting with improperly constructed sewer); *R.* v. *Pedly* (1834), 1 Ad. & El. 822 (letting dwelling-houses with common conveniences which constituted the nuisance owing to lack of cleansing, but see the grounds of decision in this case stated in *Rich* v. *Basterfield*, *supra*); *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377 (dangerous chimney-stack); *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658 (defective coal plate, defendant not knowing of defect and not negligent in not knowing); see also *Robbins* v. *Jones*, *supra*.

(*p*) *Roswell* v. *Prior* (1702), 12 Mod. Rep. 635; *R.* v. *Pedly*, *supra*; *Gandy* v. *Jubber* (1865), 5 B. & S. 485; 9 B. & S. 15, Ex. Ch.; *Sandford* v. *Clarke* (1888), 21 Q. B. D. 398; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; *Winter* v. *Baker* (1887), 3 T. L. R. 569. As to what constitutes a re-letting in the case of a weekly tenancy or of a tenancy from year to year, see title LANDLORD AND TENANT, Vol. XVIII., pp. 439, note (*o*), 505, note (*c*).

(*q*) *Payne* v. *Rogers* (1794), 2 Hy. Bl. 350 (defective coal plate); see *Leslie* v. *Pounds* (1812), 4 Taunt. 649 (where the landlord undertook to do repairs and the nuisance was caused by the negligence of his workmen). There can be no

where he lets the premises for a purpose which is likely to cause a nuisance of a particular character and such nuisance results (*r*); where he lets the premises taking from the lessee a covenant to do the things which result in the nuisance (*s*).

(c) *Principals and Contractors.*

Liability of principal.

**956.** Where a principal employs an independent contractor to execute work for him, he may, in certain circumstances, still be liable for injury arising from a nuisance caused by the independent contractor. He is liable if the nuisance is a natural consequence of the work (*t*).

(d) *Principals, Agents and Servants.*

Liability of principal or employer.

**957.** A person is liable for a nuisance committed by his agent or servant in the course of his employment and within its scope (*a*), and this liability extends so far as to make the employer criminally responsible for public nuisances so caused, although he has no personal knowledge of them (*b*). But the liability of the employer does not arise where the servant or agent acts beyond the scope of his employment (*c*).

(e) *Public Bodies.*

Liability of public bodies.

**958.** Public bodies in whom property or works are vested for public purposes, whether for profit or not, are liable for nuisances in the same way as other persons are liable (*d*), except in the case

liability on the landlord if the tenant has consented to do repairs (*Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311); see title LANDLORD AND TENANT, Vol. XVIII., p. 505.

(*r*) *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71 (letting room for dancing over offices); *Harris* v. *James* (1876), 45 L. J. (Q. B.) 545 (letting premises to be worked as a lime quarry); *Winter* v. *Baker* (1887), 3 T. L. R. 569 (letting premises for use for a noisy show). But a person who lets premises for a school is not liable for a nuisance caused by boys crowding and causing annoyance in the street (*Harrison* v. *Good* (1871), L. R. 11 Eq. 338); and see title LANDLORD AND TENANT, Vol. XVIII., p. 504, note (*u*).

(*s*) *Burt* v. *Victoria Graving Dock Co., Ltd., and London and St. Katherine's Dock Co.* (1882), 47 L. T. 378.

(*t*) See titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 238, 315 *et seq.*; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 136; MASTER AND SERVANT, Vol. XX., pp. 264, 265; TORT.

(*a*) "Whatever is done for the working of my mine, or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control or management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another" (*Laugher* v. *Pointer* (1826), 5 B. & C. 547, *per* ABBOTT, C.J., at p. 576); see *Stone* v. *Cartwright* (1795), 6 Term Rep. 411; *Bush* v. *Steinman* (1799), 1 Bos. & P. 404; *Limpus* v. *General Omnibus Co.* (1862), 1 H. & C. 526, Ex. Ch.; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; see also titles AGENCY, Vol. I., p. 211; MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.* As to the general principles of liability, see title TORT.

(*b*) *R.* v. *Medley* (1834), 6 C. & P. 292; *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702; see *Niven* v. *Greaves* (1890), 54 J. P. 548; and see title MASTER AND SERVANT, Vol. XX., pp. 256, 257, 258.

(*c*) *Bolingbroke* v. *Swindon Local Board* (1874), L. R. 9 C. P. 575; see title MASTER AND SERVANT, Vol. XX., pp. 254, 255.

(*d*) See *Foreman* v. *Canterbury Corporation* (1871), L. R. 6 Q. B. 214; *Pendlebury* v. *Greenhalgh* (1875), 1 Q. B. D. 36, C. A.; compare *Taylor* v. *Greenhalgh*

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of local authorities acting in the capacity of surveyors of highways, who are not liable for nuisance caused by nonfeasance in that capacity (*e*).

(f) *Joint Nuisances.*

Effect of joint nuisances.

**959.** A nuisance which arises by the joint action of two or more persons will be restrained by the court, although the act of any one of them would only result in an inappreciable inconvenience or damage and be insufficient in itself to constitute a nuisance in law (*f*). So, where the discharge of chemicals into a sewer or stream is innocuous until they combine with other chemicals in the sewer or stream, the persons guilty of each such discharge are nevertheless severally guilty of committing a nuisance (*g*).

SUB-SECT. 3.—*Damages.*

Claim for damages.

**960.** The person injured by a nuisance may bring an action against the tortfeasor, and may claim damages for the injury either alone or in conjunction with a claim for an injunction (*h*).

Measure.

**961.** The damages should be such as to compensate for whatever loss results to the plaintiff as a direct and natural consequence of the wrongful act (*i*).

(1874), L. R. 9 Q. B. 487; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648, C. A. As to the general liability of corporations for tort, see title CORPORATIONS, Vol. VIII., pp. 386 *et seq.* As to proceedings against public bodies generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*e*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 132, 133; LOCAL GOVERNMENT, Vol. XIX., p. 290.

(*f*) *Lambton* v. *Mellish*, *Lambton* v. *Cox*, [1894] 3 Ch. 163 (noise, although the amount of noise made by one was not of itself sufficient to constitute an actionable nuisance); *Thorpe* v. *Brumfitt* (1873), 8 Ch. App. 650 (obstruction of access); *Sadler* v. *Great Western Rail. Co.*, [1896] A. C. 450; *Blair and Sumner* v. *Deakin*, *Eden and Thwaites* v. *Deakin* (1887), 52 J. P. 327 (pollution of stream); *Nixon* v. *Tynemouth Union Rural Sanitary Authority* (1888), 52 J. P. 504 (a similar case); *Hendon Union Guardians* v. *Bowles* (1869), 20 L. T. 609; and see, generally, title TORT.

(*g*) *St. Helens Chemical Co.* v. *St. Helens Corporation* (1876), 1 Ex. D. 196; *Blair and Sumner* v. *Deakin*, *Eden and Thwaites* v. *Deakin*, *supra*; see *Brown* v. *Bussell* (1868), L. R. 3 Q. B. 251; and see, further, p. 571, *post*.

(*h*) As to damages generally, see title DAMAGES, Vol. X., pp. 317 *et seq.* As to injunctions, see p. 560, *post*.

(*i*) *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836, C. A.; *Collins* v. *Middle Level Commissioners* (1869), L. R. 4 C. P. 279. This will not include the cost of restoring the premises to their original condition (*Jones* v. *Gooday* (1841), 8 M. & W. 146), nor the injury to the amenities of a house by reason of the fouling of a neighbouring stream; but it will include the expense of securing a new water supply, and of a new engine to take the place of one rendered useless (*Harrington* (*Earl*) v. *Derby Corporation*, [1905] 1 Ch. 205). It will not include loss of profit and extra cost incurred by a contractor in executing work under a roadway, the soil of which belonged to the person engaging the contractor, where the work has been delayed owing to the leak of a pipe belonging to a water company, even assuming that there was any liability on the part of the company to anyone (*Cattle* v. *Stockton Waterworks* (1875), L. R. 10 Q. B. 453). If, as the result of the nuisance, the plaintiff has been dispossessed of the premises, he may recover not only the value of the term which he has lost, but also the expense of removing to other premises (*Grosvenor Hotel Co.* v. *Hamilton*, *supra*).

**962.** Upon proof that there has been in law an invasion of the plaintiff's right by the act or omission of the defendant, the plaintiff is entitled to nominal damages, even though no actual damage be proved. The law presumes damage in such a case (*j*) because a continuance of the nuisance might eventually destroy the plaintiff's right (*k*). Nominal damages.

Exemplary damages may be given if the circumstances warrant them, as, for example, where the defendant has wilfully acted with the intention of injuring the defendant (*l*). Exemplary damages.

**963.** Where a reversioner sues, the damages awarded should be the amount by which the value of the reversion is lessened by the injury (*m*), but he cannot recover loss of rent due to the existence of prejudice against the neighbourhood arising from fear of a recurrence of the nuisance, nor compensation for the diminution which a temporary nuisance may cause in the present selling value (*a*). Damages for reversioner.

**964.** Where the wrongful act is complete, the damages must be awarded once and for all, and no further action can be brought on subsequent loss resulting from that wrongful act (*b*). Finality of award.

**965.** All damages must be assessed down to the time when Period of assessment.

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(*j*) As to the presumption of damage in the case of a public nuisance, see pp. 509, 510, *ante*.

(*k*) *Wells* v. *Watling* (1778), 2 Wm. Bl. 1233 (right of common); *Hobson* v. *Todd* (1790), 4 Term Rep. 71 (a similar case); *Pindar* v. *Wadsworth* (1802), 2 East, 154 (a similar case); *Bealey* v. *Shaw* (1805), 6 East, 208 (alteration of flow of water); *Williams* v. *Morland* (1824), 2 B. & C. 910 (a similar case); *Bower* v. *Hill* (1835), 1 Bing. (N. C.) 549 (obstruction of watercourse); *Fay* v. *Prentice* (1845), 1 C. B. 828 (cornice overhanging premises); *Wood* v. *Waud* (1849), 3 Exch. 748 (pollution of water); *Kidgill* v. *Moor* (1850), 9 C. B. 364 (right of way); *Embrey* v. *Owen* (1851), 6 Exch. 353 (interference with flow of water); *Northam* v. *Hurley* (1853), 1 E. & B. 665 (diversion of stream); *Medway River Navigation Co.* v. *Romney (Earl)* (1861), 9 C. B. (N. S.) 575 (abstraction of water); *Sampson* v. *Hoddinott* (1857), 1 C. B. (N. S.) 590 (detention of water); *Norbury (Earl)* v. *Kitchin* (1866), 15 L. T. 501 (obstruction of stream); *Harrop* v. *Hirst* (1868), L. R. 4 Exch. 43 (abstraction of water); *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.* (1874), 9 Ch. App. 451 (a similar case); *M'Glone* v. *Smith* (1888), 22 L. R. Ir. 559 (obstructing water); *Nixon* v. *Tynemouth Union Rural Sanitary Authority* (1888), 52 J. P. 504. Where a plaintiff has obtained an injunction he may have nominal damages, although not claimed in the action, as in acknowledgment of the wrong done to him (*Lipman* v. *Pulman & Sons, Ltd.* (1904), 91 L. T. 132; see also title DAMAGES, Vol. X., p. 305).

(*l*) *Emblen* v. *Myers* (1860), 6 H. & N. 54; *Bell* v. *Midland Rail. Co.* (1861), 10 C. B. (N. S.) 287; *Thompson* v. *Hill* (1870), L. R. 5 C. P. 564; but *quære* whether exemplary damages can be given when the defendant is not the actual wrongdoer but is made liable on the principle of *respondeat superior* (*Black* v. *North British Rail. Co.*, [1908] S. C. 444, *per* Lord DUNEDIN (Lord President), at p. 454); and see title DAMAGES, Vol. X., p. 306.

(*m*) *Hosking* v. *Phillips* (1848), 3 Exch. 168.

(*a*) *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113, C. A.

(*b*) *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Harrington (Earl)* v. *Derby Corporation*, [1905] 1 Ch. 205; *Carey* v. *Bermondsey Metropolitan Borough Council* (1903), 67 J. P. 111; see *Offin* v. *Rochford Rural Council*, [1906] 1 Ch. 342; *Crawford* v. *Hornsea Steam Brick and Tile Co.* (1876), 45 L. J. (CH.) 432, C. A.; and see title DAMAGES, Vol. X., p. 306.

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the assessment is made (*c*), and this rule applies to continuing nuisances (*d*).

In case of continuing nuisances.

**966**. A continuing nuisance is one in which the wrongful act or omission is repeated or continues. In such cases there is a new nuisance each day (*e*), and the cause of action continues *de die in diem* (*f*). The recovery of damages for the erection of the nuisance does not amount to a grant of a licence to continue it, and subsequent actions may be brought for the continuance, and substantial damages may be awarded in them (*g*); and, although in the original action nominal damages might suffice, the measure of damages in subsequent actions may be the amount which the jury think sufficient to compel the defendant to abate the nuisance (*h*).

SUB-SECT. 4.—*Injunction.*

General principles.

**967**. The principles upon which the court acts in granting or refusing injunctions generally apply to injunctions claimed in respect of nuisance (*i*).

When granted.

**968**. As a rule, and subject to legal and equitable defences (*k*), an injunction will be granted to restrain the continuance of a nuisance where the injury done by it is substantial (*l*), or where, however slight the damage may be, the nuisance is a continuing or recurring one, so that it would give rise to a series of actions if no injunction were granted (*m*), or where the defendant claims the

(*c*) R. S. C., Ord. 36, r. 58.

(*d*) *Hole* v. *Chard Union*, [1894] 1 Ch. 293, C. A.; and, as to the running of time in such a case, see title LIMITATION OF ACTIONS, Vol. XIX., p. 52.

(*e*) *Roswell* v. *Prior* (1702), 12 Mod. Rep. 635; and see cases cited in notes (*f*), (*g*), *infra*. As to the meaning of the expression "in case of continuance of injury or damage" in the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, see *Carey* v. *Bermondsey Metropolitan Borough Council* (1903), 67 J. P. 111; *Harrington (Earl)* v. *Derby Corporation*, [1905] 1 Ch. 205; *Hague* v. *Doncaster Rural District Council* (1908), 25 T. L. R. 130; see *A.-G.* v. *Lewes Corporation*, [1911] 2 Ch. 495; and see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*f*) *Hole* v. *Chard Union*, *supra*; *Hague* v. *Doncaster Rural District Council*, *supra*.

(*g*) *Shadwell* v. *Hutchinson* (1831), 2 B. & Ad. 97; *Battishill* v. *Reed* (1856), 18 C. B. 696; see title DAMAGES, Vol. X., p. 310.

(*h*) *Battishill* v. *Reed*, *supra*. The diminution in the selling value of the property is not the proper measure where subsequent actions may be brought (*ibid.*; see title DAMAGES, Vol. X., p. 341); and see p. 559, *ante*.

(*i*) See title INJUNCTION, Vol. XVII., p. 199. As to perpetual injunctions, see *ibid.*, p. 206; as to damages in lieu of injunctions, see *ibid.*, p. 212; as to mandatory injunctions, see *ibid.*, p. 215; as to interlocutory injunctions, see *ibid.*, p. 217; as to acquiescence and delay, see *ibid.*, pp. 210, 219, 220, 221.

(*k*) See, generally, title INJUNCTION, Vol. XVII., pp. 197 *et seq.*

(*l*) *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *A.-G.* v. *Nichol* (1809), 16 Ves. 338; *Wilson* v. *Townend* (1860), 1 Drew. & Sm. 324; *Grand Junction Canal Co.* v. *Shugar* (1871), 6 Ch. App. 483; *Thorpe* v. *Brumfitt* (1873), 8 Ch. App. 650; *Lambton* v. *Mellish*, *Lambton* v. *Cox*, [1894] 3 Ch. 163; *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133.

(*m*) *A.-G.* v. *Sheffield Gas Consumers Co.*, *supra*; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125, 142; *A.-G.* v. *Birmingham Borough Council* (1858), 4 K. & J. 528, 540; see *A.-G.* v. *Lewes Corporation*, *supra*.

right to continue the conduct complained of (*n*), or threatens to do so (*o*).

When right to commit is claimed.

Where the right to do the act complained of is claimed and an undertaking is refused, the inference will be drawn that a repetition of the nuisance is intended, and an injunction will be granted (*p*).

When not granted.

**969.** As a rule, an injunction to restrain the continuance of an alleged nuisance will not be granted when the damage caused by the nuisance is trivial or not serious (*q*), or when it is of a temporary or occasional character (*r*), or when the injury can be adequately compensated by damages (*s*).

Prospective nuisance.

**970.** An injunction may be granted to restrain the commission of a prospective nuisance (*a*). To obtain such an injunction it is necessary to show a strong case of probability that the apprehended mischief will in fact arise (*b*). If imminent danger of a substantial kind be shown, or should it appear that the apprehended danger, if it comes, will be irreparable, an injunction will be granted (*c*). An injunction to restrain the erection of a hospital for infectious diseases will only be granted when there is real danger to health and property (*d*); in the present state of science, the establishment of a small-pox

Illustrations.

(*n*) *Roberts* v. *Gwyrfai District Council*, [1899] 1 Ch. 583; *A.-G.* v. *Preston Corporation* (1896), 13 T. L. R. 14; *A.-G.* v. *Acton Local Board* (1882), 22 Ch. D. 221; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1873), L. R. 7 H. L. 697.

(*o*) *Potts* v. *Levy* (1854), 2 Drew. 272. Where there is no nuisance existing, and no threat or intention to use the property in such a manner as to lead to a nuisance is expressed, an injunction will not as a rule be granted (*Cowley* (*Lord*) v. *Byas* (1877), 5 Ch. D. 944, C. A.; see also *North Eastern Rail. Co.* v. *Crossland* (1862), 2 John. & H. 565).

(*p*) *Phillips* v. *Thomas* (1890), 62 L. T. 793.

(*q*) *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *Wandsworth Board of Works* v. *London and South Western Rail. Co.* (1862), 31 L. J. (CH.) 854; *Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705.

(*r*) *Swaine* v. *Great Northern Rail. Co.* (1864), 4 De G. J. & Sm. 211, C. A.; *A.-G.* v. *Preston Corporation* (1896), 13 T. L. R. 14; *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166 (an injunction was refused in respect of the escape of noxious fumes where the escape was shown to be accidental, and to have happened on two or three occasions only, and the defendants had taken careful precautions toward preventing it). As to the liability for escape of noxious fumes, see p. 529, *ante*.

(*s*) See *A.-G.* v. *Sheffield Gas Consumers Co.*, *supra*; *Haines* v. *Taylor* (1846), 10 Beav. 75; *Wood* v. *Sutcliffe* (1851), 2 Sim. (N. S.) 163.

(*a*) See cases cited in notes (*b*)—(*d*), *infra*, and (*e*)—(*g*), p. 562, *post*; *Dawson* v. *Paver* (1847), 5 Hare, 415; *Elwell* v. *Crowther* (1862), 31 Beav. 163; *A.-G.* v. *Kingston-on-Thames Corporation* (1865), 34 L. J. (CH.) 481.

(*b*) *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87.

(*c*) *Fletcher* v. *Bealey* (1885), 28 Ch. D. 688; *Haines* v. *Taylor*, *supra*; *Ripon* (*Earl*) v. *Hobart* (1834), 3 My. & K. 169.

(*d*) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193; *Bendelow* v. *Wortley Union Guardians* (1887), 57 L. T. 849 (injunction granted on the ground that there was appreciable injury to plaintiff's property); *Fleet* v. *Metropolitan Asylums District* (*Managers*) (1884), 1 T. L. R. 80; affirmed (1886), 2 T. L. R. 361, C. A. (injunction refused on failure to show danger to health or property); *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673; *A.-G.* v. *Manchester Corporation*, *supra*; *A.-G.* v. *Rathmines and Pembroke Joint Hospital Board*, [1904] 1 I. R. 161

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hospital will not be assumed to be a serious source of danger so as to constitute a nuisance for which an injunction will be granted in a *quia timet* action (*e*).

Evidence necessary.

**971.** It is not sufficient merely to allege that the proposed acts of the defendant will have an illegal result as against the plaintiff, without putting before the court sufficient material to enable it to judge of that question for itself (*f*). Where some degree of present nuisance exists, the court will take into account its probable continuance and increase, and its present existence raises a presumption of its continuance (*g*). As between adjoining owners, the court will consider whether the defendant is using his property reasonably or not

Effect of motive.

**972.** Though the motive with which the act alleged to be a nuisance is done does not alter its character (*i*), the motive which actuates the person who brings the proceedings to restrain acts alleged to be a nuisance is to be considered in determining whether an injunction should or should not be granted (*j*).

Nuisance ceasing since action brought.

**973.** The court will refuse to grant an injunction to restrain obstruction of the right of access to premises, caused by crowds attending a theatre, when the nuisance existed at the time of action brought but has since ceased owing to the intervention of the police (*k*). A declaration that the defendant is not entitled to commit the act complained of is sometimes made instead of granting an injunction (*l*), but, where damage to property has been proved, the rule appears to be that the plaintiff is entitled to an injunction notwithstanding that the defendants have ceased the nuisance after the commencement of the action (*m*).

SUB-SECT. 5.—*Defences.*

(i.) *What may be Defences.*

General description.

**974.** An act or omission which in itself may constitute a nuisance may be prevented from having that consequence in law on account of some other matter which is successfully pleaded as an answer to an action brought in respect of the act or omission.

Statutory authority.

The act or omission may have been specifically authorised by statute, and may, therefore, not be actionable, but the defence of statutory authority cannot be successfully raised unless it can be

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(*e*) *A.-G.* v. *Nottingham Corporation*, [1904] 1 Ch. 673; *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87. As to relief in the nature of a *quia timet* action, see title EQUITY, Vol. XIII., p. 52.

(*f*) *Haines* v. *Taylor* (1847), 2 Ph. 209.

(*g*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349; *Phillips* v. *Thomas* (1890), 62 L. T. 793.

(*h*) *Sanders-Clerk* v. *Grosvenor Mansions Co., Ltd., and G. D'Allessandri*, [1900] 2 Ch. 373; and see pp. 526, 528, *ante*, and cases cited in note (*b*), p. 531, *ante*.

(*i*) See p. 510, *ante*; and, as to motive, see title TORT.

(*j*) *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *A.-G.* v. *Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *Harris* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, 414; *Christie* v. *Davy*, [1893] 1 Ch. 316.

(*k*) *Barber* v. *Penley*, [1893] 2 Ch. 447.

(*l*) *Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 84 L. T. 765.

(*m*) *Chester* (*Dean and Chapter*) v. *Smelting Corporation, Ltd.* (1901), 85 L. T. 67 (in this case the company had, since action, gone into liquidation).

shown that the act was within the powers conferred by the statute (*n*).

Prescriptive right.

Again, a prescriptive right may have been acquired (*o*), but it cannot be successfully set up (*p*), where, during the period of user, the nuisance complained of has not been actionable or preventable by the plaintiff (*q*), or where the nuisance is appreciably in excess of the right acquired (*r*), or is materially different in character from that for which the right is acquired (*s*); nor can a prescriptive right be acquired in respect of a public nuisance

Self-protection against extraordinary danger.

**975.** Again, an owner or occupier is entitled to protect his land against an extraordinary danger which threatens it, even though he thus makes it necessary for his neighbour either to take similar measures or to put up with the consequences of not doing so (*u*). But an owner or occupier is not entitled either to prevent

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(*n*) *Jones* v. *Festiniog Rail. Co.* (1868), L. R. 3 Q. B. 733 (liability for damage caused by a spark from a locomotive engine, the use of which was not authorised by the statute); *Roberts* v. *Haines* (1856), 6 E. & B. 643; affirmed (1857), 7 E. & B. 625, Ex. Ch. (subsidence caused under purported exercise of statutory rights); *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434 (interference with subsoil beyond statutory powers); *London and North Western Railway* v. *Westminster Corporation*, [1904] 1 Ch. 759, C. A.; reversed by the House of Lords on the facts, but not on the principle of law, [1905] A. C. 426, 432. As to the exercise of statutory powers, see pp. 516 *et seq.*, *ante*.

(*o*) *Mason* v. *Hill* (1833), 5 B. & Ad. 1; *Wright* v. *Williams* (1836), 1 M. & W. 77; *Bealey* v. *Shaw* (1805), 6 East, 208; *Carlyon* v. *Lovering* (1857), 1 H. & N. 784, 797; *Holker* v. *Porritt* (1875), L. R. 10 Exch. 59, Ex. Ch.; and see cases cited in titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256 *et seq.*, 327; WATERS AND WATERCOURSES. As to how far a local authority can acquire a right to pollute streams, see *A.-G.* v. *Luton Local Board of Health* (1856), 2 Jur. (N. S.) 180; *Rigby* v. *Bristol Corporation* (1860), 29 L. J. (EX.) 359, 364; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (1866), 1 Ch. App. 349. It is difficult to see how such a right can now be acquired having regard to the express statutory provisions against it; see titles SEWERS AND DRAINS.

(*p*) As to the prescriptive right which is essential to a successful plea, where the injury is an increasing one, *e.g.*, increase in impurity of stream, see *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, *supra*, affirming S. C. (1865), L. R. 1 Eq. 161; *Brown* v. *Dunstable Corporation*, [1899] 2 Ch. 378, 387.

(*q*) *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, C. A. The failure to complain of noise for twenty years does not bar the right to complain where it has been increased, even though slightly (*Heather* v. *Pardon* (1877), 37 L. T. 393).

(*r*) *Brown* v. *Best* (1747), 1 Wils. 174; *Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478; *Metropolitan Board of Works* v. *London and North Western Rail. Co.* (1881), 17 Ch. D. 246, C. A.; *A.-G.* v. *Acton Local Board* (1882), 22 Ch. D. 221; *Blackburne* v. *Somers* (1879), 5 L. R. Ir. 1; *Frechette* v. *La Compagnie Manufacturière de St. Hyacinthe* (1883), 9 App. Cas. 170, P. C.

(*s*) *McIntyre Brothers* v. *McGavin*, [1893] A. C. 268; *Baxendale* v. *McMurray* (1867), 2 Ch. App. 790; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648; *Clarke* v. *Somersetshire Drainage Commissioners* (1888), 57 L. J. (M. C.) 96.

(*t*) See p. 512, *ante*.

(*u*) *R.* v. *Pagham Commissioners of Sewers* (1828), 8 B. & C. 355 (erecting groynes to protect property from inroads by the sea); *Nield* v. *London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4 (damming a canal to protect banks against flood-water); see *Thomas* v. *Birmingham Canal Co.* (1880), 45 J. P. 21 (opening sluices in a heavy rainfall to protect a canal); *Ridge* v. *Midland Rail. Co.* (1888), 53 J. P. 55; *Dewey* v. *White* (1827), Mood. & M. 56; *Maxey Drainage Board* v. *Great Northern Rail. Co.* (1912), 76 J. P. (Journal) 63 (embankment to protect property from flood-water); and see *Greyvensteyn* v. *Hattingh*, [1911] A. C. 355, P. C. (driving away locusts).

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injury to his own property by diverting a natural stream, whether tidal or not, or the accustomed flow of flood-water, from its accustomed channel so as to throw it and its destructive effects on to his neighbour's land (*a*); or to rid himself of the consequences of a misfortune already suffered by diverting them to his neighbour's detriment (*b*).

*Vis major*; act of God; act of stranger.

Though a person who brings things on to his land likely to do injury if allowed to escape must ordinarily keep them at his peril (*c*), he can excuse himself by showing that the escape was due to *vis major* or the act of God (*d*), or to the act of a stranger which there was no duty on the part of the defendant to foresee and guard against (*e*).

(ii.) *What are not Defences.*

Illustrations.

**976.** Where, after taking all the circumstances into consideration, an annoyance is such as to amount to a nuisance, it cannot be justified on the ground that the place is a suitable or convenient one for the performance of the act which occasions the nuisance (*f*); or that it arises from the carrying on of a trade, lawful in itself and properly conducted, for purposes necessary and beneficial to the community (*g*); or that it arises from the defendant's use of his own property in a common and useful manner and for his own convenience (*h*); or that the character of the neighbourhood has changed since the trade giving rise to the nuisance was established (*i*); or that the nuisance, being a public one, has been authorised by the Crown (*k*), or by a local authority (*k*), unless it has statutory powers to authorise it (*l*); or that a prescriptive right has been acquired to commit it (*m*); or that the benefit to the

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(*a*) *Menzies* v. *Breadalbane (Earl)* (1828), 3 Bli. (N. S.) 414; *R.* v. *Trafford* (1831), 1 B. & Ad. 874; (1832), 8 Bing. 204, Ex. Ch.; see *Bickett* v. *Morris* (1866), L. R. 1 Sc. & Div. 47, *per* Lord CHELMSFORD, L.C., at p. 56; and see title WATERS AND WATERCOURSES.

(*b*) *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q. B. D. 131, C. A.

(*c*) See p. 528, *ante*.

(*d*) *Nichols* v. *Marsland* (1875), L. R. 10 Exch. 255; affirmed (1876), 2 Ex. D. 1, C. A.; *Tubervil* v. *Stamp* (1697), 1 Salk. 13; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; and see titles NEGLIGENCE, pp. 467 *et seq.*, *ante*; TORT.

(*e*) *Box* v. *Jubb* (1879), 4 Ex. D. 76; *Rylands* v. *Fletcher* (1866), L. R. 1 Exch. 265, Ex. Ch.; *Wilson* v. *Newberry* (1871), L. R. 7 Q. B. 31; *Barker* v. *Herbert*, [1911] 2 K. B. 633, C. A.; see *Gill* v. *Edouin* (1894), 71 L. T. 762; and see titles NEGLIGENCE, pp. 467 *et seq.*, *ante*; TORT.

(*f*) *Bamford* v. *Turnley* (1862), 3 B. & S. 62, 66, Ex. Ch., overruling *Hole* v. *Barlow* (1858), 4 C. B. (N. S.) 334; *Cavey* v. *Ledbitter* (1863), 13 C. B. (N. S.) 470; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; and see pp. 527, 532, *ante*.

(*g*) *R.* v. *Pierce* (1683), 2 Show. 327; *Stockport Waterworks Co.* v. *Potter* (1861), 7 H. & N. 160; *Scott* v. *Firth* (1864), 10 L. T. 240; *Elliotson* v. *Feetham* (1835), 2 Bing. (N. C.) 134; *West* v. *White* (1877), 46 L. J. (CH.) 333; and see p. 533, *ante*.

(*h*) *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315; and see p. 526, *ante*.

(*i*) *A.-G.* v. *Cole & Son*, [1901] 1 Ch. 205; and see pp. 528, 531, 533, *ante*.

(*k*) See p. 512, *ante*.

(*l*) See pp. 512, 516 *et seq.*, *ante*.

(*m*) See title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 256 *et* and see p. 563, *ante*.

public far exceeds the disadvantage (*n*); or that the plaintiff has come to the nuisance (*o*); or that similar nuisances already exist in the locality when it is shown that the defendant materially increases the existing nuisance (*p*); or that the plaintiff himself has committed a nuisance (*q*); or that the nuisance complained of was done to prevent the plaintiff from reaping the benefit of a wrong which he had done to defendant (*r*); or that the act of the defendant was in itself harmless until combined with the acts of others (*s*); or that others were in fault in not having done their duty (*t*).

## SECT. 4.—*Summary Proceedings.*

### SUB-SECT. 1.—*In General.*

Statutory penalties.

**977.** Apart from special provisions relating to nuisances which are made summarily abatable (*a*) under the Public Health Acts (*b*), penalties in respect of statutory nuisances or for breach of orders

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(*n*) *R.* v. *Ward* (1836), 4 Ad. & El. 384, overruling in effect *R.* v. *Russell* (1827), 6 B. & C. 566; *Beardmore* v. *Tredwell* (1862), 3 Giff. 683; *R.* v. *Train* (1862), 2 B. & S. 640; *R.* v. *Morris* (1830), 1 B. & Ad. 441; *A.-G.* v. *Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *A.-G.* v. *Basingstoke Corporation* (1876), 45 L. J. (CH.) 726; *A.-G.* v. *Terry* (1874), 9 Ch. App. 423; *A.-G.* v. *Mid-Kent Rail. Co. and South-Eastern Rail. Co.* (1867), 3 Ch. App. 100; *Raphael* v. *Thames Valley Rail. Co.* (1867), 2 Ch. App. 147.

(*o*) *Tipping* v. *St. Helens Smelting Co.* (1865), 1 Ch. App. 66; *Elliotson* v. *Feetham* (1835), 2 Bing. (N. C.) 134; *Bliss* v. *Hall* (1838), 4 Bing. (N. C.) 183; *Mousley* v. *Hutchinson* (1838), 7 L. J. (C. P.) 122, n.; see also *Barber* v. *Penley*, [1893] 2 Ch. 447, 449; *A.-G.* v. *Manchester Corporation*, [1893] 2 Ch. 87, 95; *London and Brighton Rail. Co.* v. *Truman* (1885), 11 App. Cas. 45, 52; *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409, 413; *Sander* v. *Manley and Rogers*, [1878] W. N. 181; *Shotts Iron Co.* v. *Inglis* (1882), 7 App. Cas. 518; and, as to coming to a nuisance, see also pp. 531, 532, 533, *ante*.

(*p*) *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409; *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166, 172; *Polsue and Alfieri, Ltd.* v. *Rushmer*, [1907] A. C. 121; *Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478; *A.-G.* v. *Leeds Corporation* (1870), 5 Ch. App. 583; *R.* v. *Neil* (1826), 2 C. & P. 485; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705; and see pp. 531, 532, *ante*.

(*q*) *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339.

(*r*) *Ibbotson* v. *Peat* (1865), 3 H. & C. 644.

(*s*) *Harrison* v. *Great Northern Rail. Co.* (1864), 3 H. & C. 231; and see p. 558, *ante*.

(*t*) *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111; *Wettor* v. *Dunk* (1864), 4 F. & F. 298; *Bell* v. *Twentyman* (1841), 1 Q. B. 766; see *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146. As to proceedings under the Public Health Acts (see note (*b*), *infra*), see *St. Helens Chemical Co.* v. *St. Helens Corporation* (1876), 1 Ex. D. 196 (where the local authority was held entitled to take proceedings, although itself in fault in not flushing the sewers); compare *Fordom* v. *Parsons*, [1894] 2 Q. B. 780; *Wincanton Rural Council* v. *Parsons*, [1905] 2 K. B. 34. In *A.-G.* v. *Scott*, [1904] 1 K. B. 404, C. A., it was held that it was no answer to a motion by the Attorney-General for an interim injunction to allege that the damage to a road by a traction engine would not have occurred but for the neglect of the relators to keep the road in proper repair. The court for this purpose assumed that a nuisance had been committed. On the hearing of the action it was found that the nuisance had not been committed by the defendant (*A.-G.* v. *Scott*, [1905] 2 K. B. 160, C. A.).

(*a*) As to such nuisances, see pp. 536, 537, *ante*, and as to the proceedings thereon, see pp. 566 *et seq.*, *post*.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76).

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relating thereto may generally be recovered by proceedings in courts of summary jurisdiction (*c*), subject to any exceptional provisions in the particular statute which deals with a particular nuisance (*d*).

SUB-SECT. 2.—*In Case of Nuisances made Summarily Abatable.*

Information.

**978**. Outside the Metropolis, information of the existence of those nuisances which are summarily abatable (*e*) may be given by any person aggrieved, or by two inhabitant householders, or by an officer of the local authority, or by the relieving officer, or by the police (*f*). In London, any person may, and every officer of the local authority (*g*) and every relieving officer must, give information in accordance with regulations (*h*); and official preliminary intimation in writing of the existence of the nuisance must be given to the person responsible for it (*i*).

Notice to abate.

**979**. Notice to abate (*k*) an existing nuisance must be served (*l*)

(*c*) See title MAGISTRATES, Vol. XIX., pp. 567, 571 *et seq.*

(*d*) For provisions in the Public Health Acts relating generally to the recovery and application of penalties, see titles METROPOLIS, Vol. XX., pp. 467, 468; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) For a list of these, see pp. 537 *et seq.*, *ante*.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 93. As to the local authority, see titles LOCAL GOVERNMENT, Vol. XIX., pp. 266, 292, 313, 331, 371, 375, 385; METROPOLIS, Vol. XX., p. 408; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*g*) See title METROPOLIS, Vol. XX., pp. 409, 452 *et seq.*

(*h*) The local authority is required to make such regulations, and to give directions to its officers, so as to secure that nuisances may be brougt to the notice of offenders (Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 3; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION).

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 3. As to the person responsible, see p. 567, *post*. No provision is made in the Public Health Act, 1875 (38 & 39 Vict. c. 55), for the giving of such a preliminary intimation, though one is sometimes given. As to its effect, when given, upon the right of an occupier to recover money spent under it as having been paid under legal compulsion, see *North* v. *Walthamstow Urban District Council* (1898), 62 J. P. 836; *Haedicke* v. *Friern Barnet Urban District Council* (1904), 20 T. L. R. 567; *Ellis* v. *Bromley Rural District Council* (1899), 81 L. T. 224; and see title CONTRACT, Vol. VII., pp. 468, 478. A person who acts merely upon a preliminary intimation given under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 3, acts voluntarily and not under legal compulsion, and cannot recover the expenses of so doing from the person liable therefor; see *Thompson and Norris Manufacturing Co., Ltd.* v. *Hawes* (1895), 73 L. T. 369, C. A.; *Proctor* v. *Islington Metropolitan Borough* (1903), 67 J. P. 164; *Harris* v. *Hickman*, [1904] 1 K. B. 13; *Oliver* v. *Camberwell Borough Council* (1904), 68 J. P. 165; and compare p. 567, *post*.

(*k*) For forms of notice, see Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. IV., Form A; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), Sched. III., Form A; Encyclopædia of Forms and Precedents, Vol. VI., p. 413, Vol. X., pp. 472, 544, 596—599. As to authentication of notices, see respectively Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 266; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 127. The notice may be addressed to "the owner" or "the occupier" of the premises, without his name or further description (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 128 (3)).

(*l*) As to service, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 128; title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

by, or by the direction of (*m*), the sanitary authority upon the person responsible (*n*), requiring him to abate the nuisance within the time (*o*) specified in the notice, and to do such things as may be necessary for that purpose (*p*). Outside the Metropolis the notice must (*q*), and in London it may (*r*), specify the works to be executed. In London, a notice designed to prevent the recurrence of the nuisance may be given either in the abatement notice or separately, and it may be given although the nuisance has been abated if recurrence is likely (*s*).

Appeal.

Outside the Metropolis an appeal lies from an abatement notice to the Local Government Board (*t*). No appeal is provided for under the statute relating to the Metropolis.

Person to be served.

**980.** The person responsible, and who is therefore to be served with the abatement notice, is primarily the person by whose act, default, or sufferance the nuisance arises or continues (*u*), subject to the following exceptions:—(1) If such person cannot be found, the notice is to be served on the owner or occupier (*a*) of the

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(*m*) It cannot be given by the officer on his own initiative; see *St. Leonard Vestry* v. *Holmes* (1885), 50 J. P. 132.

(*n*) See the text, *infra*.

(*o*) The time must be specified, but a notice to abate forthwith is good (*Thomas* v. *Nokes* (1894), 58 J. P. 672; *Thomas* v. *Western Steam Trawling Co.* (1894), 59 J. P. 232).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (1), (3).

(*q*) *R.* v. *Wheatley* (1885), 16 Q. B. D. 34; *Millard* v. *Wastall*, [1898] 1 Q. B. 342. Under similar provisions in the Public Health Act, 1848 (11 & 12 Vict. c. 63), it was held that the power to determine the nature and extent of the works was vested in the local board, and that the justices had no power to review the determination of the board in proceedings for penalties for non-compliance with notices (*Hargreaves* v. *Taylor* (1863), 3 B. & S. 613). The proper remedy is by way of appeal to the Local Government Board; see the text, *infra*. It must be noticed that the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96, empowers the court to make an order requiring the respondent "to comply with all or any of the requisitions of the notice" (see pp. 568, 569, *post*), and this provision contemplates that the justices may consider the necessity or advisability of the works which the local authority has required (see *R.* v. *Llewellyn* (1884), 13 Q. B. D. 681). Where a local board had undertaken the cleansing of privies and, after typhoid fever, had failed to eradicate the germs of disease in the brickwork, it was held that the board could not, under proceedings for the nuisance thereby arising, call upon the owner to abolish the privies and substitute water-closets (*Barnett* v. *Laskey* (1898), 63 J. P. 5).

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (1).

(*s*) *Ibid.*, s. 4 (2). For an instance of a recurring nuisance, see *Draper* v. *Sperring* (1861), 10 C. B. (N. S.) 113; see p. 555, *ante*. It is not necessary that there should have been a previous notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) s. 4 (1), to abate the nuisance, or that the notice under *ibid.*, s. 4 (2), should include a notice under *ibid.*, s. 4 (1) (*Central London Rail. Co.* v. *Hammersmith Borough Council* (1904), 90 L. T. 645).

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 268. As to the Local Government Board, see title CONSTITUTIONAL LAW, Vol. VII, pp. 103, 104.

(*u*) Public Health Act, 1875 (38 & 39 Vict. 55), s. 94; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). s. 4 (1); see p. 554, *ante*.

(*a*) The authority may proceed against either, with the exception that they must proceed only against the owner where the nuisance arises from structural defects (see p. 568, *post*); but in neither case is he liable unless the nuisance arises or continues by his act etc. (*River Thames Conservators* v. *Port of London Port Sanitary Authority*, [1894] 1 Q. B. 647).

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premises, unless it is clear that neither of these is the defaulter, in which case the local authority may abate the nuisance (*b*), and, in London, may do what is necessary to prevent its recurrence (*c*); (2) in any case in which the nuisance arises from the want or defective construction of any structural convenience (*d*), or where there is no occupier of the premises, the owner is the person to be served (*e*).

Proceedings on default.

**981.** If the abatement notice is not complied with, or if the nuisance, although abated, is likely to recur, summary proceedings must be taken by the authority before the justices (*f*), who may make one of three orders hereafter described (*g*), and, outside the Metropolis, may in addition impose penalties, and must give directions as to costs (*h*). In London, penalties may be imposed, whether a nuisance order is made or not, upon any person from whose wilful act or default the nuisance arose, or upon any person who makes default in complying with the requisitions of the abatement notice within the time specified (*i*).

Orders :—

**982.** Orders made under the Public Health Act, 1875 (*k*), must be signed by two justices (*l*).

Abatement orders.

**983.** An abatement order may require compliance with all or any of the requisitions of the abatement notice, or otherwise require the abatement of the nuisance, within a time specified in the order (*m*), and, outside the Metropolis, may order all works necessary for that purpose to be done (*n*).

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (1), (3) (b).

(*c*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (3) (b).

(*d*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (3) (a), the expression in the latter being any "want or defect of a structural character"; and see *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (3) (a); *River Thames Conservators* v. *Port of London Port Sanitary Authority*, [1894] 1 Q. B. 647. As to the definition of owner, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 95; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (1). The complaint may be addressed to "the owner" of the premises, naming them, without further name or description (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 267; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 128 (3); *R.* v. *Mead*, [1894] 2 Q. B. 124). For forms of summons, see Public Health Act, 1875 (38 & 39 Vict. c. 55), Sched. IV., Form B.; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), Sched. III., Form B. See also title MAGISTRATES, Vol. XIX., pp. 593 *et seq.*

(*g*) *I.e.*, an abatement, prohibition, or closing order; see the text, *infra*, and p. 569, *post*.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96.

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4 (4).

(*k*) 38 & 39 Vict. c. 55.

(*l*) *Wing* v. *Epsom Urban Council*, [1904] 1 K. B. 798.

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (3). An order may be partly good and partly bad, in which case it may stand as to the former part though quashed as to the latter (*R.* v. *Horrocks, Ex parte Boustead* (1900), 64 J. P. 661).

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96.

A prohibition order prohibits the recurrence of the nuisance (*o*), and outside the Metropolis it may direct the execution of any works necessary to prevent recurrence (*p*).

Prohibition order.

Every order made under the Public Health Act, 1875 (*q*), which requires works or things to be done, must specify the particular works and things to be done, otherwise it is invalid (*r*); but the specification is not necessary when the nuisance is such as not to require any works (*s*). The respondent is not entitled to have an alternative inserted in the order (*t*). The justices have absolute power to specify the works, structural or otherwise, which in their discretion they think necessary (*u*). In London, the necessary works are to be specified only when the respondent desires such specification, or the court thinks it desirable (*v*).

Specification of works required.

Closing orders.

A closing order prohibits a dwelling-house from being used for human habitation (*w*). It can only be made when unfitness of the house for that purpose is shown (*x*), and there is no obligation to make it, except in London (*y*). It may be rescinded on fitness being proved to the satisfaction of the court (*z*).

Nuisance order directed to an authority.

**984.** Where the person responsible (*a*) cannot be found, or the owner or occupier is not known or cannot be found, the nuisance order may be directed to, and must then be executed by, the sanitary authority (*b*).

Defences.

**985.** It is no defence to the summary proceedings for the respondent to allege that he has a right to do the things which ultimately result in the nuisance. His rights as against other

Health Act, 1875 (38 & 39 Vict. c. 55), s. 96; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (4).

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 96.

(*q*) 38 & 39 Vict. c. 55.

(*r*) *R.* v. *Wheatley* (1885), 16 Q. B. D. 34. This rule applies also where the complaint is lodged by a private individual (*R.* v. *Horrocks, Ex parte Boustead* (1900), 64 J. P. 661).

(*s*) *Millard* v. *Wastall*, [1898] 1 Q. B. 342.

(*t*) *Whitaker* v. *Derby Urban Sanitary Authority* (1885), 2 T. L. R. 68, where it was sought to have inserted the words "or otherwise necessary to abate the nuisance."

(*u*) *R.* v. *Kent Justices* (1885), 49 J. P. 404; *Whitaker* v. *Derby Urban Sanitary Authority, supra;* compare *Ex parte Whitchurch* (1881), 6 Q. B. D. 545, where the point was doubted; *Ex parte Saunders* (1883), 11 Q. B. D. 191; *R.* v. *Llewellyn* (1884), 13 Q. B. D. 681; and see note (*q*), p. 567, *ante.*

(*v*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (5).

(*w*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 97; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (6). Closing orders must also be made under the Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 17; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*x*) As to the effect of the absence from a dwelling-house of proper water fittings, or of a proper and sufficient water supply, see p. 539, *ante*, and notes (*c*)—(*e*), *ibid.*

(*y*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 97; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (7). Under the latter a fine may also be imposed.

(*z*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 97; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (8).

(*a*) As to the "person responsible," see p. 567, *ante.*

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 100; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 8. As to the sanitary authority, see note (*f*), p. 566, *ante;* title PUBLIC HEALTH AND LOCAL

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persons are immaterial, and the proceedings will not be stayed pending the determination of private disputes (*c*).

Inability to obey and execute the order without committing a trespass may be a good defence, and an order involving the commission of a trespass will probably be quashed (*d*).

The fact that the complaining local authority has contributed to the nuisance does not exonerate the individual who also occasions the nuisance (*e*); but if the nuisance is really caused by the neglect of the sanitary authority to do its duty, for example, to provide a proper and effective system of sewers, the authority cannot, it would seem, successfully proceed against a householder exercising his legal rights (*f*).

Who may complain of nuisance.

**986.** Besides the local authority, any person aggrieved, or any inhabitant or any owner of premises in the district, may, outside the Metropolis, complain to the justices of the existence of a nuisance (*g*), and, in London, any person may do so (*h*). In all such cases the proceedings, their incidents and consequences, are the same as if the complaint had been lodged by the local authority (*i*). But the court may adjourn the summons for an examination of the premises and may authorise entry for that purpose. The court may also authorise a constable or other person to do the necessary works and to recover the expenses from the party on whom the order is made (*k*), and such person then has the same powers as an officer of the local authority (*l*).

Complaint against local authority.

A private individual may also make a complaint against a local authority in respect of a nuisance committed by it, but the court has no jurisdiction to entertain a complaint in respect of a nuisance caused by sewage works of the authority (*m*).

Nuisance outside district.

**987.** Proceedings may be taken in respect of nuisances outside the district of the local authority, whether a metropolitan district or

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(*c*) *Brown* v. *Bussell* (1868), L. R. 3 Q. B. 251; *Riddell* v. *Spear* (1879), 40 L. T. 130.

(*d*) *Scarborough Corporation* v. *Scarborough Rural Sanitary Authority* (1876), 1 Ex. D. 344; *R.* v. *Trimble* (1877), 36 L. T. 508; *Letterkenny Town Commissioners* v. *Collins* (1891), 28 L. R. Ir. 235; compare *Parker* v. *Inge* (1886), 17 Q. B. D. 584, which seems irreconcilable. The defence does not avail under the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19; see *Lancaster* v. *Barnes District Council*, [1898] 1 Q. B. 855, and title SEWERS AND DRAINS. As to the effect of an "owner" ceasing to be such during the proceedings, see *Broadbent* v. *Shepherd*, [1901] 2 K. B. 274.

(*e*) *St. Helens Chemical Co.* v. *St. Helens Corporation* (1876), 1 Ex. D. 196.

(*f*) *Molloy* v. *Gray* (1889), 24 L. R. Ir. 258; see *Kirkheaton Local Board* v. *Beaumont* (1888), 52 J. P. 68; *Fordom* v. *Parsons*, [1894] 2 Q. B. 780; compare *Kinson Pottery Co.* v. *Poole Corporation*, [1899] 2 Q. B. 41; *Graham* v. *Wroughton*, [1901] 2 Ch. 451, C. A.; and see title SEWERS AND DRAINS.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 105.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 12 (1).

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 105; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 12 (1).

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 105; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 12 (2).

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 105; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 12 (3).

(*m*) *R.* v. *Parlby* (1889), 22 Q. B. D. 520; *Fulham Vestry* v. *London County Council*, [1897] 2 Q. B. 76.

otherwise, but they must be taken in the district where the nuisance exists (*n*).

SECT. 4. Summary Proceedings.

Joint nuisance.

**988.** Proceedings may be instituted against two or more persons who wholly or partially cause a nuisance. They may be included in one proceeding. Orders and fines may be made against or imposed upon one, some, or all according to requirements, and the costs distributed as the court thinks fair and reasonable. Proceedings do not abate on the death of any of such persons. Any legal right of contribution amongst them is not affected, and persons who have been proceeded against may recover a proportionate part of the expenses from those persons responsible who have not been proceeded against (*o*).

Appeals: (i.) outside London; (ii.) in London.

**989.** Outside the Metropolis, an appeal lies from an order of justices to the court of quarter sessions (*p*), and in the meantime proceedings and liability to penalties remain in abeyance (*q*).

In London, the same right of appeal and of stay is given (*r*), but only where the nuisance order is or includes a prohibition or closing order, or requires the execution of structural works (*s*). Upon the appeal being dismissed or abandoned the appellant becomes liable to a daily penalty during non-compliance with the order, unless he satisfies the court before whom proceedings are taken for the fine that there was substantial ground for the appeal, and that it was not brought for the purpose of delay. The court of quarter sessions may impose the fine when dismissing an appeal (*t*).

Abatement pending appeal.

If the petty sessional court in London thinks that the nuisance will be injurious or dangerous to health, and that immediate abatement will not cause any injury which cannot be compensated by damages, the court may order the authority to abate the nuisance, notwithstanding the appeal. If the appeal is successful the authority must pay compensation; if unsuccessful or abandoned, the authority may recover the expenses of the abatement (*a*).

Penalties for non-compliance with orders.

**990.** In case of non-compliance with the order of the justices, daily penalties may be imposed on persons during default, unless it can be shown that they have used all due diligence to carry out

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(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 108; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 14.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 255; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 120; see also *ibid.*, s. 11 (2); and *Nathan* v. *Rouse*, [1905] 1 K. B. 527; and see p. 558, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 269; see title MAGISTRATES, Vol. XIX., pp. 642 *et seq.*

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 99. There is no appeal from a Divisional Court to the Court of Appeal (*R.* v. *Whitchurch* (1881), 7 Q. B. D. 534, C. A.), nor from a refusal by the former court to grant an order *nisi* for a mandamus to magistrates to state a case (*Ex parte Schofield*, [1891] 2 Q. B. 428, C. A.); see title CROWN PRACTICE, Vol. X., p. 124.

(*r*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 6 (1), 125.

(*s*) *Ibid.*, s. 6 (2).

(*t*) *Ibid.*, s. 6 (3).

(*a*) *Ibid.*, s. 6 (4).

SECT. 4. Summary Proceedings.

Inability to obey orders.

the order. Double penalties are imposed for knowingly and wilfully acting contrary to prohibition orders (*b*).

The defence of having used all due diligence will avail an owner of premises, who has been unable to abate a nuisance existing on lands to which he has no right of access without permission of the occupier, when he has done his best to obtain such permission but has failed (*c*).

Where an order directs an owner to abate a nuisance, and in his default directs the local authority to do so, the owner is none the less liable to penalties because the local authority has failed to carry out the order (*d*).

Power or duty of authority to enter and abate after order made.

**991.** Where an order has been obtained for the abatement of a nuisance and has been disobeyed, it is competent to the authority after conviction to enter the premises and abate the nuisance (*e*). But this is a power and not a duty, so that a mandamus cannot be obtained to compel the authority to abate the nuisance (*f*). It may, however, outside the Metropolis, form the subject of complaint to the Local Government Board (*g*). In London, the metropolitan borough councils, but not the City Corporation, may be compelled to proceed by the London County Council, or by the Local Government Board after complaint made to the Board by the County Council (*h*). Where the City authority is in default an officer of the City police or some other person appointed may proceed on the authority of the Local Government Board (*i*).

Power to enter and examine.

**992.** Beyond the power to enter premises and abate a nuisance after disobedience of a nuisance order, the local authority has powers of entry and examination at limited hours for the purpose of ascertaining whether a nuisance exists, or whether, after a nuisance order has been made, and so long as it remains unexecuted, it is being obeyed (*k*).

Proceedings when admission refused.

**993.** In the event of refusal of admission, any justice on complaint (*l*) thereof on oath by any officer of the authority outside the

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(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 98; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (9).

(*c*) *Parker* v. *Inge* (1886), 17 Q. B. D. 584.

(*d*) See *Tomlins* v. *Great Stanmore Nuisance Removal Committee* (1865), 12 L. T. 118.

(*e*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 98; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 5 (9). Power is given to sell any materials removed and to apply the proceeds to the expenses and costs (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 101; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 9).

(*f*) *Re Ham Board of Health, Ex parte Bassett* (1857), 3 Jur. (N. S.) 136; see title CROWN PRACTICE, Vol. X., p. 97.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299.

(*h*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 100, 101, 133; see title METROPOLIS, Vol. XX., p. 409.

(*i*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 134, 135; see title METROPOLIS, Vol. XX., p. 469.

(*k*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 102; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 10.

(*l*) For form of notice of intention to complain, see Encyclopædia of Forms and Precedents, Vol. X., pp. 470, 545.

Metropolis, made after reasonable notice in writing of the intention to make the entry has been given to the person having the custody of the premises (*m*), may order the person having such custody to allow the admission, or if there be no person having such custody, an order may be made authorising entry. Any such order operates until the nuisance has been abated or the work for which the entry was necessary has been done; and refusal to allow entry under order renders the offender liable to penalties (*n*). The applicant for an order must show some reason why entry is necessary (*o*).

Orders for entry.

The power of the justices to make orders for entry is discretionary, and if made the order should be in such form as to show the particular matter to which it has reference (*p*). Without a justices' order the local authority has no right of entry against the will of the occupier (*q*).

Powers of entry in London.

In London, similar general powers of entry are given. The person claiming right of entry must, if required, produce some written document, properly authenticated, showing his right to enter (*r*). Any person refusing or failing to admit anyone who is authorised and claims to enter is liable to a penalty not exceeding £5 if the entry is for the purpose of giving effect to a magistrate's order, and is so stated in the document above mentioned or is claimed by an officer of the authority; or if the refusal or failure is with intent to prevent the discovery of some contravention of the statute or a bye-law under it; or is declared by the statute conferring the right of entry to render the person refusing or failing subject to a fine. Beyond this, a warrant may be granted authorising entry, and by force if necessary, with heavy penalties in case of default. The warrant remains in force until the purpose for which entry is required has been satisfied (*s*).

Costs and expenses of proceedings.

**994.** Costs and expenses of the proceedings are deemed to be money paid for the use and at the request of the person on whom any order is made or, where no order is made, of the person by whose act or default the nuisance arose. They are recoverable in a court of summary jurisdiction (*t*), or in a county court (*u*), or in the High Court (*v*). If the owner (*w*) is liable for them they may

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(*m*) For form of notice of intended entry, see Encyclopædia of Forms and Precedents, Vol. X., p. 543.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 102, 103.

(*o*) *Vines* v. *North London Collegiate and Camden Schools for Girls* (1899), 63 J. P. 244.

(*p*) *Wimbledon Urban District Council* v. *Hastings* (1902), 87 L. T. 118.

(*q*) *Consett Urban Council* v. *Crawford*, [1903] 2 K. B. 183.

(*r*) For a form of authority, see Encyclopædia of Forms and Precedents, Vol. X., pp. 543, 545.

(*s*) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 115; and see cases cited in notes (*o*), (*q*), *supra*. As to the power to enter tents, vans, sheds, and the like used for human habitation when overcrowding or infectious disease is suspected, see Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 95 (3).

(*t*) See title MAGISTRATES, Vol. XIX., p. 567.

(*u*) See title COUNTY COURTS, Vol. VIII., p. 678.

(*v*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 11.

(*w*) See the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; and see

SECT. 4. Summary Proceedings.

be recovered from any owner for the time being (*a*), subject, outside the Metropolis, to their not exceeding a year's rack-rent (*b*) of the premises. They may, where the owner is liable (*c*), be recovered from the occupier of the premises (*d*), who may deduct the amount actually paid (*e*) from his rent, but he is not to be liable to pay more than the amount of rent due from him after the demand of such costs and expenses, or after notice not to pay his landlord any rent without first satisfying the costs and expenses (*f*). This limitation as to amount does not apply if he refuses to disclose the name and address of his landlord. The court may apportion the payment among persons who have jointly caused the nuisance (*g*). Contracts between landlords and tenants are protected (*h*).

SUB-SECT. 3.—*Indictment.*

Public nuisance a misdemeanour.

**995.** Every public nuisance is a misdemeanour at common law and the subject of indictment (*i*), and this procedure is not ousted unless it is clearly barred by the express or clearly implied terms of a statute (*k*). At the trial the court may order the abatement of the nuisance (*l*).

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Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 141; title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*a*) See *Plumstead Board of Works* v. *Ingoldby* (1873), L. R. 8 Exch. 63, 174, Ex. Ch.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104; see title LANDLORD AND TENANT, Vol. XVIII., p. 478.

(*c*) If the notice to abate a structural nuisance was served on the occupier only and not on the owner, the provisions as to deductions do not apply (*Butcher* v. *Ruth* (1887), 22 L. R. Ir. 380).

(*d*) The fact that the local authority has an unsatisfied judgment against the owner is no defence in proceedings against the occupier (*Bermondsey Vestry* v. *Ramsey* (1871), L. R. 6 C. P. 247).

(*e*) *Ryan* v. *Thompson* (1868), L. R. 3 C. P. 144. As to the effect on a right of distress, see *Skinner* v. *Hunt*, [1904] 2 K. B. 452, C. A.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 121 (a). For form of demand and notice, see Encyclopædia of Forms and Precedents, Vol. X., p. 475.

(*g*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 11 (2); see *Reeve* v. *Sadler* (1903), 67 J. P. 63; *Nathan* v. *Rouse*, [1905] 1 K. B. 527.

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 104; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 121 (b).

(*i*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 329.

(*k*) See 2 Hawk. P. C., c. 25, s. 4; *R.* v. *Hall*, [1891] 1 Q. B. 747, where the subject is fully discussed.

(*l*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 412.

# NULLITY OF MARRIAGE.

*See* CONFLICT OF LAWS; HUSBAND AND WIFE.

# NUNCUPATIVE WILLS.

*See* EXECUTORS AND ADMINISTRATORS; ROYAL FORCES; WILLS.

# OATH AND AFFIRMATION.

*See* CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE; ELECTIONS; EVIDENCE; JURIES; LOCAL GOVERNMENT; MAGISTRATES; PARLIAMENT; PRACTICE AND PROCEDURE; SOLICITORS.

# OATH OF ALLEGIANCE.

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# OFFICIAL RECEIVER.

*See* BANKRUPTCY AND INSOLVENCY; COMPANIES; PARTNERSHIP; RECEIVERS.

# OFFICIAL REFEREE.

*See* COURTS.

# OFFICIAL SECRETS.

*See* CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

# OFFICIAL SOLICITOR.

*See* COURTS.

# OFFICIAL TRUSTEES OF CHARITABLE FUNDS.

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# OLD AGE PENSIONS.

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# OLD METAL DEALERS.

*See* CRIMINAL LAW AND PROCEDURE; TRADE AND TRADE UNIONS.

# OLD STYLE.

*See* TIME.

# OMNIBUSES.

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# OPEN SPACES AND RECREATION GROUNDS.

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# Part I.—Preliminary.

## SECT. 1.—*Definitions.*

Definitions.

**996.** The term "open space," as dealt with in this title, means an open space upon which building is restricted or prohibited.

The term "recreation ground," as dealt with in this title, means a recreation ground the establishment or regulation of which is provided for by law (*a*).

## SECT. 2.—*Jus Spatiandi.*

Common law right.

**997.** There can be no common law right in the public or customary right in the inhabitants of a particular place to stray over

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(*a*) There are five kinds of open spaces and recreation grounds: (1) public recreation grounds or open spaces, over which the public have a right to go for recreation (as to allotments for recreation grounds under the Inclosure Acts, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 591 *et seq.*); (2) private recreation grounds, over which certain persons only have similar rights; (3) commons (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 441 *et seq.*); (4) sanitary open spaces, upon which buildings are prohibited for sanitary reasons (compare title METROPOLIS, Vol. XX., pp. 481 *et seq.*); (5) open spaces devoted to purposes inconsistent with building operations, such as burial grounds (see title BURIAL AND CREMATION, Vol. III., pp. 401 *et seq.*), highways (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 1 *et seq.*), markets (see title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*), the foreshore (see title WATERS AND WATERCOURSES), and the like; and see pp. 601, 602, *post*. As to offences in connection with open spaces and recreation grounds under the Larceny Act, 1861 (24 & 25 Vict. c. 96), and the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 637 *et seq.*, 768 *et seq.*, 774, 782, 791. As to betting in public gardens, see *ibid.*, p. 551; title GAMING AND WAGERING, Vol. XV., pp. 292, 293. For offences in roads and squares under the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and as to the offence of injuriously affecting a public park or promenade by advertisements under the Advertisements Regulation Act, 1907 (7 Edw. 7, c. 28), s. 2 (2), see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; see also title STREET AND AERIAL TRAFFIC. As to offences arising from electric generating stations, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 565, 566. As to destructive insects, see title AGRICULTURE, Vol. I., pp. 280, 281.

SECT. 2. Jus Spatiandi.

an open space or to remain on that space for such purposes as they may think proper—*jus spatiandi vel manendi* (*b*).

The only common law right of the kind which can be claimed by the public is to pass and repass from one point to another across an open space (*c*), and the only customary right of the kind which can be claimed by the inhabitants of a particular place is to play lawful games upon an open space (*d*).

## SECT. 3.—*Exemptions.*

Licences in mortmain.

**998.** Certain open spaces are exempt from the provisions of various Acts, as follows:—

(1) Local authorities having power by statute to acquire land for open spaces and recreation grounds, whether alone or jointly with another authority (*e*), can hold such land without licence in mortmain (*f*). The provision of a public open space or recreation ground is a charitable object (*g*).

Compulsory purchase.

(2) No part of any park, garden or pleasure ground may be compulsorily acquired under the Small Holdings and Allotments Act, 1908 (*h*), under the Housing of the Working Classes Acts, 1890—1909 (*i*), or under the Development and Road Improvement Funds Act, 1909 (*k*).

(3) No open space may be compulsorily acquired under the Housing, Town Planning, etc. Act, 1909 (*l*), or under the Development and Road Improvement Funds Act, 1909 (*m*), except (i.) in exchange (*n*) for other land approved, under the former Act (*l*), by the Local Government Board (*o*), and, under the latter Act (*m*), by the

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(*b*) *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188, *per* FARWELL, J., at pp. 198, 206; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517, 519; and see title TRESPASS.

(*c*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49 *et seq.*

(*d*) See p. 583, *post*.

(*e*) Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), s. 1.

(*f*) See titles CHARITIES, Vol. IV., pp. 124 *et seq.*, 132, 137 *et seq.*, 263; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 163 *et seq.*; CORPORATIONS, Vol. VIII., pp. 367 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., pp. 267, 318, 364; METROPOLIS, Vol. XX., pp. 455 *et seq.* As to acquisition of suburban commons, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 598.

(*g*) See also the definition of a "parochial charity" in the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 75 (2). As to the enactments to be complied with on such acquisition or provision, see title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*h*) 8 Edw. 7, c. 36, s. 41. Woodlands not wholly surrounded by or adjacent to land acquired under the Act are also exempt (*ibid.*). As to the other provisions of this Act, see titles ALLOTMENTS, Vol. I., pp. 331 *et seq.*; SMALL HOLDINGS AND SMALL DWELLINGS.

(*i*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45. See, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*k*) 9 Edw. 7, c. 47, s. 5 (2).

(*l*) 9 Edw. 7, c. 44, s. 73.

(*m*) 9 Edw. 7, c. 47, s. 5.

(*n*) Public notice must be given of the proposed exchange, and the order effecting it must provide for the transfer of all private and public rights over the lands exchanged (*ibid.*, s. 19 (2), (3); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 73 (2), (3)).

(*o*) *Ibid.*, s. 73 (1).

Board of Agriculture and Fisheries (*p*), or (ii.) with the express consent of Parliament, or (iii.) for the construction or improvement of roads in rural districts (*q*).

(4) The Development Commissioners (*r*) cannot acquire part of an open space lying on either side of a new road to be constructed by the Road Board (*s*).

Land duties.

(5) Parks, gardens and open spaces, which are open to the public as of right, and those to which the public have access, if such access is in the opinion of the Inland Revenue Commissioners of public benefit, and certain other land intended to be kept unbuilt on, are not liable to undeveloped land duty (*t*).

Rates.

(6) Land *bonâ fide* used for games or other recreation is exempt from undeveloped land duty (*u*) and, if held by a corporation without a view to profit, from increment value duty (*v*).

(7) An open space which has been irrevocably dedicated to the public for the purposes of recreation, and cannot be let or used so as to produce a substantial profit, is *extra commercium*, and so exempt from rating and such charges as private street works expenses (*w*), but an open space the dedication of which is not irrevocable, or which can be so let or used, is not *extra commercium* (*x*).

## SECT. 4.—*Offences.*

Offences and prohibitions.

**999.** The statutory offences or prohibitions relating to places of public resort, and offences relating to open spaces and recreation grounds, are dealt with elsewhere (*y*).

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(*p*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 19 (1). An "open space" is any land laid out as a public garden or used for the purposes of public recreation, or a disused burial ground (*ibid.*, s. 19 (4); Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 73 (4)); compare p. 584, *post*.

(*q*) *Ibid.*, s. 73 (1); Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 19 (1). See, further, titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 28, 48, 94, 106, 201; PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the application of the purchase-money for a recreation ground acquired compulsorily, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 495 *et seq.*

(*r*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 94; REVENUE.

(*s*) Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 19 (1) (c). As to the Road Board, see titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 28, 48, 94, 106, 201; REVENUE.

(*t*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 16, 17 (3) (a); see, further, title REVENUE.

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 17 (3) (d).

(*v*) *Ibid.*, s. 9.

(*w*) *Great Eastern Rail. Co.* v. *Hackney Board of Works* (1883), 8 App. Cas. 687, *per* Lord WATSON, at p. 693; *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625 (the Brockwell Park case); *Liverpool Corporation* v. *West Derby Union Assessment Committee* (1905), 3 L. G. R. 647; *London County Council* v. *Wandsworth Borough Council*, [1903] 1 K. B. 797, C. A.; *Hampstead Corporation* v. *Midland Railway*, [1905] 1 K. B. 538, C. A.

(*x*) *Herne Bay Urban Council* v. *Payne and Wood*, [1907] 2 K. B. 130; *Pontefract Assessment Committee* v. *Pontefract Park Trustees, The Same* v. *Hartley* (1898), 78 L. T. 738, C. A.; *Lincoln (Mayor)* v. *Holmes Common* (1867), L. R. 2 Q. B. 482, C. A. See, further, titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 218, 219; RATES AND RATING.

(*y*) As to offences against public order, see title CRIMINAL LAW AND

# Part II. Establishment, Maintenance, and Regulation.

## SECT. 1.—*Royal Parks.*

SECT. 1. **Royal Parks.**

Royal parks.

**1000.** All Royal parks, gardens and possessions of which the management for the time being is vested in the Commissioners of Works (*a*) are regulated by statute (*b*), subject to the rights of the Crown and the Commissioners and any officer or servant appointed by them (*c*).

They (*d*) are protected from injury and the public therein secured from annoyance by regulations (*e*), some of which are to be read with reference to rules made by the ranger of the park or by the Commissioners (*f*).

Rules and regulations.

**1001.** The rules must be approved by Parliament (*g*), and must also comply with the conditions of the Rules Publication Act, 1893 (*h*). They may contain a power to make further regulations on particular subjects, and such further regulations need not (*i*) be approved by Parliament, or made or published in accordance with the Rules Publication Act, 1893

PROCEDURE, Vol. IX., pp. 537 (indecency), 551 (betting), 553, 554 (drunkenness); as to larceny, see *ibid.*, pp. 637, 638; as to malicious damage, see *ibid.*, pp. 774 *et seq.*, 781 *et seq.*; as to offences under the Vagrancy Acts, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537; POOR LAW; as to poaching, see title GAME, Vol. XV., pp. 228 *et seq.*; as to diseased persons, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION; as to nuisances, see titles NUISANCE, pp. 503 *et seq.*, *ante*; PUBLIC HEALTH AND LOCAL ADMINISTRATION; as to dogs, see title ANIMALS, Vol. I., pp. 394 *et seq.*; as to wild birds protection, see *ibid.*, pp. 405 *et seq.*; as to the construction of telegraph lines over public recreation grounds, see title TELEGRAPHS AND TELEPHONES; and see note (*a*), p. 579, *ante*.

(*a*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 133, 134, 137. At the date of the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), the list of parks in the regulation of the Commissioners of Works was varied by the omission of Chelsea Garden, Treasury Garden, Kew, Richmond, and Hampton Court Roads, and by the inclusion of Kennington Park (*ibid.*, preamble, Sched. II.). By Order in Council dated 28th March, 1907, the management of Kew Gardens was transferred to the Board of Agriculture and Fisheries. As to a recent alteration of the boundaries of St. James' Park, see The National Gallery and St. James' Park Act, 1911 (1 & 2 Geo. 5, c. 23), ss. 1—4. As to the leasing of Royal parks for military purposes, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 201, 202; ROYAL FORCES.

(*b*) Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 2.

(*c*) *Ibid.*, s. 13. The Act (*ibid.*, s. 11) is not to interfere with rights of way or other rights, nor (*ibid.*, s. 14) with the application of the provisions of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134). By the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 3, all Royal parks within the Metropolitan area under the management for the time being of the Commissioners of Works are public places within that Act; see title STREET AND AERIAL TRAFFIC; and see note (*a*), *supra*.

(*d*) *I.e.*, parks to which the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), applies.

(*e*) *Ibid.*, s. 4, Sched. I. The regulations must be put up in the park for the information of persons using the park (*ibid.*, s. 10).

(*f*) *Ibid.*, Sched. I. (19). The matters to which the rules may relate are set out in *ibid.*, Sched. I. (1)—(4), (7), (8), (11), (12).

(*g*) *Ibid.*, s. 9. As to the proof of rules, see *ibid.*, Sched. I. (20).

(*h*) 56 & 57 Vict. c. 66; see title STATUTES.

(*i*) *Musgrave* v. *Kerrison* (1905), 3 L. G. R. 932.

SECT. 1. Royal Parks.

Offences.

**1002.** A park-keeper (*k*) in uniform may arrest persons offending against the park regulations, where such offences are committed in the park and within the view of such keeper, provided he does not know and cannot ascertain the offender's name and address (*l*). A park-keeper has, in addition (*m*), within the park, all the powers of a police constable within the district in which the park lies (*n*). He must obey all lawful commands of the Commissioners (*o*).

Penalties, recoverable summarily (*p*), are provided for breach of the rules (*q*), and for assaulting a park-keeper in the execution of his duty (*r*).

Sanction in special cases.

**1003.** Where land situate within a prescribed (*s*) distance of a Royal palace or park is proposed to be acquired, or included in a scheme, under the Housing, Town Planning, etc. Act, 1909 (*t*), the Local Government Board (*u*) must, before sanctioning the scheme or acquisition, communicate with the Commissioners of Works (*v*) and consider their recommendations (*w*).

## SECT. 2.—*Village Greens.*

Village green.

**1004.** The expression "village green" (*x*), or, as it is sometimes called, "town green," has not been defined by Act of Parliament. The essential characteristic is that the inhabitants of the particular locality have an immemorial customary right (*a*) to use it for exercise and recreation, including the playing of lawful games (*b*). The custom must be reasonably exercised by those entitled to it (*c*).

Vesting.

**1005.** A village green may not be inclosed under the Inclosure

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(*k*) As defined by the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 3.

(*l*) Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 5. The penalty for giving a false name and address is a fine not exceeding £5, recoverable summarily (*ibid.*).

(*m*) *Ibid.*, s. 12.

(*n*) *Ibid.*, s. 7. As to these powers, see *ibid.*, s. 8, and title POLICE.

(*o*) Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 7.

(*p*) See title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*q*) Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 4. The penalty is a fine not exceeding £5 (*ibid.*).

(*r*) *Ibid.*, s. 6. The penalty is a fine not exceeding £20. In default of payment, the offender is liable to imprisonment (*ibid.*).

(*s*) *I.e.*, prescribed by regulations made by the Local Government Board after consultation with the Commissioners of Works (Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 74 (2)).

(*t*) 9 Edw. 7, c. 44.

(*u*) *Ibid.*, s. 74; see, further, titles CONSTITUTIONAL LAW, Vol. VII., pp. 103, 104; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*v*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 133, 134.

(*w*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 74.

(*x*) As to the origin and management of village greens, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 493, 542, 589 *et seq.*

(*a*) As to custom generally, see title CUSTOM AND USAGES, Vol. X., pp. 217 *et seq.*

(*b*) *Warrick* v. *Queen's College, Oxford* (1870), L. R. 10 Eq. 105, 129 (use of green "as a place of pastime by the inhabitants of the parish"); *Mounsey* v. *Ismay* (1863), 1 H. & C. 729 (use of piece of land by freemen and citizens of a town for horse races).

(*c*) *Fitch* v. *Fitch* (1797), 2 Esp. 543 (to spoil cut hay in enjoyment of the right is unreasonable).

SECT. 2. Village Greens.

Act, 1845 (*d*), but may be vested in the churchwardens and overseers, or, in a rural district, in the parish council (if any), or (if none) the chairman of the parish meeting and the overseers, in trust for use as a recreation ground

Offences.

**1006.** Persons causing any injury to or nuisance upon or interruption to the use of village greens are liable to penalties under the Inclosure Act, 1857 (*f*), and the Commons Act, 1876 (*g*).

Exemptions.

**1007.** A village green is a common under Part I. of the Commons Act, 1899 (*h*), and has the same right of partial exemption from compulsory acquisition under housing and town planning schemes and development or road improvement schemes as commons and open spaces (*i*).

Local authorities.

**1008.** A parish council has the same powers over a village green, if it is under the control of the council, as an urban district council has under the Public Health Acts (*j*) over open spaces and public walks (*k*), and the Corporation of the City of London has certain powers of acquiring, preserving, and managing village greens (*l*).

### SECT. 3.—*Open Spaces under the Open Spaces Act*, 1906.

Definition.

**1009.** An open space under the Open Spaces Act, 1906 (*m*), is any land, inclosed or not, either not built on or of which not more than one-twentieth part is built on, and the whole or remainder of which is laid out as a garden, or is used for purposes of recreation, or lies waste and unoccupied (*n*).

Application.

The Open Spaces Act, 1906 (*m*), has no application (*o*) to the Royal parks (*p*) or to land belonging to the Crown or Duchy of Lancaster (*q*), or to any garden or ornamental ground or land managed by the Commissioners of Works or the Commissioners under the Crown Estate Paving Act, 1851 (*r*), or to commons under

(*d*) 8 & 9 Vict. c. 118.

(*e*) *Ibid.*, ss. 15, 73; Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 14; see also Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (2) (c), 19 (3).

(*f*) 20 & 21 Vict. c. 31, s. 12.

(*g*) 39 & 40 Vict. c. 56, s. 29.

(*h*) 62 & 63 Vict. c. 30, s. 15; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 611 *et seq.*

(*i*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 73 (4); Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 19 (4); see pp. 580, 581, *ante*.

(*j*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 164, 183—186; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 41; see pp. 586 *et seq.*, *post*.

(*k*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8.

(*l*) See p. 601, *post*.

(*m*) 6 Edw. 7, c. 25.

(*n*) *Ibid.*, s. 20; compare note (*p*), p. 581, *ante*.

(*o*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 19.

(*p*) See pp. 582, 583, *ante*.

(*q*) As to which see title CONSTITUTIONAL LAW, Vol. VII., pp. 217 *et seq.*, 273 *et seq.*

(*r*) 14 & 15 Vict. c. 95.

SECT. 3. Open Spaces under the Open Spaces Act, 1906.

the Metropolitan Commons Acts (*s*), or to land belonging to the Inner Temple or Middle Temple (*t*).

Conveyance by statutory trustees.

**1010.** The trustees or persons charged, by private or local Act of Parliament, with the management of an open space as a garden or open space may (*a*), for or without consideration, with the consent of certain adjoining owners or occupiers (*b*), and, in certain cases, of the freeholder (*c*), signified by special resolution (*d*), convey (*e*) or lease (*f*) the same to the local authority (*g*), or agree with such authority for the care and management thereof (*h*), for the enjoyment of the same by the public.

The trustees may admit persons not being adjoining owners or occupiers (*i*), and have the same powers of making bye-laws as to such admission as the committee of the inhabitants of a square (*k*).

Effect of conveyance.

**1011.** Such a conveyance, grant, or agreement, if in accordance with the statutory provisions (*l*), is a good execution of the powers and duties of the trustees, and, if a conveyance of their entire interest or transfer of the entire care and management, is a complete discharge of their trusts, powers, and duties in relation thereto (*m*).

Consideration.

**1012.** Any consideration received for the grant or transfer is to be held upon the same trusts as the open space, or to be applied

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(*s*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 606 *et seq.*

(*t*) See title BARRISTERS, Vol. II., pp. 357 *et seq.*

(*a*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 2 (1).

(*b*) An "owner" in relation to an open space (not being a burial ground) is any person in whom the open space is vested for an estate in possession during his life or for any larger estate; and, in relation to a house, includes any person entitled to any term of years in the house. An "occupier" in relation to a house is the person rated to the relief of the poor in respect of the house (*ibid.*, s. 20); see also p. 586, *post*. For the definitions of "local authorities," "open space," "building," "burial ground," "disused burial ground," and "owner" (in relation to a burial ground), see title BURIAL AND CREMATION, Vol. III., pp. 533, 534, notes (*d*), (*e*). As to the effect of the repeal referred to in *ibid.*, note (*d*), see the Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 23 (b).

(*c*) *Ibid.*, s. 2 (2).

(*d*) As to special resolutions, see *ibid.*, s. 8 (1). As to the meetings of trustees and owners and occupiers, see *ibid.*, s. 8 (2), (5).

(*e*) *Ibid.*, s. 2 (1) (a).

(*f*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 2 (1) (b).

(*g*) As to local authorities in London, see pp. 598 *et seq.*, *post*.

(*h*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 2 (1) (c). The powers of local authorities to accept such grants or leases, and to undertake such management, and make bye-laws therefor, and their duties in respect of maintenance, and liability to pay compensation, are the same as in the case of a burial ground; see *ibid.*, ss. 9, 10, 12, 13, 15, 16, and title BURIAL AND CREMATION, Vol. III., pp. 542 *et seq*. County councils have power to acquire lands for, and to contribute to the maintenance of, public walks or pleasure grounds (Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 14).

(*i*) *Ibid.*, s. 2 (1) (d).

(*k*) *Ibid.*, s. 15 (3), applying the Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 4; see p. 594, *post*. For a series of forms of notices, resolutions, agreements and conveyances prepared for use under the Acts in force prior to the Open Spaces Act, 1906 (6 Edw. 7, c. 25), see Encyclopædia of Forms and Precedents, Vol. IX., pp. 72 *et seq*.

(*l*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 2 (3).

(*m*) *Ibid.*, s. 2 (4).

SECT. 3.

**Open Spaces under the Open Spaces Act, 1906.**

to the objects to which any rates previously imposed in respect of the open space were applied (*n*).

Non-statutory trustees.

**1013.** Land held by trustees (not being trustees under a local or private Act of Parliament) upon trusts for public recreation may be transferred to a local authority as a free gift, absolutely or for a term (*o*). Such land may be held by the local authority (subject to an obligation to use it for public recreation) as an open space (*p*), and must be held by it on the trusts subject to which the trustees held the same, or on such other agreed trusts as may be approved by the Charity Commissioners (*q*).

Corporations.

**1014.** Corporations other than municipal corporations (*r*) may, subject to any consents made necessary by statute or otherwise, convey open spaces belonging to them to a local authority upon agreed terms (*s*).

Private owners.

**1015.** The owner of an open space, including a person having a term of years or other limited interest therein, subject to rights of user for exercise and recreation by adjoining owners or occupiers, has, subject to their consent, powers of conveying and leasing and entering into agreements for the care and management of the open space similar to those of trustees under an Act of Parliament (*t*).

Expenses of local authorities.

**1016.** Expenses incurred by local authorities under the foregoing provisions are to be defrayed as follows:—(1) By county councils out of the county fund (*a*), or out of money borrowed under the Local Government Act, 1888 (*b*); (2) by metropolitan borough councils as expenses of the council (*c*), or out of money borrowed as for the purposes of the Metropolis Management Acts, 1855—1893 (*d*); (3) by municipal boroughs or urban district councils as

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(*n*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 2 (5).

(*o*) *Ibid.*, s. 3 (1). A special resolution is required (*ibid.*; and see *ibid.*, s. 8 (1).

(*p*) *Ibid.*, s. 3 (2).

(*q*) *Ibid.*, s. 3 (1).

(*r*) *Ibid.*, s. 7 (1). The corporation, if itself a local authority, has power to appropriate its land as an open space to the enjoyment of the public (*ibid.*, s. 7 (2)). The above-mentioned power would enable a local authority to appropriate land, which it had acquired for some other purpose and no longer needed for that purpose, as an open space instead of selling it as superfluous land (but see p. 589, *post*). As to the powers of trustees in whom an open space is vested for charitable purposes, see title COUNTY COURTS, Vol. VIII., p. 672.

(*s*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 7. A parish council is a local authority for this purpose (*ibid.*, s. 7 (3)).

(*t*) *Ibid.*, s. 5 (1), (2); see p. 585, *ante*. Owners of an open space having rights of user of the same for recreation may convey to the local authority like rights for the public (Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 5 (3)). As to the conveyance of a disused burial ground, see title BURIAL AND CREMATION, Vol. III., p. 533.

(*a*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 17 (a); see title LOCAL GOVERNMENT, Vol. XIX., p. 358.

(*b*) 51 & 52 Vict. c. 41; Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 18; see title LOCAL GOVERNMENT, Vol. XIX., p. 361.

(*c*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 17 (b); see title METROPOLIS, Vol XX., p. 451.

(*d*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 18. As to these Acts, see title METROPOLIS, Vol. XX., pp. 462, note (*i*), 463 *et seq.*

SECT. 3. Open Spaces under the Open Spaces Act, 1906.

general expenses under, or out of money borrowed for the purposes of, the Public Health Acts (*e*); (4) by rural district councils as special expenses under, or out of money borrowed for the purposes of, the Public Health Acts (*f*); (5) by parish councils, subject and according to, or out of money borrowed for the purposes of, the Local Government Act, 1894 (*g*).

A county council may purchase or hire, and may maintain, improve, or support and contribute to the support of public walks or pleasure grounds (*h*).

SECT. 4.—*Public Pleasure Grounds under the Public Health Acts.*

Authorities having power to act.

**1017.** The local authorities empowered to provide public walks or pleasure grounds under the Public Health Act, 1875 (*i*), are primarily borough councils and other urban district councils (*k*); but rural district councils (*l*) may be invested with urban powers for that purpose (*m*). The expression "urban authority," therefore, in this section includes rural authorities so empowered.

Powers of authorities.

**1018.** Any urban authority may purchase or take on lease (*n*), and may maintain (*o*), improve (*p*), or support or contribute (*q*) to the

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(*e*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), ss. 17 (c), 18. As to the Public Health Acts, see title LOCAL GOVERNMENT, Vol. XIX., p. 282, note (*o*); and see *ibid.*, pp. 280—282, 317, 319.

(*f*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), ss. 17 (d), 18. As to the Public Health Acts, see title LOCAL GOVERNMENT, Vol. XIX., p. 282, note (*o*); and see *ibid.*, pp. 335, 337.

(*g*) 56 & 57 Vict. c. 73; Open Spaces Act, 1906 (6 Edw. 7, c. 25), ss. 17 (c), 18; see title LOCAL GOVERNMENT, Vol. XIX., pp. 242, 244.

(*h*) Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 14.

(*i*) 38 & 39 Vict. c. 55. This does not include the local authorities in the Metropolis (Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 2, 4). As to the area excluded under the expression "the metropolis," see title METROPOLIS, Vol. XX., p. 393, note (*h*). As to public recreation grounds in London, see pp. 598 *et seq.*, *post*.

(*k*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 262, 293, 295, note (*l*).

(*l*) See title LOCAL GOVERNMENT, Vol. XIX., p. 329. In practice, however, rural district councils seldom act upon these provisions, recreation grounds in rural districts being nearly always the village greens, which are managed by the parish councils (see pp. 583, 584, *ante*).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25; see title LOCAL GOVERNMENT, Vol. XIX., pp. 249, 332. A parish council has in respect of open spaces and public walks the same powers as an urban authority in respect of recreation grounds and public walks under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164, and the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44 (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (d)); see *infra*.

(*n*) For suitable forms of conveyances and leases, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 65, 67.

(*o*) Where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted (see title LOCAL GOVERNMENT, Vol. XIX., pp. 385, 386), the authority may itself provide, or license any person to provide, pleasure boats for hire on any water in a park or pleasure ground provided by it, and make bye-laws for their regulation (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44 (2)); and where the Public Health Acts Amendment Act, 1907, Part VI. (7 Edw. 7, c. 53), ss. 76, 77, is in force, the authority has further powers in relation to games

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, (*q*). For notes (*p*) and (*q*), see next page.

SECT. 4.

**Public Pleasure Grounds under the Public Health Acts.**

support of public walks or pleasure grounds (*r*); and it may make bye-laws for the regulation of such grounds and provide for the removal of persons infringing the bye-laws (*s*). The authority may not use a public pleasure ground provided by it, or permit it to be used for any purpose inconsistent with public recreation (*t*), subject to certain statutory exceptions (*a*).

Temporary adaptation of land.

**1019.** An urban authority may temporarily adapt as a public

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and recreations, bands of music, chairs and seats, reading and refreshment rooms, and appointment of officers. As to licensing of pleasure boats by local authorities generally under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 172, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*p*) *A.-G.* v. *Sunderland Corporation* (1876), 2 Ch. D. 634, C. A., *per* MELLISH, L.J., at p. 642; and see also *A.-G.* v. *Leeds Corporation* (1880), 24 Sol. Jo. 539, *per* JESSEL, M.R.; *A.-G.* v. *Bradford Corporation* (1911), 75 J.P. 553. See also as to improvements authorised where the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), is in force, p. 589, *post*.

(*q*) Where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), has been adopted the powers of contribution are somewhat wider (*ibid.*, s. 45); as to the power of joint action between local authorities and the National Trust, see also pp. 596 *et seq.*, *post*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164. If necessary the ground may be acquired compulsorily (*ibid.*, s. 176); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*s*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164. As to the powers of local authorities relating to bye-laws and their confirmation by the Local Government Board, and as to bye-laws relating to public places generally, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to the validity of bye-laws generally, see *Kruse* v. *Johnson*, [1898] 2 Q. B. 91. As to the reasonableness of bye-laws relating to open spaces, recreation grounds and similar places, see also *Torquay Local Board* v. *Bridle* (1882), 47 J. P. 183 (fowls); *Harper* v. *Mitchell* (1879), 44 J. P. 378 (bird-catching); *Nash* v. *Manning* (1894), 58 J. P. 718 (standing vehicles); *Gray* v. *Sylvester* (1897), 46 W. R. 63; 61 J. P. 807; *Parker* v. *Bournemouth Corporation* (1902), 66 J. P. 440; *Williams* v. *Weston-super-Mare Urban District Council* (1907), 72 J. P. 54; *Moorman* v. *Tordoff* (1908), 72 J. P. 142 (hawkers); *Parker* v. *Clegg* (1903), 2 L. G. R. 608; *Pelham* v. *Littlehampton Urban District Council* (1898), 63 J. P. 88 (bathing machines); *Southend-on-Sea Corporation* v. *Davis* (1900), 16 T. L. R. 167 (street music); *De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155 (public speaking); *Kitson* v. *Ashe*, [1899] 1 Q. B. 425 (street betting); *Nash* v. *Finlay* (1901), 85 L. T. 682; *Slee* v. *Meadows* (1911), 75 J. P. 246 (Salvation Army services); *Mitcham Common Conservators* v. *Cox*, *Same* v. *Cole*, [1911] 2 K. B. 854 (golf). For a set of model bye-laws, see Encyclopædia of Forms and Precedents, Vol. IX., p. 99.

(*t*) See *A.-G.* v. *Southampton Corporation* (1859), 1 Giff. 363 (cattle fair not allowed; see, however, the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44); *A.-G.* v. *Sunderland Corporation* (1876), 2 Ch. D. 634, C. A. (erection of town hall and school of art not allowed: a free library, museum and conservatory "*bonâ fide* intended for the use of persons frequenting its grounds" (*ibid.*, *per* JAMES, L.J., at p. 642) allowable); *A.-G.* v. *Bray Township Commissioners* (1880), 5 L. R. Ir. 254, C. A. (lease of land for the erection of a pavilion and bathing place being part of land acquired "as a public place of recreation and exercise on foot" allowed). See also *A.-G.* v. *Hanwell Urban Council*, [1900] 2 Ch. 377, C. A., *per* COLLINS, L.J., at pp. 386, 387; *A.-G.* v. *Teddington Urban Council*, [1898] 1 Ch. 66; *A.-G.* v. *Bradford Corporation* (1911), 75 J. P. 553 (street widening).

(*a*) See the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44 (1); and p. 589, *post*.

pleasure ground part of a piece of land bought, but not immediately required, for another purpose, instead of selling it as superfluous land (*b*); such land must not permanently be diverted from the purpose for which it was originally acquired (*c*), and the acquirement of rights over it inconsistent with such purpose must be prevented (*d*).

Powers of closing and charging for admission.

**1020.** The authority has no general power of charging for admission to (*e*) or of closing any public walk or pleasure ground (*f*); but limited powers of closing and charging for admission may be obtained (*g*). If the ground is an inclosed space which can only be entered by gates, the exclusion of the public at night may be provided for by bye-laws.

Where powers under the Public Health Acts Amendment Act, 1890 (*h*), have been adopted (*i*), the authority may on any days, not exceeding twelve in any year nor more than four in succession, and not being Sundays or public holidays, allow a public park or pleasure ground provided by it, or part thereof, to be used by a public charity or institution, or use it, or allow it to be used, for any public purpose, and may charge, or allow a charge to be made, for admission on such days (*k*).

Power of providing apparatus etc.

**1021.** Where the Public Health Acts Amendment Act, 1907 (*l*), Part VI., s. 76, is in force, the authority may, subject to any restrictions imposed by the Local Government Board, provide in any public park or pleasure ground established or managed by it, apparatus for games and recreation, chairs or seats, reading rooms or other buildings, and conveniences and refreshment rooms, and may, subject to certain restrictions, charge for the use thereof (*m*). The authority may also provide, or contribute to providing, a band (*n*), and may inclose part of the park for the convenience of persons listening thereto (*o*), and in case of frost may inclose part of the

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(*b*) *A.-G.* v. *Teddington Urban Council*, [1898] 1 Ch. 66. As to superfluous lands, see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*; METROPOLIS, Vol. XX., p. 460; and as to its retention by sanction of the Local Government Board, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*c*) *A.-G.* v. *Teddington Urban Council, supra*; *A.-G.* v. *Hanwell Urban Council*, [1900] 2 Ch. 377, C. A.

(*d*) *A.-G.* v. *Teddington Urban Council, supra, per* ROMER, J., at p. 70; see now, however, the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 76; title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*e*) *A.-G.* v. *Leeds Corporation* (1880), 24 Sol. Jo. 539, where it was held that such a charge could only be justified under a local Act.

(*f*) "Even for a single day" (*A.-G.* v. *Loughborough Local Board* (1881), *Times*, 31st May, *per* HALL, V.-C.).

(*g*) See the Public Health Acts Amendment Acts, 1890 (53 & 54 Vict. c. 59), s. 44 (1), and 1907 (7 Edw. 7, c. 53), s. 76, *infra*.

(*h*) 53 & 54 Vict. c. 59.

(*i*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 385, 386.

(*k*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 44 (1); see also, as to *ibid.*, ss. 44 (2), 45, pp. 587, 588, *ante*.

(*l*) 7 Edw. 7, c. 53.

(*m*) *Ibid.*, s. 76 (1) (c), (f), (g), (h), (i). They may also, subject to certain conditions, let such things when provided, or let the rights of providing them (*ibid.*).

(*n*) *Ibid.*, s. 76 (1) (d).

(*o*) *Ibid.*, s. 76 (1) (e).

SECT. 4. **Public Pleasure Grounds under the Public Health Acts.**

park to protect the ice (*p*), and may charge for admission to such inclosures (*q*); or may set apart part of the park for cricket, football, or other games (*r*). Such powers, however, must not be exercised in contravention of any condition under which the park is held (*a*).

Provision is made for meeting the expenses incurred under these provisions (*b*) and for the due observance of regulations made thereunder (*c*).

Character of open spaces.

**1022.** Where the Public Health Acts Amendment Act, 1907 (*d*), Part VII., s. 81, is in force, a place of public resort or recreation ground (*e*) is to be deemed "an open and public place" under the Vagrancy Acts (*f*), and "a street" under the Town Police Clauses Act, 1847 (*g*).

### SECT. 5.—*Open Spaces under the Settled Estates and Settled Land Acts.*

Settled estates.

**1023.** Any part of a settled estate may be laid out for open spaces, either to be dedicated to the public or not, subject to certain restrictions as to the meeting of the expenses and maintenance of the open spaces (*h*).

Settled land.

**1024.** On or in connection with a sale or grant for building purposes, a building lease, or of settled land, the tenant for life may cause or require any parts to be appropriated and laid out for such spaces, with fencing, paving, or other necessary or proper works for the use of the public or of individuals (*i*).

### SECT. 6.—*Recreation Grounds under the Towns Improvement Clauses Act*, 1847.

Powers of authority.

**1025.** Where the necessary provisions of the Towns Improvement Clauses Act, 1847 (*k*), are in force (*l*), the local authority (*m*) may

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(*p*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 76 (1) (a).
(*q*) *Ibid.*, s. 76 (1) (a), (e).
(*r*) *Ibid.*, s. 76 (1) (b).
(*a*) *Ibid.*, s. 76 (4).
(*b*) *Ibid.*, s. 76 (2), (3).
(*c*) *Ibid.*, s. 77.
(*d*) 7 Edw. 7, c. 53.
(*e*) *Ibid.*, s. 81.
(*f*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 537; POOR LAW.
(*g*) 10 & 11 Vict. c. 89, s. 29, and *ibid.*, s. 28, so far as it relates to ferocious dogs, furious riding and driving, offences against public order, discharge of firearms, bonfires, and refuse in streets; see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION; STREET AND AERIAL TRAFFIC.
(*h*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 20—22. As to this and the following power, see title SETTLEMENTS.
(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16. As to golf courses, see *Re De la Warr's (Lord) Settled Estates* (1911), 27 T. L. R. 534. As to the expenses of such appropriation, see title LAND IMPROVEMENT, Vol. XVIII., p. 285; and see *ibid.*, p. 283, note (*f*), as to the provision of open spaces as "improvements" under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25 (xvii.).
(*k*) 10 & 11 Vict. c. 34.
(*l*) See title LOCAL GOVERNMENT, Vol. XIX., pp. 292, 328.
(*m*) See *ibid.*, and title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

by a special order (*n*) provide places to be used as pleasure grounds or places of public resort or recreation (*o*). Subject to the ground being in a situation approved by the inspector of nuisances (*p*), it may be either within the district or at a reasonable distance therefrom, not exceeding three miles from the centre of the principal market-place (if any), or from the principal office of the council (*o*).

SECT. 6. Recreation Grounds under the Towns Improvement Clauses Act, 1847.

### SECT. 7.—*Recreation Grounds under the Recreation Grounds Act*, 1859.

**1026.** Any lands may be conveyed to trustees by a donor or grantor for any estate of which the latter would, independently of the Recreation Grounds Act, 1859 (*q*), have power to dispose, and subject to any reservation, restrictions, and conditions by him, to be held as open public recreation grounds or playgrounds (*r*). Conveyances.

The grant or conveyance of such lands does not require enrolment (*s*), it need not be by indenture (*t*), and it is not invalidated by the death of the donor or grantor within twelve calendar months after the making of the grant (*u*).

**1027.** The grant or conveyance of land belonging to a municipal corporation must be made by the body corporate, and the consent of the Treasury is required (*v*). Grantors.

The grant or conveyance of parish land must be made by the trustees or feoffees (if any) in pursuance of a special resolution (*w*) of the parish council or parish meeting (*x*); if there are no trustees or feoffees, it is to be made by the parish council or parish meeting; in either case the approval of the Local Government Board (*y*) is required (*z*).

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(*n*) As to the procedure of incorporation by special Act, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*o*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 135. Grounds so provided may be improved (*ibid.*), and, while they belong to the local authority, are exempt from rates made under that Act or the special Acts (*ibid.*, s. 168).

(*p*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*q*) 22 Vict. c. 27.

(*r*) *Ibid.*, s. 1.

(*s*) It is not clear that this provision applies to such conveyances made under other Acts; see pp. 585, 590, *ante*.

(*t*) A statutory form is provided (Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 2. For a fuller form, see Encyclopædia of Forms and Precedents, Vol. IX., p. 60.

(*u*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 2. This provision exempts such conveyances from the provisions of the Mortmain Acts, as to which see p. 580, *ante*, and title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*v*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 3.

(*w*) The resolution is to be "a resolution for that purpose" and must be "passed in meeting assembled for the purpose" (*ibid.*, s. 4). As to such meetings, see title LOCAL GOVERNMENT, Vol. XIX., pp. 244, 254 *et seq.*

(*x*) As successors of the churchwardens and overseers and vestry; see Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5, 6, 8, 19 (4), (10), and title LOCAL GOVERNMENT, Vol. XIX., pp. 246, 254.

(*y*) As successors of the Poor Law Board; see Local Government Board Act, 1871 (34 & 35 Vict. c. 70), and title POOR LAW.

(*z*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 4.

SECT. 7. Recreation Grounds under the Recreation Grounds Act, 1859.

For the above-mentioned purposes, the lord of any manor or the churchwardens of any parish, or the overseers of the poor of any parish or township, or all or any of such persons to whom lands have been conveyed as above mentioned, are a body corporate (*a*).

Management.

**1028.** The management and direction of such grounds remain in such persons as may be named in the deed of conveyance thereof (*b*). If not named, or if there is a failure of such managers and directors, the Charity Commissioners may settle a scheme for the appointment of persons to act as managers and directors (*b*).

Bye-laws.

**1029.** The managers and directors may make and enforce bye-laws, orders, and regulations for the management, preservation, disposition and care of the grounds, and for the government of all persons using or frequenting the same (*c*).

Such bye-laws, orders, and regulations must be in accordance with the conditions of the grant, and they must be approved by the Charity Commissioners, and, if they in any manner restrict the public use or enjoyment of the grounds, they are not valid unless sanctioned with such approbation (*d*).

Bequests.

**1030.** Any person may bequeath any personal property, not exceeding £1,000, for the purpose of defraying the expenses of purchasing, preparing, maintaining, and preserving such grounds for the above-mentioned purposes, and of ornamenting such grounds (*e*).

### SECT. 8.—*Walks and Playgrounds under the Public Improvements Act*, 1860.

Adoption.

**1031.** The Public Improvements Act, 1860 (*f*), is now of practical importance only in rural districts (*g*). The Act (*g*) apparently is of no force until adopted (*h*), but it may only be adopted in parishes

(*a*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 5.
(*b*) *Ibid.*
(*c*) *Ibid.*, s. 6. The Act does not say how such bye-laws etc. are to be "enforced," and it is doubtful whether they could be enforced by a penalty, at all events by one recoverable summarily: they can, however, be enforced by indictment (*R.* v. *Hambly* (1879), 43 J. P. 495). For a form of bye-laws, see Encyclopædia of Forms and Precedents, Vol. IX., p. 107.
(*d*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 6. It would appear that if the bye-laws etc. do not contain any such restriction, the requirement as to the approbation of the Charity Commissioners is merely directory.
(*e*) Recreation Grounds Act, 1859 (22 Vict. c. 27), s. 7.
(*f*) 23 & 24 Vict. c. 30.
(*g*) It can also be adopted in boroughs (*ibid.*, s. 2) and non-municipal urban districts (see note (*i*), p. 593, *post*), but those bodies have more convenient powers under other statutes (see pp. 586 *et seq.*, *ante*). But many of the powers it confers can only be exercised in rural districts by virtue of its provisions (*e.g.*, those as to seats and shelters from rain).
(*h*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), s. 2. *Ibid.*, s. 1, is in terms absolute, but from the language of the remaining sections it appears that the Act is adoptive. However, it is one of the series of Acts called "the adoptive Acts" (see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 7 (1)). The method of adoption is the same as in the case of the

having a population of five hundred or upwards, according to the last census for the time being (*i*).

SECT. 8. Walks and Playgrounds under the Public Improvements Act, 1860.

**1032.** Where the Act is adopted, the provisions of the Baths and Washhouses Act, 1846 (*k*), concerning the following matters, take effect:—

Effect.

(1) The authority by which and the manner in which the Act is to be carried into execution;

(2) The mode of providing the expenses of carrying the Act into execution (excluding the provisions for borrowing money for such expenses);

(3) The appointment (in the case of a parish) of commissioners, their tenure of office and procedure, and the audit of their accounts;

(4) The powers of the councils and commissioners for the purposes of the Act (except the power of borrowing money) (*l*).

Powers of authority

**1033.** The authority for carrying the Act into execution may purchase or lease lands, and accept gifts and grants of land, for any public walk, exercise or play ground, and may levy rates for maintaining the same, and for removing any nuisances or obstruction to the free use and enjoyment thereof, and for improving any open walk or footpath, or placing convenient seats or shelters from rain, and for other purposes of a similar nature (*m*). Every such rate is to be made by the ratepayers of the parish in meeting assembled (*n*); it is to be a separate rate and called the "Parish Improvement Rate" (*o*); it must be agreed to by a majority of at least two-thirds of the ratepayers assembled at the meeting (*p*); and it may not exceed 6*d.* in the pound (*q*). Before any such rate is imposed, a sum in amount not less than one-half of the estimated cost of the proposed improvement must have been raised, given, or collected by private subscription or donation (*r*). Corporate bodies have the right to attend all meetings called for the purpose of imposing such rates, and may vote thereat by some person to be deputed by them for that purpose under their corporate seal (*s*).

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Baths and Washhouses Act, 1846 (9 & 10 Vict. c. 74) (Public Improvements Act, 1860 (23 & 24 Vict. c. 30), s. 2); see titles LOCAL GOVERNMENT, Vol. XIX., p. 257; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*i*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), s. 2. *Ibid.*, s. 1, setting out the powers of parishes under the Act, refers to parishes with a population "which . . . . exceeds five hundred persons," but probably, on a question whether or not the Act could be adopted in a parish with a population of exactly five hundred, such a parish would be held to be included, and that the difference between the limitation in *ibid.*, s. 1, and that in *ibid.*, s. 2, was merely a draughtsman's error (see, as to such errors in statutes, *R.* v. *Marsham, Ex parte Chamberlain*, [1907] 2 K. B. 638; and title STATUTES).

(*k*) 9 & 10 Vict. c. 74.

(*l*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), s. 3. As to these powers, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*m*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), s. 1.

(*n*) See title LOCAL GOVERNMENT, Vol. XIX., p. 257.

(*o*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), ss. 1, 4.

(*p*) *Ibid.*, s. 4; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 89, Sched. II.

(*q*) Public Improvements Act, 1860 (23 & 24 Vict. c. 30), ss. 1, 7.

(*r*) *Ibid.*, s. 6.

(*s*) *Ibid.*, s. 5.

SECT. 9. The Town Gardens Protection Act, 1863.

## SECT. 9.—*The Town Gardens Protection Act*, 1863.

Application of Act.

**1034.** The Town Gardens Protection Act, 1863 (*a*), applies to any inclosed garden or ornamental ground in a city or borough set apart, otherwise than by the revocable permission of the owner (*b*), in any public square, crescent, circus, street, or other public place for the use and enjoyment of the inhabitants thereof (*c*). There must be a legal right in the inhabitants or some of them to such use and enjoyment, a *de facto* use and enjoyment not being sufficient (*d*).

**1035.** A committee of inhabitants appointed to manage such a garden may make, revoke, and alter bye-laws for the management and preservation thereof (*e*).

Any inhabitant, or person admitted to the ground by any inhabitant, offending against any such bye-law is liable to a penalty (*f*).

Authorities power

**1036.** The authorities for the protection of such grounds (hereinafter called the corporate authority) are, in the City of London, the Common Council of the City; in the County of London outside the City, the London County Council; and elsewhere the municipal corporation of the city or borough (*g*).

The authorities in whom such gardens or grounds may, in certain circumstances, be vested, and the authorities required to raise the money necessary for defraying certain expenses incurred by garden committees, are, in the County of London, outside the City, the metropolitan borough councils, and elsewhere the corporate authority (*h*). If part of the garden or ground is situate in one city

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(*a*) 26 & 27 Vict. c. 13.

(*b*) As to the meaning of these words, see *Tulk* v. *Metropolitan Board of Works* (1868), L. R. 3 Q. B. 94, *per* COCKBURN, C.J., at pp. 117, 118; affirmed (1868), L. R. 3 Q. B. 682, Ex. Ch.

(*c*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1. The Act does not apply to grounds to which the public have a right of access (see *ibid.*, and the preamble), nor to land belonging to the Crown or Duchy of Lancaster, nor to land under the management of the Commissioners of Works or Commissioners appointed under the Crown Estate Paving Act, 1851 (14 & 15 Vict. c. 95), nor to any ground for the care and protection of which provision has been made by statute (Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 7). As to Royal parks, see p. 582, *ante*; and as to open spaces under local Acts, see pp. 590 *et seq.*, *ante*.

(*d*) *Tulk* v. *Metropolitan Board of Works* (1868), L. R. 3 Q. B. 682, Ex. Ch.

(*e*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 4. The bye-laws do not come into operation until allowed by some judge of one of the superior courts, or by the justices in quarter sessions, who must, on the request of such committee, inquire into any bye-laws tendered to them for that purpose, and allow or disallow the same as they think meet (*ibid.*). The bye-laws must be entered in a book kept for that purpose, and signed by the chairman of the committee meeting at which the same are passed: the book is evidence of such bye-laws (*ibid.*).

(*f*) *Ibid.* The proceedings for the recovery of the penalty, which may not exceed £5, are to be before a magistrate acting for the district in which the garden is situate (*ibid.*).

(*g*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), ss. 1, 2. As to the Common Council, see title METROPOLIS, Vol. XX., p. 426; as to the London County Council, see *ibid.*, p. 393.

(*h*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4 (1). As to corporate authority, see the text, *supra*.

SECT. 9. The Town Gardens Protection Act, 1863.

Powers of authorities.

or borough and part in another, the authority for these purposes is the authority of the city or borough within which the part is situate (*i*).

**1037.** Where any person can, in right of any house or other property, require that any such ground be maintained, and he, in writing signed by him, requests the corporate authority to protect such right, the authority may accede to such request (*k*). Thereupon the rights of such person vest in such corporate authority, and it can, for and in its own name, exercise all the rights of such person in relation thereto, and take legal proceedings therefor (*l*).

Where any such ground has been neglected, the corporate authority must take charge of the same (*m*), and if after due inquiry the freehold owner cannot be found, or if it is vested in any person subject to a condition for keeping the same as garden or pleasure ground, or that the same shall not be built upon, the corporate authority must cause any encroachments made therein within the period of twenty years before the 4th May, 1863, to be removed (*n*), and must, if so requested by the surrounding owners and occupiers, vest it in a committee as a garden or ornamental ground for the use of such inhabitants (*o*).

If such owners and occupiers do not undertake the charge of the ground, the corporate authority must (*p*) vest the same in the local authority (*q*) to be maintained as an open place or street for the advantage of the public, subject to the approval of the corporate authority (*r*).

Provision for expenses.

**1038.** Any charge incurred by the London County Council in the execution of any of the foregoing powers is deemed to be expenses for the payment whereof provision is made by the Metropolis Management Acts (*s*), and the expenses incurred by any other corporate authority, are to be deemed expenses necessarily incurred by it in carrying into execution within and for its city or borough the Municipal Corporations Act, 1882 (*t*), and any other Act amending the same (*a*).

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(*i*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1.

(*k*) *Ibid.*, s. 2.

(*l*) *Ibid.*

(*m*) *Ibid.*, s. 1. The authority must put up a notice to that effect (*ibid.*). This and the following powers are subject, under *ibid.*, s. 1, to all such rights as any person would have enjoyed had this Act not been passed (*ibid.*).

(*n*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1. The date mentioned is the date when this Act received the Royal assent.

(*o*) *Ibid.*, s. 1. As to the requirements of the form of the request and composition of the garden committee, see *ibid.* The expenses of the committee are raised by the local authority (see p. 594, *ante*) as an additional rate on the surrounding occupiers (Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1).

(*p*) Within six months after the notice has been put up (see note (*m*), *supra*), or within such further time as the corporate authority may think it expedient to allow (Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1).

(*q*) See p. 594, *ante*.

(*r*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 1.

(*s*) See title METROPOLIS, Vol. XX., pp. 463 *et seq.*

(*t*) 45 & 46 Vict. c. 50.

(*a*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 3;

SECT. 9. **The Town Gardens Protection Act, 1863.**

**1039.** Any police constable may apprehend any person he sees throwing any rubbish into any such garden, or trespassing therein, or getting over the railings or fence, or stealing or damaging the flowers or plants, or committing any nuisance therein

Offences.

SECT. 10.—*Places of Public Resort under the National Trust Act, 1907.*

The National Trust.

**1040.** Many open spaces and recreation grounds have been provided by private enterprise, both by individuals (*c*) and by philanthropic bodies (*d*). But few (if any) private persons have received statutory powers with respect to such matters, and "The National Trust for Places of Historic Interest or National Beauty," or, shortly, "The National Trust" (*e*), is the only philanthropic body that has, in recent years, received statutory powers exercisable beyond some particular district.

This body (*f*) has been entrusted with certain powers exercisable anywhere in the United Kingdom for the permanent preservation of lands and buildings of beauty or historic interest: the natural aspect and features of the land and the animal and plant life thereon so far as practicable must be preserved

Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 242 (1), and Sched. IX., Part I. As to such expenses, see title LOCAL GOVERNMENT, Vol. XIX., pp. 317, 319.

(*b*) Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), s. 5. The offender is triable summarily, and is liable for each offence to a penalty not exceeding 40*s*., or to imprisonment for not exceeding fourteen days (*ibid.*). In such proceedings the committee, as owners of the garden, may be described by the name of A. B. and others (*ibid.*). As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* The provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 225—228 (see title METROPOLIS, Vol. XX., p. 464), and the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43) (see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*), are incorporated in the Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), and apply to any penalty, bye-laws, and offences under the Act (*ibid.*, s. 6).

(*c*) For instance, the museum and pleasure grounds (called the "Larmer Grounds") provided by General Pitt Rivers at Rushmore on the borders of Dorsetshire and Wiltshire. See further, as to these grounds, *Re Pitt Rivers, Scott* v. *Pitt Rivers*, [1902] 1 Ch. 403.

(*d*) Amongst such bodies may be mentioned the following:—The Commons and Footpaths Preservation Society, the Metropolitan Public Gardens Association, and the open spaces branch of the Kyrle Society.

(*e*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 2.

(*f*) Its members are: subscribers, who pay an annual subscription; life members, who give a donation; honorary members, who are elected in return for some adequate gift; and local corresponding members, who undertake gratuitously to further the interests of the Trust locally (*ibid.*, s. 14). The liability of members is limited to their annual subscription or other contribution which they have agreed to give (*ibid.*, ss. 15, 16). The governing body consists of a president and fifty councillors, twenty-five of whom are elected annually from among the members, the other twenty-five (each of whom holds office until a substitute is appointed) being nominees of the Trustees of the National Gallery and the British Museum, the Presidents of the Royal Academy of Arts and the Society of Antiquaries of London, and other kindred societies, the Vice-Chancellors of the Universities of Oxford, Cambridge and London, the Senates of the Universities of Edinburgh, Glasgow, St. Andrews and Dublin, the County Councils Association, and others (*ibid.*, s. 18).

(*g*) *Ibid.*, s. 4 (1).

SECT. 10. Places of Public Resort under the National Trust Act. 1907.

**1041.** The National Trust, either alone, or jointly with other bodies or persons (*h*), may acquire, but not compulsorily, and may hold without licence in mortmain (*i*), all kinds of property in trust for any public purposes, and may act as trustees of any property devoted to public purposes (*k*).

Powers.

They may maintain and manage, either alone or jointly with other bodies or persons (*h*), open spaces or places of public resort, and buildings for public recreation, resort, or instruction (*l*), for the convenience of persons using them or resorting thereto (*m*).

They may, for the comfort or convenience of persons using or resorting to it, improve any property which belongs to them or in which they have any interest, and exercise full powers of ownership over it according to their estate and interest, so long as they do nothing inconsistent with the Trust (*n*). They may, however, borrow money either by mortgage of their alienable property or by charging the income derivable from any of their properties (*o*).

Application of revenue.

**1042.** The revenue of the Trust must be applied, first, in payment of the expenses incurred in connection with their property, then in payment of the interest on and the instalments of money borrowed by them, and the balance, if any, must either be applied in furthering the objects of the Trust, or invested in trustee investments (*p*). Their capital is to be applied, subject to any conditions attached to any particular gifts, in the repayment of loans or otherwise in furthering the objects of the Trust (*q*). Subject to the foregoing requirements, they may do what they deem desirable in furthering the objects of the Trust (*r*), but they may in no circumstances make any profit for their members in any way whatever (*a*).

They have, subject to certain restrictions, power to charge for admission (*b*), and to make bye-laws (*c*) subject to confirmation by the Home Secretary (*d*).

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(*h*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 31.

(*i*) As to this licence, see titles CHARITIES, Vol. IV., pp. 134, 137; CORPORATIONS, pp. 367 *et seq.*

(*k*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 4 (2).

(*l*) *Ibid.*, s. 4 (2).

(*m*) *Ibid.*

(*n*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 4 (2). The following properties, however, are inalienable, and may not be charged with their debts and liabilities:—Hindhead, Merton Mill Pond, and Eashing Bridges, Surrey; Burwell and Wicken Fens, Cambridgeshire; the Falkland Monument at Newbury, and Newtown Common, Berkshire; the Old Sanctuary Cross at Sharow, Yorkshire; Barrington Court, Somerset; etc. etc.; Barras Head and "The Old Post Office" at Tintagel, Cornwall; Brandlehow Park and Gowbarrow Deer Park, Cumberland; the "Dinas-oleu" cliff at Barmouth, Merionethshire; and Kanturk Castle, Co. Cork (*ibid.*, s. 21 (1), Sched. I., Part I.). A portion (185 acres) of the land acquired with Barrington Court is, however, declared to be alienable (*ibid.*, Sched. I., Part II.). They may resolve that any property vested in them shall be inalienable (*ibid.*, s. 21 (2)).

(*o*) *Ibid.*, s. 22.

(*p*) *Ibid.*, s. 27.

(*q*) *Ibid.*, s. 28.

(*r*) *Ibid.*, s. 4 (2).

(*a*) *Ibid.*, s. 5.

(*b*) *Ibid.*, s. 30 (1).

(*c*) *Ibid.*, ss. 32—34.

(*d*) *Ibid.*, s. 35. Subject thereto, the Public Health Act, 1875 (38 & 39

SECT. 10. Places of Public Resort under the National Trust Act, 1907.

Duties.

**1043.** The Trust must keep commons or commonable lands uninclosed and unbuilt on as open spaces for the public (*e*). But they may improve such commons, and make temporary inclosures thereon for protecting or renovating turf or protecting trees and plantations (*e*), and may set aside portions thereof for games and sports, and may charge for admission (*e*).

Their consent is required before any local authority can enter any common or commonable land, the soil of which is vested in them, for the purpose of obtaining highway materials; and, if such consent is withheld, the local authority must apply for an order of justices, who may prescribe such conditions as to the mode of working and restitution of the surface as they consider expedient (*f*).

Preservation of existing rights.

**1044.** All existing rights of common and commonable or other like rights (*g*), rights of way, and all existing private rights are to be preserved unless otherwise expressly provided (*h*).

## SECT. 11.—*The Metropolis.*

### SUB-SECT. 1.—*General Provisions Applicable in London.*

Metropolitan authorities.

**1045.** In addition to the powers which, as stated below, are separately possessed by the London County Council (*i*), the metropolitan borough councils and the Common Council of the City of London, these bodies are all local authorities for the purposes of the Open Spaces Act, 1906 (*k*).

London County Council.

**1046.** The London County Council may, for the purpose only of enlarging or improving any open space, exchange parts of the open space for adjacent land, and may make and receive payments in respect of such exchanges (*l*).

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Vict. c. 55), ss. 182—184, 186, 251 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION), apply to such bye-laws (National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 35).

(*e*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 29.

(*f*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 36; and, as applied, the Commons Act, 1876 (39 & 40 Vict. c. 56), s. 20.

(*g*) For the law relating to such rights, see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 441 *et seq.*

(*h*) National Trust Act, 1907 (7 Edw. 7, c. cxxxvi.), s. 37.

(*i*) As to the power of county councils under the Open Spaces Act, 1906 (6 Edw. 7, c. 25), s. 14, see p. 587, *ante*.

(*k*) 6 Edw. 7, c. 25, s. 1. For the application of the Act, see pp. 584, *et seq.*, *ante*. The expression "Common Council of the City of London" means "the mayor, aldermen and commons of the City of London in common council assembled" (*ibid.*, s. 20); see p. 601, *post*.

(*l*) London County Council (General Powers) Act, 1905 (5 Edw. 7, c. ccvi.), ss. 30—32. Among the restrictions upon such exchanges is the provision that any money received by the Council must be applied in enlarging or improving an open space (*ibid.*, s. 30). No land acquired by the Council from the Commissioners of Woods may be so exchanged except with the previous consent in writing of such Commissioners to the terms of the exchange (*ibid.*). Land taken in exchange is to be subject to all bye-laws, rights of common etc., to which the land given was subject (*ibid.*, s. 32 (1)), all private rights are to be extinguished (*ibid.*, s. 32 (3)), and land given in exchange is to be discharged from all common public rights etc. (*ibid.*, s. 31). As to the powers of the London

The Council may, subject to certain restrictions (*m*), make bye-laws for the management and control of the several parks, gardens, heaths, commons, embankments and open spaces in respect of which bye-laws are, by statute (*n*), authorised to be made by the Council (*o*).

The Council may authorise in writing any of its officers to enforce bye-laws, and may procure any such officers to be sworn in as constables, and any constable or any officer of the Council so authorised, and any person called to the assistance of such constable or officer, may, without warrant, seize and detain any person committing or having committed any offence against any such bye-law, whose name or residence is unknown to and cannot be ascertained by such constable or officer, and take him to a police station or before a justice to be dealt with according to law (*p*).

**1047.** Certain open spaces in London are under the control of

Special provisions.

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County Council of acquiring and improving open spaces, and providing bands, public lavatories and ambulances therefor, and of acquiring places of historical interest, see, further, title METROPOLIS, Vol. XX., pp. 397, 399, 458, 461. As to alienation of recreation grounds, see *ibid.*, p. 459.

(*m*) See title METROPOLIS, Vol. XX., pp. 460 *et seq.* The Metropolitan Board of Works Act, 1877 (40 & 41 Vict. c. viii.), also lays down the formalities to be observed before new bye-laws can come into force, and provides for their effect upon existing bye-laws: a printed copy of the bye-laws, authenticated by the seal of the Council, is evidence of their contents (*ibid.*, ss. 6, 10).

(*n*) *I.e.*, under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 202, 203; London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), ss. 1—22, Sched. B.

(*o*) Metropolitan Board of Works Act, 1877 (40 & 41 Vict. c. viii.), ss. 2—4. A further and much longer list of the matters concerning which bye-laws may be made is contained in the schedule to the London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), Sched. B. The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the restrictions imposed thereby (see note (*m*), *supra*), apply to the making etc. of bye-laws under the London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), except that the penalty imposed by the latter for each breach of the same may be a sum not exceeding £5 (*ibid.*, s. 19 (1)). A resolution applying all or any of such bye-laws to any park, heath, common etc. has no force unless and until such application be allowed by one of His Majesty's principal Secretaries of State (*ibid.*, s. 19 (2)), and if such a bye-law extends to the prohibition of military drill on any heath or common, it is of no force until it has received the sanction of the Secretary of State for War, and in no case can it restrict any rights or powers of the said Secretary of State over any park, heath, common etc. in any case of national danger or emergency (*ibid.*, s. 16); the application of such bye-laws to such places is not allowed unless similar notices have been given and advertisements published in London (not "in London or Middlesex," as under the Metropolitan Board of Works Act, 1877 (40 & 41 Vict. c. viii.), s. 6 (2)), and copies of the proposed bye-laws have been deposited and put on sale, as prescribed by *ibid.*, s. 6 (3); and printed authenticated copies are to be similarly conclusive (London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 19 (3), (4)).

(*p*) London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), ss. 17, 18. Any officer of the Council acting under these provisions, and not being a constable in uniform, must have with him a written authority from the Council to act, and must produce the same if required (*ibid.*, s. 18).

SECT. 11. The Metropolis.

the London County Council by virtue of special Acts and are regulated in accordance with the provisions therein contained (*q*).

SUB-SECT. 2.—*The Metropolitan Borough Councils.*

Powers.

**1048.** The metropolitan borough councils are local authorities for the purposes of the Open Spaces Act, 1906 (*r*), and have power to take, by agreement or gift, any land or any right or easement in or over land, for any estate or interest therein, and on such terms and conditions as they may think fit, for an open space or a pleasure ground for the public benefit of the inhabitants of their boroughs (*s*). This enactment, however, does not authorise any expenditure out of rates, except for the purpose of inclosing, maintaining, planting, and otherwise improving the land (*s*).

Unlike the London County Council and other county councils (*a*), and urban authorities outside London (*b*), the metropolitan borough councils have no general powers to purchase or take on lease, lay out, plant, improve and maintain lands as public walks or pleasure grounds, or to support or contribute to the support of such places when provided by any person, though they may obtain such powers by applying to the Local Government Board for an order conferring them (*c*), or they may have obtained such powers by their being inserted in the scheme for their borough made under the London Government Act, 1899 (*d*).

Liability for

**1049.** Where on 1st January, 1856, the maintenance or management of any inclosed garden was vested in any body for the benefit

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(*q*) For instance, Victoria, Battersea, and Kennington Parks, Bethnal Green Museum Garden, and Chelsea Embankment, were transferred from the Commissioners of Works and Public Buildings by the London Parks and Works Act, 1887 (50 & 51 Vict. c. 34). As to the provision of public lavatories and sanitary conveniences, and street refuges in, on, or under the Victoria Embankment and adjoining land belonging to the London County Council, see the London County Council (General Powers) Act, 1911 (1 & 2 Geo. 5, c. lxiii.), s. 13; title METROPOLIS, Vol. XX., pp. 395, 396.

(*r*) 6 Edw. 7, c. 25, s. 1. As to this Act, see pp. 584 *et seq.*, *ante*.

(*s*) Metropolis Management Amendment Act, 1856 (19 & 20 Vict. c. 112), s. 11.

(*a*) See pp. 586, 598, 599, *ante*.

(*b*) See pp. 586, 587, *ante*.

(*c*) The authority for this statement is derived from the following complicated piece of legislation by reference:—Under the Local Government Act, 1894 (56 & 57 Vict. c. 73), the Local Government Board may, on the application of the council of any urban district, make an order conferring on that council any powers, duties or liabilities of a parish council (see title LOCAL GOVERNMENT V[illegible] XIX., pp. 267 *et seq.*), applying with the necessary modifications the provisions of the Local Government Act, 1894 (56 & 57 Vict. c. 73), with reference thereto (*ibid.*, s. 33 (1)); and the provisions of this enactment respecting councils of urban districts apply to the administrative county of London in like manner (*ibid.*, s. 33 (6)) as if the district of each sanitary authority (now the metropolitan borough councils; see title METROPOLIS, Vol. XX., p. 408) in that county were an urban district and the sanitary authority were the council of that district. As to the powers of metropolitan borough councils under the Open Spaces Act, 1906 (6 Edw. 7, c. 25), see also pp. 584 *et seq.*, *ante*; and as to the Common Council of the City of London, see p. 601, *post*.

(*d*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 16 (1) (c). As to the alienation of recreation grounds, see title METROPOLIS, Vol. XX., p. 459.

of the inhabitants of any square or place surrounding or adjoining the same, and the inhabitants were liable to be assessed for the maintenance thereof, and the powers of such body extended beyond such garden and place, and beyond any adjoining street, way, or passage, so far as the same abutted upon any part of any house, building, or tenement in or fronting such square or place (*e*), then the maintenance of such garden was as from that date transferred to a committee, of not more than nine nor less than three of such inhabitants, appointed by them annually in the first week in June, and the metropolitan borough council must cause to be raised the sums required by such committee for defraying the expenses of such garden or ground, or of such part thereof as is situate within its borough, by an addition to the general rate to be assessed on the occupiers of the houses or buildings, the occupiers whereof are liable to be assessed for the same purpose; but the rate to be levied under this provision may not exceed any limit thereto in force on the 1st January, 1856 (*f*).

SUB-SECT. 3.—*The City Corporation.*

Powers.

**1050.** In addition to being a local authority for the purposes of the Open Spaces Act, 1906 (*g*), the Common Council of the City of London is empowered (*h*) to acquire open spaces (*i*) not within the Metropolis (*k*), but within twenty-five miles from the City boundaries, and to make agreements for assisting and preserving rights over such spaces (*l*).

Bye-laws.

The Common Council may also regulate such open spaces by bye-laws, approved by the Commissioners of Works (*m*), and generally manage and maintain them for the public benefit (*n*), subject to their remaining uninclosed (*o*), and unaltered as to natural aspect (*p*). The Act does not apply to Epping Forest (*q*), which is dealt with by a separate Act (*r*).

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(*e*) If the powers of the body did not so extend, the management remains vested in them as before (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 239).

(*f*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 239, 251; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 10 (1). As to the exemptions contained in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 240, 241, see title METROPOLIS, Vol. XX., p. 463.

(*g*) 6 Edw. 7, c. 25, s. 1. As to this Act, see pp. 584 *et seq*, *ante*.

(*h*) By the Corporation of London (Open Spaces) Act, 1878 (41 & 42 Vict. c. cxxvii.).

(*i*) The lands which may be dealt with are town and village greens, wastes of forests or manors, and all commons or other land within the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 11; see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 481, 541, 595, 597, 598; Corporation of London (Open Spaces) Act, 1878 (41 & 42 Vict. c. cxxvii.), s. 2.

(*k*) As defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250; as to which, see title METROPOLIS, Vol. XX., pp. 292, 393.

(*l*) Corporation of London (Open Spaces) Act, 1878 (41 & 42 Vict. c. cxxvii.), s. 4.

(*m*) *Ibid.*, ss. 12—17.

(*n*) *Ibid.*, s. 18.

(*o*) *Ibid.*, s. 6.

(*p*) *Ibid.*, s. 7.

(*q*) *Ibid.*, ss. 2, 22.

(*r*) Epping Forest Act, 1878 (41 & 42 Vict. c. ccxiii.). As to rights of

SECT. 12. Other Open Spaces and Recreation Grounds.

### SECT. 12.—*Other Open Spaces and Recreation Grounds.*

Places of public resort.

**1051.** Other open spaces and recreation grounds to which the public are entitled to resort for certain purposes are commons (*s*), the sea (*t*), highways (*a*), public market-places (*b*), and in some cases inland lakes (*c*), rivers (*d*), canals (*e*), and burial grounds (*f*).

# Part III.—Monuments.

### SECT. 1.—*Erection.*

Power to erect monuments.

**1052.** Local authorities have no general power with respect to the erection of such structures as monuments; but in some districts (*g*) the urban authority (*h*) may authorise the erection of any statue or monument in any street or public place within its district (*i*).

### SECT. 2.—*Protection and Maintenance.*

#### SUB-SECT. 1.—*Ancient Monuments Protection Acts.*

Definitions.

**1053.** Ancient monuments under the Ancient Monuments Protection Acts, 1882—1910 (*j*), are certain specified monuments (*k*), and

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common claimed over this forest, see *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103; *Chilton* v. *London Corporation* (1878), 7 Ch. D. 562.

(*s*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 441 *et seq.*

(*t*) See titles FISHERIES, Vol. XIV., pp. 573 *et seq.*; WATERS AND WATERCOURSES.

(*a*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 49 *et seq.*, 151 *et seq.*

(*b*) See title MARKETS AND FAIRS, Vol. XX., pp. 1 *et seq.*, 20 *et seq.*

(*c*) See titles FERRIES, Vol. XIV., pp. 555 *et seq.*; FISHERIES, Vol XIV., p. 573; WATERS AND WATERCOURSES; and see *Dixon* v. *Curwen*, [1877] W. N. 4.

(*d*) See titles FISHERIES, Vol. XIV., pp. 573 *et seq.*; WATERS AND WATERCOURSES.

(*e*) See titles RAILWAYS AND CANALS; WATERS AND WATERCOURSES.

(*f*) See title BURIAL AND CREMATION, Vol. III., pp. 407 *et seq.*, 533 *et seq.*

(*g*) That is, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted. As to the adoption of this Act, see p. 589, *ante*. As to the erection of statues in the Metropolitan Police District, see title CONSTITUTIONAL LAW, Vol. VII., pp. 135, 136. The cost of erecting and inclosing such statues is to be defrayed "by and out of any moneys appropriated or to be appropriated for that purpose by Parliament" (Public Statues (Metropolis) Act, 1854 (17 & 18 Vict. c. 33), s. 2).

(*h*) See pp. 586 *et seq.*, *ante*.

(*i*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 259; Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 42. As to the meaning of "street," see *ibid.*, s. 11 (3); Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; and titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 16 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*j*) 45 & 46 Vict. c. 73; 63 & 64 Vict. c. 34; 10 Edw. 7 & 1 Geo. 5, c. 3.

(*k*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), Sched. This schedule enumerates some seventy ancient structures in England, Scotland and Ireland to which the Act applies, and has been supplemented by Orders in Council of 7th March, 1887, 3rd May, 1888, 8th February, 1890, 30th June, 1890, 9th May, 1891, and 9th May, 1892.

any others of a like character of which the Commissioners of Works (*l*), at the request of the owners (*m*) thereof, may become guardians (*n*); or any monuments of a like character declared to be ancient monuments by Order in Council (*o*).

A "monument" is any structure, erection or monument of historic or architectural interest or the remains thereof (*p*).

Owner of monuments.

**1054.** An owner is defined as:—(1) Any person entitled for his own benefit for an estate in fee to the profits of any land which is the site of an ancient monument (*q*); (2) any person absolutely entitled in possession for his own benefit to a beneficial lease of such land (*r*); (3) any person entitled under any settlement (*s*), for his own benefit and for his own life or the life of any other person, to the profits of such land (*t*); and (4) any body corporate, corporation sole, trustees for charities, and commissioners or trustees for public purposes, entitled to such land (*u*).

Owner under disability.

Where the owner is a minor or of unsound mind, or a married woman, the guardian, committee or husband, as the case may be, of such owner is the owner for this purpose, except that a married woman entitled for her separate use, and not restrained from anticipation, is to be treated as not married (*x*).

Acquisition of ancient monuments.

**1055.** The Commissioners of Works may, with the consent of the Treasury, and out of moneys provided by Parliament, purchase any

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(*l*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 132, 136.

(*m*) See the text, *infra*.

(*n*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 11. The expression includes the site of such monument and enough adjoining land necessary for its protection and the means of access to it (*ibid.*).

(*o*) *Ibid.*, s. 10.

(*p*) Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 6.

(*q*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 9 (1). The land may be freehold or copyhold, and need not be free from incumbrances (*ibid.*).

(*r*) *Ibid.*, s. 9 (2). The land need not be free from incumbrances, but the lease must have at least forty-five years unexpired, and no lease is to be deemed to be a beneficial lease for this purpose if the rent reserved thereon exceeds one-third part of the fixed annual value of the land demised by the lease (*ibid.*).

(*s*) "Settlement" here includes any Act of Parliament, will, deed, or other assurance whereby particular estates or particular interests in land are created, with remainders or interests expectant thereon (*ibid.*, s. 11).

(*t*) *Ibid.*, s. 9 (3). The land may be of any tenure and need not be free from incumbrances, but the estate for the time being subject to the trusts of the settlement must be an estate for lives or years renewable for ever, or one renewable for a term of not less than sixty years, or one for a term of years of which not less than sixty are unexpired, or one greater than any of the foregoing estates (*ibid.*).

(*u*) *Ibid.*, s. 9 (4). The land need not be free from incumbrances, but if the land is freehold or copyhold it must be held in fee, and, if leasehold, the lease must be for an unexpired term of not less than sixty years (*ibid.*).

(*x*) *Ibid.*, s. 9. As to the law relating to minors, see title INFANTS AND CHILDREN, Vol. XVII., pp. 39 *et seq.* As to persons of unsound mind, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 389 *et seq.* As to married women, see title HUSBAND AND WIFE. Vol. XVI., pp. 265 *et seq.*

SECT. 2. Protection and Maintenance.

"ancient monument" (*y*), and may accept a bequest or gift of any "ancient monument" (*a*), or any "monument" (*b*). For these purposes the Commissioners, and such gifts and bequests, are exempt from the provisions of the Mortmain Acts (*c*).

Appointment of guardians.

A county council has a like power of purchasing a "monument" in its own or any adjacent county (*d*).

The provisions of the Lands Clauses Consolidation Acts (*e*) as to purchase by agreement apply to such purchases (*f*).

**1056.** The owner of any monument (*g*), or ancient monument (*h*), may by deed (*i*) under his hand appoint the Commissioners of Works (*k*) guardians thereof (*l*).

The Commissioners of Works may not become guardians of a structure occupied as a dwelling-place by any person other than a caretaker (*m*).

Save as is otherwise expressly provided (*n*), the owner of an ancient monument of which the Commissioners are guardians has the same rights therein as though they had not been appointed guardians (*o*).

The cost of maintenance by the Commissioners is to be defrayed, subject to the approval of the Treasury, from moneys to be provided by Parliament (*p*). The Commissioners and the council of any county may receive voluntary contributions towards the cost of maintenance and preservation of any monument of which they become the guardians under this Act, and may enter into any agreement with the owner of such monument or with any other person as to such maintenance and preservation and the cost thereof (*q*).

The council of any county may undertake, or contribute towards, the cost of preserving, maintaining, and managing any such monument, whether it has purchased the same or become the guardian thereof or not (*r*).

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(*y*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 3.

(*a*) *Ibid.*, s. 4.

(*b*) Ancient Monuments Protection Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 3), s. 1.

(*c*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 8. As to these provisions, see title CHARITIES, Vol. IV., pp. 124 *et seq.*

(*d*) Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 2 (1).

(*e*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*f*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), ss. 3, 11; Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 2 (2).

(*g*) *Ibid.*, s. 1; and see note (*i*), *infra.*

(*h*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 2.

(*i*) The deed is binding on persons deriving title under the owner, and in the case of certain limited estates under a settlement upon successive owners (*ibid.*, s. 9).

(*k*) The Commissioners are bound to maintain the monument, or ancient monument, until ordered not to do so by an owner not bound by the deed appointing them guardians (*ibid.*, s. 2).

(*l*) A county council may similarly be appointed guardian of a monument (Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 2 (1)).

(*m*) *Ibid.*, s. 1.

(*n*) See the text, *infra.*

(*o*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 2.

(*p*) *Ibid.* As to the provision of moneys by Parliament for this and similar objects, see title PARLIAMENT, p. 769, *post.*

(*q*) Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 3.

(*r*) *Ibid.*, s. 2 (1).

SECT. 2. Protection and Maintenance.

Injury to monuments.

**1057.** Any person, including an owner who has constituted the Commissioners of Works or a county council guardians thereof, who injures or defaces any "monument" (*s*) or "ancient monument" (*a*) in the ownership or care of the Commissioners or a county council (*b*), is punishable summarily by a penalty not exceeding £5, and in addition must pay for repairing the damage he has caused or in default may be imprisoned with or without hard labour for not more than a month (*c*).

Transfer of ownership.

**1058.** The Commissioners of Works and the council of any county may enter into and carry into effect any agreements for the transfer from the Commissioners to the council, or from the council to the Commissioners, of any monument, whether it is in the same or an adjacent county, and whether they are its owners or guardians, but if they are only its guardians, the consent of the owners is necessary (*d*). Any estate or interest in such a monument, or the guardianship thereof, may also be so transferred (*e*).

Public access

**1059.** The public are to have access to any monument, whether ancient or not, of which the Commissioners of Works or any county council are the owners or guardians, but, where such bodies are merely guardians with the consent of the owner of the monument, the public are to have such access at such times and under such regulations as the Commissioners or council may prescribe (*f*).

SUB-SECT. 2.—*Housing, Town Planning, etc. Act*, 1909.

Housing and town planning schemes.

**1060.** Nothing in the Housing of the Working Classes Act, 1890 (*g*), and any amending Acts, is to authorise the acquisition for the purposes of those Acts of any land which is the site of an ancient monument or other object of archæological interest (*h*), and the Local Government Board is authorised to make general provisions (*i*), in connection with town planning schemes under the Act of 1909, for the preservation of objects of historical interest or natural beauty (*j*).

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(*s*) Ancient Monuments Protection Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 3), s. 1.

(*a*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 6. The Summary Jurisdiction Acts apply; appeal is to quarter sessions (*ibid.*, s. 7); see title MAGISTRATES, Vol. XIX., pp. 589, 638 *et seq.*

(*b*) Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 2 (2).

(*c*) Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), s. 6. Such offences may also be punished under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 787, 788. As to the inspection of ancient monuments and the expense thereof, see Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 5.

(*d*) Ancient Monuments Protection Act, 1900 (63 & 64 Vict. c. 34), s. 4.

(*e*) *Ibid.*

(*f*) *Ibid.*, s. 5.

(*g*) 53 & 54 Vict. c. 70; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION.

(*h*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 45.

(*i*) See pp. 582 *et seq.*, *ante*.

(*j*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 55, Sched. IV.

SECT. 2.

**Protection and Maintenance.**

SUB-SECT. 3.—*In Particular Districts.*

Power to maintain statue.

**1061.** In some districts (*k*) the urban authority (*l*) may maintain any statue or monument in any public open space or recreation ground within its district, if the statue or monument was either erected with its authority or erected before the present provisions came into force in the district, and it may remove any statue or monument the erection of which has been authorised by it (*m*).

Maintenance of public monuments.

**1062.** The obelisk known as Cleopatra's Needle, and any monument, statue or work on the Victoria, Albert, or Chelsea Embankments, or other lands vested in the London County Council (as the successor of the Metropolitan Board of Works), are subject to the control and management of that Council for the benefit of the public (*n*).

The London County Council may erect in connection with Cleopatra's Needle any appropriate works of art (*o*).

All expenses incurred by the Council under these provisions are to be deemed to be expenses incurred by it in the execution of the Metropolis Management Act, 1855 (*p*), and are to be raised and paid accordingly

(*k*) That is, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted; see pp. 587 *et seq.*, *ante*.

(*l*) See *ibid.*

(*m*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 42.

(*n*) Monuments (Metropolis) Act, 1878 (41 & 42 Vict. c. 29), ss. 2—4. This description of the words "the said embankments or lands," used in the Act is taken from the preamble, the only place in which those terms are described; and see p. 602, *ante*. As to offences and the recovery of penalties in connection with these monuments, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 788, note (*i*); METROPOLIS, Vol. XX., p. 464; and see *ibid.*, p. 395, note (*k*).

(*o*) Monuments (Metropolis) Act, 1878 (41 & 42 Vict. c. 29), s. 3.

(*p*) 18 & 19 Vict. c. 120.

(*q*) Monuments (Metropolis) Act, 1878 (41 & 42 Vict. c. 29), s. 5. As to such expenses, see title METROPOLIS, Vol. XX., p. 464.

# ORDER AND DISPOSITION.

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# ORDER OF DISCHARGE.

*See* BANKRUPTCY AND INSOLVENCY.

# ORDERS OF COURT.

*See* COUNTY COURTS; EXECUTION; JUDGMENTS AND ORDERS; MAYOR'S COURT, LONDON; PRACTICE AND PROCEDURE.

# ORDINARY.

*See* ECCLESIASTICAL LAW.

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*See* ECCLESIASTICAL LAW.

# OUTLAW.

*See* CRIMINAL LAW AND PROCEDURE.

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# PARISH.

*See* ECCLESIASTICAL LAW; LOCAL GOVERNMENT.

# PARISH CLERK.

*See* ECCLESIASTICAL LAW.

# PARISH COUNCIL.

*See* LOCAL GOVERNMENT.

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*See* ECCLESIASTICAL LAW.

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## NOTE.

*It is obviously impossible to do much more in respect of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), than give the words of the Act itself.*

*Many of the matters treated of in the following pages are more or less affected by that Act, and no authority short of Parliament itself can deal with the intention expressed in the Statute to create a new Second Chamber.*

*Some Statutes are repealed by the Parliament Act, 1911, in effect, though not expressed to be repealed.*

*The effect of future legislation will be given in a supplementary volume.*

HALSBURY.

# Part I.—General Nature and Powers.

Composition of Parliament.

**1063.** The Parliament of the United Kingdom consists of the Sovereign and the three Estates of the Realm, namely, the Lords Spiritual and the Lords Temporal, who sit together in the House of Lords (*a*), and the elected representatives of the people, who sit in the House of Commons (*b*).

Powers of the Crown.

**1064.** The two Houses of Parliament are summoned, prorogued and dissolved by the Sovereign by the exercise of his Royal Prerogative, and his assent must be given to any Bill passed by the Lords and Commons (*c*) before it can have the force of law (*d*).

Supreme legislative authority of Parliament.

**1065.** Parliament is the supreme legislative authority, not only in the United Kingdom (*e*), but also throughout the whole British Empire (*f*), and there is no legal limit to its power of making and unmaking laws

(*a*) See pp. 619 *et seq.*, *post*.

(*b*) See pp. 655 *et seq.*, *post*.

(*c*) For the provisions of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), ss. 1 (1), 2 (1), by which Bills passed by the House of Commons but not passed by the House of Lords, may receive the Royal Assent and acquire the force of law, see pp. 722, 776, *post*.

(*d*) See pp. 723 *et seq.*, *post*. For the words of enactment to Acts of Parliament, see titles CONSTITUTIONAL LAW, Vol. VI., p. 388; STATUTES; and see p. 723, *post*. For the nature of the Royal Prerogative generally in relation to Parliament, see title CONSTITUTIONAL LAW, Vol. VI., pp. 388—391.

(*e*) See 1 Bl. Com. 160, 161; and title CONSTITUTIONAL LAW, Vol. VI., pp. 317, 318.

(*f*) The colonial possessions of the British Crown, whether they have been granted responsible government or not, are always subject to the control of the Imperial Parliament, and, therefore, not only can the Imperial Parliament legally pass legislation binding on the colonies, but it can also overrule laws passed by subordinate Legislatures within the Empire; see Todd, Parliamentary Government in the British Colonies, 2nd ed., pp. 40, 171, 209—246. For this subject, generally, see titles CONFLICT OF LAWS, Vol. VI., pp. 177 *et seq.*; CONSTITUTIONAL LAW, Vol. VI., pp. 423, 425; DEPENDENCIES AND COLONIES, Vol. X., pp. 565 *et seq.*

(*g*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 317, 318; May, Parliamentary Practice, 11th ed., p. 37. An existing Parliament cannot, however,

**1066.** Even in cases where it delegates to another authority, such as a public department, the power to make rules and regulations or to formulate schemes and draft orders, Parliament usually reserves to itself some measure of control over the exercise of this power by the authority in question (*h*).

Control of Parliament over rule-making authorities.

**1067.** Parliament is not an executive authority, but either directly or indirectly it exercises a dominating control over the action of the Crown and of the Executive Government (*i*) and the administration of the laws which it has enacted.

Control of Parliament over action of Crown and Executive.

This control is effected in various ways, namely :—

Means of control.

(1) By the legal restrictions which prevent the Crown or its Ministers from imposing any charge upon the people or from maintaining a standing army in time of peace without the consent of Parliament ;

(2) By the doctrine of the Constitution by which supply is granted annually by the House of Commons and must receive legislative sanction each year ;

(3) By means of the rule by which supply granted to the Crown

bind a succeeding Parliament ; see title CONSTITUTIONAL LAW, Vol. VI., p. 318, note (*k*).

(*h*) The control of Parliament in this respect is exercised in various ways. In a great number of cases, any rules etc. framed by an authority in conformity with powers conferred upon it by an Act of Parliament, before they can be acted upon, must be laid before Parliament within a certain time after they have been made, or, if Parliament is not sitting at the time, within a certain period after its next meeting: in other cases, although a department which is authorised to make rules etc. may also be empowered to act upon them forthwith, a provision is often contained in the Act conferring this power upon the department, by which either House of Parliament may render any such rule etc. null and void, if, within a specified time after the rule, etc. has been laid before Parliament, it agrees to a resolution to that effect (*e.g.*, see Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 84, 126 (3) ). An authority may also be required to lay upon the table of each House for a prescribed period of time any rule etc. which it has framed in conformity with powers conferred upon it by an Act of Parliament before it may take any action upon it (*e.g.*, see Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 97); and, in cases where an Order in Council is required to carry out a scheme formulated by an authority under powers conferred by statute, the Act which confers such powers sometimes provides that the scheme in question shall not be carried into effect until a prescribed period of time has elapsed, during which either House of Parliament, by agreeing to an address hostile to the proposed scheme, can prevent the Order being made (*e.g.*, see Endowed Schools Act, 1873 (36 & 37 Vict. c. 87), s. 15), or until both Houses have agreed to an address to the Crown praying that the required Order may be made (*e.g.*, see Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 1 (3) ). Where a form of objection is not prescribed by statute, the usual method by which either House of Parliament can object to any rule etc. made by an authority is by means of an address to the Crown. For the conditions under which proceedings of objection when prescribed by statute are exempted from interruption under the Standing Orders of the House of Commons, 1911, No. 1, see p. 674, *post*. As to publication of a proposal to make statutory rules etc., see Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 1.

(*i*) It is a recognised convention of the Constitution that, although the declaration of peace or war or the making of treaties with foreign Powers rests with the Sovereign acting upon the advice of his Ministers, all such acts must conform with the wishes of Parliament, and in certain cases the direct action of Parliament may be required to carry out the obligations incurred by a treaty; see title CONSTITUTIONAL LAW, Vol. VI., pp. 427, 440—442.

PART I. General Nature and Powers.

must be appropriated to the particular purposes for which it has been granted ; and

(4) By the doctrine of the Constitution by which Ministers of the Crown are held responsible to Parliament for any act done by them in their ministerial capacity or for any advice tendered by them to the Sovereign.

Effect of presence of Ministers in Parliament.

**1068.** In addition to the above-mentioned methods of parliamentary control, the practice and procedure of both Houses ensures that the action of the Executive shall always be open to the criticism of Parliament. For the Ministers of the Crown are members either of the House of Lords or of the House of Commons, and in either House it is permissible for members to address questions to them with regard to the administration of their departments (*j*), and in both Houses motions may be made reflecting upon the conduct of a particular Minister or of the Government as a whole (*k*).

Other means by which Parliament is supplied with information.

**1069.** Parliament also receives documentary information with regard to many matters which enables it to keep a watchful eye over the administration of the Executive Government and over its policy in general.

By command of the Sovereign both Houses are supplied with reports on the work of various departments of the Government, with reports of, and evidence heard by, Royal Commissions and other commissions of inquiry, with papers, correspondence, and reports dealing with foreign and colonial affairs, and other subjects which have occupied the attention of Ministers (*l*), and in certain

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(*j*) See pp. 628, 632, 674, 675, *post*.

(*k*) There is no rule of law which compels a Ministry which has lost the confidence of the House of Commons to resign office. It is usual, however, in ordinary circumstances for a Government to resign or advise the Sovereign to dissolve Parliament when it has been placed in a minority in the House of Commons on a division upon any matter reflecting upon its policy in general or upon any proposal contained in a Bill which it has introduced into Parliament. A Government which has been defeated in the House of Commons on a direct vote of confidence has no alternative but to resign office. When a Government is defeated upon the reduction of a vote in supply, it depends upon the circumstances of the case whether or not it will regard its defeat as a vote of want of confidence. In 1895, the Government of the day was defeated on a vote in committee of supply, and resigned office, but this course was not followed in 1904 or 1905. For the circumstances under which Governments, though defeated in the House of Commons, even upon an amendment to the Address in reply to the Speech from the Throne, have not resigned office, see the statement of the Right Hon. A. J. Balfour, M.P., and the debate on the motion for the adjournment of the House on the 24th July, 1905 (Parliamentary Debates, Vol. CL., Fourth Series, pp. 49 *et seq.*). When it is proposed in the House of Commons to move a vote of censure upon the Government from the front opposition bench, facilities for the debate thereon are always afforded by the Government.

(*l*) All such papers, commonly called "Command Papers" (with the exception of the annual estimates (see pp. 768 *et seq.*, *post*), which are printed by order of the House of Commons) are printed on the authority of the department presenting them. In each House, Command Papers are presented without any formality by being "laid on the table" by a minister representing the department responsible for them. During a recess such papers may be presented to the House of Lords by delivery to the Clerk of the Parliaments; to the House of Commons by delivery to the Librarian of that House; see Standing Orders of

cases provision is made by statute to ensure that Parliament is supplied with reports of proceedings taken under the statute in question, or that certain accounts and statistics are laid before both Houses (*m*). General Nature and Powers.

It is also possible for either House, by means of an Address to the Crown or of an order of the House, to obtain, from any public department (*n*), information upon any matter of public importance connected with the work or administration of such department (*o*).

# Part II.—The House of Lords.

## SECT. 1.—*Composition.*

### SUB-SECT. 1.—*In General.*

**1070.** The House of Lords is composed of the Lords Spiritual and Temporal, who sit together in one chamber. Composition of House of Lords.

### SUB-SECT. 2.—*Lords Spiritual.*

**1071.** The lords spiritual are the archbishops and such of the bishops of the Church of England as have seats in the House of Lords. They are appointed by the Crown, and their right to sit and vote in the House of Lords is established by ancient usage and by statute (*a*). The lords spiritual.

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the House of Lords (Public Business), No. 111; Standing Orders of the House of Commons (Public Business), No. 95.

(*m*) Papers presented pursuant to statute, or ordered to be laid before either House, are printed, if desired, by order of the House to which they are presented.

(*n*) In the case of the Privy Council or of departments presided over by a Secretary of State, an address is moved to His Majesty that he will be graciously pleased to give directions that the desired information be supplied; in the case of other departments, the House orders the information to be laid before it.

(*o*) In the House of Lords, a motion for papers is often made for the purpose of raising a debate upon a subject of public interest, but in the House of Commons this is seldom done. In the latter House, when a department has signified its willingness to supply the information for which a member has given notice of his intention of moving, the motion may be made before questions, or before the commencement, or at the close of public business. If the motion is not assented to by the Government, it cannot be made before questions or before the commencement of public business. A motion for a return, or for information upon any subject, may be refused if the making of such return, or the giving of such information, is considered to be inadvisable in the public interest, or would involve unreasonable labour or expense; see May, Parliamentary Practice, 11th ed., p. 539.

(*a*) For the origin of the right by which the lords spiritual sit in the House of Lords, see May, Parliamentary Practice, 11th ed., p. 6; Pike, Constitutional History of the House of Lords, pp. 161—168; First Report on the Dignity of a Peer of the Realm, 25th May, 1820, p. 393. When a vacancy occurs in any see a *congé d'élire* is issued from the Office of the Clerk of the Crown in Chancery to the dean and chapter of the diocese empowering them to elect a new bishop, and also a letter of recommendation stating the name of the individual who has been chosen by the Crown to fill the vacant see. The election is then made formally by the dean and chapter, and afterwards is confirmed by the Crown, after which the new bishop does homage to the Sovereign, who invests him with

SECT. 1. Composition.

Number of lords spiritual entitled to sit.

**1072.** There are two archbishops and thirty-four diocesan bishops in England and Wales (*b*), but of these only the two archbishops and twenty-four bishops are entitled to sit in the House of Lords as Lords of Parliament (*c*).

The number of lords spiritual who receive writs of summons to Parliament has not varied since the year 1847, when the bishopric of Manchester was created (*d*).

Effect of resignation of bishopric by lord spiritual.

**1073.** A lord spiritual retains his seat in the House of Lords for life unless he resigns his bishopric, when he ceases to be a lord of Parliament, and his place in the House of Lords is filled up as if he were dead (*e*).

Filling of vacancies caused by avoidance of

**1074.** When a vacancy occurs among the lords spiritual by the avoidance of the sees of Canterbury or York, or of the sees of London, Durham, or Winchester, the vacancy is filled by the issue of a writ of summons to the bishop who is appointed to the vacant see. But if the vacancy is caused by the avoidance of any other see in England or Wales, a writ of summons is issued to the senior bishop who is not already a lord of Parliament (*f*).

the temporalities of the see. After a bishop has done homage, but not before, he is qualified, whenever the occasion arises, to receive a writ of summons to the House of Lords. In a diocese where there is no dean and chapter, the bishop is appointed by the Crown without the issue of a *congé d'élire*; see also title ECCLESIASTICAL LAW, Vol. XI., pp. 396—400.

(*b*) This number does not include the Bishop of Sodor and Man, who has no right to speak or vote in the House of Lords.

(*c*) At the time of the dissolution of the monasteries in the reign of Henry VIII., twenty-six abbots and two priors appear to have been summoned to Parliament, in addition to the two archbishops and nineteen diocesan bishops, making in all forty-nine spiritual lords of Parliament. After the dissolution of the monasteries, six new bishoprics were created, one of which, Westminster, ceased to exist after a few years. As a result of the Reformation, therefore, twenty-eight abbots and priors were removed from the House of Lords and five new bishops took their places. The number of lords spiritual was reduced consequently to twenty-six. By the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4, s. 2, one archbishop and three bishops of the Church of Ireland were given seats in the House of Lords, but the Irish Church Act, 1869 (32 & 33 Vict. c. 42), s. 13, deprived them of their place in Parliament.

(*d*) See Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108), s. 2. In 1847 there were twenty-six lords spiritual belonging to the Church of England sitting in the House of Lords, but the number of bishops to be summoned to Parliament was not increased by the creation of the new see. Since the creation of the see of Manchester various Acts have been passed for the creation of new, or for the re-organisation of old, dioceses, in all of which, however, a stipulation has been made that the number of spiritual lords of Parliament should not be increased thereby (see Bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34), s. 7; Bishopric of Truro Act, 1876 (39 & 40 Vict. c. 54), s. 5; Bishoprics Act, 1878 (41 & 42 Vict. c. 68), s. 5; Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66), s. 2; Bishoprics of Southwark and Birmingham Act, 1904 (4 Edw. 7, c. 30), s. 1).

(*e*) Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111), s. 2; and see title ECCLESIASTICAL LAW, Vol. XI., p. 407.

(*f*) The writ of summons does not issue from the Crown Office until a declaration (made by someone acting on behalf of the bishop who is claiming a seat in the House of Lords, and declared before a commissioner for oaths) has been received by the Lord Chancellor. The declaration must state (1) the date of the consecration of the bishop; (2) the date of the letters patent by which the temporalities of his see were vested in the bishop, and (3) the dates of the

SECT. 1. Composition.

Places in the House of lords spiritual.

**1075.** The lords spiritual, who always wear their episcopal robes when they are present in the House of Lords, sit together on the benches immediately on the right of the woolsack (*g*), and, so far as the two archbishops and the bishops of London, Durham, and Winchester are concerned, adhere strictly to the seating which was settled by the Act "For placing of the Peers" (*h*).

Privileges of lords spiritual.

**1076.** The lords spiritual, as lords of Parliament, are entitled to all the privileges of Parliament, but, as they are not ennobled in blood, they are not peers and consequently cannot claim "trial by nobility," which is the ancient right of the peers of England (*i*).

As members of the House of Lords, however, the lords spiritual have the right to be present whenever a peer is tried in full Parliament (*k*), and they are summoned with the lords temporal to attend any such trial (*l*), or to be present during the proceedings consequent upon an impeachment of any individual by the House of Commons (*m*).

But although the lords spiritual are thus present as judges throughout the course of the trial of a peer or of the proceedings upon an impeachment, their position is a peculiar one, for they are forbidden by the canons of the Church to vote in cases of blood, and consequently it is not customary for them to take part in any judgment of the House. When the time arrives for the House to pronounce sentence in any case, the senior lord spiritual present desires the leave of the House for himself and the other lords spiritual to be absent when judgment is given, at the same time "saving to themselves and their successors, all such right in the judicature as they have by law, and of right ought to have" (*n*).

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death and burial of the previous lord spiritual, a certificate of whose burial must also be furnished. When a bishop, who is already a lord of Parliament, is translated to some other see, he must claim that a new writ of summons may be issued to him, and he must be introduced again into the House of Lords.

(*g*) A spiritual lord, unless he is a privy councillor, when he is entitled to stand at the table to address the House, must speak from the bishops' benches, but no temporal peer may address the House from these benches; see Companion to the Standing Orders of the House of Lords on Public Business, 1909, p. 50.

(*h*) Stat. (1539) 31 Hen. 8, c. 10, s. 3. The Archbishop of Canterbury sits in the corner seat immediately above the gangway, between the bishop's benches and the bench occupied by the members of the Government; next to him, "on the same form and side," the Archbishop of York. As to the places of the bishops, see title ECCLESIASTICAL LAW, Vol. XI., p. 404. As to the precedence of the archbishops and bishops, see *ibid.*, pp. 387, 388, 404, 405; title PEERAGES AND DIGNITIES.

(*i*) Standing Orders of the House of Lords (Public Business), 1902, Nos. 72 73; see p. 653, *post*; and see title PEERAGES AND DIGNITIES.

(*k*) For crimes for which a peer is tried by his peers in Parliament or in the Court of the Lord High Steward, and for the procedure upon the trial of a peer whilst Parliament is sitting, see pp. 651—653, *post*; and see p. 785, *post*.

(*l*) The lords spiritual are not summoned to attend the trial of a peer when it takes place in the Court of the Lord High Steward, *i.e.*, when Parliament is not sitting.

(*m*) For the procedure with regard to an impeachment, see pp. 650 *et seq.*, *post*.

(*n*) See the protestation made by the Archbishop of York (Dr. Maclagan) upon the occasion of the trial of Earl Russell, 18th July, 1901, Journals of the House of Lords, Vol. CXXXIII., p. 290.

SECT. 1. Composition.

Prayers in the House.

**1077.** It is customary for one of the lords spiritual to read prayers in the House at the beginning of each day's proceedings, and, in the event of the House attending a service in Westminster Abbey, one of the lords spiritual, usually the junior bishop sitting in the House, is requested to preach before the House (*o*).

SUB-SECT. 3.—*Lords Temporal.*

(i.) *In General.*

The lords temporal.

**1078.** The lords temporal include (1) all the hereditary peers of the United Kingdom (*p*); (2) certain hereditary peers of Scotland and Ireland, who are elected to represent in Parliament the peerages of those two countries (*q*); and (3) the Lords of Appeal in Ordinary, who are peers for life (*r*).

(ii.) *Hereditary Peers of the United Kingdom.*

Mode of creation.

**1079.** Hereditary peers of the United Kingdom are created by the Crown by the exercise of the Royal Prerogative, and no limit is fixed by statute or otherwise to the number of such peers who may be created. Such peers are ennobled in blood (*s*), and their dignities can only be lost by attainder or taken away by Act of Parliament (*t*).

Right to receive writ of summons.

**1080.** Any person, unless he is an alien (*a*) or an undischarged bankrupt (*b*), who succeeds to a peerage of the United Kingdom and

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(*o*) The thanks of the House are given to the preacher on motion, and he is desired to cause his sermon to be printed and published. It has been customary for the House to attend the service in Westminster Abbey, if it sits to transact business on a general fast or thanksgiving day. For the order of proceedings on such an occasion, see Companion to the Standing Orders of the House of Lords on Public Business, pp. 121—123.

(*p*) At the time of the Union between England and Scotland, all the adult peers of England were entitled to receive writs of summons to the House of Lords. By the Union with Scotland Act, 1706 (6 Anne, c. 11), all the peers of England and Scotland became peers of Great Britain; but such of the peers of Great Britain as were such only as being peers of Scotland did not become hereditary lords of Parliament. By the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), the peers of Ireland did not become lords of Parliament, but it was provided that all peerages both of Great Britain and Ireland then in existence, or subsequently to be created, should in all other respects be considered as peerages of the United Kingdom.

(*q*) See pp. 625, 626, *post*.

(*r*) See p. 628, *post*.

(*s*) See May, Parliamentary Practice, 11th ed., pp. 13, 14; First Report on the Dignity of a Peer of the Realm, 25th May, 1820, p. 393.

(*t*) See title PEERAGES AND DIGNITIES.

(*a*) The Crown is prevented, by a provision contained in the Act of Settlement (12 & 13 Will. 3, c. 2), s. 3, from issuing a writ of summons to any peer who is an alien, but this rule does not apply to an alien who has been naturalised by a special Act of Parliament or to whom a certificate of naturalisation has been granted by the Secretary of State, for such a person is entitled to all political and other rights, powers, and privileges within the United Kingdom to which he would be entitled if he were a natural-born British subject (Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7); see May, Parliamentary Practice, 11th ed., pp. 28, 29; title ALIENS, Vol. I., p. 314.

(*b*) A peer who has been adjudged a bankrupt is disqualified for sitting or voting in the House of Lords, or on any committee thereof, or for being elected as a representative peer of Scotland or Ireland (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88,

proves his right to such peerage (*c*), and any person who is created (*d*) a peer of the United Kingdom, or any peer of the United Kingdom who is advanced to a higher dignity in the peerage of the United Kingdom, is entitled, if he has reached the age of twenty-one years (*e*), to receive, in virtue of such peerage, a writ of summons to sit and vote in the House of Lords.

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note (*s*). If any peer, who has been adjudged a bankrupt, sits or votes, or attempts (while he is still a bankrupt) to sit or vote, in the House of Lords, or on any committee thereof, he is guilty of a breach of privilege and may be dealt with as the House directs (Bankruptcy Disqualification Act, 1871 (34 & 35 Vict. c. 50), s. 6). A peer is deemed to have become a bankrupt, in England, when an order has been made adjudging him a bankrupt; in Scotland, when, on any petition for sequestration, a deliverance has been pronounced awarding sequestration of his estate; and, in Ireland, when, on any petition of bankruptcy, he has been adjudged by the Court of Bankruptcy and Insolvency in Ireland to be a bankrupt, or when he has filed a petition for an arrangement with his creditors under the superintendence of that court (*ibid.*, s. 3; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32 (1)). The seat of a representative peer of Scotland or Ireland (see pp. 625, 626, *post*), unless his bankruptcy is determined within one year, is vacated at the end of the year, and a new election is held to fill the vacancy (Bankruptcy Disqualification Act, 1871 (34 & 35 Vict. c. 50), s. 5). When a peer becomes bankrupt, the court which has jurisdiction in respect of such bankruptcy causes the fact to be certified to the Speaker of the House of Lords, who informs the House that he has received such certificate. The certificate is entered in the Journals of the House (*ibid.*, s. 7). A writ of summons to Parliament is not sent to a peer so long as he is disqualified by reason of bankruptcy (*ibid.*, s. 8); but, when the adjudication of bankruptcy against him is annulled, or when he obtains from the court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part, he is again entitled to receive a writ of summons to the House of Lords (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32). The termination of a peer's bankruptcy is made known to the House in the same way as his bankruptcy was notified to it.

(*c*) When the eldest son of a deceased peer succeeds his father in the title the following evidence must be supplied to the Lord Chancellor before a writ of summons is issued from the Crown Office, namely: (1) certificates of the marriage and of the death or burial of the late peer; (2) certificate of the birth of the claimant; (3) certificate by the Clerk of the Parliaments that the late peer took his seat (this certificate can be obtained on application at the Journal Office of the House of Lords); and (4) production of the letters patent. A statutory declaration identifying the persons named in the certificates, making the certificates exhibits to declaration, and stating that the claimant is heir to the peerage, must also be made by a near relative and supplied to the Lord Chancellor. In any case in which the claimant to a peerage is not the eldest son of the deceased peer, further evidence may be required, and the declaration should refer to such certificates as may be produced, or supply the necessary evidence if certificates cannot be produced. If the Lord Chancellor is not satisfied as to the evidence of the succession to a peerage, the matter is referred to the Committee for Privileges (see p. 641, *post*); see evidence of the Clerk of the Crown in Chancery before the Select Committee of the House of Commons on House of Commons (Vacating of Seats), House of Commons Paper, 278, 1894, pp. 18—25.

(*d*) At the present time an hereditary peer of the United Kingdom is invariably created by letters patent under the Great Seal, by the terms of which a right is conferred upon him and his heirs and successors to "have the name, state, degree, style, dignity, title and honour" of a peer, and to "have, hold and possess a seat, place and voice" in Parliament; see title PEERAGES AND DIGNITIES.

(*e*) Standing Orders of the House of Lords (Public Business), 1902, Nos. 12, The first of these Orders dates from 1685 and the second from 1663.

SECT. 1. Composition.

Precedence and place in House of Lords.

**1081.** The lords temporal are divided into dukes, marquesses, earls, viscounts, and barons (*f*), and a definite precedence and place in the House of Lords is assigned to each rank of the peerage (*g*). Except, however, upon the introduction of a peer (*h*), or when there is a call of the House (*i*), no attention is now paid to this order of seating. Peers who support the Government of the day sit on the spiritual side of the House (that is, on the benches below the bishops' benches on the right of the woolsack). Peers who are opposed to the Government sit on the temporal side of the House (that is, on the benches on the left of the woolsack), and peers who do not wish to be identified with any political party sit on the cross benches by the bar (*j*).

(iii.) *Representative Peers of Scotland and Ireland.*

(1) *In General.*

Privileges of representative peers.

**1082.** The representative peers of Scotland and Ireland are entitled to all the privileges of Parliament which are enjoyed by the other lords temporal, and are summoned in the same manner as other peers to the trial of a peer in the Court of the Lord High Steward when Parliament is not sitting (*k*).

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(*f*) See title PEERAGES AND DIGNITIES.

(*g*) The order in which the peers were to sit in the House of Lords was first settled by stat. (1539) 31 Hen. 8, c. 10. This statute, after assigning definite places in the House of Lords to peers when holding great offices of state, directed that the peers of each degree were to "sit and be placed after their ancienty." At the present time the Lord Chancellor, the Lord President of the Council, and the Lord Privy Seal, if they are peers, take precedence of all dukes, except those of the blood royal; and the Lord Steward and the Lord Chamberlain of His Majesty's household take precedence of all peers of their degree; and see, further, title PEERAGES AND DIGNITIES.

(*h*) For the proceedings upon the introduction of a newly-created peer, see pp. 689 *et seq.*, *post*.

(*i*) When the House appoints a select committee, the lords appointed to serve upon it are named in the order of their rank, beginning with the highest. In the same way, when the House sends managers to a conference with the Commons, the names of the lords who are chosen are called over in order of seniority. When, however, the whole House is called over for any purpose within the House, or for the purpose of forming a procession outside the House, the call begins invariably with the name of the junior baron; and see pp. 652, 654, note (*k*), *post*.

(*j*) An official record is kept of the peers who attend the sittings of the House and is entered in the Journals. At the present time, no action is usually taken to enforce the attendance of peers, but formerly the House used, if it thought fit, to order the peers to be summoned, and peers who did not obey the summons might be fined or imprisoned; see Journals of the House of Lords, 1820, Vol. LIII., p. 361.

(*k*) Union with Scotland Act, 1706 (6 Anne, c. 11), art. 23; Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4. Peers of Scotland and peers of Ireland (not being members of the House of Commons) who are not lords of Parliament have the right to be tried by their peers and all other privileges of the peerage, except the right to sit in the House of Lords and the privileges depending thereon, and the right to take part in the trial of a peer. Peers of Scotland whose peerages were in existence at the time of the Union have precedence immediately after the peers of the like orders and degrees in England at that date and before all peers of Great Britain of the like orders and degrees created subsequently. Peers of Ireland whose peerages were in existence at the time of the Union with England have rank and

SECT. 1. Composition

**1083.** No peer of Scotland can be elected a member of the House of Commons, but a peer of Ireland, unless he has been previously elected to sit in the House of Lords, may submit himself as a candidate for any county, city, or borough in Great Britain. If, however, he is elected to sit in the House of Commons, he is no longer entitled to his privileges as a peer, nor may he be elected as a representative peer of Ireland or vote at an election of such peer (*l*).

Capacity of Irish peers to sit in House of Commons.

(2) *Representative Peers of Scotland.*

**1084.** Sixteen of their number, who must be of full age, are elected by the hereditary peers of Scotland to represent them as lords of Parliament in the House of Lords for the duration of each Parliament (*m*).

Number of representative peers of Scotland.

**1085.** Every peer of Scotland who holds a peerage which was in existence at the date of the Act of Union, or who can prove his title to such peerage to the satisfaction of the House of Lords, has the right to vote (*n*) at the election of the representative peers of Scotland.

Qualification to vote at election of representative peers of Scotland.

An authentic list of the peerage of Scotland, as it existed on the 1st May, 1707 (*o*), was returned to the House of Lords by the Lord Clerk Register of Scotland, pursuant to an order of the House of the 22nd December, 1707, and was entered into the roll of peers by an order of the House of the 12th February, 1708 (*p*). This list is called over whenever an election takes place, but a title for which no vote has been recorded since the year 1800 may not be called over until a direction with regard to it has been received from the House of Lords (*q*).

Roll of the Scottish peerage.

**1086.** The election of the sixteen representative peers of Scotland takes place at a meeting of the Scottish peers held at Holyrood Palace, presided over by the Lord Clerk Register of Scotland, and

Mode of election of representative peers of Scotland.

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precedence next and immediately after all persons holding peerages of the like orders and degrees in Great Britain subsisting at the time of the Union. Persons who have been created Irish peers since the Union take precedence as if they had been created peers of the United Kingdom (Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4).

(*l*) *Ibid.*

(*m*) Union with Scotland Act, 1706 (6 Anne, c. 11), art. 22. As to the effect of bankruptcy, see note (*b*), pp. 622, 623, *ante*. No Scottish peer may vote at the election of, or be elected, a representative peer who has twice within one year attended Divine Service in any Episcopal place of worship when the King (by name) as well as his heirs or successors and the Royal Family have not been prayed for (Scottish Episcopalians Relief Act, 1792 (32 Geo. 3, c. 63), s. 12; Pike, Constitutional History of the House of Lords, p. 276).

(*n*) See note (*m*), *supra*.

(*o*) The Roll of the Union is printed in Burke's Peerage; and see title PEERAGES AND DIGNITIES.

(*p*) Journals of the House of Lords, 1707, 1708, Vol. XVIII., pp. 399, 458.

(*q*) Representative Peers (Scotland) Act, 1847 (10 & 11 Vict. c. 52), ss. 1, 2. It was further provided by the Representative Peers (Scotland) Act, 1851 (14 & 15 Vict. c. 87), s. 4, that after every meeting of the peers of Scotland assembled for the election of a representative peer, the Lord Clerk Register of Scotland, or the Clerk of Session officiating at such election, should transmit to the Clerk of the Parliaments a list of the titles of any peerages called over at such election for which no vote has been received for fifty years then last past.

SECT. 1. Composition.

convened by virtue of a Royal proclamation under the Great Seal, which must issue twenty-five days at least before such election takes place.

Voting by proxy is allowed at the election of a representative peer of Scotland, and, therefore, any peer who is unable to be present at the meeting is entitled to send a signed list containing the names of the peers for whom he records his vote, and such list is produced by a peer who is present at the meeting (*r*).

As soon as the election has been completed, the Lord Clerk Register of Scotland sends a certificate containing the names of the elected peers to the Clerk of the Crown in Chancery, who must deliver it in at the table of the House of Lords on the first day of the first session of the new Parliament (*s*).

Filling of vacancies among representative peers of Scotland.

**1087.** In the event of a representative peer of Scotland dying or becoming legally incapable to sit as a lord of Parliament during the course of the Parliament for which he has been elected, another Scottish peer is elected to fill the vacancy. A certificate signed by two other of the representative Scottish peers or by two peers who have voted at an election of the representative peers of Scotland is sufficient evidence of the death or legal incapacity of a representative peer (*t*). As soon as such a certificate has been received, a proclamation under the Great Seal is issued for the election of a new representative peer (*u*).

(3) *Representative Peers of Ireland.*

Number of representative peers of Ireland.

**1088.** Twenty-eight of their number are elected by the hereditary peers of Ireland (*v*) to represent them in the House of Lords, and every peer so elected is entitled to receive a writ of summons to Parliament and to sit in the House of Lords for life (*w*).

Mode of election of ve Ireland.

**1089.** Whenever a vacancy occurs amongst the representative peers of Ireland by reason of the death or attainder of one of their number, the Lord Chancellor, upon receiving a certificate, under the hand and seal of two peers of the United Kingdom, of the decease of the peer, or on view of the record of his attainder, directs a writ to be issued under the Great Seal to the Lord Chancellor of

(*r*) The minutes of the meeting of Scottish peers, and a return of the names called over at the meeting, is sent by the Lord Clerk Register of Scotland to the Clerk of the Parliaments, and is ordered by the House of Lords to be printed; see Journals of the House of Lords, 1910, Vol. CXLII., p. 11.

(*s*) Standing Orders of the House of Lords (Public Business), 1902, No. 2.

(*t*) Union with Scotland Act, 1706 (6 Anne, c. 11), s. 6; Representative Peers (Scotland) Act, 1851 (14 & 15 Vict. c. 87), s. 1. The death or legal incapacity of a peer is to be certified to the Sovereign.

(*u*) No vacancy is caused amongst the representative peers of Scotland or Ireland when one of their number is created a peer of the United Kingdom; see May, Parliamentary Practice, 11th ed., p. 11.

(*v*) As to such hereditary peers and the statutory limitation on new creations, see title CONSTITUTIONAL LAW, Vol. VI., p. 456. There are at the present time eighty-six peers of Ireland who are not hereditary lords of Parliament. Only one peerage of Ireland has been created since 1877; see May, Parliamentary Practice, 11th ed., p. 12, n.

(*w*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4.

Ireland directing him to cause writs to be issued to all the temporal peers of Ireland authorising them to vote for the election of a new representative peer (*a*). In obedience to this direction, a writ, together with a form of return, on which there is a blank space for the insertion of the name of the peer elected, is sent by the Clerk of the Crown and Hanaper in Ireland to every peer of Ireland who has proved his right to vote (*b*).

Every such writ and form of return must be sent back to the Crown Office of Ireland within thirty days of the *teste* of the writ, and, immediately after the return day of the writs, the name of the elected peer is published in the London and Dublin *Gazettes*. The writs and returns, with the certificates of the Clerk of the Crown and Hanaper in Ireland annexed thereto, are delivered on oath by that official at the bar of the House of Lords (*c*).

Procedure adopted in case of equality of voting.

**1090.** In the case of an equality of voting at the election of an Irish representative peer, the names of the peers who have received an equal number of votes are delivered on oath by the Clerk of the Crown and Hanaper in Ireland at the bar of the House of Lords. The names of such peers are then written on pieces of paper of similar form and are put into a glass by the Clerk of the Parliaments whilst the House is sitting, and the peer whose name is first drawn out of the glass is declared to be duly elected (*d*).

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(*a*) A person who claims the right to vote at the election of a representative peer of Ireland by virtue of any peerage of Ireland must present a petition to the House of Lords, signed by himself or by some person on his behalf, claiming such right. In this petition the claimant must state the manner in which he derives his title to the peerage in question and must pray the House to acknowledge such right. A petition of this kind is referred by the House to the Lord Chancellor for him to consider and report upon. If the Lord Chancellor is satisfied that the claimant has proved his right to the peerage in question and is thereby entitled to vote, he reports accordingly to the House, and the Clerk of the Parliaments then transmits to the Clerk of the Crown and Hanaper in Ireland a copy of the resolution by which the House admits the claimant's right to vote at the elections of peers of Ireland to sit in the Parliament of the United Kingdom. If, however, the Lord Chancellor is not satisfied as to the claimant's right to vote, he reports to this effect to the House, and the matter is then referred to the Committee for Privileges; see Standing Orders of the House of Lords (Public Business), 1902, Nos. 90, 92, 93. As to this committee, see p. 641, *post*.

(*b*) No peer of Ireland may make a return to such writ unless he has taken the oath and signed the declaration which is required to be taken and signed by every lord of Parliament before he takes his seat in the House of Lords. Such oath and declaration may be taken and subscribed in the Court of Chancery in Ireland or before one of His Majesty's justices of the peace in Ireland (Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 8 (2)). It was decided, in the case of Lord Curzon of Kedleston, that an Irish peer who had not established his claim to vote at the election of an Irish peer might himself be elected to sit as a lord of Parliament; see Journals of the House of Lords, 1908, Vol. CXL., pp. 5, 6, 19. As to right of Irish peers to sit in the House of Commons, see p. 625, *ante*. As to the effect of bankruptcy, see note (*b*), pp. 622, 623, *ante*.

(*c*) This is done the first day of a new Parliament in the case of an election occurring since the dissolution of the preceding Parliament.

(*d*) This procedure was adopted in 1908, when Lord Farnham and Lord Ashtown each had received the same number of votes; see Journals of the House of Lords, 1908, Vol. CXL., p. 381.

SECT. 1.

(iv.) *Lords of Appeal in Ordinary.*

**Composition.**

Appointment of lords of appeal in ordinary.

**1091.** Four Lords of Appeal in Ordinary are appointed by the Crown to assist the House of Lords in the hearing and determination of appeals (*e*). They hold office during good behaviour and can only be removed from office on the address of both Houses of Parliament (*f*).

Duration of peerage of a lord of appeal in ordinary.

**1092.** A Lord of Appeal in Ordinary is created a baron for life by letters patent (*g*), and, if he resigns his office, is still entitled to receive a writ of summons to sit and vote in the House of Lords (*h*). If he vacates his office by death, resignation, or otherwise, the Crown may appoint a duly qualified person to succeed him.

## SECT. 2.—*Procedure and Conduct of Business.*

### SUB-SECT. 1.—*In General.*

Conduct of business.

**1093.** The business of the House of Lords is transacted (1) in the House itself; (2) in committee of the whole House; (3) in select committees; (4) in sessional committees which are appointed at the beginning of every session to perform certain definite duties connected with the business, administration or procedure of the House (*i*); (5) in private Bill committees; and (6) in joint committees of the two Houses.

The conduct of business in the House of Lords and the procedure of the House in general is regulated by its Standing Orders on public, private, and judicial business, by a series of resolutions and orders which have been agreed to from time to time, and by the established practice of the House.

### SUB-SECT. 2.—*Business Transacted in the House itself.*

Stages of Bills and other matters considered in the House.

**1094.** The first, second, and third readings of all Bills take place in the House itself, and all amendments which have been made to any Bill either in committee of the whole House or in any other committee (*k*), and all reports from select committees, are submitted to the consideration of the House.

Any question which is addressed by a member of the House to a Minister of the Crown, or to any other peer, is asked in the House itself. As a general rule also every motion on which the Lords are called upon to express their opinion with regard to any

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(*e*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 6, 14. As to such appeals, see pp. 643 *et seq.*, *post*.

(*f*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 6. For the legal qualifications etc. of persons who may be created Lords of Appeal in Ordinary, see title COURTS, Vol. IX., p. 23.

(*g*) By the terms of the letters patent a Lord of Appeal in Ordinary is created a baron "to hold the said style of Baron —— aforesaid, unto him the said —— during his life"; see Journals of the House of Lords, 1910, Vol. CXLII., p. 272. In precedence a Lord of Appeal in Ordinary ranks according to the seniority of his barony, and, although his dignity does not descend to his heir, his wife and children enjoy the precedence of a baron's wife and children by virtue of Royal warrants of the 22nd December, 1876, and the 30th March, 1898.

(*h*) Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 2.

(*i*) For a list of such committees, see pp. 641, 642 *et seq.*, *post*.

(*k*) In the case of a public Bill (see p. 702, *post*), or of a provisional order

matter which is thus brought to their notice is made in the House, but it is open to any peer to move that the House do resolve itself into a committee of the whole House to consider a resolution or series of resolutions upon any subject with regard to which it is thought desirable that there should be more detailed discussion than would be possible under the rules of debate which prevail in the House itself (*l*).

### SUB-SECT. 3.—*Officers of the House.*

#### (i.) *The Lord Speaker.*

Duties of the Lord Speaker.

**1095.** The Lord Chancellor, or the Lord Keeper of the Great Seal for the time being, is speaker of the House of Lords *ex officio* (*m*). He sits on the woolsack and presides over the deliberations of the House, except when it is in committee. He puts the question on all motions which are submitted to the House, but he has no power either to maintain order, or to act in any way as the representative or mouthpiece of the House, unless the House confers the necessary authority upon him (*n*).

Contrast between the position of the Lord Chancellor and the Speaker of the House of Commons.

**1096.** The Lord Chancellor is invariably an important member of the Government of the day (*o*). His position consequently is different from that of the Speaker of the House of Commons (*p*), for necessarily he takes an active part in the proceedings of the House, even when he is presiding over it as its Speaker. When he intervenes in its debates, however, he always speaks in his capacity as a peer, and, to emphasise this fact, he moves away from the woolsack and stands a few feet on the left hand side of it whilst addressing the House (*q*).

Temporary Speakers.

**1097.** Several lords are usually appointed by the Crown by commission under the Great Seal to act as Speakers of the House of Lords in the absence of the Lord Chancellor (*r*). In the event of

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confirmation Bill (see p. 703, *post*), amendments which have been made in a select committee (see pp. 637, 715, *post*), or in a committee of the whole House, are considered by the House on report (see p. 716, *post*); in the case of a private Bill (see p. 750, *post*), amendments which have been made by the committee on the Bill are considered on third reading (see p. 756, *post*).

(*l*) *E.g.*, the House has resolved itself into a committee to consider the best means of reforming its existing organisation etc.; see Journals of the House of Lords, 1910, Vol. CXLII., pp. 55, 58, 59, 63. For procedure in committee of the whole House, see, further, p. 708, *post*.

(*m*) Standing Orders of the House of Lords (Public Business), 1902, No. 5. The woolsack is considered to be outside the limits of the House, and, therefore, the Lord Chancellor, or any other person who is appointed by the Crown to act as speaker, may preside over the House of Lords and put the question without being a peer; but, if he is not a peer, he may not vote or take any part in the debates of the House; see Journals of the House of Lords, 1858, Vol. XC., p. 69.

(*n*) Standing Orders of the House of Lords (Public Business), 1902, No. 20.

(*o*) For the judicial and political duties of the Lord Chancellor, and the general nature of his office, see titles CONSTITUTIONAL LAW, Vol. VII., pp. 55—64; COURTS, Vol. IX., p. 23.

(*p*) See pp. 663, 664, *post*.

(*q*) When the Lord Chancellor, or any other peer who is sitting as Lord Speaker, takes part in a division (see p. 633, *post*), he does not leave the woolsack, but gives his vote to the tellers in the House. The same rule applies in the case of the Chairman (see p. 630, *post*) when the House is in committee.

(*r*) See Journals of the House of Lords, 1909, Vol. CXLI., p. 65.

none of these lords being present, the House may appoint its own Speaker (*a*).

Procedure and Conduct of Business.

(ii.) *The Chairman of Committees.*

Chairman of Committees.

**1098.** At the beginning of every session, or whenever a vacancy occurs in the office, a lord is appointed to fill the office of Chairman of Committees throughout the session (*b*). The peer who is chosen to hold this office takes the chair in all committees of the whole House, and is also chairman *ex-officio* of all other committees of the House on private Bills and other matters, unless the House otherwise directs (*c*). The Chairman of Committees is also the first of the Deputy Speakers, appointed by commission, and, if he is present in the House when the Lord Chancellor is absent, always presides over the House (*d*).

Absence of Chairman of Committees.

**1099.** There is no Deputy Chairman of Committees in the House of Lords, but, in the event of the absence of the Chairman of Committees owing to illness or any other cause, some other peer is appointed by the House to perform his duties, usually upon the motion of the leader of the House (*e*).

(iii.) *Permanent Officers.*

Officers in attendance upon the House.

**1100.** The principal permanent officers of the House of Lords are the Clerk of the Parliaments, the Clerk Assistant of the Parliaments, and the Reading Clerk, who sit at the table during the sittings of the House, and the Gentleman Usher of the Black Rod, and the Serjeant-at-Arms, who also are present whilst the House is sitting.

Clerk of the Parliaments and other clerks.

**1101.** The Clerk of the Parliaments is the head of the permanent staff of the House of Lords (*f*). He is appointed under letters patent by the Crown. He must exercise the duties of his office in person and can be removed from office by the Sovereign upon an address of the House of Lords for that purpose (*g*).

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(*a*) Standing Orders of the House of Lords (Public Business), 1902, No. 5; see Journals of the House of Lords, 1894, Vol. CXXV., p. 567.

(*b*) The Chairman of Committees receives a salary of £2,500 a year, and, in addition to his duties in the House, exercises an important supervision and control over all provisional order confirmation Bills and private Bills (see pp. 743, 750 *et seq.*, *post*). In this work he has the assistance of a legal adviser, who is known as the Counsel to the Chairman of Committees; see note (*v*), p. 750, *post*.

(*c*) When the name of more than one candidate for the office is proposed, the choice of the House is decided by means of a division; see Journals of the House of Lords, 1886, Vol. CXVIII., pp. 180, 181.

(*d*) The precedence of each of the other Deputy-Speakers is decided by the date of the commission appointing him.

(*e*) See Journals of the House of Lords, 1906, Vol. CXXXVIII., p. 335.

(*f*) The office of the Clerk of the Parliaments is divided into five departments, namely, the Committee Office, the Judicial Office, the Public Bill Office, the Private Bill Office, and the Journal Office. According to an arrangement arrived at in 1894, there are seventeen clerks on the establishment; see First Report from the House of Lords Offices Committee, Journals of the House of Lords, 1894, Vol. CXXVI., pp. 116—122. The clerks in the Parliament Office are appointed on the nomination of the Clerk of the Parliaments, and are removable by him at pleasure (Clerk of Parliaments Act, 1824 (5 Geo. 4, c. 82), s. 5).

(*g*) Clerk of the Parliaments Act, 1824 (5 Geo. 4, c. 82), s. 2. The House is informed by the Lord Chancellor of the appointment of a new Clerk of the Parliaments, and the letters patent are read at the table of the House. After

The Clerk Assistant and the Reading Clerk are appointed by the Lord Chancellor, subject to the approbation of the House of Lords, and, when so appointed and approved, can be removed from office only by order of the House (*h*).

Gentleman Usher of the Black Rod, and Serjeant-at-Arms.

**1102.** The Gentleman Usher of the Black Rod and the Serjeant-at-Arms are appointed by the Crown (*i*). In addition to his duties connected with the carrying out of the orders of the House with regard to the commitment of offenders for contempt (*j*), the Gentleman Usher or his deputy, the Yeoman Usher, is present whenever the House sits; supervises the admission of strangers and acts as the messenger of the House whenever the attendance of the Commons is required. He also is present with the other great officers at the introduction of a new peer (*k*). The Serjeant-at-Arms has no duties in the House itself except to attend upon the Lord Chancellor or the person who is acting as Speaker of the House for the time being. He executes the orders of the House for the attachment of offenders when they are in the country (*l*).

### SUB-SECT. 4.—*Journals of the House.*

Journals of the House.

**1103.** The Journals of the House of Lords, which have always been held to be public records (*m*), are compiled in the Journal Office (*n*) from the manuscript minutes and notes of proceedings made by the clerks at the table during the sittings of the House (*o*).

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which, the newly-appointed Clerk of the Parliaments, standing at the table, makes a declaration of allegiance to the Sovereign, and promises to carry out the duties of his office; see Journals of the House of Lords, 1886, Vol. CXVIII., p. 6. In addition to his duties connected with the judicial work of the House (for which see title COURTS, Vol. IX., p. 24), the Clerk of the Parliaments is required to make true entries and records of the things passed in the House and "to keep secret also such matters as shall be treated therein." With the assistance of the Clerk Assistant, he prepares the official Minutes of the Proceedings of the House; he signs all orders and other official communications; he is the custodian of the records and manuscripts preserved at the House; he indorses all Bills which are sent to the House of Commons, and conveys messages between the two Houses; and gives the Royal Assent to all Bills which have been passed.

(*h*) Clerk of Parliaments Act, 1824 (5 Geo. 4, c. 82), s. 3; Standing Orders of the House of Lords (Public Business), 1902, No. 62. For the procedure with regard to the appointment of a Clerk Assistant, see Journals of the House of Lords, 1890, Vol. CXXII., p. 31. The Reading Clerk reads aloud in the House all prorogation and other commissions, and the patents and writs of summons presented by newly created peers.

(*i*) The House is informed of the appointment of a new Gentleman Usher of the Black Rod by the Lord Great Chamberlain, who is the hereditary Officer of State to whom the custody and control of the Palace of Westminster is entrusted by the Crown; see Journals of the House of Lords, 1905, Vol. CXXXVII., p. 4.

(*j*) See title COURTS, Vol. IX., p. 24.

(*k*) See pp. 689, 690, *post*.

(*l*) See May, Parliamentary Practice, 11th ed., p. 199.

(*m*) Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3; see title EVIDENCE, Vol. XIII., p. 527.

(*n*) The Journals of the House of Lords date from 1509. When they are required as evidence in any court, a copy of the passage in question, authenticated by the signature of the Clerk of the Parliaments, may be produced; see May, Parliamentary Practice, 11th ed., p. 202, and see title EVIDENCE, Vol. XIII., p. 527. As to the Journal Office, see note (*f*), p. 630, *ante*.

(*o*) The House, on motion made, may order an entry in the Journals to be

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The Journal of each session is printed and laid on the table of the House during the course of the following session (*p*).

SUB-SECT. 5.—*Minutes of Proceedings.*

Minutes of Proceedings.

**1104.** The Minutes of the Proceedings of the House, together with a list of the notices and orders of the day which have been put down for the future consideration of the House and a list of all Bills in progress, are drawn up, with the authority of the Clerk of the Parliaments, at the close of each day's sitting, and are printed. The Minutes of Proceedings are issued to all members of the House. The business for each day on which the House sits is also printed on a separate notice paper, which appears before the hour appointed for the House to meet.

SUB-SECT. 6.—*Quorum.*

Quorum of the House and of committee of the whole House.

**1105.** Three lords constitute a quorum of the House and also of a committee of the whole House, but if, when a division takes place upon any stage of a Bill, it appears that thirty lords are not present in the House, the Lord Chancellor, or, if the House is in committee, the Chairman of Committees, must declare the question to be not decided. The debate is then adjourned (*q*), and is resumed at the next sitting of the House at the point at which it stood when the division took place.

SUB-SECT. 7.—*Notices and Orders of the Day.*

Division of business transacted in the House.

**1106.** Business which is transacted in the House (*r*) is divided into public business and private business (*s*), and consists of notices and of orders of the day.

Precedence of public business.

**1107.** Any peer is entitled to give notice of his intention either to make a motion or to ask a question with regard to any subject.

On Tuesdays and Thursdays, unless the House otherwise orders, notices with regard to public Bills are always given precedence of other notices (*t*), but, on other days, all notices, whether they relate to proceedings upon public Bills or to other matters, are inserted in the Minutes of Proceedings, and appear upon the notice paper in the order in which they have been received by the authorities of the House.

Orders of the

**1108.** An order of the day is a definite matter, the consideration of which has been fixed by the House for a particular day. A motion,

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amended, vacated, or altogether expunged, and also may order any resolution, report, letter of thanks or other document to be entered in the Journals.

(*p*) In pursuance of an order of the 15th May, 1793; see Journals of the House of Lords, 1793, Vol. XXXIX., p. 759; see also p. 642, *post*.

(*q*) Standing Orders of the House of Lords (Public Business), 1902, No. 33; see also Journals of the House of Lords, 1889, Vol. CXXI., p. 293; 1900, Vol. CXXXII., p. 265; 1909, Vol. CXLI., p. 210.

(*r*) See p. 628, *ante*.

(*s*) Private business includes the consideration of private Bills and provisional order confirmation Bills (see pp. 727 *et seq.*, 744 *et seq.*, *post*) and of the standing orders of the House which refer to them.

(*t*) But a petition relating to any such Bill may be presented immediately before the motion is made to proceed with the consideration of the Bill.

therefore, becomes an order of the day whenever the debate arising upon it has been adjourned by the House to a particular day.

Motions.

**1109.** No motion, except the motion which is made for an address in reply to a Speech from the Throne, requires a seconder.

A motion may be opposed either by a direct negative, or by means of an amendment, or by moving the previous question (*u*).

After it has been submitted to the House, a motion may be withdrawn only by the permission of the House, which must be unanimous.

Matters decided on question.

**1110.** Every matter with regard to which the House is called upon to give its decision is submitted to its judgment by means of a question from the woolsack, or from the chair if the House is in committee, upon a motion made by some member of the House (*a*).

SUB-SECT. 8.—*Divisions.*

Procedure on a division.

**1111.** When the debate upon any question has been brought to a conclusion, the Lord Chancellor, or, if the House is in committee, the Chairman of Committees, proceeds to collect the voices, and announces his decision as to the preponderance of the "contents" or "not-contents" to the House or to the committee, as the case may be.

If his decision is challenged, strangers are ordered to withdraw, and two lords are appointed tellers for each side (*b*). After the lapse of two minutes from the time when the question was put, the doors of the house are locked and the question is again put. If the challenge is repeated, a division takes place (*c*). The contents pass into the division lobby by the door on the right of the throne, the

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(*u*) In each House the previous question is a method which may be employed to prevent a vote being taken forthwith on a motion that has already been proposed from the woolsack or the chair, as the case may be. The effect of moving the previous question is that a new motion is submitted to the House which compels it to decide, in the first instance, whether or not the original motion is to be voted upon at all before it can determine upon its merits; see May, Parliamentary Practice, 11th ed., pp. 282—284. In the House of Lords the previous question is put in the following manner, namely:—"The original motion was ——." "Since this it has been moved that the previous question be put." "The question, therefore, which I have to put to your lordships is, Whether the said original question be now put?" If this question is decided in the affirmative, the original question is put, but, if it is decided in the negative, the original question may not be then proceeded with. In the House of Commons, since the introduction of the closure, the previous question has been put in the form "That the question be not now put?" The previous question may not be moved in committee of the whole House or in a select committee, and in the House itself it may only be moved on a motion and not on an amendment to a motion.

(*a*) By a standing order, made by the House in 1908, every motion, after it has been moved, must be proposed from the woolsack or the chair before debate arises thereon; see Journals of the House of Lords, 1908, Vol. CXXXIX., p. 217.

(*b*) Standing Orders of the House of Lords (Public Business), 1902, No. 32. The House and side lobbies are cleared of strangers, but the galleries and the space within the railing round the throne are not cleared, unless a special order is made by the House.

(*c*) The vote of no peer may be counted unless the peer was present in the House when the question was put.

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not-contents by the door on the left of the bar. As soon as all the peers who are present have passed through the lobbies (*d*) and re-entered the House, the result of the division is announced by the Lord Chancellor, or the Chairman of Committees, as the case may be, after which the doors of the House are unlocked and strangers are re-admitted (*e*). If the same number of votes are recorded on each side in a division, the question is decided in the negative, according to the rule, "*Semper præsumitur pro negante*" (*f*), for neither the Lord Chancellor nor the Chairman of Committees has a casting vote.

SUB-SECT. 9.—*Protests.*

Right to protest.

**1112.** In addition to voting against any motion, any lord has the right to record his dissent by means of a written protest, in which it is open to him to set out his reasons for objecting to any decision which has been arrived at by the House (*g*). Every such protest is entered in a book which is kept for that purpose.

According to the usage of the House no lord may enter a protest, or sign such protest, unless he was actually present when the question was put on the motion to which he takes exception, and, if a division took place upon it, voted in such division; a motion, however, may be made in the House to remove this restriction (*h*).

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(*d*) By the leave of the House a peer is sometimes allowed to give his vote without quitting the House; see Journals of the House of Lords, 1893, Vol. CXXV., p. 432. When proxies are called, the names of peers who vote by proxy and the manner of their voting is recorded by the clerks at the table. The practice of voting by proxy, however, has been practically abolished by Standing Orders of the House of Lords (Public Business), 1902, No. 34; see p. 786, *post*.

(*e*) The division lists are printed and circulated with the daily Minutes of Proceedings; see p. 632, *ante*. They are also printed in the Journals of the House.

(*f*) The object of this rule is to prevent any change being effected in the existing law or any motion or resolution being carried, unless there is a majority in favour of the change in the law or of the motion or resolution before the House. On motions on abstract resolutions, therefore, or for second readings and third readings of Bills, or for going into committee on Bills, on which the usual question is that the word "now" stand part of the motion (see pp. 707, 710, 719, *post*), whenever the voting is equal, the resolution is lost, or the Bill is not proceeded with, as the case may be. With regard to an amendment to a Bill or to a motion or resolution, the result of the application of this rule when the voting in a division is equal must depend upon the way in which the question is put to the House; see, with regard to this point, the discussion which arose in 1864 as to the manner in which the Lord Chancellor put the question on the report of the amendments to the Public and Refreshment Houses (Metropolis) Bill; Parliamentary Debates, Third Series, Vol. CLXXVI., pp. 1315—1317; see also report from the Select Committee of the House of Lords on the Standing Orders of the House, 1907, House of Lords Paper (95). Since 1509 there appear to have been only 29 cases of equality of voting in the ordinary proceedings of the House; in only 9 of these could any difference of opinion have arisen owing to the method of putting the question.

(*g*) Standing Orders of the House of Lords (Public Business), 1902, No. 35. This order states that a protest must be entered, in the book kept for the purpose, before two o'clock the next day on which the House sits, but this rule is not enforced at the present time.

(*h*) The House has also given leave to a peer to remove his name from a protest which he has signed and to amend a protest after it has been entered on the Journals of the House; see Journals of the House of Lords, 1875, Vol. CVII., p. 255.

## SECT. 3.—*Sittings of the House.*

SECT. 3. Sittings of the House.

Days of sitting.

**1113.** The House of Lords usually sits for business other than judicial business on Monday, Tuesday, Wednesday and Thursday in each week throughout the course of the session, but there is no standing order or rule to prevent it from meeting, should occasion require, on any other day of the week.

Prayers.

**1114.** The Lord Chancellor, preceded by the Serjeant-at-Arms carrying the mace, and an attendant carrying the purse, enters the House from below the bar and takes his seat on the woolsack at a quarter-past four o'clock (*i*). When the House has not met earlier in the day in its judicial capacity, the doors of the House are locked and prayers are read by one of the bishops (*k*). As soon as prayers are over, the doors of the House are opened and the business of the day begins.

Order of business.

**1115.** Between a quarter-past four and half-past four o'clock, public petitions may be presented to the House (*l*), and any business for which no previous notice is required, and any proceedings in connection with private Bills or for the suspension of the standing orders which refer to them (*m*), may be taken; after half-past four o'clock, the notices and orders of the day are considered in the order in which they appear upon the notice paper, but any notice to suspend the standing orders of the House must be considered first (*n*).

Adjournment of the House.

**1116.** The adjournment of the House is effected by means of a motion which may be made by any peer at any time during the course of the sitting. If objection is taken to any such motion, the question is decided by a division.

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(*i*) When the House meets earlier in the day for judicial business, prayers are said before the counsel are brought in (see p. 649, *post*) and are not repeated in the afternoon. The mace and the purse are deposited on the woolsack behind the Lord Chancellor, and remain there throughout the sitting even when the House is in committee. Strangers are not allowed to be present in the House whilst prayers are read.

(*k*) In the absence of a bishop, prayers are usually read by the Lord Chancellor, but, if a peer in holy orders is present, he is requested to read them. Both Houses of Parliament use the same form of prayers; see May, Parliamentary Practice, 11th ed., p. 159, n.

(*l*) A peer who presents a petition may address the House upon it, if he wishes, but in such case he should give notice of his intention; and a member of the House of Lords may present a petition on his own behalf. Every petition which is presented to the House must bear the signature of the peer who presents it. No petition with regard to a Bill which is not before the House, or which has been rejected by the House, is received, nor will the House receive any petition for a grant of public money or for compounding a debt to the Crown unless it is recommended by the Crown. As to petitions on private Bills, see pp. 729, 747 *et seq.*, *post*.

(*m*) A notice of a motion to amend a standing order with regard to private Bills, unless it is made by the Chairman of Committees, cannot be taken into consideration until half-past four o'clock.

(*n*) Unless the peer who has given any such notice withdraws the same, or, with the leave of the House, consents to its postponement, or is absent at the appointed time; see Standing Orders of the House of Lords (Public Business), 1902, No. 21. Notice is required for any motion to make a new standing order or to dispense with an existing one.

SECT. 3. **Sittings of the House.**

When the business upon the notice paper has been disposed of, or at any hour which may be determined upon in view of the business before the House (*o*), it is usual for the leader of the House, or, in the event of his absence, the leading member of the Government who is present, to move the adjournment, stating at the same time the day and hour of the next meeting. After this motion has been put from the woolsack and is agreed to by the House, the Lord Chancellor, preceded by the mace, leaves the House by the bar, and the sitting is at an end.

## SECT. 4.—*Maintenance of Order and Rules of Debate.*

Questions of order determined by the House.

**1117**. The Lords are the sole judges of their own procedure, and all questions with regard to the regulation of the proceedings of the House are settled by the House itself.

The rules as to the maintenance of order and the general conduct of debate are either laid down in the Standing Orders of the House or are sanctioned by usage

Preservation of order.

**1118**. With regard to the actual preservation of order, the House up to the present time has had no occasion to add to, or even to amend, its two Standing Orders upon the subject, which date from the seventeenth century, and which have proved amply sufficient for the purpose for which they were intended. The first of these lays it down that "all personal, sharp, or taxing speeches" are to be forborne, and the second instructs any member of the House who conceives himself affronted or injured by any other member of the House, either in the House itself, or within its precincts, or in any of its committees, "to appeal to the Lords in Parliament for his reparation" (*q*).

Conduct of debate.

**1119**. With regard to the conduct of debate, members of the House may speak upon any question which is before the House, or upon

(*o*) If a motion is agreed to for the adjournment of a debate upon any subject, or if, when the House is in committee, a motion is agreed to for the House to be resumed, the House may make an order, without notice given, that the business in question shall be taken first at the next sitting or at some subsequent sitting of the House; see Standing Orders of the House of Lords (Public Business), 1902, No. 22.

(*p*) By Standing Orders of the House of Lords (Public Business), 1902, No. 19, the peers are directed to keep their dignity and order in sitting as much as may be, and not to remove out of their places without just cause, to the disorder of the House. They are also directed when they cross the House to make obeisance to the Cloth of Estate, *i.e.*, the Throne. At the present time this rule is not enforced, but it is out of order for a peer to wear his hat when entering or leaving the House. It is also irregular for a peer to pass between the woolsack or the chair and a member who is addressing the House, or between the woolsack and the table. By Standing Orders of the House of Lords (Public Business), 1902, No. 24, any lord who has occasion to speak with another lord while the House is sitting is directed to retire into the Prince's Chamber, and not to carry on his conversation in the space behind the woolsack, "or else the Lord Speaker is to call them to order, and, if necessary, to stop the business in agitation."

(*q*) Standing Orders of the House of Lords (Public Business), 1902, Nos. 28, 29; see Journals of the House of Lords, 1871, Vol. CIII., p. 629; 1872, Vol. CIV., p. 381.

any question of order arising out of the debate. They must speak standing and uncovered (*r*), and must address their speeches to the rest of the lords in general and not to the Lord Chancellor or the Chairman of Committees, as the case may be (*s*).

SECT. 4. **Maintenance of Order and Rules of Debate.**

Except when the House is in committee, no lord may speak more than once upon the same stage of any Bill or upon the same matter, but the lord who is in charge of a Bill or who is responsible for the motion which is under the consideration of the House is entitled to a reply (*t*).

In the event of two or more lords rising to speak at the me time, the House decides, if necessary by means of a division, which of them it will hear first (*a*).

## SECT. 5.—*Committees of the House.*

### SUB-SECT. 1.—*Committee of the whole House.*

**Procedure in committee of the whole House.**

**1120.** The House resolves itself into a committee of the whole House by means of an order made on the motion:—"That the House do resolve itself into a committee," either forthwith or on a future day, for the consideration of some Bill (*b*) or for some other definite purpose (*c*). When the House goes into committee the Lord Chancellor leaves the woolsack and the Chairman of Committees takes the chair at the table of the House.

As soon as the business for which the committee has been appointed has been disposed of, or whenever it is decided to bring the proceedings of the committee to a conclusion, the House is resumed by means of a question to that effect put from the chair. The Lord Chancellor then returns to the woolsack, and the Chairman of Committees, standing at the table on the Government side of the House, reports the results of the committee's deliberations.

### SUB-SECT. 2.—*Select Committees.*

**Purposes for which select committees appointed.**

**1121.** Select committees may be appointed by the House (1) to inquire into and to report upon any subject with regard to which the House desires a full investigation to be made, and (2) to consider and

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(*r*) Standing Orders of the House of Lords (Public Business), 1902, No. 26. By the leave of the House, a peer may address the House without rising from his seat. A peer may not read his speech. If a peer speaks on a breach of privilege whilst a division is in progress, he must address the House without rising from his seat and must not remove his hat.

(*s*) *Ibid.*, No. 25.

(*t*) *Ibid.*, No. 27. Any peer, if he obtains the consent of the House, may speak a second time during the course of the same debate in order to explain himself upon some material point in his previous speech; but he must confine himself to his explanation and not introduce any new matter (*ibid.*).

(*a*) See Journals of the House of Lords, 1847, Vol. LXXIX., p. 111.

(*b*) For the procedure on a public Bill in committee of the whole House, see pp. 708, 713, *post*.

(*c*) When the order of the day is read for the House to go into committee, an instruction to the committee may always be moved in order to enable the committee to do something which otherwise it would have no power to do: *e.g.*, to consolidate two Bills into one Bill, or to divide one Bill into two Bills; see Journals of the House of Lords, 1853, Vol. LXXXV., p. 289; 1891, Vol. CXXIII., p. 158,

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if necessary, to hear evidence with regard to the provisions of any Bill which has been read a second time by the House.

Scope of inquiry.

**1122.** When a select committee is appointed to inquire into and to report to the House upon any given subject, the scope of its inquiry is defined and limited by the order of reference by which it is appointed. But when a Bill is referred to the consideration of a committee, the Bill itself constitutes the order of reference to the committee whose duty it is to examine, and, if necessary, to amend, the provisions of the proposed measure, and then to report it to the House.

Order of reference extended or amended by instruction of the House.

**1123.** If, after a select committee has been appointed, it is deemed advisable or found necessary to authorise it to consider matters which were not originally referred to it, any member of the House may move that an instruction be given to the committee either extending or amending the terms of its order of reference (*d*).

Appointment and meeting.

**1124.** A select committee is appointed on motion (*e*), and the peers who are to serve on it (*f*) are either named by the House, or are proposed by the Committee of Selection (*g*), or, in special cases, may be appointed by ballot (*h*).

The date and hour for the first meeting of a select committee are fixed by the House, but its subsequent sittings are appointed by the committee itself (*i*).

Powers with regard to witnesses.

**1125.** A select committee may examine witnesses who voluntarily appear before it, but it cannot compel their attendance or examine them upon oath, nor can it order the production of papers or hear counsel, unless it obtains the necessary authority from the House (*k*).

Procedure.

**1126.** The procedure in a select committee is practically the same as the procedure in committee of the whole House (*l*). One of the members of the committee is chosen by the committee at its first

(*d*) A mandatory instruction may also be moved to compel a select committee to do something which it already has the power to do if it wishes.

(*e*) Notice of such a motion must be given, and notice is also required of the motion for naming the lords to serve on a committee, or for adding any lord to a committee, or for substituting any other lord for one already appointed to serve on a committee; see Standing Orders of the House of Lords (Public Business), 1902, No. 57.

(*f*) There is no rule as to the number of members of a select committee. Peers who are not members of a select committee are not excluded from speaking in the committee, but they may not take part in its deliberations or vote; see Standing Orders of the House of Lords (Public Business), 1902, No. 55.

(*g*) For the constitution and duties of this committee, see note (*x*), p. 750, *post*.

(*h*) See Journals of the House of Lords, 1820, Vol. LIII., p. 118.

(*i*) A select committee may sit during an adjournment of the House, and may adjourn from time to time without obtaining the leave of the House.

(*k*) An order of the House is also required to authorise the printing of the evidence which is heard before a select committee. As a rule the proceedings of a select committee are public, but it is always within the power of a committee to exclude strangers; see Standing Orders of the House of Lords (Public Business), 1902, No. 56.

(*l*) For the procedure in committee of the whole House, see p. 637, *ante*, and pp. 708, 713, *post*.

meeting to preside over its deliberations (*m*). It is the duty of the chairman, when evidence is heard, to conduct the examination-in-chief of the witnesses who appear before the committee. He puts the question on any motion which is submitted for the decision of the committee, and, when the inquiry is concluded, he is generally requested to draw up a draft report for the consideration of the committee (*n*).

Presentation of report to the House.

**1127.** When a report has been agreed upon by a committee, a member of the committee, usually the chairman, presents it to the House (*o*). Every such report, as soon as it has been laid upon the table of the House, is ordered to be printed and circulated, and notice must be given of the day upon which it is proposed to take it into consideration (*p*).

### SUB-SECT. 3.—*Secret Committees.*

Secret committees.

**1128.** If it is considered inadvisable in the public interest to disclose the nature or scope of an inquiry which is referred to a committee, the House may appoint a secret committee to consider and report upon any matter which is referred to it. A secret committee is usually appointed by ballot. No record is kept of its proceedings, but its report is ordered to be printed as soon as it has been presented to the House (*q*).

### SUB-SECT. 4.—*Committees on Private Bills and Provisional Order Confirmation Bills.*

Committees on private Bills etc.

**1129.** The appointment, composition, and procedure of committees on private Bills and provisional order confirmation Bills is dealt with elsewhere (*r*).

### SUB-SECT. 5.—*Joint Committees.*

Appointment of joint committees.

**1130.** A joint committee may be appointed, with the concurrence of both Houses, either to consider a Bill or a group of Bills, or to

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(*m*) The power to appoint its own chairman is usually conferred upon every select committee. If no such power is conferred, the Chairman of Committees (see p. 630, *ante*) is the chairman of the committee *ex officio*, even if he has not been appointed to serve upon it.

(*n*) It is open to any member of a select committee to submit a draft report to the committee. In the event of there being more than one draft report, the committee must decide (if necessary by a division) which report should be considered as the basis of its own report to the House. Every draft report is entered amongst the minutes of the committee.

(*o*) A member of a select committee who disagrees with the report of the committee is not entitled to present a minority report to the House, but he can signify his disagreement to any paragraph in the report, or to the entire report, either by dividing the committee against the proposals to which he objects, or by moving amendments to them whilst they are under the consideration of the committee. The proceedings of every select and joint committee (see the text, *infra*, and p. 640, *post*) are printed and published with the report from such committee.

(*p*) Standing Orders of the House of Lords (Public Business), 1902, No. 58.

(*q*) For instances of such committees, and the procedure with regard to them, see Journals of the House of Lords, 1819, Vol. LII., p. 35 (secret committee on the state of the Bank of England); 1820, Vol. LIII., pp. 111, 115, 118, 249, 250 (secret committee as to the proceedings against Queen Caroline); Vol. LXXX., pp. 19, 199 (secret committee on commercial distress).

(*r*) See pp. 750 *et seq.*,

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inquire into some particular subject and to report upon it to the respective Houses (*s*).

Mode of appointment of joint committees.

**1131.** A motion to the effect that it is desirable to appoint a join committee may be made in either House, and, when it has been agreed to, a message is sent to the other House to inform it of the resolution and to request its concurrence. The consent of the other House to the desirability of the appointment of the joint committee is signified by means of another message. When this message has been received by the House in which the proposal originated, a motion is made for the appointment of a select committee and for the nomination of the members to serve on it. A message is then sent to the other House to acquaint it of the appointment of the committee and of the number of members appointed to serve on it, and to request it to appoint a similar committee, consisting of an equal number of members (*t*). As soon as this request has been complied with, a day may be fixed for the first meeting of the committee. The committee is empowered to appoint its own chairman (*u*).

In whichever House the motion for the appointment of a joint committee may have originated, it is always customary for the House of Lords to fix the time and place of meeting, of which the House of Commons is informed by means of a message.

Procedure.

**1132.** The procedure in a joint committee is entirely governed by the practice of the House of Lords, and is the same as that in a select committee of that House. The chairman, therefore, has no casting vote, and all decisions of the committee are governed by the rule, "*Semper præsumitur pro negante*" (*v*). When its inquiry is concluded, the report of the committee is presented to both Houses.

SUB-SECT. 6.—*Committees to prepare Reasons.*

Purpose of appointment.

**1133.** Whenever the House of Lords is unwilling to agree to an amendment or to amendments which the House of Commons has

(*s*) The practice of referring matters to the consideration of joint committees was not uncommon before 1695, but fell into disuse during the eighteenth century. It was revived in 1864 and is now recognised as a convenient and expeditious method of parliamentary procedure. For the method of appointment and procedure of a joint committee set up under the provisions of the Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), see pp. 762—765, *post*.

(*t*) Formerly there was a rule that the number of members of the House of Commons on a joint committee should be double that of the House of Lords, but this rule is no longer in force. As to communications between the Houses of Parliament generally, see pp. 804 *et seq.*, *post*.

(*u*) If an additional Bill is referred to a joint committee, or if a member is added by either House to its representatives on a joint committee, a message must be sent to the other House acquainting it of the fact, but, in the event of either House nominating a new member to take the place of a member already appointed to serve on a joint committee, no message is necessary, as the names of the members originally nominated are not communicated to the other House.

(*v*) Each House confers upon a select committee, appointed to join with a committee of the other House, the same powers as it confers upon any other select committee (see p. 638, *ante*, and p. 715, *post*). A joint committee, therefore, is enabled to send for persons, papers, and records, and papers and reports of former committees can be referred to it by either House.

made to one of its Bills, it appoints a committee to meet forthwith and prepare reasons for such disagreement. The committee reports the reasons to the House and the House agrees to them, after which they are submitted to the Commons by means of a message (*x*).

SECT. 5. Committees of the House.

SUB-SECT. 7.—*Sessional Committees.*

**1134.** Sessional committees may conveniently be divided into two groups. The first group includes the Committee for Privileges, the Committee for the Journals, and the Appeal Committee. These three committees consist of "all the lords who have been or shall be present" during the session, and are appointed by order of the House without notice given.

List of sessional committees.

The second group includes the Standing Orders Committee, the Committee of Selection, and the House of Lords Offices Committee, each of which consists of a limited number of members and is appointed by the House as early as possible in each session, usually upon a motion made by the Chairman of Committees, of which notice is required.

**1135.** The Committee for Privileges is appointed to consider and report upon all matters touching the privileges and customs of the House, the precedence of its members, any other matters which are referred to it by the House, and all claims to peerages (*a*) or claims to vote at the election of the representative peers of Scotland and Ireland (*b*).

Committee for Privileges;

The committee may examine witnesses on oath, order the production of documents, and hear counsel (*c*). It meets in the House

A committee for the same purpose is appointed as occasion arises in the House of Commons; see p. 721, *post.*

(*a*) See note (*c*), p. 623, *ante;* see also titles COURTS, Vol. IX., p. 21; PEERAGES AND DIGNITIES.

(*b*) The right to settle any questions arising with regard to a contested election of a representative peer of Scotland was conferred upon the House of Lords by the Union with Scotland Act, 1706 (6 Anne, c. 11), and confirmed by subsequent Acts; see title COURTS, Vol. IX., p. 21. By the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4, it was enacted that all questions touching the election of the Irish representative peers should be decided by the House of Lords (see Standing Orders of the House of Lords (Public Business), 1902, Nos. 90—99, which refer to the peerage of Ireland). The Committee for Privileges, in a claim to vote at the election of representative peers of Ireland, may admit an entry in their Journals as evidence of limitations in a patent without requiring the production of the patent (*Roscommon's (Earl) Claim* (1828), 6 Cl. & Fin. 97, H. L.). As to Scottish and Irish representative peers, see pp. 624 *et seq.*, *ante.*

(*c*) Every person who claims a title of honour must, within six weeks after his petition has been presented to the House, if Parliament is sitting at the time, and, if not, within six weeks after the next meeting of Parliament, lay his printed case, pedigree, and proofs on the table of the House. The Committee for Privileges will not proceed to the hearing upon any claim until fourteen days after the printed case has been delivered. In all claims of peerage, the House has laid down directions with regard to documents delivered in at the Bar in evidence, and the examination of those documents when printed by order of the House. No original of any record or document in public custody in the United Kingdom may be produced before the Committee for Privileges without a written order for its production, signed by the Lord Chancellor or the chairman of the committee. Such records and documents must be proved

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itself, and may continue to hold its sittings during a temporary adjournment of the House (*d*). It is presided over by the Chairman of Committees, and three peers designated Lords of Appeal in the Appellate Jurisdiction Act, 1876 (*e*), must always be present at its sittings (*f*).

Committee for the Journals;

**1136.** The Committee for the Journals is appointed "to peruse and perfect" the journals of the current session and of previous sessions (*g*).

Appeal Committee;

**1137.** The Appeal Committee is appointed to consider and report upon all petitions relating to causes which are, or which formerly were, depending in the House, and upon all matters relating thereto.

The committee, of which three is a quorum, is given the power to appoint its own chairman, and meets as often as it may be necessary in the course of the session (*h*).

Standing Orders Committee; Committee of Selection;

**1138.** The Standing Orders Committee and the Committee of Selection have certain duties to perform with regard to private Bills and provisional order confirmation Bills. The appointment, composition and functions of these two Committees are dealt with elsewhere (*i*).

House of Lords Offices Committee.

**1139.** The House of Lords Offices Committee consists of the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal (when he is a peer), the Chairman of Committees, and an undefined number of other lords.

by copies as in ordinary legal proceedings, pursuant to the Public Record Office Act, 1838 (1 & 2 Vict. c. 94), and subsequent Acts (see title EVIDENCE, Vol. XIII., pp. 524 *et seq.*). In the case of documents in private custody, original documents and copies thereof must be delivered in by a witness who is required to swear to the accuracy of the copies. If the claim to a peerage is unopposed, the print is examined against the original documents, or the officially certified copies, by a competent examiner appointed by the Crown Agent. In opposed peerage claims, when the Crown is always represented in the proceedings before the Committee for Privileges, the Crown Agent may appoint a competent examiner for the purpose of the above examination. The costs of such examination are borne by the petitioner adducing the evidence. In all claims of peerage, all the expenses attending the taking and printing of evidence are borne by the claimants, and must be paid whenever the Clerk of the Parliaments delivers in an account of such charges; see Standing Orders of the House of Lords (Public Business), 1902, Nos. 86, 87, 88. As to the evidence required on a claim to a peerage, see title PEERAGES AND DIGNITIES.

(*d*) Standing Orders of the House of Lords (Public Business), 1902, No. 85.

(*e*) 39 & 40 Vict. c. 59. For the legal qualifications which are required for this designation, see p. 643, *post*. As to the status of Lords of Appeal in Ordinary, see p. 628, *ante*.

(*f*) See Order of the House, 31st July, 1882; Journals of the House of Lords, 1882, Vol. CXIV., p. 362.

(*g*) The duties of this committee are purely formal. It usually only makes one report in the course of the session, when it lays on the table of the House the journal of the preceding session and recommends that it should be delivered out; see p. 632, *ante*.

(*h*) Although any peer is at liberty to attend this committee, as a rule only the Lord Chancellor and the Lords of Appeal are present at its meetings. For the functions performed by the committee, see note (*a*), p. 644, p. 647, *post*.

(*i*) See pp. 743, 750, *post*.

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To this committee is entrusted the control of the domestic arrangements of the House. It is presided over by the Chairman of Committees, and meets from time to time during the course of the session and reports to the House with regard to matters relating to (1) the offices of the Clerk of the Parliaments (*k*), the Gentleman Usher of the Black Rod (*l*), and the Lord Great Chamberlain (*m*); (2) the receipts and expenditure of the Fee Fund of the House; and (3) the preparation of the annual estimate of the House of Lords.

## SECT. 6.—*Judicial Functions of the House.*

### SUB-SECT. 1.—*Appellate Jurisdiction.*

#### (i.) *In General.*

The supreme court of appeal.

**1140.** The House of Lords is the supreme court of appeal in Great Britain and Ireland (*n*).

The constitution of the House as a court of appeal.

**1141.** For the discharge of its functions as a court of appeal, the House of Lords consists of the Lord Chancellor of Great Britain, the four Lords of Appeal in Ordinary, and any peer of Parliament who holds, or has held, any of the following high judicial offices, namely: the office of (1) Lord Chancellor of Great Britain or Ireland; (2) member of the Judicial Committee of the Privy Council; (3) Lord of Appeal in Ordinary; (4) judge of the Supreme Court of England or Ireland or of the Court of Session in Scotland (*o*).

#### (ii.) *Procedure in Appeals.*

Lodgment of appeal etc.

**1142.** An appeal to the House of Lords must be lodged in the office of the Clerk of the Parliaments within one year from the date of the last decree, order, or interlocutor appealed from (*p*). It must

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(*k*) See p. 630, *ante*.

(*l*) See p. 631, *ante*.

(*m*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 326, 330, Vol. VII., p. 107.

(*n*) For the courts from which appeals lie, see title COURTS, Vol. IX., p. 22. As to appeals from the Court of Criminal Appeal, see *ibid.*, and title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 433. Up to the present time there have been only two such appeals, namely, *R.* v. *Ball* (*William Henry*); *R.* v. *Ball* (*Edith Lilian*), [1911] A. C. 47; see Journals of the House of Lords, 1910, Vol. CXLII., pp. 326, 327.

(*o*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 5, 25, as amended by the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 5. As to the number of such persons who must be present, and as to the right of any lord of Parliament to take part in the proceedings of the Court, see, further, title COURTS, Vol. IX., pp. 22, 23; May, Parliamentary Practice, 11th ed., p. 360.

(*p*) Standing Orders of the House of Lords (Judicial Business) 1907, No. 1. The time for the lodgment of an appeal is calculated from the last order affecting the subject-matter of the appeal and the House will not extend the time unless the circumstances are exceptional (*Phillips* v. *Fothergill* (1886), 11 App. Cas. 466; *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232, H. L.). If an appeal is competent in point of time, the House under certain conditions can entertain an appeal from a previous order connected with it, although made more than a year before (*Concha* v. *Concha*, [1892] A. C. 670, *per* Lord MACNAGHTEN, at p. 674). An extension of time is allowed in any case in which the person entitled to appeal is under twenty-one years of age, or covert, *non compos mentis*, imprisoned, or out of the United Kingdom. The maximum limit in such cases is five years. The practice on appeal is governed by the Standing Orders of the House of Lords (Judicial Business), and Directions for Agents issued by the Judicial Office of

SECT. 6. Judicial Functions of the House.

be signed and its reasonableness must be certified by two counsel who have either attended as counsel in the court below or purpose attending as counsel at the hearing (*q*).

Service.

A copy of the appeal must be served upon the respondent in the cause or upon his agent, and a certificate that such service has been made must be written on the last page of the appeal, which cannot be presented to the House until two clear days have elapsed from the date of such service (*r*).

Order of service etc.

**1143.** Subject to the foregoing condition, an appeal may be presented forthwith if the House is sitting, and an order is then made by the House calling upon the respondent to lodge a printed case in answer thereto within six weeks from the date of the presentation of the petition of appeal to the House (*s*). A copy of this order, which is signed by the Clerk of the Parliaments and is known as the order of service, is issued to the appellant, who must return it to the office of the Clerk of the Parliaments, together with an affidavit of due service on the respondent or his agent, within the period named in the order (*t*).

The appellant within this period must also lodge the printed case and the appendix thereto (*a*).

the House of Lords; see Yearly Practice of the Supreme Court, 1912, pp. 1799—1824. For form of petition of appeal, see form prefixed to Directions for Agents, issued by the Judicial Office of the House of Lords, pp. 3, 4; Yearly Practice of the Supreme Court, 1912, p. 1797. Statutory appeals must be presented within the period limited by statute (*Cleaver* v. *Cleaver* (1884), 9 App. Cas. 631).

(*q*) Standing Orders of the House of Lords (Judicial Business), 1907, No. 2.

(*r*) Directions for Agents, paragraph 2.

) A respondent incurs no penalty if he does not lodge his printed case within the six weeks prescribed by the order of service; see *ibid.*, paragraph 30.

(*t*) Standing Orders of the House of Lords (Judicial Business), 1907, No. 3. If this period expires during a recess, prorogation, or dissolution, it may be extended to the third sitting day after the next ensuing meeting of the House; see *ibid.*, No. 7.

(*a*) Every printed case must be signed by one or more counsel who either attended as counsel in the court below or purpose attending as counsel at the hearing in the House (see *ibid.*, No. 5; see also *Price* v. *Seeley* (1843), 10 Cl. & Fin. 28, H. L.). In cross-appeals or in consolidated appeals, it is usual to lodge one case for each party, and one appendix. Leave may also be obtained from the House on petition to lodge one case and appendix applicable to two or more appeals and one appendix applicable to two or more appeals, and to refer in a case lodged in one appeal to an appendix lodged in another cause. Where possible, especially in appeals upon a special case stated in the courts below, a joint case should be lodged. The appendix consists of such documents, or parts thereof, used in evidence in the court below, as may be necessary for reference on the argument of the appeal. Documents, plans etc. which the appellant refuses to include in the appendix may be lodged by the respondent as additional documents, and it is open to either party in an appeal to petition against the admissibility of documents. Questions as to the admissibility of documents are usually reserved (on report from the Appeal Committee) as preliminary questions when the appeal is heard. Shorthand notes of arguments in the courts below must not be printed by either party, but there are two exceptions to this rule—(1) where remarks made by the judge in the course of the argument are relied upon by either party; and (2) when the arguments refer to facts which are admitted by both sides and no evidence has been called as to those facts. For general directions as to the preparation of a case and appendix, see Directions for Agents, paragraphs 23—29. For rules as to the production of original documents and certified copies, see *ibid.*, paragraphs 35—37.

**1144.** Unless a respondent lodges a printed case, he cannot be heard at the bar of the House. If, therefore, he has not lodged his case within the time specified in the order of service, the cause, on the lodgment of the appellant's case and the appendix, is set down for hearing *ex parte*. It is open, however, to the respondent to lodge his case at a later date (*b*).

Effect of failure to lodge case.

**1145.** When separate cases are lodged by different respondents, the case first lodged must contain a certificate stating either (1) that an opportunity has been given to the other respondents to join in the case, or (2) that the interests represented in the case are distinct from those of the remaining respondents (*c*). Any subsequent lodgment of cases by other respondents must be made on petition.

When separate cases lodged.

**1146.** An appellant is required, within one week (*d*) after the presentation of his appeal to the House, to give security for costs by recognisance to the amount of £500 and a bond for £200 (*e*). The recognisance is entered into by the appellant in person (*f*) or by a substitute, who must not be a party to the appeal; the bond is entered into by two sureties, who must not be parties to the appeal.

Security for costs.

**1147.** It is the duty of the agent for the appellant to supply the agent of the respondent with information which will enable him to ascertain the sufficiency of the proposed substitute and sureties (*g*).

Sufficiency of sureties.

If a respondent delays to lodge his printed case until a day has been appointed for the hearing of the cause, he must petition the House for leave to do so.

(*c*) Where the remaining respondents are merely stakeholders, as trustees etc., it is sufficient if their position is explained by a paragraph in the case of the substantial respondents; see Directions for Agents, paragraph 31.

(*d*) Standing Orders of the House of Lords (Judicial Business), 1907, No. 4. If this period, however, expires during a recess, prorogation, or dissolution, it may be extended to the third sitting day after the next ensuing meeting of the House; see *ibid.*, No. 7.

(*e*) *Ibid.*, No. 4. In lieu of the bond, payment of £200 may be made into the Security Fund Account of the House of Lords within one week after the presentation of the appeal, and the House, on a special order being made, may also accept £500 in lieu of a recognisance, if such sum is paid within the above period; see Directions for Agents, paragraph 5. For directions as to the disposal of the deposits when an appeal is affirmed, reversed, or dismissed for want of prosecution, see *ibid.*, paragraphs 42—44. The Crown, when it is an appellant, does not enter into a recognisance, but, where the Attorney-General prosecutes at the instance of relators, the relators are required to enter into the recognisance (*A.-G.* v. *Brazen Noze College* (1832), Journals of the House of Lords, 1832, Vol. LXIV., p. 320). In a case where a private person is appealing against the Crown, and where, if he is successful, the Crown would not be bound to pay costs, it is questionable whether or not the appellant should be obliged to enter into a recognisance (*Lord Advocate* v. *Dunglas* (*Lord*) (1842), 9 Cl. & Fin. 173, H. L.). In such a case, the appellant, in order to avoid liability, should present a petition to the House praying for the suspension of standing order No. 4 (see Yearly Practice of the Supreme Court, 1912, p. 1819). A party suing *in formâ pauperis* and a respondent in an appeal are not required to enter into a recognisance for payment of costs.

(*f*) Where there are several appellants, all must enter into the recognisance, unless a petition is presented and the leave of the House obtained for one or more of the appellants to enter into the recognisance on behalf of the remainder.

(*g*) See Directions for Agents, paragraph 8.

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Certificates (*h*) giving this information are kept for a week in the office of the Clerk of the Parliaments, and, in the event of no objection to the sureties being made by the respondents within this period, the bond and recognisance are issued to the agent of the appellant for execution and must be returned to the same office within one week (*i*).

If the respondent objects to the sureties who have been proposed, the Clerk of the Parliaments requires a justification (*k*) from the appellants, and, if such justification appears to him unsatisfactory, he may require the appellant to pay in the sum of £200 and enter into the recognisance in person (*l*).

Setting down of cause for hearing.

**1148.** As soon as all the printed cases and the appendix thereto have been lodged by the appellant and the respondent (*m*), and the necessary security has been given by the appellant, it is optional for either party to the appeal to set down the cause for hearing; but, if the respondent does not lodge a printed case, it is obligatory on the appellant to set down the cause for hearing *ex parte* within the period specified in the order of service (*n*).

Incidental petitions.

**1149.** Incidental petitions may be presented to the House upon any matter connected with an appeal (*o*). In the majority of cases,

(*h*) For form of such certificate, see *ibid.*, paragraph 24, Appendix A.

(*i*) Standing Orders of the House of Lords (Judicial Business), 1907, No. 4.

(*k*) Justification is made by sworn affidavit, and the respondent may file a counter affidavit.

(*l*) The appellant is entitled to enter into the recognisance, and an objection to his sufficiency can only be made on petition to the House.

(*m*) After the lodgment in the office of the Clerk of the Parliaments of their printed cases by the appellant and the respondent, each side must supply the other side with ten copies of its case; see Directions for Agents, paragraph 32.

(*n*) Standing Orders of the House of Lords (Judicial Business), 1907, No. 5. Cross-appeals must be presented to the House within the same period; see *ibid.*, No. 6. In either case, however, if this period expires during a recess, prorogation, or dissolution, it is extended to the third sitting day of the next ensuing meeting of the House; see *ibid.*, No. 7. During a recess (but not during a prorogation or dissolution) the lodgment of a petition for a further extension of time for lodging cases etc. before the expiration of the extended time prevents the dismissal of the appeal. Thirty copies of the case and appendix must be lodged in the office of the Clerk of the Parliaments before the appeal is set down for hearing, and, after the exchange of cases between the two parties, the appellant must also lodge, for the use of the Lords of Appeal, ten bound copies of the two cases, the original petition of appeal, and the appendix; see Directions for Agents, paragraph 29, Appendix B.

(*o*) *E.g.*, petitions (1) for extension of time to lodge cases etc. (for form of such petition, see Directions for Agents, Appendix C); (2) for leave to dispense with standing orders; for restoration of an appeal which stands dismissed through non-compliance with a standing order; (3) for revivor of an abated or defective appeal (an appeal abates through death when it becomes necessary to add new parties and becomes defective through bankruptcy; for procedure in such cases, see Standing Orders of the House of Lords (Judicial Business), 1907, No. 8: where such an appeal has been revived on petition, a supplementary case is lodged); (4) for amendment of petition of the case or appendix etc.; (5) as to the competency of an appeal or the admissibility of documents in the appendix; (6) for the review of taxation (the costs of the House are taxed by a taxing officer appointed by the Clerk of the Parliaments; for the taxing fee and directions as to pauper costs, see Yearly Practice of the Supreme Court, 1912, pp. 1821, 1823; for the ordinary fees of the House,

petitions, to which the consent of all the parties has been obtained, are ordered as prayed, but any petition to sue *in formâ pauperis* (*p*) and all opposed petitions are always referred to the Appeal Committee, if Parliament is sitting (*q*). During a dissolution, such petitions are read and ordered to lie on the table of the House, and are referred to the Appeal Committee when the new Parliament meets.

(iii.) *Effect of Prorogation or Dissolution of Parliament.*

**1150.** The judicial business of the House is not delayed during a prorogation or a dissolution of Parliament. During a prorogation, the Lords of Appeal are empowered by an order of the House to sit for the purpose of hearing and determining appeals (*r*), and the Crown, by writing under the Sign Manual, may authorise them in the name of the House of Lords to hear and determine appeals during a dissolution of Parliament (*s*).

No delay caused by prorogation or dissolution.

(iv.) *Assistance of Judges of the Supreme Court.*

**1151.** The judges of the Supreme Court of Judicature in England are the assistants of the House of Lords (*a*), and the House can order

Judges as assistants of the House.

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see Yearly Practice of the Supreme Court, 1912, p. 1821); (7) for amendment of draft judgments (in every appeal, after the House has given judgment, copies of the proposed order are submitted to the parties).

(*p*) A *primâ facie* case to sue *in formâ pauperis* must be established before the Appeal Committee (Appeal (Formâ Pauperis) Act, 1893 (56 & 57 Vict. c. 22); see Directions for Agents, paragraph 16). The House has fixed no rule or practice with regard to the liability of a pauper appellant for costs; see Yearly Practice of the Supreme Court, 1912, p. 1796.

(*q*) For the constitution of the Appeal Committee, see p. 642, *ante*. No affidavits may be lodged in incidental petitions, except in a petition to sue *in formâ pauperis*, when an affidavit of poverty is required. The parties may, however, hand in affidavits at the sitting of the Appeal Committee. While a pauper petition is pending, no steps need be taken for giving security; but if leave to sue *in formâ pauperis* is refused by the committee, further time in which to give security must be obtained, or the appeal will stand dismissed. Counsel are not heard before the Appeal Committee, unless the circumstances of the case are very unusual (*Sackville West* v. *Holmesdale (Viscount)* (1877), Journals of the House of Lords, 1877, Vol. CIX., p. 372; *Stubbs, Ltd.* v. *Russell* (1908), Journals of the House of Lords, 1908, Vol. CXL., p. 163). Notice of the meeting of the Appeal Committee is given to solicitors who enter their names in the appearance book kept at the Judicial Office in the House of Lords; see Directions for Agents, paragraph 17. In its reports to the House the Committee simply recommends the admission or rejection of the prayer of the petition referred to it, or submits a special order for the consideration of the House. The report, however, may reserve a point for the consideration of the House upon the hearing of the appeal in an important case affecting competency or the admissibility of evidence (*Ford's Hotel Co., Ltd.* v. *Bartlett* (1895), Journals of the House of Lords, 1895, Vol. CXXVII., p. 260). The House can adopt, reject, or modify a report from the Appeal Committee.

(*r*) A Lord of Appeal in Ordinary may be introduced and take the oath at a time when Parliament is prorogued (Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 1).

(*s*) See title COURTS, Vol. IX., p. 22; compare Journals of the House of Lords, 1910, Vol. CXLII., p. 321.

(*a*) In the early Parliaments of England, when the affairs of the nation were transacted "by the King in his Council in Parliament," the judges used to receive writs of summons to Parliament and formed part of that assembly. But when the original conception of Parliament changed and the council of the

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them to be present at the hearing of any cause or for any purpose for which it may require their assistance (*b*).

Attendance of judges in the House.

**1152.** When the judges attend the House at the hearing of a cause (*c*), a question of law, which is prepared by the Lord Chancellor and the lords of appeal, is submitted to them from the woolsack (*d*). If the judges are agreed upon their answer, they may give it at once, but the more usual practice is for the senior judge present to advance to the table of the House and request that further time may be allowed to the judges for the consideration of the question which has been referred to them. A motion to this effect is then made from the woolsack and agreed to by the House (*e*). As soon as the judges have prepared their answer or answers, they are again ordered to attend the House. If their opinion is unanimous, one judge attends and delivers the general opinion, but, if their opinions differ, each judge attends in person and delivers his own opinion or concurs in that of one of the other judges, as the case may be (*f*).

(v.) *Assistance of Nautical Assessors.*

Attendance of nautical assessors in the House.

**1153.** To assist it in the hearing and determination of Admiralty actions (England) and Maritime causes (Scotland), the House of Lords may summon the attendance of one or more nautical assessors whenever it deems it expedient to do so, or when either party in

King became distinct from the legislative assembly of the nation, the position of the judges appears also to have changed. Thus, in stat. (1539) 31 Hen. 8, c. 10 (referred to at p. 613, *ante*), no place is assigned to the judges in the House of Lords, and from this time onwards they became merely the assistants of the House, whose advice could be called for when required. This position was definitely assigned to them by an order of the House of the 4th June, 1660, "That the Lord Chancellor do move His Majesty that he would be pleased to give order for writs to the judges, whereby they may attend the House as assistants"; see Journals of the House of Lords, 1660, Vol. XI., p. 52; see also Pike, Constitutional History of the House of Lords, pp. 247, 248. Such writs are now issued to the judges and also to the Attorney-General and Solicitor-General; see title COURTS, Vol. IX., p. 23.

(*b*) The House only calls upon the judges for their advice in cases of great public importance and is not bound to accept their advice even when it is unanimous (*O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, 327, H. L.).

(*c*) For the procedure adopted when the judges attend the House as assistants, see *Allen* v. *Flood and Another* (1897), Journals of the House of Lords, 1897, Vol. CXXIX., pp. 174, 208—235.

(*d*) Questions addressed to the judges may relate either to a preliminary point arising before the appeal to which it refers is heard (*Dimes* v. *Grand Junction Canal Proprietors* (1852), 3 H. L. Cas. 759, 784); or to an abstract question of law not having direct regard to the form of an appeal before the House or to the matters raised by it (*Bright* v. *Hutton*, *Hutton* v. *Bright* (1852), 3 H. L. Cas. 341, 371); or to a question of law not arising out of an appeal actually before the House (*M'Naghten's Case* (1843), 10 Cl. & Fin. 200, H. L.). The judges may decline to answer any question addressed to them which is not strictly confined to the legal interpretation of an existing Act of Parliament (*Re London and Westminster Bank* (1834), 2 Cl. & Fin. 191, H. L.).

(*e*) The consideration of the cause is then adjourned, and an order is made to print the question which has been referred to the judges.

(*f*) Each judge when he gives his answer to the question addressed to him must state the reasons upon which his opinions are based (*R.* v. *Millis* 10 Cl. & Fin. 534, H. L.).

an appeal applies for the appointment of such assessors in a letter addressed to the Clerk of the Parliaments (*g*).

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(vi.) *Sittings for the Hearing of Causes.*

Judicial sittings of the House.

**1154.** When the House sits for the hearing of causes, it usually meets at half-past ten o'clock in the morning, on such days as may be fixed by the Lord Chancellor, and continues sitting in its judicial capacity until a quarter before four o'clock (*h*). The business of the day begins with prayers, after which the causes are taken in the order in which they are set down for hearing in the minutes of the House (*i*).

(vii.) *Delivery of Judgment.*

Procedure with regard to delivery of judgment.

**1155.** After a cause has been fully heard, judgment is either given forthwith, or its consideration is adjourned *sine die* or to some specified day (*k*).

When the judgment of the House is delivered, the Lord Chancellor, or, in his absence, the Lord Speaker, gives his opinion first, and then the other lords in the order of their precedence (*l*).

(*g*) Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 3; Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. c. 40), s. 6. The attendance of such assessors, their qualifications, the method of their appointment, and the fees to be paid to them, are regulated by orders of the House made on the 10th and 13th May, 1892, and on the 20th November, 1894; see Journals of the House of Lords, 1892, Vol. CXXIV., pp. 145, 153, and 1894, Vol. CXXVI., p. 339; see also Directions for Agents, paragraph 38.

(*h*) When the House sits for judicial business, the Lord Chancellor or Lord Speaker, as the case may be, after the mace has been deposited on the woolsack and prayers have been said, moves to a seat placed in front of a table near the bar, and the Lords of Appeal, who are also provided with tables, sit on the two front benches on each side of the bar. Peers who are counsel may appear and argue before the House (see *Re Kinross* (*Lord*), [1905] A. C. 468; and see note (*b*), p. 754, *post*). English, Scottish, and Irish counsel have equal audience before the House of Lords. They address the House from the bar. It is a general rule of the House that only two counsel shall be heard on each side (*R.* v. *Millis* (1844), 10 Cl. & Fin. 534, H. L.). For the practice of the House with regard to hearing counsel in cases where there are several classes of appellants and respondents, see *South Leith Parish* v. *Allan and Edinburgh Parish* (1852), 1 Macq. 93, H. L.; *Home* v. *Pringle and Hunter* (1841), 8 Cl. & Fin. 264, H. L. If neither counsel nor agent appear on behalf of one of the parties to an appeal when the cause comes on for hearing, it has been usual for the House to adjourn the hearing after ordering the offending party to pay the costs of the day; in some cases, however, the appeal has been dismissed; see Companion to the Standing Orders of the House of Lords on Public Business, p. 132. On re-argument only one counsel is heard on each side.

(*i*) When a cause is put down for consideration (*i.e.*, when the House delivers judgment), it is usual to give such cause priority of any cause which stands appointed for hearing.

(*k*) A draft copy of every judgment of the House is drawn up by the Clerk of the Parliaments and sent out to the agents of the various parties in the appeal, who are given instructions as to alterations and amendments. Any difference of opinion that may arise as to the form of a judgment is settled by the Lord Chancellor. A judgment may be proved by an examination of the Minutes, which can be obtained from the Clerk of the Parliaments; see Directions for Agents, paragraph 41; Yearly Practice of the Supreme Court, 1912, p. 1815. A judgment of the House on a question of law is binding upon the House in future cases; see title JUDGMENTS AND ORDERS, Vol. XVIII., p. 210.

(*l*) If one of the lords, who was present during the hearing of an appeal in

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As soon as the Lord Chancellor, or the Lord Speaker, as the case may be, has delivered his opinion, he goes to the woolsack, and, after the other lords have given their opinion, he puts the question, "That this judgment [interlocutor, decree, or order] be reversed?" (*m*). If the majority of the lords who have heard the cause have given their opinions in favour of the appellant, this motion is agreed to; but, if the House is equally divided, or if there is a majority against reversing the decision of the court below, the motion is decided in the negative. If a case is decided in favour of the respondent, therefore, the Lord Chancellor puts the further question, "That the appeal be dismissed?" or, if such is the decision of the House, "That the appeal be dismissed with costs?" (*n*), and the necessary motion is then agreed to by the House.

SUB-SECT. 2.—*Original Jurisdiction.*

(i.) *Impeachment.*

Impeachment.

**1156.** An impeachment of any individual by the House of Commons is one of the matters within the original jurisdiction (*o*) of the House of Lords. It is the most solemn form of trial known to English law (*p*), and, although of frequent occurrence in the earlier

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which judgment was reserved, dies before judgment is delivered, it is the practice of the House for his judgment to be read by one of the other lords (*Lord Advocate* v. *Wemyss*, [1900] A. C. 48, 59, following *Galloway* v. *Craig* (1861), 4 Macq. 267, H. L.). If a lord dies after the hearing of the evidence, but before judgment has been prepared, the House may order the appeal to be re-argued by one counsel on each side (*Ruabon Steamship Co.* v. *London Assurance*, [1900] A. C. 6, 9).

(*m*) The question is put in this way in order to ensure that the rule of the House with regard to an equality of voting, "*Semper præsumitur pro negante*," is carried out, by making it perfectly clear which party in the appeal is the person "*negans*," *i.e.*, the person who wishes to uphold the decision of the court below; see note (*f*), p. 634, *ante;* see also *Carr* v. *Render* (*Henry*), *Ltd.* (1883), Journals of the House of Lords, 1883, Vol. CXV., p. 461; *Paquin, Ltd.* v. *Beauclerk* (*formerly Holden*), 1906, Journals of the House of Lords, 1906, Vol. CXXXVIII., p. 100; [1906] A. C. 148. Costs are never given in a case where an equality of voting occurs.

(*n*) The jurisdiction of the House with regard to costs, including costs in the court below, is inherent in the House itself and does not depend upon any statute (*Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Doncaster Union Guardians*, [1897] 1 Q. B. 117, C. A.; *West Ham Union Guardians* v. *St. Matthew, Bethnal Green* (*Churchwardens, etc.*), [1896] A. C. 477; *Brocklesby* v. *Temperance Building Society*, [1895] A. C. 173). For the rules as to application for costs etc., and the enforcement of their payment, see Yearly Practice of the Supreme Court, 1912, pp. 1812—1814. In all cases where the House makes an order for the payment of costs, the bill of costs must be certified by the Clerk of the Parliaments or the Clerk Assistant, after it has been taxed by a taxing officer appointed by the Clerk of the Parliaments (Standing Orders of the House of Lords (Judicial Business), 1911, No. 10).

(*o*) The House of Lords also possesses original jurisdiction (1) as a court of justice for the trial of peers and peeresses in certain cases (see p. 653, *post*); (2) in claims to peerages (see p. 623, *ante;* title PEERAGES AND DIGNITIES), and in claims of Scottish or Irish peers to vote at the election of representative peers (see pp. 625, 627, note (*a*), *ante*); (3) in enforcing the observance and in punishing any breach of its own privileges (see p. 790, *post*). For the original jurisdiction of the House of Lords generally, see title COURTS, Vol. IX., pp. 19 *et seq.*

(*p*) The proceedings upon an impeachment are not brought to a conclusion either by a prorogation or a dissolution of Parliament; see 4 Hatsell, Precedents of Parliament, ed. 1818, pp. 273, 274, n. In some cases, however,

periods of English history, has not been resorted to since the year 1806 (*q*).

In an impeachment the Commons are the accusers and the Lords are the judges, "exercising at once the functions of a High Court of Justice and of a jury" (*r*).

Liability to impeachment.

**1157.** By the law of Parliament any person, whether a peer or a commoner, may be impeached by the House of Commons for any crime or misdemeanour (*s*). No person so accused may plead a pardon under the Great Seal of England in extenuation of the crime or misdemeanour for which he is impeached (*t*), but, after judgment has been delivered by the Lords, it is lawful for the Crown to pardon or reprieve the guilty person (*u*).

Initiation of impeachment.

**1158.** The right to institute an impeachment belongs exclusively to the House of Commons, and a motion must be made and agreed to in that House before any proceedings with regard to an impeachment can be begun (*v*).

When a motion for an impeachment has been agreed to by the Commons, the member who made the motion in question is instructed to go to the House of Lords, and at the bar of that House to impeach the offender of high crimes and misdemeanours "in the name of the House of Commons, and of all the Commons of the United Kingdom of Great Britain and Ireland," at the same time acquainting the Lords that the House of Commons "will, in due time, exhibit particular articles against him, and make good the same."

Articles of impeachment drawn up by Commons.

**1159.** After this message has been conveyed to the House of Lords, the Commons appoint a committee to draw up the articles of impeachment, which, as soon as they have been agreed to by the House, are sent up to the House of Lords (*w*), where an order is made for a copy of the articles to be granted to the accused person, to each of which he is directed to put in his answer within a specified time (*x*).

special Acts have been passed to provide that an impeachment should not lapse by reason of a prorogation or a dissolution, *e.g.*, in the cases of Warren Hastings and Lord Melville (stat. (1786) 26 Geo. 3, c. 96, and stat. (1805) 45 Geo. 3, c. 125).

(*q*) The impeachment of Viscount Melville; see note (*v*), *infra*.

(*r*) May, Parliamentary Practice, 11th ed., p. 51. For the position of the lords spiritual in an impeachment, see p. 621, *ante*.

(*s*) May, Parliamentary Practice, 11th ed., p. 663; see also 4 Hatsell, Precedents of Parliament, ed. 1818, Appendix No. 10.

(*t*) Act of Settlement (12 & 13 Will. 3, c. 2), s. 3.

(*u*) May, Parliamentary Practice, 11th ed., p. 667.

(*v*) For a full account of the proceedings of the two Houses with regard to an impeachment, see the account of the trial of Viscount Melville (1806), 29 State Tr. 550—606.

(*w*) When they send up the original articles of impeachment, the Commons always reserve to themselves the liberty of exhibiting any other articles which may afterwards occur to them to be necessary. If such other articles are exhibited, they are conveyed to the House of Lords in the same way as the original articles, and the accused person is given an opportunity of putting in his answers to them.

(*x*) As soon as the articles of impeachment have been exhibited the accused

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These answers, when they have been delivered to the House of Lords, are communicated by means of a message to the House of Commons, and that House may put in replications, if it is deemed necessary.

Procedure on an impeachment.

**1160.** The day for the hearing of an impeachment is fixed by the House of Lords (*a*). If a peer is being impeached, the trial is presided over by a Lord High Steward, who is specially appointed for the occasion by the Crown (*b*); but, if the accused person is a commoner, the duty is performed by the Lord Chancellor or the Lord Keeper of the Great Seal for the time being. The Commons attend the trial as a committee of the whole House, and their case is put forward by certain of their members whom the House appoints as its managers to prepare the evidence and conduct the prosecution on its behalf. The accused person is empowered to summon witnesses and may employ counsel in his defence.

Determination and delivery of judgment.

**1161.** When the case has been fully heard, the Lords determine whether the charges against the defendant have been proved. Each article of the impeachment is treated separately, the Lord High Steward, or the Lord Chancellor, as the case may be, asking each peer in turn (beginning with the junior baron) whether the defendant is guilty, or not guilty, of the crime charged therein. In reply to this question, each peer, standing up in his place and laying his right hand upon his breast, answers in the words "guilty [or "not guilty"] upon my honour." As soon as every peer present has given his opinion upon every article of the impeachment, the numbers are cast up, and the result of the trial is then announced by the Lord High Steward, or the Lord Chancellor, as the case may be.

If the accused person is declared to be not guilty, he is informed that he is acquitted, and the proceedings are then at an end (*c*); if he is declared to be guilty, he may plead matters in arrest of judgment, and in no case is judgment delivered by the Lords until it has been demanded by the Speaker on behalf of the Commons (*d*).

person may be attached. If he is a peer, he is committed by order of the House of Lords in safe custody to the Gentleman Usher of the Black Rod (see the case of the Earl of Oxford in 1715, Journals of the House of Lords, 1715, Vol. XX., p. 112); if he is a commoner, the House of Commons orders its Serjeant-at-Arms to attach him and to keep him under arrest until the House of Lords orders the Gentleman Usher of the Black Rod to take him into custody (see the case of Dr. Sacheverell, Journals of the House of Commons, 1709, Vol. XVI., p. 242). The Lords may admit any accused person to bail.

(*a*) The trial of an impeachment may take place in the House of Lords or in Westminster Hall; see case of Viscount Melville, where an address was ordered by the House of Lords praying His Majesty to give directions for the preparation of a place in Westminster Hall for the trial (Parliamentary Debates, First Series, Vol. VI., p. 557).

(*b*) See May, Parliamentary Practice, 11th ed., p. 665; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 265. In the case of Viscount Melville, however, the trial was presided over by Lord Erskine, the Lord Chancellor.

(*c*) After the conclusion of the trial, both the Lords and Commons adjourn to their own Houses. In the House of Lords an order is made for the proceedings in the trial to be printed and published. In the House of Commons a motion is made thanking the managers for their services in the trial.

(*d*) See the resolution of the Commons on the occasion of the impeachment of

(ii.) *Trial of a Peer by his Peers.*

SECT. 6. Judicial Functions of the House.

Right of a peer to be tried by his peers.

**1162.** The right to be tried by the House of Lords if Parliament is sitting, or in the Court of the Lord High Steward if it is not sitting, belongs to any peer or peeress against whom an indictment has been found for treason, misprision of treason, felony or misprision of felony (*e*).

Communication of indictment of a peer to Lord Chancellor, and subsequent proceedings in the House.

**1163.** An indictment is found in the usual way, and the House of Lords is informed of the fact by means of a letter addressed by the judge of the court to the Lord Chancellor, acquainting him that a true bill for the offence committed has been returned into court against the peer or peeress (*f*). The Lord Chancellor communicates this information to the House, and a committee is appointed to inspect the Journals in order to find out the procedure which has been adopted in former cases, and to consider the proper methods to bring the accused peer or peeress to a speedy trial (*g*).

This committee is given power to report from time to time to the House, and as soon as it has issued its first report stating a suitable day for the trial to be held, an address to the Sovereign is drawn up informing him of the date which has been fixed, and desiring him to appoint a Lord High Steward to continue during the trial (*h*).

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the Earl of Winton in 1721, "That it is not parliamentary for their lordships to give judgment until the same be first demanded by this House" (Journals of the House of Commons, 1716, Vol. XVIII., p. 405). For the form in which the Commons demand judgment, see 4 Hatsell, Precedents of Parliament, ed. 1818, p. 232, n. Except in the case of a capital offence, it would appear that in an impeachment the House of Lords has the power to inflict any punishment which it deems expedient; see the sentences passed on Viscount St. Alban (Journals of the House of Lords, 1621, Vol. III., pp. 105, 106); on Goudet and others (*ibid.*, 1698, Vol. XVI., pp. 337, 338); on Dr. Sacheverell (*ibid.*, 1709, Vol. XIX., pp. 121, 122); and on Lord Macclesfield (*ibid.*, 1725, Vol. XXII., p. 560).

(*e*) Standing Orders of the House of Lords (Public Business), 1902, No. 72; and see titles COURTS, Vol. IX., pp. 19, 26; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 270; PEERAGES AND DIGNITIES. For a misdemeanour, a peer or peeress is tried by a jury in the same way as a commoner; see *R.* v. *Vaux (Lord)* (1612), 1 Bulst. 197.

(*f*) A bill of indictment against a peer or peeress is removed before the House of Lords by means of a motion made by the Lord Chancellor and agreed to by the House, and a writ of *certiorari* is issued under the Great Seal for the purpose. The clerk of the court in which the indictment has been found attends at the bar with the writ of *certiorari*; see proceedings in the trial of Earl Russell (Journals of the House of Lords, 1901, Vol. CXXXIII., pp. 224 *et seq.*; see, further, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 270; CROWN PRACTICE, Vol. X., pp. 157 *et seq.*

(*g*) In obedience to an order of the House, the Gentleman Usher of the Black Rod takes the accused person into his custody and brings him to the bar of the House, and the Lord Chancellor then acquaints him of the charge which has been brought against him and asks him whether he has anything to offer to the House. It is then open to the accused person to present a petition praying that the hearing of the case may be postponed until he has had time to prepare his answer to the indictment. It is usual for the House to agree to such a petition and to admit the accused person to bail.

(*h*) A further address is presented to the Sovereign requesting him to order that a sufficient police force be in attendance to keep clear the approaches to the House during the trial.

SECT. 6. Judicial Functions of the House.

Procedure at hearing.

**1164.** As soon as the answer of the Sovereign signifying his willingness to appoint a Lord High Steward has been made known to the House, an order is made summoning the accused peer to appear at the bar of the House on the day appointed for the trial in order to answer the indictment which has been brought against him, and the Clerk of the Parliaments is authorised to summon such witnesses as may be desired by the Crown and the accused peer (*i*).

Upon the day appointed for the trial, the lords, wearing their robes, assemble in the House of Lords, and are called over by the Clerk of the Parliaments (*k*), after which they adjourn to the place in which it has been arranged for the trial to take place (*l*).

The commission under the Great Seal appointing a Lord High Steward to preside over the trial is then read by the Clerk of the Crown in Chancery, after which the Lord High Steward is presented with his staff of office by Garter King of Arms and the Gentleman Usher of the Black Rod (*m*).

Determination and delivery of judgment by the peers.

**1165.** As soon as the trial has been concluded, the lords (*n*) adjourn to the House of Lords to consider their judgment. When this has been agreed to, they return to the place in which the trial has been held, and their judgment is delivered by the Lord High Steward, after which he declares that the proceedings are at an end, and directs that proclamation be made for dissolving his commission. When this has been done, he breaks his staff of office in two and declares the commission to be dissolved, and the House then adjourns during pleasure.

(*i*) The fact that a peer acts as a judge in the trial does not invalidate his competency as a witness; see title EVIDENCE, Vol. XIII., p. 570.

(*k*) When the House is called over, the name of the junior baron is called first.

(*l*) The officers, attendants, judges, and lords proceed to the appointed place under the direction of Garter King of Arms. No one is allowed to be covered at the trial except the lords. The accused peer or peeress is allowed a seat within the bar, but must be uncovered and without robes.

(*m*) Although the Lord High Steward presides over the trial, the lords are the judges (see titles COURTS, Vol. IX., p. 22; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 270), and all persons who may have occasion to speak to the court must address themselves to the lords in general and not to the Lord High Steward. Any proclamation which is made during the course of the trial must be made in the name of the Sovereign. As to the position of the Lord High Steward in his own court, see title COURTS, Vol. IX., p. 26.

(*n*) Every lord, when he gives his judgment, does so in the manner described in an impeachment; see p. 652, *ante*. For the position of the lords spiritual in the trial of a peer, see p. 621, *ante*.

# Part III.—The House of Commons.

## SECT. 1.—*Composition.*



### SUB-SECT. 1.—*In General.*

**1166.** The House of Commons consists of 670 members, 495 of whom are elected as representatives of England and Wales, 72 of Scotland, and 103 of Ireland (*o*). Composition of House of Commons.

Members of the House of Commons who are not in receipt of salaries as ministers of the Crown, as officers of the House itself, or as officers of His Majesty's household, are paid a salary of £400 a year (*p*). Salaries of members.

### SUB-SECT. 2.—*Disqualifications for Membership.*

**1167.** Certain persons are disqualified either at common law or by statute for sitting or voting in the House of Commons (*q*). If it is alleged that any candidate who has been elected to be a member of Parliament is thus disqualified, his right to sit and vote in the House of Commons must be decided by the House itself, or, if the alleged disqualification has been raised in a petition under the Parliamentary Elections Act, 1868 (*r*), by the judges appointed to try such petitions (*s*). Disqualifications for sitting or voting in the House of Commons.

**1168.** It is clear at common law that a woman cannot be elected to serve in Parliament (*a*). Women.

(*o*) Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23). Seats in the House of Commons are distributed as follows, namely:—

| | Counties. | Boroughs. | Universities. |
|---|---|---|---|
| England and Wales ..... | 253 | 237 | 5 |
| Scotland ..... | 39 | 31 | 2 |
| Ireland ..... | 85 | 16 | 2 |
| | 377 | 284 | 9 |

As to the election of members, see title ELECTIONS, Vol. XII., pp. 139 *et seq.*, 257 *et seq.*

(*p*) Appropriation Act, 1911 (1 & 2 Geo. 5, c. 15).

(*q*) If an objection is raised as to the qualification of a candidate when he is nominated it is not the duty of the returning officer to determine the question of the candidate's qualification, unless the nomination is obviously an abuse of the right of nomination (2 Rogers on Elections, 18th ed., pp. 96, 97). Notice may be given of a candidate's disqualification at any time before the close of the poll. The effect of such a notice is that all votes which are given to a disqualified candidate after the publication of the notice may be treated as if they had not been given. If the disqualified candidate is elected, therefore, and a petition is brought against his return, the candidate next on the poll may be declared elected if, after taking away the votes given to the successful candidate after the publication of the notice of his disqualification, the latter is found to be in a minority to the other candidate. If no notice of a successful candidate's disqualification is given before the close of the poll and he is unseated on petition, the candidate next on the poll is not entitled to the seat, and a fresh election must take place.

(*r*) 31 & 32 Vict. c. 125.

(*s*) For the practice of the House of Commons with regard to controverted elections, see pp. 787 *et seq.*, *post*.

(*a*) See 1 Whitelocke on the King's Writ, p. 475.

SECT. 1. Composition.

Infants.

**1169.** It would appear that infants have always been debarred by the law of Parliament from sitting and voting in the House of Commons (*b*), but before the reign of William III. infancy was not a statutory disability, although it was subsequently provided by Act of Parliament that no person under the age of twenty-one years should vote at an election of a member of the House of Commons, or be elected as a member of that House (*c*).

Aliens.

**1170.** An alien is disqualified for sitting in Parliament unless he becomes a naturalised British citizen, either by means of a private Act of Parliament (*d*) or by obtaining a certificate of naturalisation from the Secretary of State (*e*), when he becomes entitled to all the political and other rights, powers, and privileges to which a natural-born British subject is entitled.

Lunatics.

**1171.** Mental imbecility disqualifies a person for sitting and voting in the House of Commons (*f*). If a member after his election to the House is received, or committed into, or detained in any asylum or other place as a lunatic, it is the duty of the court, judge, magistrate, or other person upon whose certificate or order the member has been thus dealt with, to send a certificate to the Speaker acquainting him of the fact. The case is then dealt with under prescribed statutory provisions and, if the member is certified to be insane by the Commissioners in Lunacy, he is no longer capable of sitting or voting in the House

Peers.

**1172.** Every peer of the United Kingdom or Scotland, whether he is a lord of Parliament or not (*h*), and every representative

(*b*) See 2 Hatsell, Precedents of Parliament, ed. 1818, pp. 9—11. For the definition of "infant," see title INFANTS AND CHILDREN, Vol. XVII., pp. 43 *et seq.*

(*c*) Stat. (1696) 7 & 8 Will. 3, c. 25, s. 7. The same rule was applied to Scotland by the Union with Scotland Act, 1706 (6 Anne, c. 11), s. 6, and to Ireland by the Parliamentary Elections (Ireland) Act, 1823 (4 Geo. 4, c. 55), s. 74. After the passing of these Acts, minors sat in the House of Commons, but they have not done so since the passing of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45); see 1 Anson, Law and Custom of the Constitution, 4th ed., p. 78.

(*d*) For the procedure with regard to a naturalisation Bill, see title ALIENS, Vol. I., pp. 315, 316, and see p. 761, *post.*

(*e*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 7; see title ALIENS, Vol. I., pp. 313 *et seq.*

(*f*) D'Ewes, Journals of all the Parliaments in the reign of Queen Elizabeth, ed. 1566, p. 126. For the general law relating to lunatics and idiots, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 389 *et seq.*

(*g*) Lunacy (Vacating of Seats) Act, 1886 (49 & 50 Vict. c. 16), s. 2. For the procedure adopted in such cases, see pp. 788, 789, *post.*

(*h*) The fact of his succession to a peerage of the United Kingdom disables the person so succeeding from being elected to, or from sitting or voting in, the House of Commons. When a member of the House succeeds to a peerage which entitles him to receive a writ of summons to the House of Lords, it is not the practice of the House of Commons to declare his seat vacant until the issue of such writ of summons from the Crown. But in the case of a member succeeding to a Scottish peerage, the possession of which does not entitle its holder to receive a writ of summons to the House of Lords, the House of Commons declares his seat vacant upon such evidence of the death of his predecessor and of his succession to the title as it considers fit and sufficient. If a member who succeeded to a peerage which entitles him to receive a writ of summons to

SECT. 1. Composition.

peer of Ireland, is disqualified for sitting in the House of Commons (*i*).

Clergy.

**1173.** It would appear that the clergy of the Church of England from an early date have been held incapable by law of sitting in the House of Commons (*k*). No statute upon the subject existed, however, until 1801, when it was provided that any person who had been ordained a priest or deacon, or who was a minister of the Church of Scotland, was incapable of being elected a member of the House of Commons; and, further, that if any person, after his election to the House of Commons, was ordained to the office of priest or deacon, or became a minister of the Church of Scotland, he should vacate his seat, a penalty of £500 for every day in which such person continued to sit or vote in the House of Commons being imposed (*l*).

Any person in holy orders in the Church of Rome is incapable of being elected to sit in Parliament, and, if any person who has been elected to the House of Commons afterwards takes or receives such holy orders, he must vacate his seat, and, if he presumes to sit or vote in the House, renders himself liable to the penalty already mentioned (*m*).

Felons and other offenders.

**1174.** Persons who have been convicted of treason or felony (*n*), or who have been found guilty of corrupt or illegal practices at

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the House of Lords delays or refuses to apply for such writ, the House of Commons is entitled to ascertain the fact of his succession by such inquiry and upon such evidence as it considers appropriate to the case; see Report from the Select Committee of the House of Commons on House of Commons (Vacating of Seats), 1895, House of Commons Paper, 272; and Report from the Select Committee of the House of Commons on the Earldom of Selborne, 1895, House of Commons Paper, 302.

(*i*) For the position of Irish peers, see pp. 624, 626, 627, *ante*.

(*k*) See 1 Bl. Com. 175; 2 Hatsell, Precedents of Parliament, ed. 1818, pp. 12—17.

(*l*) House of Commons (Clergy Disqualification) Act, 1801 (41 Geo. 3, c. 53), s. 2. A priest or deacon of the Church of England who relinquishes his orders is no longer disqualified for sitting in the House of Commons; see title ECCLESIASTICAL LAW, Vol. XI., pp. 557, 559.

(*m*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 9; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 804, 805. Ministers of Protestant nonconformist religious bodies are capable of being elected to membership of the House of Commons; see title ECCLESIASTICAL LAW, Vol. XI., pp. 811, 813. As to Quakers, Unitarians, and Jews, see *ibid.*, pp. 822, 824.

(*n*) See Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2; title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 428, 429. Before the passing of this Act it was clearly established at common law that a person attainted or adjudged guilty of treason or felony could not be elected to the House of Commons before the expiration of his sentence (see the case of John Mitchel, 18th February, 1875, Journals of the House of Commons, 1875, Vol. CXXX., p. 52; Parliamentary Debates, Third Series, Vol. CCXXII., p. 511; May, Parliamentary Practice, 11th ed., p. 34, n.; for a later case, see that of Alfred Arthur Lynch, 2nd March, 1903, Journals of the House of Commons, 1903, Vol. CLVIII., p. 40). A person who has been convicted of a misdemeanour and sentenced to a shorter period of imprisonment than twelve months without hard labour is not disqualified from being elected a member of the House of Commons. If a person who has been thus sentenced is already a member of the House and is expelled from the House, he may be again elected, therefore, to sit in Parliament.

SECT. 1. Composition.

parliamentary elections (*o*), are subject to certain disqualifications.

Bankrupts.

**1175.** A person who has been adjudged bankrupt is incapable of being elected as a member of the House of Commons, or, if he is already a member, of sitting or voting in that House or of serving upon any of its committees. The seat of any member who has been adjudged bankrupt falls vacant six months after the date of the adjudication, unless within that period the adjudication against him is annulled or he obtains his discharge from the court with a certificate stating that his bankruptcy was due to no misconduct upon his part (*p*).

Persons holding pensions from the Crown.

**1176.** Any person who holds a pension from the Crown either during pleasure, or for a term of years, whether such pension is held by the person himself or by another in trust for him, and any person who receives a sum of money as of royal bounty more than once in three years, is disqualified for being elected to, or for sitting or voting in, the House of Commons (*a*).

This disqualification no longer exists in the case of any person who holds a pension granted for service rendered in the Civil Service or the Diplomatic Service (*b*).

Government contractors.

**1177.** Any person who, directly or indirectly, holds for his own

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(*o*) See title ELECTIONS, Vol. XII., pp. 257—303, 483, 484.

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 32, 33; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88. A member incurs no penalty by continuing to sit or vote in the House of Commons after he has been adjudged bankrupt. He can continue, therefore, to discharge his duties as a member of Parliament for a period of six months, unless notice is taken of his presence in the House and an order is made by the House for him to withdraw (see Journals of the House of Commons, 1858, Vol. CXIII., p. 229; for the procedure when a member is adjudged bankrupt during a prorogation, see pp. 789, 790, *post*). The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 9, provides that no disqualification which arises under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, shall exceed a period of five years from the date of a discharge granted under the provisions of either Act. These provisions apply only to England. In Scotland the disqualifications above referred to have been made to apply, with certain modifications; see Bankruptcy Frauds and Disabilities (Scotland) Act, 1884 (47 & 48 Vict. c. 16), ss. 5, 6. In Ireland the law is different. A person who has been adjudged bankrupt in England or Scotland may not be elected to represent any constituency in the United Kingdom, but a person who has been adjudged bankrupt in Ireland may be elected to represent an English or Scottish constituency, and a member of the House who represents an Irish constituency does not vacate his seat until a period of one year has elapsed after he has been adjudged bankrupt; see Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), ss. 41, 42.

(*a*) Succession to Crown Act, 1707 (6 Anne, c. 41), s. 24; Crown Pensioners Disqualification Act, 1715 (1 Geo. 1, stat. 2, c. 56); Civil List and Secret Service Money Act, 1782 (22 Geo. 3, c. 82), s. 30. By the Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 28 (which applies to pensioners during pleasure), a penalty of £500 can be recovered from any person so disqualified who sits or votes in the House of Commons; but under the Crown Pensioners Disqualification Act, 1715 (1 Geo. 1, stat. 2, c. 56), s. 2 (which applies to pensioners for a term of years) a fine of £20 may be recovered for every day on which the disqualified person sits or votes.

(*b*) Pensioners Civil Disabilities Relief Act, 1869 (32 & 33 Vict. c. 15), s. 1; Diplomatic Salaries, etc. Act, 1869 (32 & 33 Vict. c. 43), s. 17.

use or benefit, in the whole or in part, any contract with any person or persons, for or on account of the public service, is incapable of being elected to, or of sitting or voting in, the House of Commons (*c*).

Holders of office.

**1178.** The holding of certain offices either (1) altogether disqualifies the holders for being elected as members of the House of Commons, or, if already elected, for continuing to sit or vote in that assembly; or (2) necessitates the vacation of their seats by members appointed to fill them, without, however, preventing their re-election.

The disability to sit in the House of Commons which attaches to the holding of office in almost every case has been created by statute (*d*), although in respect of some offices a disability has always existed by the law of Parliament (*e*).

Offices of profit under the Crown.

**1179.** Any person who accepts an office of profit under the Crown, created since the 25th October, 1705, is incapable of being elected to, or, if already elected, of continuing to sit or vote in, the House of Commons (*f*), unless a statutory exception has been made

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(*c*) House of Commons (Disqualification) Act, 1782 (22 Geo. 3, c. 45), ss. 1, 2. The Act imposes a penalty of £500 in the case of any disqualified person who sits or votes in the House (*ibid.*, s. 9). The Act does not extend to incorporated trading companies where the contract is made for the general benefit of the company (*ibid.*, s. 3); see 2 Rogers on Elections, 18th ed., pp. 27—29. The provisions of the Act were extended to Ireland by the House of Commons Disqualifications Act, 1801 (41 Geo. 3, c. 52), s. 4.

(*d*) The legislation upon this subject dates from the period immediately following the Revolution of 1688, when the House of Commons was extremely jealous of any interference in its proceedings upon the part of the Crown. During the reign of William III. two Acts were passed disqualifying commissioners of stamps and excise for sitting in the House of Commons, and a stringent provision was inserted in the Act of Settlement (12 & 13 Will. 3, c. 2), s. 3, to make any person who held an office or place of profit under the Crown incapable of serving as a member of the House of Commons. This provision was repealed in 1705 (see stat. (1705) 4 & 5 Anne, c. 20, ss. 27, 28), and two years later the Succession to the Crown Act, 1707 (6 Anne, c. 41), was passed, the provisions of which form the basis of the present law with regard to disqualification incurred by the holding of offices; see 1 Anson, Law and Custom of the Constitution, 4th ed., p. 83.

(*e*) With the exception of the Master of the Rolls, who became disqualified by virtue of the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5, the judges have always been excluded from the House of Commons by the law of Parliament for the reason that they were the assistants of the other House; see Yearly Practice of the Supreme Court, 1912, p. 1325. The Attorney-General used formerly to be excluded for the same reason, although apparently the Solicitor-General has always been allowed to sit in the House of Commons: see 2 Hatsell, Precedents of Parliament, ed. 1818, pp. 26—29. Sheriffs used formerly to be disqualified altogether for sitting in the House of Commons, although eventually the disqualification of a sheriff appears to have been limited to an incapacity to be elected for his own county; but that considerable uncertainty existed with regard to this matter is proved by a resolution of the House of Commons in 1789 declaring that the nomination of any of its members as a sheriff was a breach of the privileges of the House; see *ibid.*, pp. 30—34; and see title SHERIFFS AND BAILIFFS.

(*f*) Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 24, which has been held to apply not only to new offices accepted directly from the Crown, but also to new offices the appointment to which is vested in some authority under the Crown, and also to new offices created by Parliament for the service of the

SECT. 1. Composition.

exempting the office in question from the provisions of the Act passed in that year (*g*); and any member of the House who accepts an office of profit under the Crown, which was in existence before that date, must thereupon resign his seat and again submit himself for election (*h*).

Other administrative and official posts.

**1180.** In addition to the statutory disqualifications referred to in the preceding paragraphs (*i*) and to the other disqualifications to which allusion has already been made (*k*), the holders of many offices have been definitely excluded by Parliament from sitting in the House of Commons. Such incapacity generally attaches to persons

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State the appointment to which is vested in the Crown. (For a list of new offices created since the 25th October, 1705, to which this provision applies, see 2 Rogers on Elections, 18th ed., pp. 15—17.) In Ireland, any person who accepts a new office under the Lord Lieutenant created since the passing of an Act of the Irish Parliament (stat. (1793) 33 Geo. 3, c. 41 (Irish)) is made incapable of sitting or voting in the House of Commons by the House of Commons (Disqualifications) Act, 1801 (41 Geo. 3, c. 52), s. 5. Any member of Parliament who sits or votes in the House of Commons after becoming disqualified under the provisions of the Succession to the Crown Act, 1707 (6 Anne, c. 41), or the House of Commons (Disqualifications) Act, 1801 (41 Geo. 3, c. 52), renders himself liable to a fine of £500 for every day he sits or votes. Examples of offices created since the 25th October, 1705, which have been held by the House of Commons from time to time to come within the provisions of the Act, can best be found in the Journals of the House; see General Index to the Journals under title Elections, Writs (Warrants for New Writs) Ordered, in the room of members who have accepted offices or employments.

(*g*) The Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 27, expressly excludes any member of the House, being an officer of the navy or army, who receives a new commission in the navy or army, from the provisions of *ibid.*, s. 24 (see note (*f*), *supra*), but the House has determined upon more than one occasion that a member who receives a commission in the navy or army for the first time thereby vacates his seat. For a complete list of the statutes which have been passed from time to time excepting certain offices from the provisions of the Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 24, see 2 Chronological Table and Index of the Statutes, 26th ed., pp. 628—629, under title "House of Commons, Members, (b) Persons not disqualified." Among such offices may be cited those of Postmaster-General, President of the Board of Trade, President of the Local Government Board, President of the Board of Agriculture, and President of the Board of Education, Paymaster-General, First Commissioner of Works and Buildings, four Secretaries of State, Commissioner of the Treasury, Secretary for Scotland, and Governor, Deputy Governor, Director, or any member of the Bank of England. Acceptance of certain of these offices necessitates the resignation of his seat by a member, but his appointment is no bar to his re-election.

(*h*) Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 25. The practice of the House has been to interpret the meaning of this provision to apply only to old offices in existence before the passing of the Act, which are accepted direct from the Crown and not from some authority under the Crown; see 2 Hatsell, Precedents of Parliament, ed. 1818, pp. 51, 61; see also 2 Rogers on Elections, 18th ed., pp. 46—54. For a list of the offices to which this provision refers, see 2 Chronological Table and Index of the Statutes, 26th ed., pp. 628—629. A member of the House of Commons who is returned to the House after accepting any one of certain specified offices from the Crown is not required again to vacate his seat if he accepts another of such specified offices (Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52). For a list of such offices, see *ibid.*, Schedule (H); title CONSTITUTIONAL LAW, Vol. VII., p. 40, note (*e*). For the procedure upon the vacation of a seat in the House of Commons, see p. 652, *post*.

(*i*) See the text, *supra*.

(*k*) See pp. 656 *et seq.*, *ante*.

who are connected with the administration of justice or the police (*l*); who are employed in connection with the collection or audit of public money, or in the administration of property for public purposes (*m*); or who are appointed to represent the Crown or to hold offices at Court or in the Government departments (*n*).

SUB-SECT. 3.—*Retirement from Membership.*

Methods of retirement from the House of Commons.

**1181.** A member who has been elected to sit in the House of Commons cannot resign his seat (*o*), and can only cease to

(*l*) *E.g.*, judges of the High Court and Court of Appeal in England (Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5); judges of the Court of Session etc. in Scotland (Parliamentary Elections (Scotland) Act, 1733 (7 Geo. 2, c. 16), s. 4); judges of the High Court and Court of Appeal in Ireland (Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 13); recorder of a borough in England for the borough of which he is recorder (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (6)); county court judges in England (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 8); justices and police officers in Dublin (Dublin Police Act, 1836 (6 & 7 Will. 4, c. 29), s. 19); Commissioners etc. of Metropolitan Police (Metropolitan Police Acts, 1829 (10 Geo. 4, c. 44), s. 18, 1856 (19 & 20 Vict. c. 2), s. 9); magistrates and inspectors of constabulary in Ireland (Constabulary (Ireland) Act, 1836 (6 & 7 Will. 4, c. 13), s. 18); sheriff and salaried sheriff-substitute in Scotland (Sheriff Courts (Scotland) Act, 1907 (7 Edw. 7, c. 51), s. 21); revising barrister in England for the county or borough for which he is appointed (Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 28); corrupt practices commissioner (Election Commissioners Act, 1852 (15 & 16 Vict. c. 57), s. 1); paid chairman or deputy-chairman of London Quarter Sessions (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (4)); assistant barrister (chairman of quarter sessions), Ireland (Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), s. 2); registrars and other officers in bankruptcy (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 116); barrister appointed to try a municipal election petition (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 92); commissioners etc. under the Land Commission in Ireland (Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 54); stipendiary magistrates (under the various Acts by which they are appointed).

(*m*) *E.g.*, Auditor of the Civil List (Civil List Audit Act, 1816 (56 Geo. 3, c. 46), s. 8); Collector-General of Rates etc. in Dublin (stat. (1849), 12 & 13 Vict. c. 91, s. 24); Commissioners of Woods and Forests, with the exception of the President of the Board of Agriculture and Fisheries (Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 10); paid Charity Commissioners, secretary and inspectors (Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 5); Comptroller and Auditor-General and his assistant (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 3); paid officers of county councils permanently employed, in England and Ireland (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 (13), and Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 83 (10)); commissioners and officers of excise (Excise Management Act, 1827 (7 & 8 Geo. 4, c. 53), s. 8).

(*n*) *E.g.*, clerks in the Treasury, Admiralty, and in the departments of the Secretaries of State, and other officials (House of Commons Disqualification Act, 1741 (15 Geo. 2, c. 22), preamble, and House of Commons (Disqualifications) Act, 1801 (41 Geo. 3, c. 52), s. 4); members of the Council of India and governors and deputy-governors in India (Government of India Act, 1858 (21 & 22 Vict. c. 106), ss. 12, 64; fifth Under Secretary of State, when four Under Secretaries are already sitting in the House (Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 4, and House of Commons (Vacation of Seats) Act, 1864 (27 & 28 Vict. c. 34); Court appointments enumerated in the Civil List and Secret Service Money Act, 1782 (22 Geo. 3, c. 82); Commissioners of Public Works in Ireland (Public Works (Ireland) Act, 1831 (1 & 2 Will. 4, c. 33), s. 11).

(*o*) See resolution of the House of Commons upon this subject, 2nd March, 1623; compare 2 Hatsell, Precedents of Parliament, ed. 1818, pp. 78—80.

SECT. 1. Composition.

represent his constituency in Parliament (1) by reason of his death; (2) by being expelled from the House of Commons by an order of the House (*p*); (3) by the dissolution of the Parliament to which he has been elected; (4) by disqualifying himself for continuing any longer to sit or vote in the House of Commons; or (5) by the establishment against him of some legal disqualification for sitting and voting.

Acceptance of office of profit under the Crown.

**1182.** If a member, therefore, wishes to retire from Parliament, or is anxious to resign the seat for which he has been elected in order to stand for some other constituency or to discover whether he still possesses the confidence of his constituents, the practice of Parliament is for him to apply to be appointed to some office under the Crown the possession of which (*q*) disqualifies its holder for sitting or voting in the House of Commons (*a*).

A member is appointed to the office of Steward of the Chiltern Hundreds, or other similar office, by means of a warrant which is signed, in the presence of a witness, by the Chancellor of the Exchequer (*b*). As soon as the warrant has been signed, the person who has been appointed to the office in question ceases to be the member of Parliament for the constituency for which he is sitting (*c*) at the time, although he is not disqualified for re-election to Parliament (*d*).

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(*p*) As to the powers of the House with regard to the expulsion of members, see pp. 787 *et seq.*, *post*.

(*q*) Under the provisions already referred to; see p. 659, *ante*, and see p. 789, *post*.

(*a*) At the present time the offices for which application is usually made are those of Steward of the Chiltern Hundreds, co. Bucks, and of the Manor of Northstead, co. Yorks; see May, Parliamentary Practice, 11th ed., p. 643. There are numerous other offices of the same kind, however, for which a member of the House of Commons can apply and the appointment to which vacates his seat in Parliament. All such offices are now nominal. Appointments to the offices of Steward of the Chiltern Hundreds and of the Manor of Northstead are made by the Chancellor of the Exchequer, whose duty it is to grant any application for either of the offices, unless there is some lawful reason to the contrary; see statement of Sir William Harcourt, as Chancellor of the Exchequer in 1893, Parliamentary Debates, Fourth Series, Vol. VIII., p. 50. The offices are now in no sense offices of profit under the Crown, but, as formerly they used to carry with them certain emoluments, it has been found convenient, as a matter of parliamentary practice, to retain in the warrants of appointment to them words entitling their holders to all wages, fees, allowances etc. which used formerly to belong to them, and the insertion of these words has always been held to necessitate the immediate vacation of their seats by the holders of such offices; see Report from the Select Committee of the House of Commons on House of Commons (Vacating of Seats), 1894, House of Commons Paper (278), Appendix. It is possible for a member who has not taken the oath to apply for the Chiltern Hundreds; see case of Mr. Bradlaugh, Journals of the House of Commons, 1884, Vol. CXXXIX., p. 46.

(*b*) All appointments to these offices are published in the *London Gazette*, and the warrants of appointment are registered at the Treasury.

(*c*) If the appointment is made during the course of the session, notice of a motion for the issue of a new writ to fill the vacancy thereby caused may be made immediately the warrant of appointment has been signed; but, if the appointment is made during a recess, the Speaker has no power to issue a writ to fill the vacancy; and see p. 789, *post*.

(*d*) The person appointed to hold one of these nominal offices holds it until someone else is appointed to take his place.

## SECT. 2.—*Procedure and Conduct of Business.*

### SUB-SECT. 1.—*In General.*

Conduct of business.

**1183.** The business of the House of Commons is transacted (1) in the House itself; (2) in committees of the whole House; (3) in four standing committees, appointed for the consideration of Bills; (4) in select committees and joint committees of the two Houses, appointed to consider Bills or other matters; (5) in various other committees, appointed under the standing orders of the House every session for certain purposes; and (6) in private Bill committees.

The conduct of business in the House of Commons and the procedure of the House on public and private business are fixed and regulated by the standing orders of the House, by numerous resolutions and orders which have been agreed to from time to time and have continued to be acted upon by the House, and by a series of precedents and customs which are based partly upon the traditions of the House and partly upon the rulings given from time to time by successive Speakers on questions of practice and points of order.

### SUB-SECT. 2.—*Business Transacted in the House itself.*

Stages of Bills and other matters considered in the House.

**1184.** In the House of Commons, the business which is transacted in the House itself is similar to that which is transacted in the House of Lords (*e*). It is divided into public business and private business. The former consists of all the stages of public Bills except the committee stage, of other orders of the day (*f*), and of notices and motions (*g*). The latter includes the first, second, and third readings, and the report stage of private Bills and provisional order confirmation Bills as well as the consideration of the standing orders which relate to such Bills.

### SUB-SECT. 3.—*The Speaker.*

The Speaker.

**1185.** The deliberations of the House of Commons, except when the House is in committee (*h*), are presided over by a Speaker, who is chosen by the House at the beginning of every new Parliament (*i*). He is the guardian of the privileges of the House, and its spokesman and representative upon all occasions.

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(*e*) See pp. 628, 629, *ante*.

(*f*) See p. 632, *ante*.

(*g*) By the practice of the House notice of a substantive motion—*i.e.*, notice of the intention of a member to call the attention of the House to some particular subject which does not arise out of the orders of the day, or to move a resolution, or to ask for a return—must be printed on the notice paper; see May, Parliamentary Practice, 11th ed., p. 238. (As to the notice paper, see note (*n*), p. 670, *post*). In the case of a matter of privilege immediately or presently arising, as no notice of the matter in question could have been given, a motion, arising out of the alleged breach of privilege, may be made without notice. To an adjourned debate on such a question precedence is given over the orders of the day.

(*h*) See p. 665, *post*.

(*i*) For the procedure with regard to the election of the Speaker and the confirmation of his election by the Crown, see pp. 692 *et seq.*, *post*. The Speaker receives a salary of £5,000 per annum, which is charged upon the Consolidated

SECT. 2. Procedure and Conduct of Business.

Guardian of the privileges of the House.

**1186.** As the guardian of the privileges of the House, the Speaker, immediately after the confirmation of his election has been announced to him by the Lord Chancellor, demands from the Crown the rights and privileges of the Commons, and, throughout the duration of the Parliament, he is responsible for the preservation of the dignity, the maintenance of the privileges, and the due enforcement of the rights of the House of Commons.

To the Speaker, therefore, belongs the duty of executing all the orders of the House, and accordingly he issues warrants for the commitment of persons who have incurred the displeasure of the House, for the attendance of witnesses in custody, and for the issue of writs for filling seats in the House which become vacant during the course of a Parliament.

It is also the duty of the Speaker to draw the attention of the House to, and to express his views with regard to, any amendments proposed by the Lords to a Bill sent up to them by the Commons, which, in his opinion, infringe the privilege claimed by the House of Commons to the sole control in matters of finance.

Spokesman and representative of the House.

**1187.** As the spokesman of the House, the Speaker communicates its resolutions and orders, conveys its thanks, and expresses its censures and warnings, to those concerned; and to him, as the official representative of the House, are addressed any communications from outside which are sent to the House of Commons.

Presiding officer of the House.

**1188.** As the presiding officer of the House, the Speaker is the interpreter of its rules and procedure, and is invested with the power to control and regulate the course of debate and to maintain order. He puts the question on every motion and declares the decision of the House with regard to it, but he will not submit any motion to the House which infringes any standing order or rule of procedure, and he is the sole judge of the admissibility or propriety of a question which any member proposes to ask a minister or other member in the House.

Duties under Parliament Act, 1911.

**1189.** In addition to these various functions, the Speaker is empowered to perform certain specified duties with regard to Bills

Fund (House of Commons Officers Act, 1834 (4 & 5 Will. 4, c. 70), s. 1). During a dissolution of Parliament the Speaker of the late House of Commons, for certain purposes laid down in the regulation of offices in the House of Commons (Offices) Act, 1812 (52 Geo. 3, c. 11), is deemed to be the Speaker until a Speaker is chosen by the new House (House of Commons Offices Act, 1846 (9 & 10 Vict. c. 77), s. 5). The precedence of the Speaker is fixed indirectly by stat. (1868) 1 Will. & Mar. c. 21, s. 1, which enacts that the Lords Commissioners of the Great Seal, not being peers, "shall have and take place next after the peers of this realm, and the Speaker of the House of Commons"; see 2 Hatsell, Precedents of Parliament, ed. 1818, p. 249, n. Since the passing of this statute, however, definite precedence immediately after the Archbishop of York has been given by Royal warrant, dated December, 1905, to the Prime Minister, whether peer or commoner, and presumably, therefore, he takes precedence of the Speaker except in the House of Commons. Upon his resignation of office the Speaker is usually created a peer, and it is customary also for Parliament to confer upon him a pension of £4,000 during his natural life; see Mr. Speaker's Retirement Acts, 1895 (58 & 59 Vict. c. 10), and 1905 (5 Edw. 7, c. 5).

defined as "money Bills" in the Parliament Act, 1911 (*j*), and also with regard to Bills, other than money Bills so defined, which, having been passed by the House of Commons, have not been passed by the other House (*k*).

Attitude of House with regard to criticism of the Speaker.

**1190.** The House will allow the conduct of the Speaker to be questioned only by means of a substantive motion, and will not tolerate a reflection upon his conduct to be made in any other way by one of its members either inside or outside the precincts of the House of Commons. Nor may any notice of a question to the Speaker be given by any member in the House. If, however, an appeal is made to him by a member with regard to a question of order or a matter affecting the privilege of the House or of one of its members, the Speaker will state his opinion upon the point in question.

### SUB-SECT. 4.—*Committee of the whole House.*

#### (i.) *Going into Committee.*

Purposes for which House goes into committee.

**1191.** The House resolves itself into a committee of the whole House (1) to consider a public Bill after it has been read a second time, or any Bill which is re-committed after it has been reported from a select committee, or any Bill which has been specially re-committed (*l*); (2) to consider supply and ways and means (*m*); and (3) to consider any other matter which the House is required by its rules, or which it thinks fit, to discuss therein.

Appointment and constitution of committee of the whole House.

**1192.** A committee of the whole House consists of all the members present, and meets either forthwith or on some future day. In the case of a matter imposing a charge upon the people or affecting the public expenditure, the committee must always be fixed for some future day.

When the Speaker leaves the chair without question put.

**1193.** When the order of the day is read for the House to resolve itself into committee, the Speaker leaves the chair without question put (*n*), except in the following cases, when the question "That Mr. Speaker do now leave the chair?" must be proposed, namely:—(1) when the committee is one to consider a message from the Crown (*o*); (2) when the House is moved to resolve itself into a committee on the East India Revenue Accounts; or (3) when, upon the first occasion of considering in committee of supply the navy, army, or civil service estimates or any vote of credit, an amendment is moved or a question raised relating to the estimates or vote of credit proposed to be taken in committee of supply (*p*).

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(*j*) 1 & 2 Geo. 5, c. 13; see note (*i*), p. 776, *post*.
(*k*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), ss. 1 (3), 2 (2), (4); see pp. 723, 776, *post*.
(*l*) See pp. 710, 715, *post*.
(*m*) See pp. 772, 774, *post*.
(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 51; see p. 712, *post*.
(*o*) See p. 802, *post*.
(*p*) Standing Orders of the House of Commons (Public Business), 1911, No. 17; see p. 772, *post*.

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The Speaker also remains in the chair when the order of the day for committee on a Bill is read, if notice has been given by any member of his intention to move an instruction to the committee, until such instruction has been disposed of by the House (*q*).

(ii.) *The Chairman of Ways and Means.*

Chairman of Ways and Means.

**1194.** Committees of the whole House are presided over by a member of the House, chosen by the House for that duty upon the motion (*r*) of the leader of the House or of some prominent member of the Government (*s*).

The member who is thus appointed is known as the Chairman of Ways and Means, and holds office for the duration of the Parliament (*t*). In addition to taking the chair in all committees of the whole House, the Chairman of Ways and Means is empowered to act as Deputy Speaker, and, when the unavoidable absence of the Speaker has been announced, may exercise the authority and perform the duties of Speaker (*u*).

Deputy Chairman.

**1195.** A Deputy Chairman is also appointed by the House in a similar manner, who, in the absence of the Chairman of Ways and Means, presides over any committee of the whole House, and, if necessary, may also act as Deputy Speaker (*v*).

Temporary Chairmen.

**1196.** In addition to the Chairman of Ways and Means and the Deputy Chairman, the Speaker is empowered to nominate five members at the beginning of every session, any one of whom may act as Temporary Chairman of any committee of the whole House, upon the request of the Chairman of Ways and Means (*w*).

(*q*) Standing Orders of the House of Commons (Public Business), 1911, No. 51. In the House of Commons a general instruction is given to committees of the whole House to make any relevant amendments to the Bills which are referred to them (*ibid.*, No. 34). The object of an instruction to a committee of the whole House, or to a standing committee, is to enable the committee to do something which it could not do under its general powers. An instruction to a committee of the whole House, or to a standing committee, must not be mandatory, or such as to alter the character of the Bill which is before the committee. For the principles which guide and limit the system of instructions, see May, Parliamentary Practice, 11th ed., pp. 478, 935.

(*r*) This motion is made when the House goes into committee of supply for the first time in a new Parliament, or the first day of the session after the usual sessional orders have been agreed to, and before the Speech from the Throne (see p. 696, *post*) is reported to the House by the Speaker, or on a subsequent day before the commencement of public business.

(*s*) For the procedure with regard to the transaction of business in committee of the whole House, see p. 713, *post*, and for the procedure in Committee of Supply and Committee of Ways and Means, see pp. 772, 774, *post*.

(*t*) The Chairman of Ways and Means receives a salary of £2,500 per annum. For the duties of the Chairman with regard to private Bills, in which he is assisted by a legal adviser who is known as Counsel to the Speaker, see pp. 750 *et seq.*, *post*.

(*u*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 1, (9), 81 (1).

(*v*) *Ibid.*, No. 81 (2). The Deputy Chairman receives a salary of £1,000 per annum.

(*w*) *Ibid.*, No. 1 (9); see Journals of the House of Commons, 1910, Vol. p. 28.

Officers in attendance

**1197.** The principal permanent officers of the House are the Clerk of the House of Commons and the two Clerks Assistant, who sit at the table during the sittings of the House, and the Serjeant-at-Arms, who is also present in the House.

Clerk of the House and other clerks.

**1198.** The Clerk of the House is the head of the permanent staff of the House of Commons (*x*). He is appointed under letters patent by the Crown to be "Under Clerk of the Parliaments to attend upon the Commons" (*y*). The Clerks Assistant are appointed by the Crown under the Sign Manual to assist him in carrying out his duties upon the nomination of the Speaker (*z*).

Serjeant-at-Arms.

**1199.** The Serjeant-at-Arms is appointed by the Crown "to attend upon His Majesty's person when there is no Parliament; and, at the time of every Parliament, to attend upon the Speaker of the House of Commons." He can only be removed from his office by the Crown upon the presentation of an address from the House of Commons for that purpose (*a*).

### SUB-SECT. 6.—*Votes and Proceedings.*

Votes and proceedings.

**1200.** A record of the previous day's proceedings in the House is issued each morning during the session, under the title of "The Votes and Proceedings" (*b*). This record is compiled from the minute books kept by the clerks at the table, and, after

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(*x*) The office of the Clerk of the House of Commons is divided into four departments, namely, the Private Bill Office, the Public Bill Office, the Journal Office, and the Committee Office. There are thirty-two clerks on the establishment, who are appointed on the nomination of the Clerk of the House of Commons. A clerk in the House of Commons can be removed or suspended if, after an inquiry, it appears to the Speaker that he has been guilty of misconduct or is unfit to hold his situation (House of Commons (Offices) Act, 1812 (52 Geo. 3, c. 11), s. 16).

(*y*) For the duties which are performed by the Clerk of the House of Commons, see title COURTS, Vol. IX., p. 25. In addition to the duties there mentioned, the Clerk of the House of Commons has certain other duties entrusted to him by the House and by statute. He indorses all Bills which are sent to the Lords, carries messages between the two Houses, is responsible for the printing of the Journals, and lays certain papers on the table of the House. When the office of Speaker is vacant and there is no Deputy Speaker, he performs certain duties assigned to the Speaker with regard to election petitions; see Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 4.

(*z*) The Clerks Assistant are removable only by the Sovereign upon an address of the House of Commons for that purpose (House of Commons Offices Act, 1856 (19 & 20 Vict. c. 1), s. 1).

(*a*) For the duties of the Serjeant-at-Arms with regard to the arrest of persons for breach of privilege, see title COURTS, Vol. IX., p. 26. In addition to these duties, he is the executive officer who carries out the rules of the House and the orders of the Speaker with regard to the maintenance of order in the House. He is entrusted by the Lord Great Chamberlain with the custody of all parts of the palace of Westminster occupied by the House of Commons and its officers during the session. He appoints all officers, messengers and other persons attendant upon the House (House of Commons (Offices) Act, 1812 (52 Geo. 3, c. 11), s. 15; compare May, Parliamentary Practice, 11th ed., pp. 204, 205).

(*b*) The Votes and Proceedings of the House have been issued with some interruptions since the year 1680; see May, Parliamentary Practice, 11th ed., p. 201.

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"being first perused by Mr. Speaker," is printed by some person authorised by him.

SUB-SECT. 7.—*Journals of the House.*

Journals.

**1201.** The Journals are compiled in the Journal Office of the House from the Votes and Proceedings of the House. The Journal of each session, together with an index, is issued as soon as possible after the session has been brought to a close, and is printed by a person licensed by the Speaker (*c*).

SUB-SECT. 8.—*Quorum.*

Quorum of the House and of committee of the whole House.

**1202.** The quorum of the House of Commons, and of a committee of the whole House, consists of forty members, which number includes the Speaker or the Chairman, as the case may be (*d*).

Count of the House.

**1203.** Any time during a sitting of the House, except between a quarter past eight and a quarter past nine o'clock p.m. (*e*), any member may take notice that forty members are not present, and may call the attention of the Speaker to the fact (*f*). Strangers are then ordered to withdraw, and if, within two minutes after this order has been given, the Speaker finds that forty members are not present, and it is then after four o'clock in the afternoon (*g*), he adjourns the House, and thereupon the House stands adjourned until the day appointed for its next sitting (*h*).

SUB-SECT. 9.—*Motions.*

Matters decided on question.

**1204.** Every matter with regard to which the House or any committee of the House is called upon to give a decision is submitted to its judgment by means of a question put from the chair on a motion which has been made by some member of the House or of the committee.

Motions requiring a seconder.

**1205.** In the House itself every motion, unless it is of a purely formal character, must be seconded before it is proposed from the

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(*c*) The Journals of the House of Commons, which date from the year 1547, have not been regarded as public records, but at the present time they are accepted as evidence in any court of law in England or Ireland (Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3; see title EVIDENCE, Vol. XIII., p. 527; compare note (*n*), p. 631, *ante*). When a cause is tried in London and a Journal of the House is required in evidence, it is usual for an officer of the House to attend at the court with the necessary volume: in other cases a certified copy of the required entries in the Journals can be obtained from the Journal Office of the House; see May, Parliamentary Practice, 11th ed., p. 202.

(*d*) Forty members need not be present when a message is received from the Sovereign, or when a request is sent by the Lords Commissioners for the attendance of the Commons in the House of Lords; see p. 694, *post*.

(*e*) Standing Orders of the House of Commons (Public Business), 1911, No. 25.

(*f*) The fact that there are not forty members present may also be brought to the notice of the Speaker or the Chairman by the report of the tellers in a division. A division in which less than forty members take part is invalid.

(*g*) If it is proved, on a count before four o'clock, that forty members are not present, the Speaker leaves the chair until a quorum is present, or until four o'clock, when the House may be counted out.

(*h*) The same rules with regard to a count out apply when the House is in committee. The House is resumed, and the Chairman reports to the Speaker the fact that forty members are not present. The Speaker, after again counting the House, adjourns it if forty members are not then present.

chair, but an order of the day or a motion made in committee does not require a seconder (*i*).

Irregular motions.

**1206.** A motion is irregular and out of order (1) which is substantially the same as a question which the House has decided, either in the affirmative or the negative, during the same session (*j*); (2) which anticipates a matter already appointed by the House for its consideration (*k*); or (3) which anticipates a motion for leave to bring in a Bill, or a notice to present a Bill, upon the same subject as that proposed to be dealt with in the motion (*l*).

A motion which embodies a personal charge is not in order unless it be drawn in a direct and substantive form, and a motion which deals with a matter which is still under judicial consideration is also out of order.

Rules with regard to anticipation in debate.

**1207.** A subject with regard to which notice of a motion has been given cannot be anticipated in debate upon some other matter, and the same rule applies to a debate upon a motion for the adjournment of the House, (1) whether for the purpose of discussing a definite matter of urgent public importance or for the holidays, or (2) which is moved at the end of, or between, the orders of the day (*m*).

In the same way, it is out of order to anticipate the discussion of a motion standing upon the notice paper or the order book by means of an amendment moved to the address or to some other motion.

Notices of motions.

**1208.** As a general rule, notice is required of every motion with regard to any matter upon which the House is asked to arrive at a decision.

Such notices must be handed in by members to the clerk at the

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(*i*) In the case of a motion made by a member of the Government, the rule as to a seconder is usually dispensed with, but otherwise, if a motion for which a seconder is required is not seconded, it is not entered on the proceedings; see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed., p. 106.

(*j*) See Resolutions of the House, 8th May, 1606, 1st June, 1610 (Journals of the House of Commons, Vol. I., pp. 306, 434).

(*k*) A matter appointed for consideration by the House includes a Bill which has been introduced, or an adjourned debate upon a motion which has thus become an order of the day. The rules against anticipation were explained at length by the Speaker on the 10th July, 1908; see Parliamentary Debates, Fourth Series, Vol. CXCII., pp. 228—231.

(*l*) See May, Parliamentary Practice, 11th ed., p. 279.

(*m*) The object of these rules is to prevent a member from forestalling unfairly the discussion of a matter which another member has already given notice of his intention of bringing before the House. In practice, however, it has been found that motions have been put down in order to prevent the discussion by the House of a particular matter; see Report from the Select Committee of the House of Commons on Procedure (Anticipatory Motions), 1907, House of Commons Paper (264). On the 27th March, 1907, the House resolved "That to put a motion on the order paper of this House, or to introduce a Bill, so as to prevent discussion in this House of motions for which precedence has been obtained in the ballot, or of definite matters of urgent public importance, is hurtful to the usefulness of this House and an infringement of the rights of its members"; see Journals of the House of Commons, 1907, Vol. CLXII., p. 96.

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table during the sitting of the House, and are then printed and sent out with the Votes and Proceedings (*n*).

A member may also give oral notice in the House of any motion which he intends to move (*o*), but, in order to obtain precedence for such motion, he must not fail to hand in at the table on the same day the terms of his motion in writing.

SUB-SECT. 10.—*Closure.*

Closure of debate.

**1209.** After a question has been proposed either in the House or in committee of the whole House, or in a standing committee (*p*), it is permissible for a member to rise in his place and claim to move "That the question be now put." When such a motion is made, unless he is of opinion that it is an abuse of the rules of the House or an infringement of the rights of the minority, the Speaker or the Chairman, as the case may be, immediately puts the question "That the question be now put?" which must be decided by the House or the committee, without amendment or debate (*q*). As soon as a motion of this kind has been carried, the question upon which it was moved is put from the chair, and, unless the assent of the Speaker or the Chairman, as the case may be, is withheld, any further motion may be made which may be necessary to obtain the decision of the House, or of the committee, upon any question which has already been proposed from the chair.

When a clause of a Bill is under consideration either in committee or on the report stage (*r*), unless the assent of the chair is withheld, a motion may be made that the question, that certain

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(*n*) As to Votes and Proceedings, see pp. 667, 668, *ante*. In addition to the notices of motions, and of questions handed in the previous day, a notice paper (known as the "Blue Paper"), showing the agenda for the day, is circulated with the Votes and Proceedings; see p. 667, *ante*. A reprint of the Blue Paper (known as the "White Paper") is issued before the meeting of the House, on which the business of the day is set out in the order in which it will be taken. With the agenda of each day there are also circulated the printed answers to questions. Another paper (known as the "Order Book of the House of Commons") is also issued every afternoon throughout the session. On this paper appears every order of the day and notice of motion that has been set down for any day in the session, as well as every notice of motion for which no day has been fixed. On Saturdays, in addition to the agenda for the next sitting day, the Order Book for the remainder of the session, commencing with the next sitting day but one, is circulated to members.

(*o*) Oral notice of a motion is effective during the day on which it is given.

(*p*) Standing Orders of the House of Commons (Public Business), 1911, No. 26. In the House itself a motion for the closure may be put in force only when the Speaker, or, if his unavoidable absence has been announced, the Deputy Speaker, is in the chair; in a committee of the whole House, only when the Chairman of Ways and Means or the Deputy Chairman is in the chair.

(*q*) In the House, or in a committee of the whole House, a motion for the closure of debate can be decided in the affirmative only when it appears by the numbers declared from the chair, after a decision has been taken, that not less than one hundred members voted in the majority in support of the motion; see Standing Orders of the House of Commons (Public Business), 1911, No. 27. In a standing committee the majority must be not less than twenty; see *ibid.*, No. 47 (5).

(*r*) See pp. 713, 714, 717, *post*.

words of the clause or schedule under consideration stand part of the clause or schedule, or that the entire clause or schedule stand part of or be added to the Bill, as the case may be, be now put (*s*).

In both the above cases the question which is put to the House, or to the committee, is that for the closure, and, if it is carried, the subsequent question must be decided forthwith and without amendment or debate.

Motion empowering chair to select amendments.

**1210**. In addition to the forms of closure already described, another form of closure may also be employed, unless the assent of the chair is withheld. A motion may be made stating that, with regard to certain specified words in any motion, or clause, or schedule of a Bill, which is under the consideration of the House or a committee of the whole House (*t*), the chair be empowered to select the amendments to be proposed. If a motion of this kind, which is put forthwith and decided without amendment or debate, is carried, the Speaker or the Chairman, as the case may be, is thereby authorised to exercise the power of selecting which of the amendments proposed to the words covered by the motion shall be submitted to the consideration of the House or the committee (*u*).

### SUB-SECT. 11.—*Divisions.*

Procedure on a division.

**1211**. When the decision of the Speaker or the Chairman as to the preponderance of voices upon a question which has been put from the chair is challenged, the Speaker or the Chairman, as the case may be, immediately orders the lobby to be cleared, and, after an interval of two minutes, he again puts the question. If his decision is again challenged, and in his opinion the challenge is a genuine one (*v*), he directs the "ayes" to go into the right lobby and the "noes" into the left, and nominates two tellers for each side (*a*). The division then begins without any further delay. The members who take part in it pass through one or other of the lobbies, give their names to the clerks who stand at the turnstiles, and are counted by the tellers as they re-enter the House (*b*).

(*s*) This question may be put (1) to the exclusion of amendments of which notice has been given; (2) although no amendments have been proposed to the clause; and (3) although closure has not been moved on the question last proposed from the chair; see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed., p. 116.

(*t*) A motion of this kind cannot be made in a standing committee. As to standing committees, see p. 711, *post*.

(*u*) To enable the Speaker or the Chairman to form his opinion, he is empowered to ask a member to explain the object of any amendment which he wishes to propose.

(*v*) See Standing Orders of the House of Commons (Public Business), 1911, No. 26 (3). If the Speaker or the Chairman is of opinion that a division has been vexatiously or frivolously claimed, he may take the vote of the House by calling upon the members who support his decision and those who challenge it to rise in their places. He may then determine, as he thinks fit, whether or not the division is to take place; see Standing Orders of the House of Commons (Public Business), 1911, No. 30.

(*a*) No division may take place unless there are two tellers on each side. In the House of Commons the tellers do not vote.

(*b*) If a member votes upon a matter in which he has a direct pecuniary

SECT. 2. Procedure and Conduct of Business.

After six minutes have elapsed from the time when the question was put from the chair for the first time, the doors which lead from the House into the division lobbies are locked, but the doors into the lobby of the House are left open, and members may remain in the House whilst a division is in progress (*c*).

As soon as all the members who wish to record their votes have passed through the lobbies, the four tellers go to the table of the House and report the numbers of the division, which are then announced from the chair (*d*).

The vote of the Speaker or Chairman.

**1212.** In the House of Commons the member who occupies the chair, either in the House itself or in committee, does not take part in a division, but, in the event of any division resulting in a tie, the Speaker or the Chairman, as the case may be, is required to give his vote (*e*).

## SECT. 3.—*Sittings of the House.*

### SUB-SECT. 1.—*Attendance of Members.*

Attendance of members.

**1213.** Members of the House of Commons are under a constitutional obligation to attend the sittings of the House, although their attendance is not enforced and no official record is kept of their attendance (*f*).

Places of members in the House.

**1214.** No member is entitled as of right to any particular seat in the House, but, by the custom and usage of the House, the front bench on the right of the Speaker's chair, which is known as the Treasury Bench, is always occupied by the members of the Government (*g*), and the front bench on the opposite side of the table by the leading members of the official opposition.

interest, his vote may, on motion, be disallowed; see May, Parliamentary Practice, 11th ed., p. 373.

(*c*) The present method of recording divisions in the House of Commons was adopted after the Whitsuntide adjournment in 1906; see May, Parliamentary Practice, 11th ed., Appendix VI., p. 953.

(*d*) Lists containing the names of the members and recording the manner in which they voted in all divisions are printed and sent out with the Votes and Proceedings each day; see p. 667, *ante*.

(*e*) When the Speaker has been called upon to record his vote, he has recorded it, if it has been possible, in such a manner as to give to the House a further opportunity of arriving at a decision in the matter with regard to which an equality of voting has occurred. If the Speaker or Chairman gives reasons for his vote, they are entered in the Journal.

(*f*) The duty of members to attend the House of Commons is laid down in two unrepealed statutes (stat. (1382) 5 Rich. 2, stat. 2, c. 4, and stat. (1514-5) 6 Hen. 8, c. 16), and the absence of members, without the leave of the House or the licence of the Speaker, was formerly punished by loss of wages and other penalties. Orders for the summoning of absent members and calls of the House were not uncommon in the past, but, although motions for a call of the House have occasionally been made, no such call has been enforced since 1836.

(*g*) No member may take possession of a seat in the House by affixing his card to it before the hour of prayers, but a member who secures a seat at prayers is entitled to retain it until the rising of the House; see Standing Orders of the House of Commons (Public Business), 1911, Nos. 82, 83. The first day of a new Parliament the members for the City of London claim the right to sit on the Treasury Bench—a right which they usually exercise.

SUB-SECT. 2.—*Sittings of the House.*

(i.) *Time and Duration of Sitting.*

SECT. 3. **Sittings of the House.**

Days and hours of meeting and adjournment of the House.

**1215.** The House usually meets five days a week throughout the session. On Mondays, Tuesdays, Wednesdays, and Thursdays, unless the House otherwise orders, the Speaker takes the chair at a quarter to three o'clock, and the House adjourns, without question put, at half-past eleven o'clock, unless exempted business is then under consideration (*h*). On Fridays the Speaker takes the chair at noon, and the House adjourns, without question put, at half-past five o'clock, or before that hour if the orders of the day and notices of motions have been disposed of.

Interruption of business.

**1216.** At five o'clock on Fridays, and at eleven o'clock on ordinary sitting days, an interruption takes place in the business of the House, and any debate which happens to be in progress, or any proceedings upon which the House is engaged at the time, stands adjourned (*i*). No opposed business may be taken after the interruption of business, but at the moment of interruption the closure may be moved (*j*).

Meeting of the House.

**1217.** At the time appointed for the meeting of the House, the Speaker enters the chamber by the door below the bar (*k*), preceded by the Serjeant-at-Arms carrying the mace and accompanied by his chaplain. Upon entering the House the Speaker and the chaplain proceed to the table on which the mace is laid by the Serjeant-at-Arms. Prayers are then said by the chaplain, after which the Speaker takes his seat in the chair (*l*). The Speaker leaves the House at its adjournment by the door behind the chair, and the mace, which is removed from the table by the Serjeant-at-Arms as soon as the House is adjourned, is carried before him.

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(*h*) See p. 674, *post*.

(*i*) Standing Orders of the House of Commons (Public Business), 1911 No. 1 (3). If a division is in progress at eleven o'clock or five o'clock, as the case may be, the interruption of business takes place after the result of the division is announced. A member who is in charge of any business which is not disposed of on the day upon which it has been appointed to be taken may fix some other day for it to be taken, and the business in question is then set down in the Order Book (see note (*n*), p. 670, *ante*) as an order of the day for the day which he has chosen.

(*j*) Standing Orders of the House of Commons (Public Business), 1911, No. 1 (4), (5). A motion to commit a public Bill (other than a Bill for imposing taxation, or a consolidated fund Bill, or an appropriation Bill, or a provisional order confirmation Bill) to a committee of the whole House, or to a select committee, or to a joint committee, if made immediately after the Bill has been read a second time, may be decided, although the motion is opposed, after the expiration of the time for opposed business; see Standing Orders of the House of Commons (Public Business), 1911, No. 46 (1), which applies to any sitting of the House; see, further, note (*n*), p. 674, *post*. For the rules as to closure of debate, see p. 670, *ante*.

(*k*) When the Speaker is unable to attend a meeting of the House the mace is laid on the table by the Serjeant-at-Arms, and the Clerk of the House in his place at the table announces the fact of the Speaker's absence. The Chairman of Ways and Means, or, if the absence of the Chairman of Ways and Means has been announced, the Deputy Chairman (see p. 666, *ante*), then proceeds to the table from behind the Speaker's chair and prayers are read.

(*l*) In the absence of the chaplain, prayers are read by the Speaker himself; see May, Parliamentary Practice, 11th ed., p. 159, n. It is the duty of the Serjeant-at-Arms to give notice to all committees when the House is going to

SECT. 3. **Sittings of the House.**

Business exempt from interruption.

**1218.** A Bill which originates in Committee of Ways and Means and proceedings which are made in pursuance of an Act of Parliament or standing order (*m*) are exempted from interruption at eleven o'clock, or at half-past eleven o'clock, when the House usually adjourns, if they are then under consideration.

The House, by means of a motion (which is not open to amendment or debate) (*n*), made by a Minister of the Crown at the commencement of public business, may exempt from interruption at eleven o'clock that night any specified business if it is under discussion at that hour, and may also, by means of a similar motion, provide for the resumption, after the interruption of business, of any specified business if it should be under discussion when business is postponed at a quarter-past eight o'clock, for the consideration of a motion for the adjournment of the House to discuss a definite matter of urgent public importance, or for the consideration of opposed private business set down by direction of the Chairman of Ways and Means (*o*).

(ii.) *Government Business.*

Precedence of Government business.

**1219.** Unless the House otherwise orders, Government business up to Easter has precedence of any other public business at every sitting, except on Fridays and after a quarter-past eight o'clock on Tuesdays and Wednesdays (*p*). After Easter, the Government are also allowed precedence for their business during the entire day on Tuesdays (*q*), and, after Whitsuntide, until Michaelmas, at all the sittings of the House, except on the third and fourth Fridays after Whit Sunday (*r*).

(iii.) *Private Members' Business.*

Precedence of private members' business.

**1220.** Under the present rules of the House very little time is allowed to private members either to introduce Bills or to bring forward motions, as their business is allowed precedence of

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prayers, and, after such notice has been given, the subsequent proceedings of all committees are null and void, unless they be otherwise empowered to sit after prayers; see Standing Orders of the House of Commons (Public Business), 1911, No. 64.

(*m*) Standing Orders of the House of Commons (Public Business), 1911, No. 1 (2). Such proceedings principally relate to draft Orders in Council, statutory rules and administrative schemes and orders which are required by statute to be laid before Parliament, and in the case of which proceedings are prescribed by the statute for the purpose of giving effect to, or of invalidating, the rule, order, or scheme; *e.g.*, Endowed Schools Act, 1873 (36 & 37 Vict. c. 87), s. 15; Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 1 (3); Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 5 (2) (a); see also note (*h*), p. 617, *ante*.

(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 1 (7). A motion to exempt business from interruption at more than one sitting, or to exempt business from interruption at five or half-past five o'clock on a Friday, or to exempt business from interruption at eleven or half-past eleven o'clock under *ibid.*, No. 1 (see p. 674, *ante*, and the text, *supra*), and also to allow it to be entered upon after eleven o'clock, although opposed, may be debated.

(*o*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 4, 8, 10.

(*p*) *Ibid.*, No. 4 (a). On days when Government business has precedence of other business, Ministers may arrange their business in such order as they may think fit; see *ibid.*, No. 5.

(*q*) *Ibid.*, No. 4 (c).

(*r*) *Ibid.*, No. 4 (d).

Government business only at and during the excepted times referred to in the preceding paragraph.

SECT. 3. Sittings of the House.

**1221.** In order to expedite as far as possible the business of private members, a ballot is held at the beginning of every session to decide the precedence of the Bills which private members propose to introduce, and of the motions which they propose to make on the first four days on which private members' notices of motions have precedence of other business. No Bill, other than a Government Bill, may be introduced in anticipation of this ballot (*s*). After Whitsuntide, Bills which have been introduced by private members are arranged upon the Order Paper so as to give priority to those which are most advanced (*t*), and it is always open to the Government, if they think it advisable, to grant special facilities to a private member's Bill, or to treat it as a Government measure.

Ballot for Bills and notices of motions.

(iv.) *Private Business.*

**1222.** In the House of Commons, precedence over opposed private business is always given to unopposed private business (*a*), and no opposed private business of any kind may be taken on Fridays (*b*). On any sitting day, the consideration of private business is entered upon immediately after the Speaker takes the chair, and, if the private business which is before the House on Mondays, Tuesdays, Wednesdays, or Thursdays has not been disposed of by three o'clock, it must be postponed until such time as the Chairman of Ways and Means may determine. It is then taken at a quarter-past eight o'clock, or as soon after that hour as possible, on Mondays, Tuesdays, Wednesdays, and Thursdays (*c*).

When unopposed and opposed private business is taken.

(v.) *Public Petitions.*

**1223.** After private business has been disposed of (*d*), any member of the House may rise in his place and present a public

Presentation of public petitions.

(*s*) The ballot is held on the third day of the session in obedience to an order of the House. A member who is successful in the ballot may choose whether he will give notice of his intention to bring forward a motion on one of the first four occasions on which private members' notices of motions have precedence or to introduce a Bill. Further ballots are held to decide the precedence of private members' notices of motions as each notice day becomes open. These subsequent ballots for notices of motions are rendered necessary by the rule which prevents a notice of motion being given for a day beyond the period which includes the next four days on which notices of motions are entitled to precedence; see Standing Orders of the House of Commons (Public Business), 1911, No. 7.

(*t*) *Ibid.*, No. 6. The Bills are arranged as follows, namely: (1) Bills which have been returned with amendments by the House of Lords; (2) Bills which are to be read a third time; (3) consideration on report of Bills as amended in committee; (4) Bills in committee; (5) Bills appointed for committee; and (6) Bills which are to be read a second time.

(*a*) *Ibid.*, No. 8 (5).

(*b*) *Ibid.*, No. 8 (1).

(*c*) *Ibid.*, No. 8 (2), (3). No opposed private business (other than that which is under the consideration of the House at the time) may be taken after half-past nine o'clock (*ibid.*, No. 8 (4)). Between Easter and Whitsuntide no opposed private business may be taken at a quarter past eight o'clock on Wednesdays (*ibid.*, No. 8 (1)). As to the effect of a motion for the adjournment of the House on a question of urgent public importance, see p. 677, *post*.

(*d*) A motion for the issue of a new writ is usually made immediately after

SECT. 3. Sittings of the House.

petition (*e*). The only other persons entitled to present petitions personally to the House of Commons are the official representatives of the corporations of London and Dublin, who are allowed to present petitions at the bar of the House (*f*).

As soon as a public petition has been presented it is ordered to lie on the table, and is then referred to the Committee on Public Petitions

Restriction of speech on presentation of petition.

**1224.** A member who presents a public petition orally (*h*) must confine his remarks to a brief statement of the allegations which are contained in the petition and of the number of persons who have signed it. No debate is allowed to arise upon a petition unless it refers to a breach of privilege, or to some personal grievance which calls for immediate remedy (*i*).

A member may require a petition to be read by the clerk at the table.

(vi.) *Questions to Members.*

When questions are put.

**1225.** Every Monday, Tuesday, Wednesday, and Thursday throughout the session, after the conclusion of private business, or at any rate not later than three o'clock, members are called upon to address the questions (*j*), of which they have given notice, either

the conclusion of private business. Various other kinds of non-contentious motions may also be made at this period in the proceedings, if time permits, before questions are taken, *e.g.*, motions to set up committees for the purpose of authorising public expenditure under Standing Orders of the House of Commons (Public Business), 1911, Nos. 66—71, and motions for the consideration of amendments made to Bills by the House of Lords, when they raise no question of principle.

(*e*) The Speaker does not present petitions to the House. No petition may be presented the first day of the session, or in a new Parliament until the Speaker has been chosen and his election approved by the Crown. Every petition which is presented must be indorsed with the name of the member who presents it. There are strict rules with regard to the form in which the petition must be presented to the House; see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed. pp. 51—53. A copy of the rules with regard to the form and presentation of petitions is supplied to members at the beginning of each session. As to the prohibition of the tumultuous gathering of persons upon the pretence of presenting a petition to Parliament, and as to the meeting of more than fifty persons within a mile of Westminster Hall for the purpose of considering a petition to Parliament any day when either House is sitting being an unlawful assembly, see *Pankhurst* v. *Jarvis* (1909), 26 T. L. R. 118; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 470, 471.

(*f*) See May, Parliamentary Practice, 11th ed., pp. 529, 530. A member cannot be compelled by any person to present a petition to the House (*Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186).

(*g*) For the composition and functions of this committee, see p. 685, *post*.

(*h*) The more usual method of presenting a public petition is for the member who is responsible for it to place it in a bag which is kept for the purpose behind the Speaker's chair. He may do this any time during a sitting of the House.

(*i*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 76—78.

(*j*) Notice of any question must be given in writing to the clerk at the table, and no question may be read *vivâ voce* in the House, unless the consent of the Speaker has been previously obtained (Standing Orders of the House of Commons (Public Business), 1911, No. 9 (1)). For the rules with regard to the

to Ministers with regard to matters connected with the administration of the various departments of the Government, or to private members with regard to matters connected with the business of the House for which they may happen to be responsible (*k*).

Notices of questions.

Notices of questions are printed and sent out with the notice paper (*l*) each day. Unless a question is marked with an asterisk, in which case notice must be given so that the question may appear on the notice paper at latest the day before that on which an answer is required, the Minister to whom it is addressed does not reply orally, but causes a printed answer to be sent out with the Votes and Proceedings (*m*).

(vii.) *Consideration of Public Business.*

Consideration of orders of the day.

**1226.** As soon as questions have been disposed of, the House proceeds to the consideration of the public business which is on the order paper for the day (*n*).

Motion for adjournment on matter of urgent public importance.

**1227.** Before this is entered upon, however, a member may ask the leave of the House to move the adjournment for the purpose of discussing a definite matter of urgent public importance (*o*). If the leave of the House is refused to him, a member can still make the motion in question if he obtains the support of not less than forty members, who, when called upon by the Speaker, must rise in their places to signify their assent to the proposed motion.

A motion for adjournment for which the leave of the House has been signified stands over until a quarter-past eight o'clock, when the business then before the House is postponed in order that the motion may be moved (*p*), and any private business set down for a quarter past eight o'clock by direction of the Chairman of Ways and Means is not taken until the motion for the adjournment of the House is disposed of.

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form and contents of questions, which are strictly enforced by the Speaker, see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed. pp. 61, 62.

(*k*) No question may be taken after a quarter before four o'clock, except a question of an urgent character with regard to a matter of public importance or to the arrangement of the business of the House, or a question addressed during question time to a member of the Government who was not present in his place at the time when the question was called (Standing Orders of the House of Commons (Public Business), 1911, No. 9 (3) ).

(*l*) As to the notice paper, see note (*n*), p. 670, *ante*.

(*m*) Standing Orders of the House of Commons (Public Business), 1911, No. 9 (4), (5).

(*n*) A new member is generally introduced and takes the oath immediately after the expiration of the time allotted for questions ; see *ibid.*, No. 84.

(*o*) *Ibid.*, No. 10. Such a motion must not raise a question of privilege, nor may it revive the discussion of a subject which has already occupied the attention of the House in the same session, nor may it anticipate a matter which has been previously appointed for consideration, or notice of which has been given ; see p. 669, *ante*.

(*p*) If a motion of this kind is supported by fewer than forty members, but by not less than ten, the Speaker puts the question as to whether leave should be given to make the motion, and a division takes place. If this is carried in the affirmative, the motion is brought before the House at a quarter past eight o'clock.

SECT. 3. **Sittings of the House.**

Motions at commencement of public business.

**1228.** At the beginning of public business, before the House proceeds to the consideration of the orders of the day, a member may present a Bill without obtaining the leave of the House, or he may move for leave to bring in a Bill (*q*), or for the nomination of a select committee (*r*), and a Minister of the Crown is permitted to make a motion with regard to the business of the House.

As soon as any such motion has been disposed of, or, if there is no such motion, immediately after the time allotted to questions has elapsed or questions have been disposed of, the Speaker directs the Clerk of the House to read the orders of the day. These are taken by the House in the order in which they are arranged upon the order paper (*s*).

## SECT. 4.—*Maintenance of Order and Rules of Debate.*

Rules as to addressing the House.

**1229.** A member of the House of Commons who wishes to speak (*t*), whether in the House itself or in a committee of the whole House or in a standing committee, must rise in his place uncovered (*a*). When his name has been called by the Speaker or the Chairman (*b*), as the case may be, he must address himself not to the House or to the committee, but to the Speaker or to the Chairman (*c*).

Relevance in debate.

**1230.** A debate arises as soon as the question before the House or the committee has been proposed by the Speaker or the Chairman, as the case may be. Such debate must be strictly relevant to the subject or question which is submitted to the consideration of the House, or to an amendment to the question which the member speaking proposes to move.

It is the duty of the Speaker, or of the Chairman, to call to order

Standing Orders of the House of Commons (Public Business), Nos. 11, 31; see pp. 705 *et seq.*, *post*.

(*r*) A private member may only make a motion for leave to bring in a Bill, or for the nomination of a select committee, on Tuesdays and Wednesdays; a member of the Government may do so on Mondays and Thursdays as well. If such a motion is opposed, the Speaker, after a short statement from the mover, and also from an opponent, of the motion, may either put the question thereon, or the question that the debate be adjourned (Standing Orders of the House of Commons (Public Business), 1911, No. 11).

(*s*) *Ibid.*, Nos. 12, 13. The right, however, is reserved to the Government of placing their orders or motions at the head of the list on the days when their business has precedence (*ibid.*, No. 13).

(*t*) A member must speak in English, and is not allowed to read his speech. It is also out of order for a member to read from any book or document the report of a debate in the House held during the same session; see May, Parliamentary Practice, 11th ed., p. 310.

(*a*) When a member is so much incapacitated by illness that he cannot stand, it is customary for the House to give him leave to retain his seat whilst speaking.

(*b*) When several members rise to address the House at the same time, it rests with the Speaker or the Chairman, as the case may be, to decide which member he will call upon.

(*c*) When a member speaks on a point of order in the House or in a committee of the whole House whilst a division is actually in progress (see p. 671, *ante*), he does not rise in his place, but speaks sitting, and retains his hat.

any member whose speech, in his opinion, transgresses this rule (*d*).

If a motion is made during the course of any debate for the adjournment of the House, or of the debate which is in progress, or if, when the House is in committee, a motion is made that the Chairman do report progress or do leave the chair, the debate must be strictly confined to the particular matter to which it relates (*e*).

Occasions when a second speech is permissible.

**1231.** A member is not allowed to speak upon the same question more than once in the same debate (*f*), unless he has moved a substantive motion, when he is entitled to a right of reply (*g*). A member who has already taken part in a debate, by leave of the House, may speak a second time on the same question, if he wishes to explain some material point in his first speech which has been misunderstood, or desires to make a personal explanation.

Order in debate.

**1232.** In the House of Commons strict rules are laid down for the maintenance of order in debate, to a breach of any of which it is permissible for a member to call the attention of the Speaker or the Chairman, as the case may be (*h*), whose duty it is to call the offending member or members to order.

A breach of order is committed by any member (1) who mentions disrespectfully the name of the Sovereign, or who casts a reflection upon the conduct of the Sovereign or of certain high

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(*d*) Standing Orders of the House of Commons (Public Business), 1911, No. 19. This order empowers the Speaker or the Chairman, as the case may be, after calling the attention of the House or of the committee to the conduct of a member who persists in irrelevance or in tedious repetition, to direct such member to discontinue his speech. The same power is given to the chairmen of the standing committees by *ibid.*, No. 47 (5); compare May, Parliamentary Practice, 11th ed., pp. 314—316. In spite of the rule against irrelevancy, a member may rise at any time during the course of a debate to speak on a point of order or a matter of privilege which suddenly arises. By the indulgence of the House a member is also allowed, before the commencement of public business, to make a personal explanation. In such a case, as there is no question before the House, no debate should be allowed to arise; see *ibid.*, p. 319.

(*e*) Standing Orders of the House of Commons (Public Business), 1911, No. 22. A member who moves or seconds a motion of this kind may not move or second a similar motion during the same debate (*ibid.*).

(*f*) This rule does not apply when the House is in committee (see pp. 710 *et seq.*, 751 *et seq.*, *post*), nor does it apply, on the report stage of a Bill which has been referred to a standing committee (see p. 717, *post*), in the case of the member who is in charge of such Bill; or in the case of any member who moves a new clause or amendment to such Bill in respect of such new clause or amendment; see Standing Orders of the House of Commons (Public Business), 1911, No. 46 (3); see also note (*p*), p. 716, *post*.

(*g*) If, when an order of the day is read, the member who is responsible for the matter in question merely raises his hat when he makes the motion, he is entitled to address the House later in the debate, and the same rule applies in the case of a member who seconds a substantive motion in this formal way; see May, Parliamentary Practice, 11th ed., pp. 321, 322.

(*h*) Any ordinary breach of order is repressed immediately by the Speaker or the Chairman without the intervention of any other member. When a member draws the attention of the Speaker, or of the Chairman, if the House is in committee, to a breach of order, he must do so at the time when the offence is committed, and must confine himself in his remarks to pointing out the breach of order which has occurred.

SECT. 4. Maintenan of Order and Rules of Debate.

officials (*i*), or who gives utterance to treasonable or seditious words, or who introduces the name of the Sovereign to influence debate; (2) who brings a personal charge against another member, or who refers to another member by name; (3) who expresses an opinion with regard to any matter with regard to which a decision is still pending in the courts; (4) who refers in an offensive manner to the proceedings of either House of Parliament; (5) who uses his right of addressing the House merely for the purpose of obstructing its business; or (6) who attempts to speak on any question which has been fully put either by the Speaker or the Chairman, as the case may be. It is also out of order for any member to refer to any debate in the House of Lords, or to any debate which has taken place in the House itself during the same session; and it is not permissible for a member to cast any reflection upon a decision already arrived at by the House, unless a motion has been made to rescind such decision.

Behaviour in the House.

**1233.** In addition to these rules (*j*), which must be observed by any member who takes part in a debate, there are certain rules of etiquette and behaviour which regulate the conduct of members whilst a debate is proceeding, and which are interpreted and put in force when necessary by the Speaker or the Chairman, as the case may be (*k*).

A member must keep his seat and not walk about the House whilst a debate is proceeding (*l*). He must not interrupt in a disorderly manner another member who is addressing the House (*m*), nor may he read a newspaper or book whilst a debate is proceeding.

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(*i*) *E.g.*, the Viceroy of India, the Lord Lieutenant of Ireland, the Speaker, or the Chairman of Ways and Means. It is also out of order to allude in disrespectful terms to the Sovereign of a friendly State. The conduct of the Sovereign himself, and of any official whose conduct may not be discussed otherwise, may be brought to the notice of the House by means of a substantive motion, which can be dealt with by amendment or by a distinct vote of the House; see May, Parliamentary Practice, 11th ed., pp. 277, 278.

(*j*) See p. 679, *ante*, and the text, *supra*.

(*k*) See May, Parliamentary Practice, 11th ed., pp. 343—345. Thus, a member must enter and leave the House uncovered, and should bow to the chair when he goes to or leaves his seat. A member is not permitted to cross between the chair and another member who is speaking, nor may he cross the House between the table and the chair, or between the chair and the mace when the Serjeant-at-Arms removes it from the table.

(*l*) See Orders of the House upon this subject, 10th February, 1698-9, and 16th February, 1720-1; Journals of the House of Commons, 1698-9, Vol. XII., p. 496; 1720-1, Vol. XIX., p. 425. The rule is not strictly enforced at the present time; but the Speaker may order members who are standing at the bar to take their places, and, if they disobey, may instruct the Serjeant-at-Arms to clear the gangway.

(*m*) It is left to the Speaker or to the Chairman, as the case may be, to decide when any interruption comes within this rule. By a resolution of the House of the 5th May, 1641, the Speaker is instructed to present to the House the name of any member who whispers or stirs out of his place to the disturbance of the House whilst any message or business of importance is being discussed (Journals of the House of Commons, 1641, Vol. II., p. 135). At the present time the Speaker or the Chairman, as the case may be, calls the House or the committee to order whenever the conversation is loud enough to disturb the debate.

**1234.** Whenever any member is guilty of gross disorder, the Speaker or the Chairman, as the case may be, is empowered to order him to withdraw immediately from the House for the remainder of the sitting (*n*).

Withdrawal of member.

If, upon any occasion, the Speaker, or the Chairman, if the House is in committee, considers that his power to order a member to withdraw is inadequate, he may name the member who has disregarded his authority or who has abused the rules of the House. In such a case, if the offence has been committed in the House itself, a motion is made, usually by the leader of the House, for the offending member to be suspended from the service of the House, upon which the Speaker puts the question forthwith, as no amendment, adjournment or debate of a motion of th s kind is allowed. If the offence has been committed whilst the House is in committee of the whole House, the Chairman immediately suspends the proceedings of the committee, the Speaker returns to the chair, and the Chairman reports the circumstance to him. A motion is then made similar to that already described (*o*).

Suspension of member.

Adjournment of House in case of grave disorder.

**1235.** If a grave disorder arises, the Speaker may adjourn the House without question put or suspend any sitting for a time to be named by him (*p*).

## SECT. 5.—*Jurisdiction of the House.*

Limits to its jurisdiction.

**1236.** Although the House of Commons together with the House of Lords forms the High Court of Parliament, it is not strictly speaking a judicial body, and its jurisdiction, except in respect of the authority which it exercises over its own members and its own composition, and the powers which it possesses to punish persons for committing any breach of the privileges of the House or of any

(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 20. In such case the Serjeant-at-Arms is directed to carry out such orders as may be given to him from the chair. A member who receives an order of this kind to withdraw from the precincts of the House must continue to serve upon any private Bill committee of which he happens at the time to be a member. As to the power of the House to expel members, see p. 787, *post*.

(*o*) Standing Orders of the House of Commons (Public Business), 1911, No. 18. Suspension under this order used formerly to continue in force for one week for the first offence, for a fortnight for the second, and for one month for the third or any subsequent offence. On the 13th February, 1902, the standing order upon this subject was amended and the words defining the different periods of suspension were left out without any others being inserted. As a result of this amendment, therefore, the period of suspension now extends to the end of the session or until the order of the House by which it is enforced is rescinded. A member who is suspended must immediately leave the precincts of the House, and, if he refuses to do so, the Speaker may call the attention of the House to his refusal, and he may then be forcibly ejected. The standing order provides that a member who is thus ejected is suspended from the service of the House for the remainder of the session without further question put. A member after being suspended must continue to serve on any private Bill committee to which he has been appointed at the time of his suspension. If several members have jointly disregarded the authority of the chair, they may be named together, but otherwise not more than one member may be named at the same time (*ibid.*).

(*p*) *Ibid.*, No. 21.

SECT. 5. Jurisdiction of the House.

of its members (*q*), is of a legislative character and is practically confined to the share that the House takes in passing Bills in which Parliament is exercising judicial or *quasi*-judicial functions (*r*).

## SECT. 6.—*Committees.*

### SUB-SECT. 1.—*Classification.*

Classification of committees.

**1237.** The committees of the House, other than committees of the whole House and committees appointed to prepare reasons for disagreeing with the Lords' amendments to Bills (*s*), may be divided into three main classes, which differ in respect of the method in which they are appointed and nominated, namely:—Standing committees on public Bills, select committees, and committees on private Bills and provisional order confirmation Bills (*t*).

### SUB-SECT. 2.—*Standing Committees.*

Standing committees.

**1238.** The appointment, constitution, and functions of standing committees are dealt with elsewhere (*u*).

### SUB-SECT. 3.—*Select Committees.*

#### (i.) *Select Committees on Public Matters or Public Bills.*

Scope of inquiry by a select committee.

**1239.** A select committee (*v*) may be appointed either to inquire into and report upon any subject with regard to which the House requires information (*w*), or to consider a public Bill (*a*).

Number of members.

**1240.** The number of members of a select committee varies, but, as a general rule, not more than fifteen members are nominated to serve upon any such committee, of whom five, or in some cases three, form a quorum (*b*).

(*q*) The jurisdiction of the House of Commons over these matters is dealt with amongst the privileges of the House; see pp. 787 *et seq.*, *post*.

(*r*) *E.g.*, Bills of Attainder or Bills of Pains and Penalties, and Divorce Bills; see pp. 727, 761, 762, *post*; see also title COURTS, Vol. IX., p. 24.

(*s*) See p. 721, *post*.

(*t*) See pp. 711, 712, 714, 715, 751, *post*, and the text, *infra*.

(*u*) See pp. 711, 712, *post*.

(*v*) Select committees of the House of Commons are usually appointed and nominated by the House, but certain of these committees are almost invariably nominated partly by the House and partly by the committee of selection, and certain others which sit sessionally are appointed under standing orders.

(*w*) A member who intends to move for the appointment of a select committee, one day before the nomination of such committee, must place on the notices the names of the members who it is proposed should serve on the committee; see Standing Orders of the House of Commons (Public Business), 1911, No. 57.

(*a*) When a select committee is appointed to inquire into any matter, the scope of its inquiry is defined in the order of reference given to it by the House. If a Bill is referred to a select committee, the Bill itself is the order of reference, and the committee must report it with or without amendment to the House. The House can extend the scope of the inquiry of a select committee either by means of an instruction or by committing an additional Bill to the committee.

(*b*) Standing Orders of the House of Commons (Public Business), 1911, No. 55. If no quorum is fixed by the order of reference appointing the committee, all the members of the committee must attend its sittings. If the quorum of a

SECT. 6. Committees.

Powers.

**1241.** A select committee chooses its own chairman (*c*), and almost invariably is given power by the House to send for persons, papers and records—a power which enables it to summon and examine witnesses (*d*). Counsel may only be heard before a select committee by order of the House, made either originally by the House itself or as the result of a special report made by the committee to the House.

Sittings.

**1242.** All select committees and other committees of the House, with the exception of standing committees, may continue to sit whilst the House itself is sitting, except during the time while the House is at prayers, and they may also sit during an adjournment of the House (*e*), but no committee may sit without leave on any day over which the House has adjourned.

Presence of strangers.

**1243.** A select committee may always forbid the presence of strangers at its sittings, but, as a rule, strangers are admitted whilst evidence is being taken (*f*).

Consideration of report

**1244.** As soon as the hearing of evidence is concluded, the committee meets to consider its report, or to go through the provisions of the Bill, as the case may be (*g*). It is open to any of its members to prepare a draft report, and every such draft report is brought up by its author and read a first time. A motion is then made proposing that one of the reports, usually that which has been submitted by the chairman, be read a second time. As soon as the committee has decided, if necessary by means of a division, which draft report

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committee has been fixed by the House, the chairman must suspend the sitting of the committee until the necessary quorum is present; see Standing Orders of the House of Commons (Public Business), 1911, No. 62.

(*c*) The chairman of a select committee only votes when there is an equality of voices in the committee. A member of a select committee is not entitled to vote in any division in the committee, unless he is present when the question is put. A record of the attendance of members and of all divisions which take place in a committee must be kept in the minutes of its proceedings; see Standing Orders of the House of Commons (Public Business), 1911, Nos. 60, 61.

(*d*) If any witness who has been summoned to appear before a select committee refuses to attend, the chairman of the committee reports the fact to the House and moves that an order be made for his attendance. A select committee of the House of Commons has the power to administer the oath to witnesses examined before it (Parliamentary Witnesses Oaths Act, 1871 (34 & 35 Vict. c. 83), s. 1). When a committee decides to exercise this power it usually passes a resolution, "That the evidence of all witnesses examined before the committee (except those who shall be exempted by special resolution) shall be taken on oath."

(*e*) Standing Orders of the House of Commons (Public Business), 1911, No. 54. Standing committees are excepted from this rule; see *ibid.*, No. 47 (1). The Serjeant-at-Arms is instructed to give notice to committees from time to time when the House is going to prayers; see *ibid.*, No. 64, and note (*l*), p. 673, *ante*.

(*f*) Any member of a select committee has the right to require the room to be cleared at any time if he desires to take the opinion of the committee upon any matter.

(*g*) The procedure with regard to the consideration of a Bill in a select committee is practically the same as that adopted in committee of the whole House; see pp. 665 *et seq.*, *ante*, and pp. 710, 713, *post*. In dealing with money clauses a select committee is bound by the same rules as a standing committee; see p. 712, *post*. A select committee may alter the title of a Bill which has been referred to it, but, if it does so, it must report the fact to the House. Acting upon an instruction from the House, it is permissible for a select committee to

SECT. 6. Committees.

it will take as the basis of its report, this draft report is read a second time and taken into consideration paragraph by paragraph (*h*).

Upon the conclusion of the consideration of a draft report the chairman puts the question, "That this report [or this report as amended] be the report of the committee to the House?" (*i*). In the case of a Bill, as soon as the measure has been agreed to by the committee, the chairman puts the question, "That I do report this Bill as amended [or without amendment] to the House?"

Select committees on hybrid Bills.

**1245.** After it has been read a second time, a hybrid Bill (*k*) is referred to a select committee, the members of which are nominated, as a general rule, partly by the House and partly by the committee of selection. The proceedings in a select committee on a hybrid Bill are the same as in a committee on a private Bill (*l*), except that, as the committee is a select committee, the standing orders which apply definitely to committees on private Bills are not applicable (*m*).

(ii.) *Select Committees relating to Public Matters appointed Sessionally or by Standing Order.*

Public Accounts Committee.

**1246.** In compliance with a standing order of the House (*n*), the Public Accounts Committee is appointed annually for the examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure (*o*). It consists of fifteen members, nominated by the House at the beginning of every session (*p*), of whom five form a quorum.

The committee examines the accounts for the financial year ending on the 31st March in the previous year, inquires into the causes which have led any department to exceed the money granted to it by Parliament and into the application of savings on grants made to the Admiralty and War Office (*q*). Its meetings are attended by the Comptroller and Auditor-General and a representative of the Treasury, who assist it during the taking of evidence. It is not the practice of the committee to admit the public to its sittings.

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consolidate two or more Bills which have been referred to its consideration, and, with the leave of the House, it may divide a single Bill into two or more Bills.

(*h*) Amendments may be made to any paragraph, and new paragraphs may be added.

(*i*) Any select committee having power to send for persons, papers and records, may present its opinion and observations and also the evidence which has been given before it to the House without previously obtaining the leave of the House. A committee of this kind may also make a special report to the House with regard to any matters which it thinks fit to bring to the notice of the House; see Standing Orders of the House of Commons (Public Business), 1911, No. 63. If a select committee on a Bill is of opinion that the measure should not be allowed to proceed, it reports it to the House without amendment, and also makes a special report to the House, stating the reasons against proceeding further with the Bill.

(*k*) See p. 703, *post*.

(*l*) See pp. 753 *et seq.*, *post*.

(*m*) Namely, Standing Orders of the House of Commons (Private Business), 1911, Nos. 115—124, 126.

(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 75.

(*o*) See Journals of the House of Commons, 1910, Vol. CLXV., p. 36.

(*p*) When the committee was first appointed, in 1862, it consisted of nine members, but from time to time its number has been increased.

(*q*) See note (*e*), p. 770, *post*.

The committee makes reports to the House from time to time during the session.

Public Petitions Committee.

**1247.** To the Public Petitions Committee, which is appointed by an order of the House at the beginning of every session, are referred all petitions presented to the House which do not relate to private Bills (*r*). The function of the committee is to classify and prepare abstracts of all such petitions, and to convey to the House all requisite information respecting their contents (*s*).

The committee usually consists of fourteen members, of whom three form a quorum.

Kitchen and Refreshment Rooms Committee.

**1248.** The Kitchen and Refreshment Rooms Committee is appointed by the House at the beginning of every session to control the arrangements for the kitchen and refreshment rooms in the department of the Serjeant-at-Arms, and consists of seventeen members, of whom three form a quorum. It appoints several sub-committees to transact the necessary executive work, and meets once a week throughout the session to confirm the proceedings of these sub-committees. At the end of the session the committee issues a statement of its accounts and a balance sheet, which it reports to the House (*a*).

(iii.) *Select Committees appointed under Standing Orders to deal with Matters relating to Private Business.*

Select committees dealing with private business.

**1249.** The Select Committee on Standing Orders, the Committee of Selection, and the General Committee on Railway and Canal Bills have certain duties to perform with regard to private and provisional order confirmation Bills, which are described elsewhere (*b*).

(iv.) *Select Committee on Commons.*

Select Committee on Commons.

**1250.** The Select Committee on Commons is appointed, by an order of the House at the beginning of every session, to consider and report to the House with regard to every report made by the Board of Agriculture and Fisheries under the Commons Act, 1876 (*c*), certifying the expediency of any provisional order for the inclosure or regulation of a common, before a Bill for its confirmation by Parliament is brought into the House.

The committee consists of seven members, partly nominated by the House and partly by the Committee of Selection, of whom five form a quorum (*d*).

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(*r*) Standing Orders of the House of Commons (Public Business), 1911, No. 79. The members of the committee are nominated by the House. For the method in which public petitions are presented to the House of Commons, see pp. 675, 676, *ante*. As to petitions in opposition to private Bills, see pp. 747 *et seq.*, *post*.

(*s*) See sessional order of appointment of the committee, Journals of the House of Commons, 1910, Vol. CLXV., p. 92. All public petitions (unless they are informal, when they are returned to the members who have presented them) are entered in the Votes and Proceedings; see p. 667, *ante*. The committee may authorise the printing of any petition if it considers it advisable, and issues a report containing a list of all other petitions with the number of signatures attached thereto.

(*a*) See Journals of the House of Commons, 1910, Vol. CLXV., pp. 46, 310.

(*b*) See pp. 743, 751, *post*.

(*c*) 39 & 40 Vict. c. 56.

(*d*) See Journals of the House of Commons, 1910, Vol. CLXV. p. 110 and

SECT. 6. Committees.

(v.) *Select Committees on Private Bills and Provisional Order Confirmation Bills.*

Specially constituted committees on private Bills.

**1251.** An ordinary private Bill introduced on petition, if it is considered expedient for any reason, may be referred like a hybrid Bill to a select committee, nominated partly by the House and partly by the Committee of Selection, instead of to an ordinary private Bill committee (*e*). The procedure in a committee of this kind is practically the same as in a private Bill committee (*f*), but the quorum of the committee is fixed by the House, and the chairman, who may only vote when there is an equality of voices, is chosen by the committee itself (*g*). The committee is given power to send for persons, papers and records, and may, therefore, make a special report to the House without obtaining leave to do so.

Local Legislation Committee and Select Committee on Divorce Bills.

**1252.** The appointment, constitution, and functions of the Select Committee on Divorce Bills and the Local Legislation Committee are dealt with elsewhere (*h*).

(vi.) *Committee of Privileges.*

Committee of Privileges.

**1253.** This committee is appointed by an order of the House at the beginning of every session (*i*). Since 1904, it has been usual to nominate seven members, of whom five form a quorum, to serve on

see title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 547. Objectors to any scheme contained in an order may present petitions to the House, which are referred to the committee (see Journals of the House of Commons, 1879, Vol. CXXXIV., p. 163). The committee also requires the Board of Agriculture and Fisheries to publish, in the locality of the common proposed to be dealt with, notices of the day fixed by the committee for the consideration of the case, and directing any person who objects to the scheme to send a statement to the committee setting forth his objections. When the case is heard the Board of Agriculture and Fisheries calls witnesses in support of its proposals, and opponents are also heard. The committee has no power to hear counsel. On the conclusion of the evidence, the committee proceeds to consider its decision, and reports upon each scheme which has been submitted to it, either recommending that the order ought to be confirmed with or without modifications, or that it ought not to be confirmed. If the committee recommends that an order should be modified, it is referred to the Board of Agriculture and Fisheries, to be modified in accordance with the recommendations of the committee. An order which is so modified must again be submitted to the consideration of the committee; see First and Third Reports from the Select Committee on Commons, 1911, House of Commons Papers (128), (222).

(*e*) The Belfast Corporation Bill, 1896; the Fishguard and Rosslare etc. Bill, 1899; the London County Council (Electric Supply) Bills, 1906 and 1907, are examples of Bills which were referred to specially constituted committees of this kind.

(*f*) See pp. 751 *et seq.*, *post*.

(*g*) Members who serve on these committees are not bound to attend every sitting, nor to sign the declarations as prescribed by Standing Orders of the House of Commons (Private Business), 1911, No. 117. Such committees may also adjourn over a day on which the House sits without making the report prescribed by Standing Orders of the House of Commons (Private Business), No. 126. The evidence heard by these committees is usually printed by the promoters as in the case of an ordinary private Bill committee (see note (*s*), p. 754, *post*), but occasionally the House has made a special order with regard to the printing of evidence; see Journals of the House of Commons, Vol. CLXII., p. 162. Private Bills which have been considered by a specially constituted committee are exempted from the committee stage in the House itself.

(*h*) See pp. 752, 762, *post*.

(*i*) See Journals of the House of Commons, 1910, Vol. CLXV., p. 6.

the committee. The committee is given power to send for persons, papers and records (*j*).

SUB-SECT. 4.—*Committees on Private Bills and Provisional Order Confirmation Bills.*

Committees on private Bills and provisional order confirmation Bills.

**1254.** The appointment, constitution, and functions of committees on private Bills and provisional order confirmation Bills appointed under the standing order relating to private business are dealt with elsewhere (*k*).

# Part IV.—Meeting, Adjournment, Prorogation and Dissolution of Parliament.

## SECT. 1.—*Meeting.*

### SUB-SECT. 1.—*Issue and Return of Writs.*

Parliament summoned by the Crown.

**1255.** A new Parliament can be called together for the transaction of business only by the Crown (*l*). It is summoned by means of the King's writ, issued by the direction of the Lord Chancellor from the office of the Clerk of the Crown in Chancery (*m*) with the advice of the Privy Council and in pursuance of a Royal proclamation.

A period of not less than thirty-five days must elapse between the date of the proclamation summoning a new Parliament and the date fixed for its assembling (*n*).

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(*j*) It has been the practice of the House from an early date to appoint a Committee of Privileges. In former times the committee used to consist of all "the knights for shires, gentlemen of the long robe and merchants in the House"; see Journals of the House of Commons, 1837, Vol. XCII., p. 16. This committee did not meet between 1847 and 1909, but the House occasionally appointed select committees to deal with particular matters of privilege as they occurred, *e.g.*, a committee was appointed to inquire into a petition containing a libel on a member in 1857 (see Journals of the House of Commons, 1858, Vol. CXIII., pp. 68, 77); and a committee was appointed to inquire into the commitment of a member in 1874 (see Journals of the House of Commons, 1874, Vol. CXXIX., pp. 28, 61, 71). In 1909 the Committee of Privileges itself was ordered by the House to inquire into an alleged intervention by the Duke of Norfolk in an election in the High Peak division of Derbyshire. For the report from the committee on this occasion, see House of Commons Paper, 1909 (281). For the privileges of the House of Commons in general, see pp. 777, 787 *et seq.*, *post*.

(*k*) See pp. 751 *et seq.*, *post*

(*l*) See title CONSTITUTIONAL LAW, Vol. VI., p. 389. For the reasons which make the annual meeting of Parliament necessary, see *ibid.*, pp. 383, 419; see also pp. 768, 770, *post*.

(*m*) As to this official, see title CONSTITUTIONAL LAW, Vol. VII., p. 12.

(*n*) Meeting of Parliament Act, 1852 (15 & 16 Vict. c. 23). During a recess, the Crown, acting upon the advice of the Privy Council, by Royal proclamation has power to prorogue Parliament from the day to which it shall then stand summoned or prorogued to any further day being not less than fourteen days from the date thereof (Prorogation Act, 1867 (30 & 31 Vict. c. 81), s. 1). The Crown may also issue a proclamation summoning Parliament to meet for the dispatch of business on a date earlier than that on which it had been originally summoned (Meeting of Parliament Act, 1797 (37 Geo. 3, c.

SECT. 1. Meeting.

Writs of summons to peers.

**1256.** At the beginning of each new Parliament, a writ of summons, on which is stated the day and place of meeting of Parliament (*o*), is issued from the office of the Clerk of the Crown in Chancery by the direction of the Lord Chancellor to every peer of the United Kingdom who has proved his right to his peerage, to each representative peer of Ireland (*p*), to each lord spiritual who is entitled to sit in the House of Lords (*q*), and to each of the four Lords of Appeal in Ordinary (*r*).

Writs for election of members of House of Commons.

**1257.** Writs for the election of the members of the House of Commons are sent to the returning officers in each constituency directing the election of a member or members, as the case may be, to serve for that constituency in Parliament. In Great Britain, the writs are sent out by the Clerk of the Crown in Chancery; in Ireland, by the Clerk of the Crown and Hanaper (*s*).

SUB-SECT. 2.—*Oath of Allegiance.*

Oath of allegiance or affirmation.

**1258.** The members of both Houses of Parliament must make and subscribe the oath of allegiance, or make a solemn affirmation or declaration in lieu thereof, before they are entitled to take their seats.

The form of oath or affirmation, which must be solemnly and publicly made by members in their respective Houses (*t*), is fixed by statute (*u*), and any lord temporal or lord spiritual who votes by

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as amended by the Meeting of Parliament Act, 1870 (33 & 34 Vict. c. 81)); and see p. 699, *post*.

(*o*) Since the reign of Charles II., Parliament has always met at Westminster, but there is no constitutional objection to Parliament being summoned by the Sovereign to meet in any other place.

(*p*) As to such peers, see p. 626, *ante*. Writs are not sent to the representative peers of Scotland.

(*q*) As to the lords spiritual, see pp. 619 *et seq.*, *ante*.

(*r*) As to the Lords of Appeal in Ordinary, see pp. 628, 643, *ante*. The judges of the Supreme Court receive writs of summons to Parliament; see p. 647, *ante*. See also Report from the Joint Committee on the Presence of the Sovereign in Parliament, 1901, p. vii.; House of Commons Paper (212).

(*s*) As to the form of writ, see Ballot Act, 1872 (35 & 36 Vict. c. 33), Sched. II.; and see title ELECTIONS, Vol. XII., p. 258. As to the duties of returning officers with regard to returns, see *ibid.*, pp. 331—333. When a member is elected at a bye-election, the Clerk of the Crown sends a certificate of his election to the Public Bill Office in the House of Commons, and the new member, before he can take his seat, must obtain a certificate at that office stating that the certificate from the Crown Office has been duly received.

(*t*) Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 3.

(*u*) The following is the prescribed form of oath: "I, ——, do swear that I will be faithful and bear true allegiance to His Majesty King George, his heirs and successors, according to law. So help me God" (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 1, 8). The oath may also be taken in the manner prescribed by the Oaths Act, 1909 (9 Edw. 7, c. 39), s. 2 (1); or in the manner in which an oath is usually administered in Scotland (Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 5). Any peer or member of the House of Commons who objects to taking an oath either because he has no religious belief, or because taking an oath is contrary to his religious belief, is permitted to make the following affirmation, namely: "I, ——, do solemnly, sincerely, and truly, declare and affirm that I will be faithful and bear true allegiance to His Majesty King George, his heirs and successors, according to law" (Oaths Act, 1888 (51 & 52 Vict. c. 46), ss. 1, 2). For a historical survey of the Parliamentary oath; see May, Parliamentary Practice, 11th ed., pp. 159—170; and, as

himself or his proxy, or who sits as a peer during any debate in the House of Lords, and any member who votes or who sits as a member in the House of Commons, during any debate after the Speaker has been chosen, without taking the oath or making such affirmation, is liable to a fine of £500 for each offence (*v*).

SUB-SECT. 3.—*Introduction of Peers.*

Manner in which an hereditary peer or a representative peer takes his seat.

**1259.** A peer who succeeds to his peerage by descent, and is of age, has the right, as soon as he has proved his title and received his writ of summons (*a*), to come to the House of Lords and take his seat without any formal introduction (*b*).

A representative peer of Scotland (*c*) or of Ireland (*d*) is not introduced, but takes his seat in the same way as an hereditary peer of the United Kingdom, as soon as his election has been notified to the House (*e*).

Introduction of a newly created peer.

**1260.** A newly-created peer, or the successor of a newly-created peer who never took his seat, or a peer who has succeeded to his peerage under a special limitation (*f*), must be introduced (*g*) with

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to administering the oath to a person of no religious belief, see title CONSTITUTIONAL LAW, Vol. VI., p. 343. As to oaths generally, see title EVIDENCE, Vol. XIII., pp. 590 *et seq.*

(*v*) Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5. The pecuniary penalty can be sued for only by the Crown (*Bradlaugh* v. *Clarke* (1883), 52 L. J. (Q. B.) 505, H. L.). In addition to the pecuniary penalty, the seat of a member of the House of Commons who transgresses this rule is vacated as if he were dead (Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5). The penal sections of the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), were not repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66); see *Clarke* v. *Bradlaugh* (1881), 8 Q. B. D. 63, C. A.

(*a*) As to what is required before a writ can be issued, see p. 623, *ante*.

(*b*) Standing Orders of the House of Lords (Public Business), 1902, No. 13. Any day on which the House sits, as soon as prayers have been said and before public business has begun, the new peer may go to the table of the House and present his writ of summons to the clerk, who then administers the oath to him, after which the peer signs the roll and shakes hands with the Lord Chancellor. As to the peerage, see title PEERAGES AND DIGNITIES.

(*c*) A representative peer of Scotland does not bring a writ of summons to the House, but merely takes the oath and signs the roll. As to such peers, see p. 625, *ante*.

(*d*) If a representative peer of Ireland is, subsequent to his election, advanced to a higher degree in the peerage of Ireland, the letters patent by which such advancement is made must be produced and read in the House; see Standing Orders of the House of Lords (Public Business), 1902, No. 99. As to such peers, see p. 626, *ante*.

(*e*) The names of the peers elected to represent the peers of Scotland are communicated to the Lord Chancellor by the Lord Clerk Register of Scotland at the beginning of every new Parliament; see p. 626, *ante*. The same procedure is adopted in the case of an election taking place during the course of a Parliament. As to notifying the election of an Irish representative peer, see p. 627, *ante*.

(*f*) Standing Orders of the House of Lords (Public Business), 1902, No. 14.

(*g*) *Ibid.*, No. 15. When a newly-created peer is introduced, he enters the House by the bar. He is preceded by the Gentleman Usher of the Black Rod, the Earl Marshall the Lord Great Chamberlain, and Garter King of Arms, or their deputies, and is supported by two peers of his own degree. The new peer carries his writ of summons, and both he and his supporter, and also the Earl Marshal and the Lord Great

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certain formalities before he may sit and vote in the House of Lords and his patent and writ of summons are entered in full upon the Journals of the House (*h*).

Introduction of the Lord Chancellor.

**1261.** When a commoner who has been appointed Lord Chancellor is created a peer, or when a Lord Chancellor has been advanced a rank in peerage, the leader of the House announces the fact in the House (*i*). The Lord Chancellor then leaves the House by the bar and returns wearing his peer's robes and accompanied by two supporters and the Officers of State (*k*). The ceremony of introduction is the same as that already described in the case of a newly-created peer (*l*), except that the Lord Chancellor, after receiving his patent from Garter King of Arms, kneels and lays it upon the Throne, and from thence takes it and delivers it with his writ of summons to the Reading Clerk. After he has taken the oath and signed the roll, the Lord Chancellor is first placed between his two supporters at the lower end of the bench on which his rank in the peerage entitles him to sit. From this position the three peers salute the Throne by rising and uncovering three times. The Lord

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Chamberlain, wear their peers' robes. The Gentleman Usher of the Black Rod and Garter King of Arms wear their official uniforms, and the latter carries the new peer's patent of creation. After bowing to the Throne as they enter the House, the new peer and his escort advance up the House on the temporal side (see p. 624, *ante*) to the woolsack, making a second bow as they pass the table, and a third when they reach the woolsack. Garter King of Arms then hands his patent to the new peer, who, kneeling on one knee, presents it and also his writ of summons to the Lord Chancellor, who hands them to the Reading Clerk. The new peer, with his two supporters, then proceeds to the table of the House, whilst the Earl Marshal and the other officers station themselves between the first cross bench and the table facing the Lord Chancellor. The Reading Clerk, who has meanwhile returned to the table, reads aloud both the patent and the writ of summons, and then administers the oath to the new peer, who signs the roll. The procession is then re-formed in the original order and crosses the House, passing between the first cross bench and the table. It then turns and again crosses the House between the lowest cross bench and the bar. The Earl Marshal and the other officers remain standing by the cross benches whilst Garter King of Arms conducts the new peer to the bench upon which he is entitled to sit. The new peer then takes his seat between his two supporters, and they all three put on their cocked hats and bow three times to the Lord Chancellor, rising and uncovering each time. The Lord Chancellor returns their salutations by taking off his hat, but he does not rise. As soon as this ceremonious greeting has been exchanged, the procession is once again re-formed and again moves up the House, a proceeding which enables the new peer as he passes the woolsack to shake hands with the Lord Chancellor before leaving the House to unrobe. Two or more peers of the same degree may be introduced together. On such occasions each patent and writ of summons is read in succession, each peer taking the oath as soon as his own have been read. When all the patents and writs of summons have been read, the new peers are conducted to the proper bench, from which they salute the Lord Chancellor simultaneously; see Journals of the House of Lords, 1906, Vol. CXXXVIII., pp. 18 *et seq.*

(*h*) See note (*c*), p. 623, *ante*.

(*i*) Journals of the House of Lords, 1898, Vol. CXXX., p. 6; 1906, Vol. CXXXVIII., p. 5.

(*k*) If the Lord Chancellor has been created a peer before the opening of the session, he may perform the duties of his office at the opening of Parliament, but he is not introduced until after the delivery of the Speech from the Throne (see p. 696, *post*) and prayers have been said.

(*l*) See note (*g*), p. 689, *ante*.

Chancellor, accompanied by his supporters, then moves and takes his seat alone at the upper end of the Earls' bench, to which position in the House he is entitled in virtue of his office. From this position he again salutes the Throne, after which he rises, uncovers, and returns to the woolsack. The House then adjourns during pleasure to enable the Lord Chancellor to unrobe.

Introduction of a peer of the Blood Royal.

**1262.** When the Prince of Wales is introduced, he does not kneel when he presents his patent to the Lord Chancellor, and, after his patent and writ of summons have been read and he has taken the oath and signed the roll, he is conducted to his chair on the right of the Throne. He then receives the congratulations of the Lord Chancellor, after which he retires to unrobe (*m*). A peer of the Blood Royal also presents his patent to the Lord Chancellor standing, and, after he has taken the oath and signed the roll, he takes his seat on a chair placed on the left of the Throne (*n*).

Introduction of a lord spiritual.

**1263.** The ceremony upon the introduction of a lord spiritual (*o*) is practically the same as that upon the introduction of a lord temporal, except that as a bishop has not been created a peer he has no patent, and, therefore, only presents his writ of summons to the Lord Chancellor. When he takes his seat in the House of Lords, a lord spiritual is supported by two other lords spiritual, and is not accompanied by the Earl Marshal and the other Officers of State.

### SUB-SECT. 4.—*Introduction of Members of the House of Commons.*

Manner in which a member of the House of Commons takes his seat.

**1264.** There is no formal introduction of members of the House of Commons at the beginning of the first session of a new Parliament. The return book, which is delivered in by the Clerk of the Crown in Chancery, is the only evidence which is required of each member's election (*p*).

When a member is elected to fill a vacancy in the House caused by a bye-election (*q*), during the course of a Parliament, he must be formally introduced (*r*).

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(*m*) For the ceremony upon the introduction of His late Majesty King Edward VII., as Prince of Wales, on the 5th February, 1863, see Journals of the House of Lords, 1863, Vol. XCV., p. 6.

(*n*) By stat. (1539) 31 Hen. 8, c. 10, s. 1, only the children of the Sovereign are entitled to sit on either side of the Throne in the House of Lords. When Prince Albert Victor of Wales was created Duke of Clarence and Avondale, and again when His present Majesty was created Duke of York, Queen Victoria sent a message to the House of Lords recommending the House to consider of the place His Royal Highness should occupy in the House. The matter was referred to the Committee for Privileges, which, upon each occasion, recommended that His Royal Highness should sit on the left hand of the Throne, in the place usually reserved for younger sons of the reigning Sovereign.

(*o*) As to the lords spiritual, see pp. 619 *et seq.*, *ante*.

(*p*) See title ELECTIONS, Vol. XII., pp. 331—333.

(*q*) For the causes which necessitate the vacation of their seats by members, see pp. 656, 658 *et seq.*, *ante*, and see pp. 787, 789, *post*.

(*r*) See Resolution of the House of the 23rd February, 1688-9 (Journals of the House of Commons, Vol. X., p. 34). Any day the House sits, immediately after questions are disposed of, or after the conclusion of public business, the Speaker invites the new member, who is standing at the bar between two other members, to take his seat. In reply to this invitation, the new member, between his two supporters, advances up the floor of the House

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SUB-SECT. 5.—*Preliminary Proceedings when a New Parliament Meets.*

Proceedings on the first day of a new Parliament.

**1265.** On the day when a new Parliament is appointed to meet for the transaction of business, the Lord Chancellor and four other lords, who must be members of the Privy Council (*s*), take their seats on a form which is placed between the woolsack and the Throne (*t*). The Lord Chancellor then directs the Gentleman Usher of the Black Rod, or his deputy, to let the Commons know that the Lords Commissioners desire their attendance in the House of Lords to hear the commission read.

As soon as the members of the House of Commons appear at the bar, the Lord Chancellor informs them that he and the other Lords Commissioners have been empowered by letters patent under the Great Seal "to do all things in His Majesty's name which are to be done on his part in this Parliament, as by the letters patent will more fully appear." The letters patent are then read aloud by the Reading Clerk, after which the Lord Chancellor informs both Houses that, as soon as the members of the two Houses have taken the oath, the causes of His Majesty calling the Parliament will be declared to them, and he further informs the Commons that it is the King's pleasure that they should repair to the place where they are to sit, and there proceed to the choice of some proper person to be their Speaker, and that they should present such person, when they have chosen him, for His Majesty's approbation. The Commons then retire to their own House to choose a Speaker, and the House of Lords is adjourned during pleasure (*u*).

Proceedings in the House of Lords subsequent to the reading of the commission for the election of Speaker.

**1266.** In the House of Lords, when the House has been resumed and prayers have been said, the Lord Chancellor takes the oath. He goes alone to the table of the House, repeats the oath of allegiance, and signs the roll, after which he returns to the woolsack, and any lords who are present take the oath or make the affirmation prescribed by statute. Each lord presents his writ of summons to the clerk, signs the roll, and shakes hands with the Lord Chancellor (*v*).

On the first day of a new Parliament, and also of each of its succeeding sessions, Garter King of Arms delivers at the table of the House a complete list of the lords temporal sitting in Parliament (*a*).

to the table, where he presents the certificate of his election to the clerk. He then takes the oath or makes his affirmation in the prescribed form, signs the roll, and shakes hands with the Speaker, to whom he is presented by the clerk.

(*s*) See title CONSTITUTIONAL LAW, Vol. VII., pp. 51 *et seq.*

(*t*) The Lord Chancellor and the other Lords Commissioners wear their peers' robes. The former wears a three-cornered hat, and the other peers wear cocked hats.

(*u*) When the House is adjourned during pleasure, the mace is left on the woolsack, and the Lord Chancellor leaves the House by the door which opens into the Prince's Chamber. When the House is resumed, he returns by the same way.

(*v*) A peer of the Blood Royal takes the oath singly.

(*a*) The Clerk of the Parliaments also prepares a roll of the lords spiritual and temporal, which he lays on the table of the House on the third sitting day. As to notifying the House of Lords of the election of Scottish and Irish representative peers, see pp. 626, 627, *ante*, and note (*e*), p. 689, *ante*. As to Garter King of Arms, see title PEERAGES AND DIGNITIES.

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Election of Speaker by the Commons.

**1267.** In the House of Commons, the first and only business of the day is to carry out the instruction of the Sovereign to choose a Speaker. As soon, therefore, as the members have returned from hearing the commission read in the House of Lords, the Clerk of the House rises in his place and points with his finger to the member who is to propose the name of the Speaker (*b*). The member thus designated then moves that some other member who is present "do take the chair of this House as Speaker," and this motion is seconded by another member. If no other candidate is proposed, the motion is agreed to without any question being put. The member who has been chosen to be Speaker then rises in his place, expresses his sense of the honour proposed to be conferred upon him, and submits himself to the House, after which his proposer and seconder conduct him to the Speaker's chair. Standing upon the upper step leading to the chair, the Speaker-elect returns his humble acknowledgments to the House for the great honour which it has conferred upon him, after which he sits down in the chair, and the mace, which has hitherto lain under the table, is placed upon the table of the House. The Speaker-elect is then congratulated by the leader of the House and the leader of the opposition, or by two other members acting on their behalf, and also by the leaders of other recognised groups of members in the House. As soon as these speeches have been delivered, the leader of the House moves the adjournment, the Speaker-elect puts the question, and the proceedings are brought to a close (*c*).

If there is more than one candidate for the Speakership, the procedure is somewhat different (*d*).

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(*b*) The duty of proposing and seconding the name of the Speaker is usually entrusted to two old and influential members of the House who are not at the time Ministers of the Crown, and one of whom represents a borough and the other a county constituency. When there is no contest for the office, the proposer and the seconder are generally chosen from different political parties to signify the united opinion of the House.

(*c*) See Journals of the House of Commons, 1910, Vol. CLXV., p. 5. The Speaker is elected for the duration of the Parliament. If, owing to his death or resignation during the course of the Parliament, a vacancy occurs in the office, it is customary for a Minister of the Crown in the Commons to acquaint the House that the Sovereign "gives leave to the House to proceed forthwith to the choice of a new Speaker"; see Journals of the House of Commons, 1905, Vol. CLX., p. 249. (The proceedings with regard to the election of a new Speaker during the course of a session are the same as those described in the text, *supra*). As soon as the choice of the House has been made, a Minister of the Crown acquaints the House that "he has it in command from his Majesty that the House should present their Speaker (on a certain day) in the House of Peers for his Majesty's Royal approbation." The approval of the Crown to the choice of the Commons is signified by the Royal Commissioners in the same way as at the beginning of a new Parliament (see p. 694, *post*), except that the new Speaker does not claim the privileges of the House which have already been accorded to it upon the request of his predecessor. When a Speaker retires during the course of the session, it is customary for the House, on the motion of its leader, which is seconded by the leader of the opposition and supported by other prominent members, to pass a Resolution expressing its appreciation of the services of the retiring Speaker, and an order is made for this Resolution to be entered in the Journals of the House; see Journals of the House of Commons, 1895, Vol. CL., p. 147.

(*d*) The candidates, after they have been proposed and seconded, address themselves to the House, and a debate thereupon ensues. The decision of the

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Confirmation by the Crown of election of Speaker.

**1268.** The second day of the first session of a new Parliament, the Lord Chancellor and the four other Lords Commissioners again take their seats on the form in front of the Throne, and send the Gentleman Usher of the Black Rod to the Commons to desire their immediate attendance in the House of Lords. In reply to this request, the Speaker-elect, accompanied by the Gentleman Usher of the Black Rod, attended by his Chaplain, the Serjeant-at-Arms of the House of Commons, and the Clerk of that House, and followed by the Commons, comes to the bar of the House of Lords. After exchanging greetings with the Lords Commissioners, the Speaker-elect informs them that, in obedience to His Majesty's commands, His Majesty's faithful Commons, in the exercise of their undoubted rights and privileges, have proceeded to the election of a Speaker, and, as the object of their choice, submits himself with all humility for His Majesty's gracious approbation. The Lord Chancellor intimates the approval of the Crown, and confirms the election of the Speaker, who then proceeds, in the name and on behalf of the Commons of the United Kingdom, to lay claim "to their ancient and undoubted rights and privileges, and especially to freedom from arrest and molestation for their persons, servants and estates, to freedom of speech in debate, and to free access to His Majesty whenever occasion may require it, and to the most favourable construction of all their proceedings" (*e*). He also prays, on his own account, that whatever error may occur in the discharge of his duty may be imputed to him alone, and not to His Majesty's faithful Commons. In answer to this speech the Lord Chancellor informs the Speaker "that His Majesty most readily confirms all the rights and privileges which have ever been granted to or conferred upon the Commons by His Majesty or any of His Royal Predecessors," and assures him that His Majesty will always put the most favourable construction on his words and actions.

Proceedings in the House of Commons subsequent to the confirmation by the Crown of the Speaker's election.

**1269.** As soon as this ceremony has been concluded, the Speaker returns to the House of Commons and reports to the House that his election has been approved by the Sovereign, and also that the privileges of the House have been confirmed. He again thanks the House for the honour which it has conferred upon him, reminds members that it is incumbent upon them to take the oath prescribed by law, and himself takes the oath, standing upon the upper step below the Speaker's chair. Other members who are present then come to the table of the House and either take the oath or make the affirmation in the manner prescribed by statute (*f*), after which they sign the roll and shake hands with the Speaker. As soon

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House is determined upon the question, "That Mr. —— (the member who has been first proposed) do take the chair of this House as Speaker?" and a division is taken, if necessary. If this question is decided in the affirmative, the elected candidate is at once conducted to the chair by his proposer and seconder; if the question, however, is decided in the negative, a similar question is put upon the name of the second candidate who has been proposed. The subsequent proceedings after the election of a Speaker has been decided in this way are the same as those already described; see Journals of the House of Commons, 1895, Vol. CL., pp. 149, 693, *ante*, and the text, *supra*.

(*e*) See pp. 777 *et seq.*, *post*.

(*f*) See p. 688, *ante*.

as the majority of members of both Houses have taken the oath (*g*), the causes for the summoning of Parliament are communicated to the two Houses in a Speech from the Throne (*h*).

SUB-SECT. 6.—*Proceedings at the Opening of Parliament.*

Opening of Parliament by Sovereign in person.

**1270.** When the Sovereign opens the session in person, the Lord Chancellor, who wears his peer's robes, enters the House of Lords by the bar and takes his seat on the woolsack. As soon as he is informed that the King is approaching, he goes to meet him at the foot of the staircase in the Victoria Tower and then takes his place in the Royal procession, which proceeds from the King's Robing Room through the Royal Gallery and the Prince's Chamber to the House of Lords (*i*).

Before the Royal procession reaches the House of Lords, the members of the Royal Family, the lords spiritual and temporal, wearing their robes, peeresses (*j*), the judges, and the members of the Corps Diplomatique, take their places in the House.

Upon the arrival of the Royal procession all persons present in the House of Lords rise and remain standing until the King is seated on the Throne and directs them to be seated (*k*). His Majesty

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(*g*) On the occasion of the meeting of a new Parliament, when a change of Ministry has taken place since the general election, after the election of the Speaker has been confirmed in the manner already described (see p. 694, *ante*), the Commons are requested to come to the House of Lords, and are informed by the Lord Chancellor, on behalf of the Lords Commissioners, that he is directed by His Majesty to acquaint them that since the date when His Majesty deemed it right to call them together for the consideration of many grave and important matters, several vacancies have occurred in the House of Commons, owing to the acceptance of office from the Crown by members of that House (see p. 659, *ante*), and that it is His Majesty's pleasure that an opportunity may now be given to issue writs for supplying the vacancies thus occasioned, and that after a suitable recess Parliament may proceed to the consideration of such matters as may be laid before it. Parliament then adjourns to a future day, when the Speech from the Throne is submitted to it and business proceeds as usual.

(*h*) Every session, after the first one of a new Parliament, as there is no election of a Speaker in the House of Commons, or any general swearing in of members in either House, the Speech from the Throne is delivered the first day of the session without any preliminary proceedings.

(*i*) The procession is headed by the poursuivants and heralds, and the officers of the Royal Household, Norroy King of Arms, the Lord President of the Council, the Lord Chancellor, the Gentleman Usher of the Black Rod, Garter King of Arms, the Earl Marshal, and the Lord Great Chamberlain. The peers who carry the Sword of State, the Imperial Crown and the Cap of Maintenance walk immediately in front of the Sovereign.

(*j*) As far as possible, peeresses are provided with seats in the House, but it appears that they can claim no right to be present; see Report from the Joint Committee on the Presence of the Sovereign in Parliament, pp. vi., vii., 1901, House of Commons Paper (212). Admission to the House of Lords at ceremonies of State is regulated by the Lord Great Chamberlain.

(*k*) When the Sovereign takes his seat on the Throne, the peer who carries the Cap of Maintenance stands on the steps of the Throne on the right, and the peer bearing the Sword of State on the left. The Lord Chancellor, the Lord President of the Council, and the Earl Marshal stand on the right of the Sovereign, and the Lord Great Chamberlain stands on the steps of the Throne on the left of the Sovereign to receive the Royal commands. The officers of the Royal Household (see title CONSTITUTIONAL LAW, Vol. VII., pp. 106, 107) arrange themselves on each side of the steps of the Throne, in the rear of the

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then commands the Gentleman Usher of the Black Rod to let the Commons know that "It is His Majesty's pleasure that they attend him immediately in this House."

Meanwhile the House of Commons has met and prayers have been read. As soon, therefore, as the Gentleman Usher of the Black Rod has announced the King's command, the Speaker leaves the chair and proceeds to the House of Lords, followed by the members of the House.

When he reaches the bar of the House of Lords, the Speaker bows three times to the King, who acknowledges his salutation by raising his hat. The Lord Chancellor then hands a copy of the Royal Speech to His Majesty, who reads it aloud. The King then retires from the House and returns to the Robing Room, and the Speaker and the members of the House of Commons withdraw to their own Chamber.

Opening of Parliament when Sovereign not present in person.

**1271.** When the Sovereign is not present in person to open the session, the task is deputed to the Lord Chancellor and four other Lords Commissioners, who are appointed by letters patent as already described (*l*). The Lord Chancellor reads the Speech from the Throne, and, except that there is no procession and that the Lords Commissioners request, instead of commanding, the attendance of the Commons, the proceedings are the same as when the King is present in person (*m*).

After the delivery of the Speech from the Throne, both Houses adjourn during pleasure until later in the afternoon of the same day.

Proceedings in the House of Lords subsequent to the opening of Parliament.

**1272.** The House of Lords usually resumes its sitting at a quarter-past four o'clock, when the Lord Chancellor enters the House by the bar and takes his seat on the woolsack. Prayers are then read. At half-past four o'clock, the hour at which public business begins, the leader of the House moves that a Bill, usually a Bill for the regulation of select vestries, be read a first time. This is purely a formal proceeding, but until it has taken place no other business should be done, and no business should intervene between the first reading of the Bill and the report of the King's Speech (*n*). As soon as the first reading of this Bill has been agreed to, the Lord Chancellor reports the Speech from the Throne to the House (*o*), and an address thanking His Majesty for his most gracious Speech is moved and seconded by two lords to whom the duty has been entrusted by the Government (*p*). A debate follows,

great Officers of State. When the Sovereign retires, the procession returns to the Robing Room in the same order as it came.

(*l*) See p. 692, *ante*.

(*m*) See p. 695, *ante*, and the text, *supra*.

(*n*) See Companion to the Standing Orders on Public Business of the House of Lords, ed. 1909, p. 16.

(*o*) The Lord Chancellor, standing in his place at the woolsack, reads the Speech without any prefatory words. Whilst the Speech is read, all the lords present remain uncovered.

(*p*) It is customary for the lords to whom this duty is entrusted to appear in levée dress or uniform.

but it is unusual for an amendment to be moved to the address in the House of Lords (*q*). It is generally agreed to *nemine dissentiente*, and is then ordered to be presented to the Sovereign by the Lords with White Staves (*r*).

Proceedings in the House of Commons subsequent to the opening of Parliament.

**1273.** The House of Commons resumes its sitting at four o'clock, but, unlike the other House, it does not immediately proceed to the consideration of the address in reply to the Speech from the Throne. Before this subject is entered upon, the Speaker informs the House of any new writs which may have been issued since the previous session, and of any other event which it may be his duty to communicate to the House; matters affecting the privileges of the Commons may also be raised (*s*), and various sessional orders and regulations are made (*t*); after which the Clerk of the House reads

(*q*) The last occasion upon which an amendment was moved to the address in the House of Lords was in 1878 with regard to the Afghan War; see Journals of the House of Lords, 1878, Vol. CXI., p. 6. The form of the address in answer to a speech from the Throne is always the same, namely, "Most Gracious Sovereign, We Your Majesty's most dutiful and loyal subjects, the Lords Spiritual and Temporal of the United Kingdom of Great Britain and Ireland in Parliament assembled, beg leave to thank Your Majesty for the most gracious Speech which Your Majesty has addressed to both Houses of Parliament." Occasionally, if the circumstances demand it, an additional paragraph may be added; see the allusions to the death of the Duke of Clarence and Avondale in the address in 1892, and to the death of Prince Henry of Battenburg in 1896; Journals of the House of Lords, 1892, Vol. CXXIV., p. 7; 1896, Vol. CXXVIII., p. 16.

(*r*) See p. 803, *post*. There is usually no other public business on the first day of the session, but, before the House adjourns, it is customary to appoint a lord to be Chairman of Committees for the session (see p. 630, *ante*). Three Committees, namely, the Committee for Privileges, the Committee for the Journals, and the Appeal Committee (see pp. 641, 642, *ante*) are also appointed, and an order is made to prevent stoppages in the streets whilst the House is sitting.

(*s*) See Journals of the House of Commons, 1911, Vol. CLXVI., p. 6.

(*t*) Orders are made to the following effect, namely:—(1) That a member who has been elected for two constituencies must make election for which he will serve within one week after it shall appear that there is no question upon the return for that place; (2) that if any question is raised with regard to the return of any member, he must withdraw whilst the matter is in debate; (3) that all members returned upon double returns must withdraw until their returns are determined; (4) that the commissioners of the metropolitan police must see that the passages through the streets leading to the House are kept open during the session, and that the members of the House suffer no obstruction in getting to the House; (5) that the Votes and Proceedings of the House (see p. 667, *ante*) be perused by the Speaker and printed by his authority; (6) that a Committee of Privileges be appointed; (7) that the Journal of the House (see p. 668, *ante*) of the previous session be printed under the direction of the Clerk of the House, and by some person appointed by the Speaker. Resolutions are made stating (1) that no peer of the Realm, other than an Irish peer who is a member of the House of Commons, has any right to give his vote in the election of any member to serve in Parliament; (2) that it is a high infringement of the liberties and privileges of the Commons for any lord-lieutenant or governor of any county to avail himself of any authority derived from his commission to influence the election of any member to serve in the House of Commons; (3) that if it appears that any member has been elected by means of bribery, the House will treat with the utmost severity any person who has been wilfully concerned in such bribery or corrupt practices; (4) that the House will treat with the utmost severity any person who tampers with any witness in respect of evidence to be given

SECT. 1. Meeting.

the short title of some Bill of a formal character, usually a Bill for the more effectual preventing clandestine outlawries, which is ordered to be read a second time. The Speaker then reports to the House that he has been to the House of Lords to hear the Speech from the Throne, which he proceeds to read to the House. Two members who have been entrusted with the task by the Government then move and second an address of thanks to the Sovereign (*u*). Upon this motion a debate may ensue, for as soon as the Speaker has put the question for the address it is possible for members to hand in amendments to it at the table (*x*). Such amendments invariably raise questions of public policy, criticising the action of the Government and their programme as disclosed in the Speech from the Throne (*a*). As soon as the address has been agreed to by the House, an order is made for it to be presented to His Majesty by "such members of the House as are of His Majesty's most honourable Privy Council, or of His Majesty's Household"

SUB-SECT. 7.—*Proceedings on a Demise of the Crown.*

Effect on Parliament a demise of the Crown.

**1274.** A demise of the Crown does not affect the duration of Parliament (*c*). In the event of the death of the reigning Sovereign, the two Houses of Parliament are required by statute to meet as soon as possible. If Parliament is sitting, therefore, when a demise of the Crown takes place, it must immediately proceed to act without any formal summons, and, if it is prorogued or adjourned at the time, it must meet and sit with the least possible delay (*d*).

Meeting of Parliament

**1275.** As soon as each House meets after a demise of the Crown, its members proceed immediately to take the oath of allegiance to the new Sovereign. After a certain time has been allowed for this purpose, a message under the Sign Manual is sent to each House, in which the Sovereign acquaints the Lords and Commons of the death of his predecessor and states such other matters as may be necessary in the circumstances.

before the House or one of its committees, and against any witness who gives false evidence before the House or one of its committees.

(*u*) It is usual for the Government to appoint for this duty one member representing a county constituency, and the other a borough constituency. It is customary for the members who move and second the address to appear in levée dress or uniform.

(*x*) The King's Speech is printed and can be obtained by members of either House of Parliament immediately after it has been delivered.

(*a*) If an amendment to the address is carried, it is usually treated as a vote of want of confidence in the Government; see note (*k*), p. 618, *ante*.

(*b*) The form of the address in answer to the Speech from the Throne is the same as that in the House of Lords; see note (*q*), p. 697, *ante*.

(*c*) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 51; see title CONSTITUTIONAL LAW, Vol. VI., p. 384.

(*d*) See Journals of the House of Lords, 1910, Vol. CXLII., p. 121; Journals of the House of Commons, 1910, Vol. CLXV., p. 147. If Parliament is prorogued or adjourned when the Sovereign dies, there is no obligation on the authorities to issue an official summons. It is the duty of members of both Houses to proceed immediately to Westminster in order to take the oath of allegiance to the new Sovereign.

SECT. 1. Meeting.

Address to the Sovereign.

Each House votes an address condoling with the Sovereign upon the death of his predecessor and congratulating him upon his accession to the Crown. If the demise of the Crown has taken place sa the course of a session, business is then resumed and proceeds in usual; but, if it occurred during a period of adjournment or prorogation, both Houses adjourn for a short period as soon as the addresses have been presented to the new Sovereign (*e*).

### SECT. 2.—*Power of Each House to Adjourn.*

Power of each House to adjourn.

**1276.** Each House of Parliament has the power to adjourn its sittings for any period of time to be determined by an order of the House.

Power of Crown to adjourn and to summon Parliament during an adjournment or proroga-

**1277.** The Crown has occasionally signified its pleasure that both Houses should adjourn, but the practice is unusual, and there is no instance of an adjournment of this kind since 1814 (*f*). The Crown, however, has statutory power during any adjournment or prorogation of Parliament to issue a proclamation, with the advice of the Privy Council, declaring that the two Houses shall meet on a day named in the proclamation, but not less than six days from the day of the date of such proclamation. In such cases, any order which has been made by either House with regard to the date of its reassembling after an adjournment is cancelled, and the House meets upon the day appointed by the Crown (*g*).

If Parliament is adjourned or stands prorogued for a longer period than ten days, there is also a statutory obligation placed upon the Crown to issue a proclamation summoning both Houses to meet within ten days, whenever, in consequence of the calling out of the first class of the army reserve, directions are required to be given for embodying the Territorial Force (*h*).

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(*e*) As to the case of a demise after a dissolution and before the day appointed for the meeting of the new Parliament, see title CONSTITUTIONAL LAW, Vol. VI., p. 384; Meeting of Parliament Act, 1797 (37 Geo. 3, c. 127), s. 3. This Act further provides for the continuance in existence of the old Parliament for a further period of six months in the event of a Sovereign dying within six months of his succession to the Throne, and enacts that, in the case of a demise of the Crown on the day appointed for calling a new Parliament, or any day thereafter before its meeting, the new Parliament shall immediately meet and sit for a period of six months unless prorogued or dissolved within that period.

(*f*) See Journals of the House of Lords, 1814, Vol. XLIX., p. 747; Journals of the House of Commons, 1814, Vol. LXIX., p. 132; compare May, Parliamentary Practice, 11th ed., pp. 46, 47.

(*g*) Meeting of Parliament Act, 1870 (33 & 34 Vict. c. 81), s. 2.

(*h*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 17 (2). Previous to the passing of this Act, the same statutory obligation to summon Parliament during a prorogation or adjournment was imposed upon the Crown by the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 13 (amended by the Reserve Forces and Militia Act, 1898 (61 & 62 Vict. c. 9), and still unrepealed), whenever it might be found necessary to call out the army reserve and militia reserve on permanent service, and by the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 19 (still unrepealed), whenever the militia was embodied; and see title ROYAL FORCES. In 1899, a proclamation was issued on the 7th October summoning Parliament, which was prorogued until the 27th October, to meet on the 17th of that month; see Journals of the House of Commons, 1899, Vol. CLIV., p. 428.

SECT. 3.

## Prorogation.

### SECT. 3—*Prorogation.*

Prorogation of Parliament only effected by exercise of the Royal Prerogative.

**1278.** A session of Parliament can only be brought to an end by the exercise of the Royal Prerogative. Parliament is prorogued at the end of a session either by the Sovereign in person or by a commission appointed for the purpose by letters patent under the Great Seal. It is always prorogued to a definite day on which its next meeting is appointed to take place. If it is decided afterwards to postpone the reassembling of Parliament to a later date than that which has been originally fixed, the further prorogation can be effected by means of a Royal proclamation, issued with the advice of the Privy Council, without any subsequent writ or commission under the Great Seal (*i*).

Prorogation of Parliament by Sovereign in person.

**1279.** When the Sovereign comes in person to prorogue Parliament, the procedure is much the same as when he is present to open Parliament (*j*). As soon as the King is seated on the Throne in the House of Lords, the Commons are summoned. When the Speaker arrives at the bar of the House of Lords, he makes a short speech in which he informs the King of the work of the session, after which he hands the Appropriation Bill to the Clerk of the Parliaments, who goes to the bar to receive it.

Speech from the Throne.

**1280.** After the Royal Assent to this and other Bills has been signified in the usual manner (*k*), the Sovereign reads the Speech from the Throne. As soon as the Speech has been delivered, the Lord Chancellor advances to the steps of the Throne and, kneeling, receives His Majesty's directions with regard to the prorogation of Parliament. He then retires to the right of the Throne and informs both Houses that "it is His Majesty's Royal will and pleasure that this Parliament be prorogued" (to some specified future date) "to be then here holden, and this Parliament is accordingly prorogued" to the day previously mentioned.

Prorogation of Parliament by Lords Commissioners.

**1281.** When the Sovereign himself does not come to prorogue Parliament, the duty is performed by the Lord Chancellor and four other lords who are appointed commissioners by letters patent under the Great Seal. As soon as the Lords Commissioners have taken their seats on a form placed in front of the Throne, the Gentleman Usher of the Black Rod is sent to request the attendance of the Commons. Except that the Speaker does not make a speech, the subsequent proceedings are much the same as when the Sovereign is

Prorogation Act, 1867 (30 & 31 Vict. c. 81), s. 1.

(*j*) When the Sovereign prorogues Parliament in person, it is the duty of the Clerk of the Parliaments to attend him in the Robing Room and inform him of the Bills which are waiting to receive the Royal Assent. The Clerk of the Parliaments reads the short titles of the Bills and His Majesty replies that he assents to the Bills, after which the Clerk of the Parliaments withdraws and returns to the House. It is now, however, customary for Parliament to be prorogued by commission. The Sovereign has not prorogued Parliament in person since 1854; see Journals of the House of Lords, 1854, Vol. LXXXVI., p. 521.

(*k*) See pp. 723, 724, *post*.

present in person (*l*). The Royal Assent is given in the usual manner to any Bills which there may be, after which the Lord Chancellor reads the Speech from the Throne (*m*), and then "in His Majesty's name, and in obedience to his commands" prorogues Parliament (*n*).

SECT. 3. Prorogation.

**1282.** It is a recognised rule of parliamentary procedure that, in addition to bringing a session of Parliament to a conclusion, a prorogation puts an end to all business which is under the consideration of either House at the time of such prorogation (*o*). In both Houses, therefore, any proceedings either in the House or in any committee of the House lapse with the session, and any Bill which does not receive the Royal Assent before Parliament is prorogued must be reintroduced as a new Bill in a subsequent session (*p*).

Effect of prorogation upon proceedings in Parliament.

It is also a rule in both Houses that no Bill of the same substance may be introduced twice in the same session (*q*), and consequently it has occasionally been found necessary to prorogue Parliament for the special purpose of reintroducing in the new session, and passing into law, a Bill which has been thrown out in the previous session (*r*).

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(*l*) See p. 700, *ante*.

(*m*) There is not always a Speech from the Throne on the occasion of a prorogation of Parliament; see Journals of the House of Lords, 1892, Vol. CXXIV., p. 413; 1895, Vol. CXXVII., p. 273.

(*n*) The Reading Clerk used formerly to read aloud the commission for proroguing Parliament, but this is no longer the practice.

(*o*) There are two exceptions to this rule. The House of Lords has been given power to sit as a Court of Appeal whilst Parliament is prorogued or after it has been dissolved (see p. 647, *ante*), and the proceedings upon an impeachment by the Commons may be carried on from one session to another and also from one Parliament to another (see note (*p*), p. 650, *ante*).

(*p*) The proceedings on private Bills and provisional order confirmation bills (see pp. 729, 744, *et seq.*, *post*) are sometimes suspended over a prorogation or dissolution. In any such case, a special order is made by each House enabling the Bill in question to be reintroduced if a declaration is deposited to prove its identity with the Bill of the previous session. The stages through which the Bill may have already passed are then taken formally, after which its remaining stages proceed in the ordinary manner; see the case of the Leeds Corporation (Consolidation) Bill, 1904, Journals of the House of Lords, 1904, Vol. CXXXVI., p. 330; Journals of the House of Commons, 1904, Vol. CLIX., p. 403; see also the order for the suspension of private Bills and provisional order confirmation Bills in 1910, Journals of the House of Lords, 1910, Vol. CXLII., p. 307; Journals of the House of Commons, 1910, Vol. CLXV., p. 307. As to the release of the monetary deposit made by the promoters of a private Bill when the Bill is suspended, see note (*w*), p. 740, *post*. A suspending procedure similar to that already described was adopted in the case of the Port of London Bill in 1903. This was a hybrid Bill (see p. 703, *post*), and an order was made for it to be suspended after it had been reported from a joint committee; see Journals of the House of Commons, 1903, Vol. CLVIII., p. 421. In the following session the House of Commons agreed to an order renewing the Bill, but the proceedings went no further; see Journals of the House of Commons, 1904, Vol. CLIX., p. 181.

(*q*) See resolution of the House of Commons upon this subject, Journals of the House of Commons, 1610, Vol. I., p. 434; and see p. 669, *ante*.

(*r*) In 1831, Parliament was prorogued from the 20th October to the 6th December, to enable the Reform Bill, which the Lords had rejected, to be reintroduced; see May, Parliamentary Practice, 11th ed., p. 308.

SECT. 4. **Dissolution.**

### SECT. 4.—*Dissolution.*

Duration of Parliament.

**1283.** Parliament can be dissolved at any time by the Crown by the exercise of the Royal Prerogative, but its duration is limited by statute to a period of five years from the day on which by the writ of summons it was appointed to meet (*s*).

Manner of dissolving Parliament.

**1284.** Just as Parliament can be prorogued, so it can be dissolved, by the Sovereign in person, but this method of dissolution has not been adopted since the reign of George III. When it has been decided to dissolve Parliament, the usual practice is for the Sovereign to prorogue it to a definite date, and then, with the advice of the Privy Council, to issue a proclamation under the Great Seal dissolving Parliament, and announcing at the same time that he has ordered the Lord Chancellor and the Lord Chancellor of Ireland to issue out writs in due form for summoning a new Parliament.

# Part V.—The Legislative Work of Parliament.

### SECT. 1.—*Classification of Bills.*

Public and private Bills.

**1285.** All legislative proposals which are submitted to Parliament are divided into two classes and are described either as public or private Bills (*t*).

Differences in procedure on public and private Bills.

**1286.** Parliament deals with each of these two classes of Bills in a different manner. A public Bill may be introduced by any member in either House (*u*), but a private Bill may only be laid before Parliament upon a petition presented by the parties interested; and the procedure which is adopted to pass a public Bill into law is not the same in all respects as that which is adopted with regard to a private Bill.

Distinction between subject-matter dealt with in public and private Bills.

**1287.** The boundary line which divides the subjects which should be submitted to Parliament by means of a public Bill, and those which should be submitted to it by means of a private Bill is extremely difficult to draw (*v*), but, as a general rule, it may be laid down that any measure the object of which is to alter the

(*s*) Septennial Act, 1715 (1 Geo. 1, stat. 2, c. 38), as amended by the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 7.

(*t*) As to hybrid Bills, see p. 703, *post*.

(*u*) Each House has the right to originate and pass any public Bill, but Bills of supply and Bills which impose or appropriate charges on the people originate in the House of Commons (see pp. 766, 792, *post*), and Bills for restitution of honours, or of blood, should originate in the House of Lords (see p. 727, *post*) (3 Hatsell, Precedents of Parliament, ed. 1818, pp. 67—70; May, Parliamentary Practice, 11th ed., pp. 459—461). As a matter of courtesy, any Bill which concerns the constitution or privileges of one House should not originate in the other House.

(*v*) For the distinction between private and public Bills, see May, Parliamentary Practice, 11th ed., pp. 672—682; Ilbert, Legislative Methods and Forms, ed. 1901, pp. 19—35.

general law, except for local purposes or for the benefit of particular persons or bodies of persons, or which deals in any way with the public revenue, with the general administration of justice, or with the constitution or election of local governing bodies, should be introduced as a public Bill; whilst any measure which affects only private interests, or refers to a particular locality, should be introduced as a private Bill (*a*).

SECT. 1. Classification of Bills.

**1288.** There are, however, many Bills which, although introduced into Parliament as public Bills, are found to affect private interests. Bills of this kind are subject partly to the rules of procedure which govern private Bills (*b*) and partly to those which govern public Bills (*c*), and are known as hybrid Bills (*d*).

Hybrid Bills.

**1289.** Provisional order confirmation Bills (*e*) are measures introduced by various Government departments in order to obtain legislative sanction for an order, or series of orders, which they have made under powers conferred upon them by Parliament, and which they are empowered to embody in a Bill and submit to Parliament for confirmation in that form. These Bills in their progress through Parliament are treated partly as public Bills and partly as private Bills.

Provisional order confirmation Bills.

## SECT. 2.—*Drafting of Public Bills.*

**1290.** The Parliamentary Counsel to the Treasury (*f*) is directly responsible to the Treasury and receives instructions from that

Parliamentary Counsel to the Treasury.

(*a*) See p. 727, *post*.
(*b*) See pp. 729, 744, *post*.
(*c*) See pp. 704, *et seq.*, *post*.
(*d*) A Bill relating to Crown property, or a Bill introduced by the Government, even if it affects private interests, must be introduced as a public Bill and not as a private Bill, because the Crown cannot petition Parliament. Such a Bill, however, is treated as a *quasi*-public or hybrid Bill, and, in order that private interests may be protected after a Bill of this kind has been read a first time in either House, it is referred to the Examiners; see p. 740, *post*. In the House of Lords, a hybrid Bill, when it has been read a second time, is referred, if opposed, to an opposed private Bill committee (see p. 750, *post*); if unopposed, to the committee on unopposed Bills (see p. 750, *post*). The proceedings in both these committees are the same as if the measure were a private Bill. In the House of Commons, a hybrid Bill is referred to a select committee (see p. 682, *ante*). In both Houses, when a hybrid Bill has been reported by the committee to which it has been referred, it is re-committed to a committee of the whole House, and its remaining stages are the same as those of any other public Bill (see pp. 715, 718, *post*).
(*e*) See, further, pp. 727 *et seq.*, *post*.
(*f*) Before 1869, each Government department was responsible for the drafting of any public Bill which its parliamentary chief submitted to the consideration of Parliament. For a historical survey with regard to the preparation of Acts of Parliament before this date, see Ilbert, Legislative Methods and Forms, ed. 1901, pp. 77—84. In 1869, with the object of effecting a financial saving and also of securing as far as possible uniformity and accuracy in legislation, the office of Parliamentary Counsel to the Treasury was constituted. The office, which was established by Mr. Lowe, afterwards Lord Sherbrooke, was constituted temporarily by a Treasury Minute, dated 8th February, 1869. It was finally established on its present footing by a second Treasury Minute, dated 31st January, 1871. Its staff consists of two barristers, whose whole time is devoted to the work of the office, and who are paid a fixed salary. But, in

SECT. 2. Drafting of Public Bills.

department with regard to the departmental and other Bills which he will be required to draft for the Government (*g*).

Drafting a Government Bill.

**1291.** As soon as any Government department has decided to bring in any Bill, the Parliamentary Counsel receives instructions from the Treasury to put himself into communication with the Minister who will be responsible for the Bill in Parliament. When the provisions of the proposed measure have been discussed between the Minister, the Parliamentary Counsel, and the officials of the department or departments concerned, the Parliamentary Counsel prepares a draft of the Bill, which, as soon as it has been agreed upon by the Minister, is circulated to the Cabinet before it is presented to Parliament.

Duty of Parliamentary Counsel during progress of Government Bills.

**1292.** During the progress of Government Bills through the two Houses, the Parliamentary Counsel keeps careful watch over them. It is his duty to prepare explanatory notes for the information of Ministers, to draft amendments on behalf of the Government, and to point out the effect upon a Bill of amendments which are proposed from other quarters of the House (*h*).

Supervision over public Bills presented by private members.

**1293.** It is not the duty of the Parliamentary Counsel to criticise or to keep watch over public Bills which are presented by private members in either House of Parliament, unless he is especially instructed by the Treasury to do so. With regard to such Bills, there is, indeed, no kind of systematic supervision on behalf of the Government, but, as a rule, the department which would be affected if a Bill became law keeps a close watch upon the measure and opposes any of its provisions if it considers them to be unworkable or ill-advised.

## SECT. 3.—*Public Bills.*

### SUB-SECT. 1.—*Presentation and First Readiug.*

Introduction and first reading of Bill in House of Lords.

**1294.** Any lord spiritual or lord temporal has the right, any day on which the House sits, to introduce a Bill in the House of Lords

addition to the Parliamentary Counsel to the Treasury and his assistant, provision is made for the employment of additional barristers, of whom two attend regularly at the office and are paid by fees in accordance with the amount of work which they perform, and other barristers unconnected with the office are also employed if their services are required.

(*g*) The Parliamentary Counsel does not draft Scottish Bills, nor, as a rule, Irish Bills. The former are drafted in the office of the Lord Advocate, the latter in the Irish Office. Many of the principal measures referring to Ireland, owing to their political and financial importance, have been prepared in the office of the Parliamentary Counsel—*e.g.*, the Irish Church Bill, 1869; the Government of Ireland Bills, 1886 and 1893; the Local Government (Ireland) Bills, 1892 and 1898; and the Irish Land Bill, 1903. When it is intended that an English Bill should be made to apply to Scotland and Ireland, the necessary clauses are left blank and are afterwards inserted by the draftsmen employed by the Scottish and Irish Offices.

(*h*) In the House of Lords, the Parliamentary Counsel attends during the debate on a Bill at the gangway on the right of the Throne; in the House of Commons, in the seats which are provided for officials behind the Speaker's chair on the Government side of the House. As to the "sides" of the House, see p. 624, *ante*.

without either moving for leave or giving previous notice to the House of his intention to bring it in (*i*). Any Bill which is presented to the House of Lords is almost invariably read a first time without discussion as a matter of courtesy (*j*), and, therefore, as a general rule, no opposition is offered to the motion "That this Bill be read a first time?" As soon as this motion has been agreed to, an order is made for the Bill to be printed, and the lord who is in charge of the Bill either personally informs the House, or gives notice to the clerk at the table, of the day upon which he proposes to take the second reading (*k*).

Introduction of Bill in House of Commons.

**1295**. In the House of Commons, until 1902, a member might only introduce a Bill after having first obtained an order of the House made upon a motion for leave to bring in the Bill (*l*).

It is now, however, permissible (*m*) for a member, after having given notice of his intention, either to adopt the old procedure or

(*i*) A Bill may be presented in "dummy" (see note (*n*), p. 706), *post*). If a Bill is of special interest to the House or of great public importance, the lord in charge of it occasionally gives notice in the House of his intention to introduce it upon some future day. But in a case of this kind the more usual, and probably the more convenient, course would be for him to place a notice on the Minutes of Proceedings (see pp. 667, 669, *ante*), stating his intention to call attention to the law relating to the subject in question and to present a Bill.

(*j*) Standing Orders of the House of Lords (Public Business), 1902, No. 37. Debates, however, may arise before the first reading not only of a Bill which is introduced in the Lords, but also of a Bill that has been brought up from the Commons. Bills, in fact, may be opposed at any stage during their passage through the House, and there are instances upon record in which the House has refused to allow a Bill to be read even a first time.

(*k*) The name of the lord who moves the second reading of any public Bill is entered on the Journals of the House of Lords, and the name of the lord who presents any public Bill in the House, and the name of the lord who gives notice of his intention to move the second reading of any public Bill brought up from the Commons, is printed in the Minutes of Proceedings (Standing Orders of the House of Lords (Public Business), 1902, No. 37). With regard to Bills sent up from the House of Commons, the rule of the House of Lords is that unless, within twelve sitting days after a Bill has been brought from the House of Commons, notice is given by any lord of his intention to move its second reading, it shall no longer appear among the list of Bills before the House. When a Bill has been allowed to lapse in this way, no further proceedings may be taken with regard to it during the same session, unless some lord takes it up and gives eight days' notice of the second reading before the second day of August; see Standing Orders of the House of Lords (Public Business), 1902, No. 38.

(*l*) When a member has obtained the leave of the House to bring in a Bill, the Speaker asks who will prepare the measure and bring it in. The member who is responsible for the proposed Bill then states the names of the other members who act with him in bringing it in, after which he leaves his seat and goes to the bar of the House. The Speaker then calls him by name and the member walks up to the table of the House and hands the Bill to the clerk, who reads its short title. The Bill is then considered to have been received by the House.

(*m*) Standing Orders of the House of Commons (Public Business), 1911, No. 31 (2). The new procedure was copied from that of the House of Lords (see Parliamentary Debates, Fourth Series, Vol. CIII., pp. 267—294). It is now the procedure usually employed by private members when presenting Bills and by members of the Government in charge of departmental Bills of a non-contentious character.

SECT. 3. **Public Bills.**

simply to present his Bill at the table (*n*) without an order of the House (*o*).

Introduction of Bills at the commencement of public business

**1296.** An additional facility for the introduction of Bills in the House of Commons is afforded to the Government by the rule that enables a member of the Government to move for leave to bring in a Bill at the commencement of public business on Mondays, Tuesdays, Wednesdays and Thursdays, whereas a private member may only make such a motion on Tuesdays and Wednesdays (*p*).

In the event of such motion, moved at this period in the proceedings of the House, being opposed, the Speaker, if he thinks fit, may allow the member who wishes to bring in the Bill and a member who objects to its introduction to make short explanatory statements; after which, without further debate, he must put the question thereon, or the question that the debate be now adjourned.

First reading.

**1297.** A Bill which is presented in pursuance of an order of the House, or which has been brought from the House of Lords, is read a first time and ordered to be printed without amendment or debate (*q*). When a Bill is presented without an order of the House, its title is read by the clerk at the table, and it is then deemed to have been read a first time, and is ordered to be printed.

SUB-SECT. 2.—*Second Reading.*

Second reading.

**1298.** The second reading is the stage at which the House, which is considering the measure, is called upon either to affirm or to reject the principle upon which the Bill is based (*r*). In both Houses it is irregular for members to discuss the details of clauses during a second reading debate (*s*).

(*n*) A member who presents a Bill, without the leave of the House having been first obtained, does not go to the bar, but, on being called by the Speaker, brings his Bill to the table, when the short title of the measure and the day for its second reading are announced by the clerk. It is not necessary for a member when introducing a Bill to lay the actual text of the measure before the House. It is sufficient if he presents a "dummy" (obtained from the Public Bill Office in the House of Commons), upon which is written the short title of the Bill and the names of the members who support it. The number of names on the back of a Bill must not exceed twelve.

(*o*) The rules for the introduction of a Bill the main object of which is to appropriate money for the public service or to impose a charge upon the public revenue of the United Kingdom or of India are not the same as for other Bills; see pp. 766, 771, *post*.

(*p*) As to the precedence of Government business, see p. 674, *ante*.

(*q*) Standing Orders of the House of Commons (Public Business), 1911, No. 31. When a Lords' Bill reaches the House of Commons, the member who takes charge of it notifies to the clerk at the table his wish for its first reading and printing; he also fixes a day for the second reading, and the Bill is set down accordingly.

(*r*) At this stage of a public Bill, counsel may be heard at the bar in either House. At the present time such a proceeding would be unusual, but in the past the practice was not uncommon in the case of a Bill which affected private interests in a manner distinct from the general interests of the country; see May, Parliamentary Practice, 11th ed., pp. 476, 477.

(*s*) It is irregular also during a second reading debate on one Bill to discuss the principle of any other Bill which is also before the House, even if the other Bill deals with the same subject.

Procedure on second reading.

**1299.** The procedure with regard to the second reading of a Bill is practically identical in both Houses. When the order of the day for the second reading of the Bill is read by the clerk at the table, the member who is in charge of the measure moves that the Bill be now read a second time (*t*). He takes this opportunity of explaining the main provisions of the Bill and of recommending it to the House, after which a debate ensues in which the opponents of the measure have an opportunity of expressing their objections to the principles which underlie the Bill.

Methods of opposing a Bill on its second reading.

**1300.** If the motion for the second reading is not opposed, the question is put from the woolsack in the House of Lords and from the chair in the House of Commons, "That the Bill be now read a second time?" (*a*). But it is open to any member who wishes to prevent the Bill from passing into law to challenge the question by moving an amendment to the effect that the second reading shall not take place for a definite period of time, usually three months or six months. The object of an amendment of this kind is to ensure that the Bill shall not be considered further during the course of the session (*b*). If such an amendment is carried, the result is to postpone the second reading stage until after the prorogation of Parliament, and so to prevent the Bill from becoming law in the same session (*c*).

A member may also oppose the motion for the second reading of a Bill by moving, as an amendment to the original question, a resolution stating definite reasons why the House should not proceed further with the consideration of the Bill (*d*). In the

(*t*) If, when the order of the day is read, no motion is made either to read the Bill a second time or to postpone it, the order lapses and a fresh order must be made before the second reading may be taken.

(*a*) It is possible in both Houses for the opponents of a Bill to vote against the motion for the second reading. But, if such a motion is negatived, the actual effect is not to throw out the Bill, but merely to postpone its second reading; and the Bill, therefore, is still before the House; see May, Parliamentary Practice, 11th ed., p. 471. As to moving a resolution stating why the House should not proceed with the consideration of the Bill, see the text, *infra*.

(*b*) The usual method of proposing an amendment of this kind is to move to leave out the word "now" which stands in the original question: "That the Bill be now read a second time?" and to add the words "upon this day three months" or "upon this day six months," as the case may be, at the end of the question. The question proposed to the House, therefore, for its decision is "That the word 'now' stand part of the question?"

(*c*) A Bill, against the second reading of which an amendment of this nature has been carried, is removed from the list of Bills in progress in the House of Lords and from the order book in the House of Commons.

(*d*) The principle of relevancy which applies to an amendment governs any such resolution. It must relate strictly to the Bill before the House, and should be one that if carried, would give clearly the reason which had induced the House not to read the Bill a second time. Such a resolution, therefore, should declare some principle adverse to, or differing from, the principles of the Bill; or should state definite grounds upon which it would be inexpedient for the House to proceed further with the Bill; or should demand that further information with regard to the matters dealt with in the Bill should be supplied to Parliament either by means of an inquiry by a Royal Commission or by a select committee of the House, before the House is asked to pass the second reading; see May, Parliamentary Practice, 11th ed., pp. 472, 473; see

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event of such a resolution being carried (*e*), the Bill technically is not rejected, because the House has only signified its refusal to read it a second time on that particular day. The Bill, therefore, remains amongst those Bills which may still be considered by the House in which it may happen to have been introduced, and it is open to the member who is in charge of it again to bring forward a motion for its second reading. As a general rule, however, a Bill is dropped for the session when an adverse resolution of this kind is successful, unless the resolution refers merely to some matter to which effect can be given by means of an amendment in the Bill at a later stage without frustrating the main principle of the measure.

SUB-SECT. 3.—*Committee Stage.*

(i.) *In the House of Lords.*

Commitment.

**1301.** In the House of Lords, as soon as a public Bill has been read a second time, the ordinary practice is to commit it to a committee of the whole House (*f*), but occasionally, if for any reason it is desired to expedite the passage of a Bill through the House, the motion for its commitment is negatived and an order is made for the third reading of the Bill, usually upon the next day the House sits for public business.

If it is considered desirable in order to hear evidence, or for any other reason, a public Bill may also be referred to a select committee of the House or to a joint committee of the two Houses before it is considered in committee of the whole House (*g*).

Notice of day for committee of the whole House.

**1302.** When a Bill has been committed to a committee of the whole House, unless the day on which the committee is to meet is fixed by the order of the House appointing the committee, it is customary for the lord who is in charge of the Bill to give notice in the Minutes of Proceedings of the day upon which he proposes to

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Report from the Select Committee of the House of Commons on Public and Private Business of the House, 1837, House of Commons Paper (517).

(*e*) In the House of Lords, a resolution protesting against the second reading of a Bill may be moved before the motion is put for the second reading of the Bill (*e.g.*, the resolution moved by the Duke of Richmond protesting against the Army Regulation Bill, on the 31st July, 1871 ; Journals of the House of Lords, 1871, Vol. CIII., p. 609) ; in the House of Commons, it would be out of order to move a resolution of this kind, except as an amendment to the question for the second reading of the Bill.

(*f*) No two stages of a Bill may be taken the same day in the House of Lords (Standing Orders of the House of Lords (Public Business), 1902, No. 39). A motion must be made and carried, therefore, suspending this standing order whenever it is desired to take the second reading and committee stages, or indeed any two stages, of a Bill on the same day. Notice must be given in the orders of the day by a lord who proposes to ask the permission of the House to suspend any standing orders. As to such notices, see p. 632, *ante*. In the House of Commons there is no standing order to prevent all the stages of a Bill being taken the same day. For an instance of a Bill being carried through both Houses in a single day, see the proceedings on the Explosive Substances Bill in 1883, Journals of the House of Lords, 1883, Vol. CXV., p. 76 ; Journals of the House of Commons, 1883, Vol. CXXXVIII., p. 126.

(*g*) For the procedure in a select or joint committee on a public Bill, see pp. 714, 715, *post*. As to select committees of the House of Lords, see pp. 637, 638, *ante*.

take the committee stage. This practice is essential for the convenience of the House, for it enables peers who are anxious to amend the Bill to prepare their amendments before the appointed day, and it gives to the supporters of the measure and the departments of the Government which may be interested in its provisions an opportunity of seeing the amendments, which are printed and circulated, before the House actually goes into committee (*h*).

Motion for going into committee of the whole House.

**1303.** Upon the order of the day being read for the House to be put into committee, the lord who is in charge of the measure (*i*) moves, "That the House do now resolve itself into a committee upon the Bill?" (*k*). This motion is then put from the woolsack, but, before it is agreed to by the House, it is possible for any lord to move that an instruction (*l*) be given to the committee, or to bring forward an amendment either proposing to put off the committee for a definite period of time, or asking the House to agree to a resolution stating the grounds upon which it is unwilling to resolve itself into committee. If an amendment or a resolution of this character is carried, the order for the House to be put into committee is discharged, and no further progress can be made with the Bill until a fresh order is obtained for the House to be put into committee.

Procedure in committee of the whole House.

**1304.** As soon as the motion to go into committee has been agreed to by the House, the Lord Chancellor leaves the woolsack, and the Chairman of Committees takes his seat at the table opposite to the clerks, and presides over the committee. The title and preamble of the Bill, if there is one, are usually postponed (*m*), and

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(*h*) Amendments may be handed in at the table of the House, or sent to the Clerk of the Parliaments, as soon as a Bill has been read a second time. Each amendment, or series of amendments, proposed by any lord is printed and circulated as soon as possible after it has been received. If the amendments to a Bill are at all numerous, they are arranged or marshalled in order in the office of the Clerk of Public Bills before the committee stage is taken. There are certain definite rules with regard to the order in which amendments are taken. An amendment to insert words when it occurs in the same place in a clause or schedule where there is an amendment to leave out words takes precedence. All amendments to a sub-section, or to a clause, are considered before an amendment to leave out the entire sub-section, or the clause itself, is taken into consideration. Amendments to a proposed new clause are always considered before the clause itself is proposed to the committee. When two lords propose a similar amendment, the lord who first handed in his amendment has precedence in moving the amendment.

(*i*) In the event of the absence of the lord in whose name an amendment stands, it is permissible for some other lord to move the amendment upon his behalf.

(*k*) Before the House agrees to this motion, it is possible for any lord to initiate a discussion of the same character as a debate on second reading, a practice which is sometimes resorted to in order to enable lords who have not had an opportunity of speaking at the second reading stage to state their views with regard to the principle of the measure more fully than they would be able to do during the discussion in committee.

(*l*) The object in moving that an instruction be given to the committee is to enable the committee to do something which otherwise it would not have the power to do, *e.g.*, to consolidate two Bills into one, or to divide one Bill into two, or to extend the scope of a Bill which only refers to England, to Scotland or to Ireland; see Companion to the Standing Orders of the House of Lords on Public Business, pp. 61, 62.

(*m*) The Chairman of Committees puts the two questions separately: "That

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each clause is then considered separately. As soon as the clauses have been disposed of, the schedules to the Bill, if there are any, are considered in the same manner, after which the Chairman of Committees puts the questions, "That this be the preamble of the Bill?" and "That this be the title of the Bill?" (*n*) If these questions are agreed to by the committee, he puts the further questions, "That I report this Bill without amendment [or with amendments] to the House?" and "That this House be resumed?" If these questions are agreed to, the Lord Chancellor resumes his seat on the woolsack, and the Chairman of Committees, standing at the table on the Government side of the House, reports the Bill to the House, either with or without amendments, as the case may be.

Motions on the House being resumed.

**1305.** If the Bill has not been amended in committee, the lord who is in charge of it moves that the report of the committee "be now received," and at the same time usually fixes a day for the third reading (*o*). If, on the contrary, the Bill has been amended in committee, an order is made for it to be printed as amended, and the report stage is fixed for a subsequent day.

(ii.) *In the House of Commons.*

Commitment.

**1306.** In the House of Commons, as soon as a public Bill has been read a second time, it may be committed either to a committee of the whole House (*p*), or to one of the standing committees (*q*), or to a select committee (*r*), or to a joint committee of the two Houses (*s*). Unless, however, the House on motion to be decided without amendment or debate, otherwise order (*t*), every public Bill, except an Appropriation Bill, a Bill to impose taxes, a Consolidated Fund Bill, or a Bill to confirm a provisional order, stands committed to one or other of the standing committees as soon as it has been read a second time (*u*).

the title of the Bill be postponed?" and "That the preamble of the Bill be postponed?" It is open, therefore, to the House to amend or to negative both motions, but such a procedure would be unusual in the House of Lords. The ordinary practice is to amend the title of a Bill, if necessary, after the consideration of the clauses is concluded. As a rule, at the present time, there is no preamble to a public Bill. For the conduct of business in committee of the whole House on a Bill, see pp. 713 *et seq.*, *post*.

(*n*) If the committee is unable to conclude the consideration of a Bill in one sitting, the House is resumed and the Chairman of Committees reports the progress that has been made, and an order is made for the House to be again in committee either on the following or some subsequent day. "Progress" is the term applied in both Houses to the stage occupied by the consideration of a Bill in committee.

(*o*) As to the third reading, see p. 718, *post*.

(*p*) For the conduct of business in committee of the whole House, see pp. 713 *et seq.*, *post*.

(*q*) As to standing committees, see p. 711, *post*.

(*r*) As to select committees, see pp. 682 *et seq.*, *ante*, and p. 714, *post*.

(*s*) As to such joint committees, see pp. 639, 640, *ante*. As to procedure therein, see p. 715, *post*.

(*t*) Standing Orders of the House of Commons (Public Business), 1911, No. 46. A motion of this kind, for which notice is not required, must be made immediately after the second reading of the Bill, and may be decided after the time has expired for opposed business.

(*u*) A member who is in charge of a Bill may, if he thinks fit, move that some

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Constitution of standing committees.

**1307.** Four standing committees for the consideration of public Bills are appointed every session (*r*), of which three consist of not less than sixty nor more than eighty members nominated by the Committee of Selection (*w*). When nominating such members, the Committee of Selection must have regard to the classes of Bills referred to the committees, to the composition of the House, and to the qualifications of the members selected (*x*).

The fourth standing committee is appointed for the consideration of Bills which refer exclusively to Scotland, and is composed of all the members who represent Scottish constituencies, together with not more than fifteen other members who are nominated by the Committee of Selection to serve on the committee in respect of any Bill (*a*).

Panel of chairmen of standing committees.

**1308.** The Committee of Selection also nominates a panel of not less than four nor more than eight members to act as chairmen of the standing committees, and it is the duty of this panel to appoint a chairman of each standing committee (*b*).

Distribution of Bills.

**1309.** Bills, other than Scottish Bills, are distributed amongst the standing committees by the Speaker (*c*).

Procedure in standing committees.

**1310.** The procedure which is adopted in the standing committees in most respects is the same as that in select committees (*d*), but the chairman of a standing committee is given the same power to check irrelevance and repetition in debate as is allowed to the Chairman in committee of the whole House (*e*), and debate may be closured if not less than twenty members of the committee vote in the majority in support of a motion for the closure (*f*). In all but one of the standing committees, Bills which have been introduced by the Government have precedence of other Bills (*g*).

of its provisions be submitted to a standing committee and the remainder to a committee of the whole House (Standing Orders of the House of Commons (Public Business, 1911), No. 46 (2)).

(*v*) *Ibid.*, No. 47 (1). The quorum of a standing committee is twenty (*ibid.*).

(*w*) *Ibid.*, No. 47 (2).

(*x*) *Ibid.*, No. 48. The Committee of Selection has power to discharge members of a standing committee for non-attendance, and to appoint others in their place. It also has power to add not more than fifteen members to serve on a standing committee (except the standing committee on Scottish Bills) in respect of any Bill referred to such committee.

(*a*) *Ibid.*, No. 47 (2). If a Bill relates entirely to Wales and Monmouthshire, the standing committee which considers it must comprise all the members sitting for constituencies in Wales and Monmouthshire; see *ibid.*, No. 48.

(*b*) *Ibid.*, No. 49. The quorum of the chairmen's panel is three.

(*c*) *Ibid.*, No. 47 (3).

(*d*) *Ibid.*, No. 47 (1). Strangers are admitted to standing committees, but they may be ordered to withdraw. Standing committees may not continue their sittings after four o'clock without an order of the House (*ibid.*). As to select committees, see pp. 682, 683, *ante*.

(*e*) The power to select amendments which is exercised by the Chairman of Ways and Means, under Standing Orders of the House of Commons (Public Business), 1911, No. 26 (3), is not conferred on the chairman of a standing committee; see p. 671, *ante*.

(*f*) Standing Orders of the House of Commons (Public Business) 1911, No. 47 (5).

(*g*) *Ibid.*, No. 47

SECT. 3. **Public Bills.**

**Powers of standing committees with regard to financial provisions.**

**1311.** A standing committee may consider any clause or provision in a Bill which imposes a financial charge upon the people, but no such clause or provision may be taken into consideration by the standing committee on the Bill, unless and until a resolution of a committee of the whole House authorising the proposed expenditure has been agreed to by the House (*h*).

**Committee of the whole House.**

**1312.** When the order of the day is read for the House to go into committee on a Bill which has been committed to a committee of the whole House and the Speaker has left the chair (*i*), the Chairman of Ways and Means (*j*) takes his seat at the table in the place usually occupied by the Clerk of the House (*k*), and the consideration of the Bill is begun forthwith. The title and preamble stand postponed, and the clauses and schedules of the Bill are then considered (*l*). When the committee is unable to conclude the consideration of a Bill before the hour arrives for the interruption of business (*m*), the Chairman leaves the chair, without question put, to report progress. The Speaker then returns to his chair, and the Chairman informs him that the committee have made progress with the Bill and asks for leave to sit again (*n*). The member who is in charge of the Bill, in reply to a question from the Speaker, then fixes the day when the committee is to sit again. On the day appointed for the resumption of the consideration of a Bill in committee of the whole House, the Speaker leaves the chair without question put as soon as the order of the day has been read.

**Conclusion of consideration of Bill in committee.**

**1313.** When the consideration of a Bill in committee of the whole House has been concluded, the Chairman puts the question, "That I do report this Bill without amendment [or with amendments] to the House?" As soon as this question has been decided, he leaves

(*h*) See pp. 766 *et seq.*, *post*.

(*i*) For the procedure in the event of a motion being made for an instruction to be given to the committee, see p. 666, *ante*.

(*j*) See p. 666, *ante*.

(*k*) When the Speaker leaves the chair, and the House goes into committee, the Serjeant-at-Arms removes the mace from the table of the House and places it on rests which are attached to the front of the table facing the bar.

(*l*) See pp. 713, 714, *post*. Amendments of which notice has been given are printed on the order paper of the House, and are arranged by the officers of the House in the order in which they ought to be taken; when two or more amendments raise the same question at the same place in a clause, precedence is given to the amendment which has been first handed in, but, if the member who is in charge of the Bill is responsible for one of such amendments, he is given precedence of the other members. Amendments may be handed in as soon as a Bill has been read a second time.

(*m*) As to interruption of business, see pp. 673, 674, *ante*.

(*n*) If it is wished to stop the consideration of a Bill in committee of the whole House, the usual practice adopted is to bring forward a motion to report progress. If such a motion is carried, the Chairman leaves the chair and the House is resumed in the manner described in the text, *supra*. When for any reason further progress with a Bill is not desired, a motion may be made that the Chairman do leave the chair. If such a motion is carried, the Chairman forthwith leaves the chair and does not report progress. The Bill then becomes a dropped order, and no longer appears on the Order Paper of the House; see May, Parliamentary Practice, 11th ed., p. 390.

the chair without question put (*o*) and reports the Bill to the Speaker, who has meanwhile returned to his chair (*p*).

Motions in House subsequent to report of Bill from committee of the whole House.

**1314.** If a Bill is reported from the committee of the whole House without amendment, an order is made for it to be read the third time either forthwith or on some subsequent day. If a Bill has been amended by the committee, the amendments may be considered immediately after the report has been received, but, as a general rule, a future day for the consideration of such amendments is fixed by the member who is in charge of the Bill, and an order is made by the House for the Bill to be reprinted as amended in committee of the whole House.

(iii.) *Conduct of Business in Committee of the whole House.*

Procedure both Houses.

**1315.** The actual procedure with regard to the consideration of the clauses and schedules of a Bill in committee of the whole House is practically the same in both Houses (*q*), except that in the House of Commons the practice with regard to amendments is more precisely defined than it is in the House of Lords, and that the Chairman is entrusted with powers to control the proceedings of the committee which are not possessed by the Chairman of Committees in the other House (*r*).

Amendments to clauses.

**1316.** In both Houses, the Chairman (*s*) calls the number of each clause in order, and, if no amendment is moved to any clause, he puts the question "That this clause stand part of the Bill?" If it is proposed to amend a clause, he calls upon the member by name who has given notice of, or who has expressed his intention of, moving an amendment. As soon as the member who has been thus called upon has moved his amendment, the Chairman reads out the terms of the proposed amendment (*t*) to the committee and proposes the question thereon. It is then permissible for any other member to move an amendment to this amendment. In such a case, the original amendment is treated as if it were the original question, and any amendment to it must be decided before the amendment to the clause itself is proposed to the committee (*a*).

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(*o*) Standing Orders of the House of Commons (Public Business), 1911, No. 52.

(*p*) *I bid.*, No. 39.

(*q*) In the House of Commons, it used to be the practice in former times to read a Bill a first and a second time in committee of the whole House. This practice is no longer in force; see *ibid.*, No. 36.

(*r*) The Chairman, in committee of the whole House in the Commons, is not only entrusted with the duty of maintaining order in the debates of the committee, but he is also empowered to decide whether or not amendments are in order, to determine the place in a Bill where an amendment ought to be moved, and to refuse to propose to the committee any amendment which, in his opinion, is frivolous. As to the Chairman's power to select amendments, see p. 671, *ante*.

(*s*) In the House of Commons, in committee of the whole House, the preamble stands postponed without question put; see Standing Orders of the House of Commons (Public Business), 1911, No. 35, and p. 712, *ante*.

(*t*) In neither House is it absolutely necessary to give notice of amendments, but, in the case of important amendments, it is obviously for the convenience of the committee that members should give notice as soon as possible of any alterations which they are anxious to make in a Bill.

(*a*) The method in which the Chairman puts the question to the committee

SECT. 3. Public Bills.

Consideration of clauses as amended.

**1317.** When all the amendments to a clause have been disposed of, the question is put from the chair "That this clause, as amended, stand part of the Bill?"(*b*). Any subsequent consideration of a clause which has been agreed to by the committee is out of order, but it is possible, upon motion, for the committee to postpone the consideration of a clause (*c*).

Consideration of new clauses and new schedules.

**1318.** In the House of Lords, a new clause or a new schedule is treated as an ordinary amendment, and may be proposed when the committee reaches the place in the Bill where it is desired to insert it; in the House of Commons, new clauses and schedules are proposed and taken into consideration after the clauses and schedules respectively in the Bill as it is printed have been disposed of by the committee

SUB-SECT. 4.—*Consideration of a Public Bill by a Select Committee or by a Joint Committee of the two Houses.*

Commitment of a Bill to a select or joint committee.

**1319.** In either House, a public Bill, after it has been read a second time (*e*), may be committed to a select committee, or to a

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depends upon the nature of the amendment which is proposed. Before putting any question to the committee, the Chairman states the amendment. If the amendment is to leave out certain words which stand in the clause, the question is "That the words proposed to be left out [or, if the rejection of all the words contained in the proposed amendment would prejudice the moving of a subsequent amendment, that certain specified words], stand part of the clause?" If the amendment is to insert words, the question is "That the proposed words be there inserted?" If the amendment is to leave out words in order to insert other words, two questions may be necessary. In such a case, the first question proposed by the Chairman is "That the words proposed to be left out stand part of the clause?" If this is agreed to, no further question is needed, as the committee has decided that the words in the Bill shall stand; but if the question is negatived, a further question is necessary, "That those words [*i.e.*, the words proposed by the amendment] be there inserted?"

(*b*) In both Houses there are certain rules with regard to amendments. An amendment must be relevant to the subject-matter of the Bill and of the clause to which it is proposed. An amendment must not be inconsistent with a previous decision given by the committee on the same question. An amendment must not be such as to make the clause in which it is intended to insert it unintelligible, nor be of a frivolous nature. For other amendments which are irregular, see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed., pp. 151, 152. In both Houses, when once an amendment has been moved, it may not be withdrawn except by leave of the committee.

(*c*) In the House of Commons, a clause may not be postponed if it has been amended. There is no such rule in the House of Lords. For procedure as to postponed clauses generally, see May, Parliamentary Practice, 11th ed., p. 488.

(*d*) In the House of Commons, when a new clause is proposed, its principle must be affirmed before its details are considered by the committee. The Chairman, therefore, puts the question "That this clause be read a second time?" If this is agreed to, amendments may be moved to the clause in the ordinary way. As soon as the amendments to the clause have been disposed of by the committee, the Chairman puts the question "That this clause [*or* this clause as amended] be added to the Bill?" The same procedure is adopted with regard to new schedules as with new clauses.

(*e*) A Bill which has only been read a first time has sometimes been referred to a select committee. In such a case, the Bill is treated as a document, upon which the committee to which it is referred is ordered to report; see Order of the House of Commons, Journals of the House of Commons, 1899, Vol. CLIV., pp. 151, 152.

joint committee of the two Houses, if a motion to that effect is made and agreed to by the House.

Nomination of select and joint committees.

**1320.** A select committee or a joint committee to consider a Bill is nominated by each House in the same way as a select committee or a joint committee nominated to inquire into a public matter, and the rules which regulate its proceedings are the same (*f*).

Procedure in committee.

**1321.** A select committee or a joint committee considers the Bill which has been referred to it clause by clause (*g*) in the same manner as a committee of the whole House (*h*), and then reports it, with or without amendments, to the House, or to both Houses, as the case may be (*i*); but it is open to any select or joint committee, if it wishes to express its views upon the matters dealt with in the Bill, also to present a special report, which is drawn up and agreed to by the committee in the same way as a report by a select committee or a joint committee on a public matter (*j*).

Procedure on report of a Bill from a select or joint committee.

**1322.** When a public Bill has been reported from a select committee or a joint committee, it is re-committed to a committee of the whole House (*k*). The Bill, as amended, is then considered, and further amendments may be made.

SUB-SECT. 5.—*Re-commitment.*

Re-commitment of Bill.

**1323.** In both Houses, it is permissible, on motion made, to re-commit a public Bill to a committee of the whole House (*l*). Such a form of procedure is adopted when it is considered for any reason that the provisions of a Bill require further amendment or investigation than they have already received (*m*).

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(*f*) See pp. 637, 639, 640, 682, *ante*.

(*g*) In a joint committee on a public Bill, the procedure of the House of Lords is adopted as in other joint committees; see pp. 638, 640, *ante*.

(*h*) See p. 713, *ante*. In considering clauses in a Bill which involve charges on the public funds, a select committee of the House of Commons is governed by precisely the same limitations as a standing committee of that House; see p. 712, *ante*.

(*i*) In the House of Lords, the decision of a joint committee with regard to any Bill which has been referred to it is reported to the House, whether the Bill is in the House of Lords or is in the other House; but, when a Bill which has been considered by a joint committee is not in the House of Commons, the Bill is not reported from the committee to that House, but a report is presented "in respect of the Bill" pending in the House of Lords.

(*j*) See pp. 639, 640, 683, *ante*.

(*k*) In the House of Lords, a motion is made in committee of the whole House to consider the amendments which have been made by a select committee or a joint committee, and it is then permissible for a member to move an amendment either postponing the report stage of the Bill for a definite period of time, or advancing some reason which should influence the House not to proceed any further with the measure.

(*l*) In the House of Lords, after a Bill has been considered in a committee of the whole House, it may be referred to a select committee. In such a case, the Bill, on being reported by the select committee, must be re-committed to a committee of the whole House. In both Houses a Bill which has been reported from a select committee may be re-committed to the same committee before it is considered in committee of the whole House.

(*m*) In the House of Commons, it is possible to re-commit certain provisions

SECT. 3. **Public Bills.**

Procedure for and on re-commitment.

**1324.** A motion for the re-committment of a Bill may be made in both Houses, either when it stands for consideration as amended in committee of the whole House, or when the motion is made for it to be read a third time (*n*). In both Houses the procedure on the re-commitment of a Bill is the same as in committee of the whole House (*o*). If further amendments are made at this stage, they must be reported to the House, and the Bill is considered on report before it can be read a third time.

SUB-SECT. 6.—*Report Stage.*

Consideration of Bill on report.

**1325.** In both Houses, when a public Bill has been amended in committee of the whole House, it must be considered by the House before it is read a third time (*p*), and in the House of Commons any Bill, which has been referred to one or other of the standing committees, instead of being committed to a committee of the whole House, must receive the consideration of the House before its third reading, whether it has been amended or not (*q*).

Procedure in House of Lords.

**1326.** In the House of Lords, on the day which has been previously appointed by the House for the report of amendments,

in a Bill and not the whole measure. In such a case, the committee of the whole House to which such provisions are committed, or the select committee to which they are referred, must only take into consideration the provisions which are submitted to them, and not the Bill as a whole.

(*n*) In the House of Lords, if it is thought desirable that a Bill should be materially modified before it is considered in detail in committee of the whole House, the practice is sometimes adopted of not amending it on the committee stage. In such a case, the necessary amendments are made immediately after the report from the committee has been received by the House, and the Bill is then re-committed to a committee of the whole House; see Companion to the Standing Orders of the House of Lords on Public Business, pp. 66, 67. In the House of Commons, the practice is for the House to go into committee *pro formâ* when such amendments are made, and the Bill, on its being reported, is re-committed. For the procedure on the report stage, see the text, *infra*, and pp. 717, 718, *post*, and on third reading, see pp. 718, 719, *post*.

(*o*) See p. 713, *ante*.

(*p*) In both Houses, on the report stage of a Bill which has been amended in committee of the whole House, a member is only allowed to speak once on an amendment. In the House of Commons, however, this rule has been relaxed in the case of Bills which have been considered in one of the standing committees. On the report stage of any such Bill the member who is in charge of the Bill may speak more than once, and the same permission is accorded to a member who moves a new clause or amendment in respect of the new clause or amendment; see Standing Orders of the House of Commons (Public Business), 1911, No. 46 (3).

(*q*) In the House of Lords, until recently, every public Bill, after passing through committee of the whole House, was re-committed to a standing committee which was appointed at the beginning of each session. In 1910, however, a select committee was appointed by the House to inquire into this practice, and it reported that it was not expedient to continue the standing committee; see Report from the Select Committee on the Standing Orders relating to the Standing Committee, 1910, House of Lords Paper (56). A motion to carry into effect the report of the select committee was agreed to by the House, and Standing Orders of the House of Lords (Public Business), 1902, Nos. 45—53, which deal with the appointment and functions of the standing committee, were accordingly vacated; see Journals of the House of Lords, 1910, Vol. CXLII., p. 159.

the lord who is in charge of the Bill moves "That this report be now received?" The question is then put by the Lord Chancellor from the woolsack. As soon as this question has been agreed to, it is possible for any lord to move a new clause or other amendment to the Bill (*r*). Such amendments may be handed in as soon as the Bill has been agreed to in committee of the whole House, and they are printed and circulated in the same way as amendments moved on the committee stage (*s*).

On the report stage, the Bill is considered as a whole, and not clause by clause. The Lord Chancellor, therefore, does not propose any question to the House when the consideration of each clause is concluded, and when he puts the question on any amendment by which it is proposed to leave out certain words, he expresses it in the form "That these words stand part of the Bill?"

Procedure in House of Commons.

**1327.** In the House of Commons, as soon as the order of the day for the consideration of a Bill which has been amended in committee of the whole House, or which has been reported with, or without, amendments from one or other of the standing committees, has been read, the House proceeds to consider the same without question put (*t*). The Bill as a whole is considered by the House on the report stage. It is permissible, therefore, for members to propose new clauses or amendments to the Bill as it is laid before them.

Rules and restrictions as to insertion of ments on report.

**1328.** There are certain restrictions, however, with regard to such clauses and amendments, in addition to the general rules with regard to amendments which have already been described (*u*). No new clause may be proposed unless notice of it has been given (*v*), and even then it may only be proposed by the member in whose name it stands. No amendment of any kind may be proposed on report which could not have been proposed in committee of the whole House without instruction from the House having been first obtained (*w*), and no amendment may be submitted to the consideration of the House which would create a charge of any kind on the people (*x*).

(*r*) If such amendments are of no great importance, or merely of a drafting character, they are usually proposed to the House *en bloc* in one question: "That these amendments be agreed to?" Frequently, however, amendments which it is proposed to introduce at this stage of the Bill are numerous and important; in such cases they are dealt with *seriatim*.

(*s*) See note (*h*), p. 709, *ante*.

(*t*) Unless the member who is in charge of the Bill proposes to postpone its consideration, or a motion is made to re-commit it; see Standing Orders of the House of Commons (Public Business), 1911, Nos. 40, 50.

(*u*) See pp. 709, 713, *ante*.

(*v*) Standing Orders of the House of Commons (Public Business), 1911, No. 38.

(*w*) Prior to 1888, amendments which were wholly irrelevant in their character were often moved on the report stage of a Bill. In that year Standing Order of the House of Commons (Public Business), 1911, No. 41, was passed to prevent this practice; see May, Parliamentary Practice, 11th ed., p. 495.

(*x*) But an amendment to leave out any such charge contained in the Bill would be in order.

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On the report stage also, the procedure with regard to the consideration of amendments is not the same as in committee of the whole House. New clauses and new schedules are not postponed until the clauses and schedules in the Bill have been considered, but are proposed to the House before any amendments may be proposed to the clauses and schedules as they appear in the Bill (*a*). A motion to postpone the consideration of a clause is not permissible on the report stage (*b*). If an amendment is proposed to leave out the preamble of the Bill, or a clause or schedule, the Speaker puts the question "That the preamble [or the clause or schedule] stand part of the Bill?" (*c*).

Conclusion of in either House.

**1329.** As soon as the report stage of a Bill is concluded in either House, an order is made for it to be read a third time, and, if it is considered necessary, a further order is made for the Bill to be reprinted.

### SUB-SECT. 7.—*Third Reading.*

Procedure in House of Lords.

**1330.** In the House of Lords, upon the order of the day for the third reading being read, the lord who is in charge of the Bill moves "That the Bill be now read a third time" (*d*). If this motion is unopposed, the Lord Chancellor proposes the question "That the Bill be now read a third time?" and amendments may then be submitted to the consideration of the House (*e*). As soon as such amendments, if any, have been disposed of, any amendments which may be necessary to avoid infringing the privileges of the House of Commons with regard to the control of public money (*f*) are laid before the House by the Lord Chancellor, who does not state them, but simply proposes the question "That the privilege amendment [or amendments] be

(*a*) Compare p. 714, *ante*. In the consideration of new clauses, priority is given to those proposed by the member who is in charge of the Bill. A new clause is read a first time without question put, and the member who proposes it usually explains its provisions at this stage in the proceedings. The question is then proposed from the chair "That the clause be read a second time?" Opponents of the clause then state their objections to it, and the member who has proposed it has a further opportunity of addressing the House. If the second reading of the clause is agreed to, amendments may be proposed. When the consideration of the clause is concluded, the Speaker puts the question, "That this clause [or this clause as amended] be added to the Bill?"; see May, Parliamentary Practice, 11th ed., p. 496.

(*b*) Compare note (*c*), p. 714, *ante*.

(*c*) Or, if necessary in order to save later amendments, the question is framed differently, and only the words of the amendment down to the first word of the next amendment are put to the House.

(*d*) When this question is proposed to the House, and also when the question "That the Bill do pass?" (see p. 719, *post*) is proposed, it is permissible for any lord either to move an amendment of the same kind as has been described on previous stages of the Bill for the purpose of postponing its consideration by the House (see pp. 707, 716, *ante*), or to move the rejection of the measure.

(*e*) Notice should be given of amendments to be moved on third reading. They should be handed in at the table or sent to the Clerk of the Parliaments as soon as possible after the report stage is concluded. They are then printed and circulated in the manner which has already been described; see note (*a*), p. 709, *ante*; and see p. 632, *ante*.

(*f*) See p. 792, *post*.

agreed to?" When this motion has been agreed to, the lord who is in charge of the Bill then moves "That the Bill do pass?" (*g*).

Bill sent to House of Commons.

**1331.** Unless a Bill is heavily amended on third reading, it is unusual for the House to order it to be reprinted for circulation (*h*). A new House copy of the Bill in its final shape is prepared in the Public Bill Office, which is printed and is then signed and indorsed with the words "*Soit baillé aux Communes*" by the Clerk of the Parliaments, who then carries it down to the bar of the House of Commons with a message from the Lords stating that they have passed the Bill and desire the concurrence of the other House to it.

Procedure in House of Commons.

**1332.** In the House of Commons, a motion may be made by the member who is in charge of the Bill for the third reading of any public Bill, either forthwith or on some subsequent day, as soon as the consideration of amendments on report has been completed (*i*).

As soon as the motion for the third reading of a Bill has been made, the Speaker proposes the question "That the Bill be now read the third time?" (*j*). When important Bills are under consideration, lengthy debates usually take place before this question is voted upon by the House, but no amendments, except of a verbal character, may be made to a Bill at this stage (*k*).

Bill sent to House of Lords.

**1333.** When the third reading of a Bill has been agreed to by the House, a new House copy of the Bill is prepared in the Public Bill Office. When this has been printed, it is signed and indorsed with the words "*Soit baillé aux Seigneurs*" by the Clerk of the House, who then carries it to the bar of the House of Lords, with a

(*g*) This motion has occasionally been postponed until a later day, and it has also been negatived by the House. Bills may be withdrawn by the lords who have presented them, even after they have been read a third time, provided that the leave of the House has been obtained. Amendments are also made occasionally to Bills by order of the House after the third reading has been agreed to.

(*h*) In 1883 an order was made that Bills amended on third reading should always be reprinted as amended. This order, however, is no longer observed.

(*i*) When a Bill has not been amended in committee of the whole House, the third reading may be taken immediately after the report of the committee has been received. The facilities for taking more than one stage of a Bill on one day are not extended to Bills originating on the agreement by the House to a resolution reported from a committee of the whole House based upon the recommendation of the Crown.

(*j*) Upon this question, a member may move an amendment of the same nature as it is permissible to move on the second reading (see p. 707, *ante*), either postponing the third reading for a definite period of time or stating reasons which should induce the House to refuse to read the Bill the third time. It is also permissible at this stage for a member to propose that the Bill, or some of its provisions, be re-committed to a committee of the whole House; see p. 716, *ante*. The question "That this Bill do pass?" which is proposed in the House of Lords after the third reading has been agreed to (see the text, *supra*), is not put in the House of Commons.

(*k*) Standing Orders of the House of Commons (Public Business), 1911, No. 42. After a Bill has been read the third time, the title may be amended if any alteration in it is required to make it conform with the provisions of the Bill; see Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed., p. 162.

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message from the Commons stating that they have passed the Bill and desire the concurrence of the Lords to it.

SUB-SECT. 8.—*Consideration of Bills by the Second House.*

Stages of a second House.

**1334.** In order that a Bill passed by one House may secure the concurrence of the other House, it must pass through the same stages in the second House as it has already passed through in the House in which it originated, and is similarly open to amendment.

Bills not amended by second House.

**1335.** If the House of Commons does not amend a Bill which has been sent down to it by the House of Lords, the Bill is returned to the Lords after it has been indorsed by the Clerk of the House of Commons with the words "*A ceste Bille les Communes sont assentus*," and it is then ready to receive the Royal Assent. If the House of Lords makes no amendment to a Commons Bill, a message is sent to the House of Commons informing that House that the Lords have agreed to the Bill without amendment, and the Bill itself, unless it is a Bill for granting aids and supplies to the Crown (*l*), is retained in the House of Lords and added to those which are waiting to receive the Royal Assent.

Bills amended in second House.

**1336.** If a Lords Bill is amended by the House of Commons, it is returned to the House of Lords after it has been indorsed by the Clerk of the House of Commons with the words "*A ceste Bille avecque des amendemens* [or *avecque une amendement*] *les Communes sont assentus.*" In the same way, a Commons Bill when it is amended by the Lords, is returned to the House of Commons after it has been indorsed by the Clerk of the Parliaments with the words "*A ceste Bill avecque des amendemens* [or *avecque une amendement*] *les Seigneurs sont assentus.*"

Consideration by first House of amendments to a Bill made by second House.

**1337.** The procedure in each House of Parliament with regard to the consideration of amendments which have been made in one of its Bills by the other House is practically the same. If the amendments are not of a material character, a motion may be made for them to be considered forthwith without notice (*m*), but, if the amendments are material, the more usual practice is for the House which is considering the amendments to order them to be printed, and then to fix a day for their consideration (*n*). If the amendments are agreed to, a message is sent by the House in which the Bill originated to inform the other House that it

(*l*) For the procedure with regard to such Bills, see p. 775, *post*.

(*m*) In both Houses, a motion for the consideration of amendments made by the other House is usually made by the member who is in charge of the Bill.

(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 43. There is no standing order on the subject in the House of Lords, but the almost invariable practice adopted by the House is not to consider the Commons' amendments to one of its Bills the day they are received. In the House of Commons, if the Speaker is satisfied that the amendments which have been made by the Lords are not material, he will put the question upon a motion for their consideration, made without notice, before questions to members are taken (see p. 676, *ante*), or before the commencement or at the close of public business the day the amended Bill is received or a subsequent day.

accepts the amendments (*o*). The Bill is then ready to receive the Royal Assent.

If, however, any of the amendments are of a contentious character, and such that the House in which the Bill originated is not prepared to accept, the procedure may become more complicated (*p*). In such a case, when the order of the day is read in either House of Parliament for the consideration of the amendments which have been made in any Bill by the other House, a motion is made for their consideration to which an amendment may be proposed that the consideration of such amendments be postponed "until this day three months" or "until this day six months," or that the amendments be laid aside (*q*). If an amendment of this nature is agreed to, no further proceedings are taken on the Bill, which accordingly drops for the session. But, if the original question is agreed to, the amendments are considered in turn, and motions may be made in respect of each amendment either to agree with it, or to disagree with it, or to amend it (*r*).

Committee to prepare reasons for disagreeing with amendments to a Bill.

**1338.** Whenever either House has agreed to a motion to disagree with an amendment to one of its Bills made by the other House, it appoints a committee to prepare a reason or reasons for such disagreement. This committee meets as soon as the consideration of the amendments to the Bill has been concluded in the House, and proceeds to draw up the necessary reason or reasons, which it reports forthwith to the House. A report from a committee appointed for this purpose is agreed to in either House without discussion, after which the Bill, together with the reason or reasons for disagreement, as well as any amendments which may have been made to the amendments made by the other House, and any consequential amendment to the Bill which may have been rendered necessary by any such amendment, is then sent back to the other House (*s*).

(*o*) Thus, if the Bill is a Commons Bill, it is returned to the Lords with a message, after having been indorsed with the words "*A ces amendemens les Communes sont assentus.*"

(*p*) For this procedure, see the Rules, Orders etc. of the House of Commons, dated 4th June, 1891, No. 267. The order is set out in May, Parliamentary Practice, 11th ed., Appendix vii., p. 954.

(*q*) Ilbert, Manual of Procedure in the Public Business of the House of Commons, 2nd ed., pp. 163, 164. Fresh amendments may also be made in the Bill itself, but any such amendments must be consequential on an amendment which has been inserted in the Bill by the other House (*ibid.*).

(*r*) In 1906 the House of Commons rejected *en bloc* the whole of the amendments made by the House of Lords to the Education (England and Wales) Bill without assigning, in the case of any amendment, a specific reason for its rejection, and a resolution was carried in the House of Lords protesting against this procedure as an innovation in constitutional procedure; see Journals of the House of Lords, 1906, Vol. CXXXVIII., p. 495.

(*s*) The reasons are written out on a sheet of paper containing the amendments which are disagreed with. This paper is attached to the Bill. The Bill, if it is a House of Lords Bill, is indorsed by the Clerk of the Parliaments with the words "*Ceste Bille est remise aux Communes avecque des Raisons* [or *une Raison*]"; if it is a House of Commons Bill, it is indorsed by the Clerk of the House of Commons with the same words, except that "*Seigneurs*" is substituted for "*Communes.*" After this, no further indorsement is made on a Bill, however often it may pass between the two Houses.

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Consideration by second House of its amendments disagreed with by first House.

**1339.** Several courses are thereupon open to the House which made the amendments in the first instance. The first course is to insist upon its amendment or amendments to which the other House has disagreed; the second is to agree not to insist upon such amendment or amendments; and the third is to amend its own amendments, or propose new amendments to meet the objections which have been taken to its original amendments by the other House.

If the House which made the amendment or amendments in the first instance adopts the first course, the Bill drops, unless the House in which the Bill originated gives way and does not insist upon its disagreement, in which case it is still open to it to amend the amendments which have been made by the other House, and to which it originally objected. In this event, it is again left to the House which made the amendments in the first instance to accept, amend, or refuse the amendments to its amendments.

If the House adopts the second course, the Bill is complete so far as the particular points in dispute with regard to such amendment or amendments are concerned.

If the House adopts the third course, it returns the Bill to the other House with such amended or new amendment or amendments. It then remains for that House to decide whether it will accept, amend, or refuse the new proposals.

It is, therefore, possible for a Bill to pass and repass between the two Houses for an indefinite number of times, until an agreement has been arrived at, or until one or other of the Houses insists finally upon some amendment to which the other House disagrees, in which case the Bill drops.

### SUB-SECT. 9.—*Passing into Law of Bills to which the House of Lords has not Agreed.*

Application of Parliament Act, 1911, to Bills other than money Bills etc.

**1340.** Bills which have been passed by the House of Commons, but which have not been agreed to by the House of Lords, may, under certain circumstances, become law (*t*).

If any public Bill, other than a "money Bill" (*u*), or a Bill for extending the maximum duration of Parliament beyond five years, or a Bill for confirming a provisional order (*a*), is passed by the House of Commons in three successive sessions, whether of the same Parliament or not (*b*), and, having been sent up to the House of Lords at least one month before the end of the session in each of those sessions, is rejected by that House, or is not passed either without amendment, or with such amendments only as the House of Commons is prepared to accept (*c*), it is, upon its rejection for the

(*t*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 2 (1).

(*u*) As defined in *ibid.*, s. 1 (2). For the procedure with regard to a money Bill, see p. 776, *post*.

(*a*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 5.

(*b*) Two years must elapse between the second reading of a Bill in the first of these sessions by the House of Commons and its passing by that House in the third session (*ibid.*, s. 2 (1)).

(*c*) A Bill is deemed to be rejected by the House of Lords unless these two conditions are complied with (*ibid.*, s. 2 (3)).

third time by the House of Lords, and unless the House of Commons direct to the contrary, to be presented to His Majesty for the Royal Assent, and, upon the Royal Assent being signified, is to become an Act of Parliament as if it had been passed in the usual manner by both Houses of Parliament (*d*).

Upon any Bill, which is thus presented to His Majesty for the Royal Assent, must be indorsed a certificate signed by the Speaker, stating that the provisions of the Parliament Act, 1911 (*e*), have been duly complied with (*f*).

Provisions of Parliament Act, 1911, as to amendments made to a Bill during second and third sessions.

**1341.** A Bill is to be deemed the same Bill as a former Bill sent up to the House of Lords by the House of Commons in a preceding session: (1) when it is identical with the former Bill, or contains only such alterations as are rendered necessary by the lapse of time since its first introduction; or (2) when it contains amendments made by the House of Lords in the preceding session, which have been agreed to by the other House (*g*). In the case of any such Bill, the Speaker is required to certify either that the alterations are necessary on account of the lapse of time, or that the amendments have been agreed to by both Houses (*h*).

Amendments which are made by the House of Lords in a Bill which is sent up to it for the third time, and to which the House of Commons agrees, may also be inserted in the Bill before it receives the Royal Assent, if the Speaker certifies that they have been agreed to by both Houses (*i*).

SUB-SECT. 10.—*Royal Assent.*

Royal Assent to Bills.

**1342.** When a Bill has been passed by both Houses of Parliament, or has been passed by the House of Commons in the manner provided by the Parliament Act, 1911 (*k*), it is ready to receive the Royal Assent (*l*).

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(*d*) For the words of enactment to a Bill passed under the provisions of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), see title STATUTES.

(*e*) 1 & 2 Geo. 5, c. 13.

(*f*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 2 (2). *Ibid.*, s. 3, provides that any certificate of the Speaker given under the Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

(*g*) *Ibid.*, s. 2 (4).

(*h*) *Ibid.*

(*i*) *Ibid.* The House of Commons may suggest amendments to a Bill in the second or third session. Such amendments are to be considered by the House of Lords, and, if agreed to by that House, are to be treated as if they were amendments proposed by the House of Lords, and agreed to by the House of Commons (*ibid.*).

(*k*) 1 & 2 Geo. 5, c. 13.

(*l*) It is sometimes necessary that a Bill (usually a Consolidated Fund Bill or the Army (Annual) Bill) should become law before a certain date either to meet the exigencies of the public service or to comply with the provisions of a statute. In such a case a commission to notify the Royal Assent is held as soon as possible after the Bill is ready to receive it. As a general rule, however, a commission is not held until a reasonable number of Bills are waiting to receive the Royal Assent. Bills which are ready for the Royal Assent, with the exception of Bills imposing a financial burden on the people which are returned to the House of Commons, are in the custody of the Clerk of the Parliaments; see p. 720, *ante*.

SECT. 3. **Public Bills.**

Proceedings on giving Royal Assent to Bills.

**1343.** Unless the Sovereign is present in person, the Royal Assent is signified by Lords Commissioners appointed for the purpose (*m*). The ceremony takes place in the House of Lords, and the procedure is practically the same whether the Sovereign himself is present on the occasion or is represented by Commissioners (*a*).

At the time which has been appointed for holding a commission (*b*) the Lord Chancellor, accompanied by two or four other Lords Commissioners, takes his seat on a form placed in front of the Throne, and the Gentleman Usher of the Black Rod is directed to request the attendance of the Commons in the manner which has already been described.

As soon as the Speaker, accompanied by the Commons, has arrived at the bar of the House of Lords, the Lord Chancellor acquaints the two Houses with the commission (*c*).

The Reading Clerk then reads the commission, after which the Lord Chancellor declares and notifies the Royal Assent to the Acts which are mentioned in the commission and directs (*d*) the clerks to pass the same in the usual form and words.

Mode of signifying Royal Assent to Bills.

**1344.** It is the duty of the Clerk of the Crown to read out the titles of the Acts, to each of which in succession the Clerk of the

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(*m*) The Sovereign does not now attend to give his assent to Bills except when he prorogues Parliament in person. It used to be customary for the Sovereign to be present in person to give his assent to Bills for making provision for the honours and dignity of the Crown, even when such Bills were passed during the course and not at the conclusion of a session, but this practice was not adhered to either in 1901 or 1910; compare May, Parliamentary Practice, 11th ed., p. 514.

(*a*) See p. 692, *ante*.

(*b*) The forms of commissions for declaring the Royal Assent are prescribed by Rules made by Order in Council, pursuant to the Crown Office Act, 1877 (40 & 41 Vict. c. 41), amended by the Crown Office Act, 1890 (53 & 54 Vict. c. 2). Such commissions are prepared in the Crown Office by the Clerk of the Crown in Chancery, and are then sent by the Lord Chancellor, through the Secretary of State for the Home Department, to the Sovereign to receive his approval and signature. As soon as the commission has been signed by the Sovereign, it is returned to the Lord Chancellor. The wafer Great Seal is then attached to it, and it is placed on the table of the House of Lords. The authority for the Bills which are ready to receive the Royal Assent is supplied to the Crown Office by the Clerk of the Parliaments, who sends to the Clerk of the Crown a list of the Bills which are to appear in the commission. He also sends another copy of this list to the Lord Chancellor, who sends it to the Sovereign with the commission. Bills which are to receive the Royal Assent are arranged in a definite order, namely:—(1) Bills which grant aids or supplies to the Crown, (2) public Bills, (3) hybrid Bills, (4) Bills to confirm provisional orders, (5) private Bills of a local or personal character, and (6) strictly private Bills.

(*c*) The Lord Chancellor informs the two Houses that "His Majesty, not thinking fit to be personally present, has been pleased to cause a commission to be issued under the Great Seal, and thereby given his Royal Assent to certain Acts which have been agreed upon by both Houses of Parliament the titles whereof are particularly mentioned, and by the said commission has commanded us to declare and notify his Royal Assent to the said Acts in the presence of you the Lords and Commons assembled for that purpose.'

(*d*) In obedience to this direction, the Clerk of the Crown in Chancery, who, on this occasion, takes the seat at the table of the House which is usually occupied by the Clerk Assistant, and the Clerk of the Parliaments rise from their places, and, after bowing to the Throne, stand one on each side of the table for the remainder of the proceedings.

Parliaments signifies the Royal Assent in Norman French (*e*). In the case of an ordinary public or private Act, the assent of the Crown is signified in the words "*Le Roi le veult*"; in the case of a Finance Act or of an Act making a grant of public money or imposing a charge upon the public revenue, in the words "*Le Roi remercie ses bons sujets, accepte leur benevolence, et ainsi le veult*"; and, in the case of a strictly private Act, in the words "*Soit fait comme il est désiré*" (*f*).

As soon as all the Acts mentioned in the commission have received the Royal Assent, the ceremony is at an end, and the Speaker, after exchanging salutations with the Lords Commissioners, returns to the House of Commons.

### SUB-SECT. 11.—*Printing and Publication.*

**Printing of public Acts of Parliament.**

**1345.** After a public Act has received the Royal Assent (*g*) it is printed (*h*). Two vellum copies of the Act are signed by the Clerk of the Parliaments or his deputy, one of which is preserved in the Victoria Tower at Westminster, the other in the Public Record Office.

**Division of statutes.**

**1346.** The legislation of each year is divided into two main groups: the first includes the public general Acts, which are printed and issued separately (*i*); the second, the local and private Acts and the public Acts of a local character, which are printed together.

**Method of publication of public Act of Parliament.**

**1347.** The public general Acts are published in one volume as soon as possible after the end of the year in which they have been passed into law. In addition to the public general Acts, this volume contains (1) a table of the titles of the public general Acts arranged according to chapter; (2) a table of the titles of the local and private Acts (including the public Acts of a local character), arranged alphabetically; (3) a table showing the effect of the year's legislation on public general Acts; (4) a table of the local

(*e*) When the title of each Bill is read, the Clerk of the Parliaments and the Clerk of the Crown bow to the Throne. The former then turns round and faces the Speaker at the bar before signifying the Royal Assent.

(*f*) If the Royal Assent is refused to a Bill, the intention of the Crown is signified in the words "*Le Roi s'avisera.*" The Royal Assent has not been withheld since 1707, when Queen Anne refused her assent to a Bill for settling the militia of that part of Great Britain called Scotland; see Journals of the House of Lords, 1707-8, Vol. XVIII., p. 506.

(*g*) The printed copy of an Act of Parliament bears the date on which it received the Royal Assent. In the absence of any direction to the contrary contained in the Act itself, the Act comes into operation from the date it receives the Royal Assent; see Commencement of Acts of Parliament Act, 1792 (33 Geo. 3, c. 13), and title STATUTES.

(*h*) A proof is sent to the Clerk of Public Bills in the House of Lords, who examines it with the House copy of the Act. As soon as the proof has been examined, the Clerk of Public Bills returns it with his certificate to the printers, and at the same time requests the Controller of His Majesty's Stationery Office to give instructions for the Act to be issued with as little delay as possible.

(*i*) An Act which has been treated as a public Bill during its passage through Parliament is not necessarily printed amongst the public general Acts. If the measure is of a local character, it is usually published amongst the public Acts of a local character.

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and private Acts arranged in classes; and (5) an index to the public general Acts (*j*).

The public Acts of a local character are also published together in a subsequent volume.

## SECT. 4.—*Public Bills of a Special Character.*

### SUB-SECT. 1.—*In General.*

Private Bills involving special procedure.

**1348.** In addition to the ordinary public Bill (*k*), Parliament is sometimes called upon to deal with certain other public Bills which must be briefly noticed, either because they are introduced for a special purpose or because the procedure with regard to them is of a peculiar character.

### SUB-SECT. 2.—*Act of Grace.*

Act of Grace.

**1349.** An Act of Grace, which is an Act for a general pardon, originates with the Crown (*l*). The Bill is introduced into the House of Lords by a Minister in obedience to a command of the Sovereign, and, as soon as it has been read a first time, a motion is made that it be humbly accepted and passed. This motion is agreed to *nemine contradicente*, and the Bill is then sent to the House of Commons, where the same procedure is adopted. The Bill receives the Royal Assent in the usual form and manner (*m*).

### SUB-SECT. 3.—*Act of Indemnity.*

Act of Indemnity.

**1350.** An Act of Indemnity is an Act passed to relieve any person from disabilities and penalties which he has incurred by having contravened the law.

A Bill for this purpose is presented to Parliament by a Minister in obedience to a command of the Sovereign, and is then proceeded with in the same way as an ordinary public Bill. It is passed through both Houses with as much dispatch as possible, all its stages generally being taken on the same day, and then receives the Royal Assent in the usual form and manner (*n*).

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(*j*) Each category of Acts is numbered in a different way. Public general Acts are numbered in Arabic characters; private local Acts and public Acts of a local character in small Roman numerals; personal Acts, if printed, in italicised Arabic figures.

(*k*) As to the passage into law of ordinary public Bills, see pp. 723 *et seq.*, *ante*.

(*l*) For an example of an Act of Grace, see "An Act for the King and Queens most Gracious, Generall and Free Pardon" (stat. (1690) 2 Will. & Mar. c. 10); and for the procedure with regard to it, see Journals of the House of Lords, 1690, Vol. XIV., pp. 502, 503; Journals of the House of Commons, 1690, Vol. X., p. 423.

(*m*) To an Act of Grace, to which the consent of the Crown must be given before it is considered by Parliament, the form of assent in former times used to be, "*Les prelats, seigneurs et communes, en ce present parlement assemblés, au nom de touts vos autres sujets, remercient tres humblement vostre majesté, et prient à Dieu vous donner en santé bonne vie et longue.*" In more recent times, however, the Royal Assent to a Bill of this kind has been given in the same form as to an ordinary public Bill; see Journals of the House of Lords, 1717, Vol. XX., p. 546; 1747, Vol. XXVII., p. 137; compare May, Parliamentary Practice, 11th ed., p. 513.

(*n*) For the procedure on a Bill of Indemnity, see the proceedings on

SUB-SECT. 4.—*Act of Attainder*

SECT. 4. Public Bills of a Special Character.

Act of Attainder.

**1351.** An Act of Attainder, although it is a legislative enactment, is the highest form of parliamentary judicature, because an individual for whose punishment a Bill of this kind is introduced is tried by both Houses of Parliament, and can only be condemned with the assent of the Crown (*o*).

A Bill of Attainder has been usually, although not invariably, introduced in the House of Lords (*p*), and the procedure upon it in both Houses of Parliament is the same as upon an ordinary public Bill, except that, as the measure is one of a judicial character, the accused person is allowed to produce evidence and employ counsel in his defence

*5.—Acts for the Reversal of Attainders, or for Restoration of Honours and Lands, or for Restitution of Blood.*

Acts for the reversal of attainders etc.

**1352.** Bills which are introduced for the purpose of reversing attainders, or for the restoration of honours and lands, or for the restitution of blood, cannot be laid before Parliament unless they are signed by the Sovereign.

Such Bills are introduced in the House of Lords (*r*) in the same way as an Act of Grace, but are then dealt with as ordinary public Bills. In the House of Commons, the consent of the Crown must be signified before a Bill of this kind is read the first time. After it has been read the second time, it is committed to a select committee which is specially nominated by the House (*s*).

## SECT. 5.—*Private Bills and Bills to Confirm Provisional Orders.*

### SUB-SECT. 1.—*General Classification of Private Bills.*

Division of private Bills.

**1353.** Private Bills, although they deal with almost every class of subject, are divided into two main groups, namely:—

(1) Local Bills, which are commonly referred to as private Bills, are Bills promoted by particular corporations, companies, and other

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Lord Byron's Indemnity Bill, 1880 (Journals of the House of Lords, 1880 Vol. CXII., pp. 266, 274; Journals of the House of Commons, 1880, Vol. CXXXV., p. 306).

(*o*) May, Parliamentary Practice, 11th ed., pp. 669—671; see title COURTS, Vol. IX., p. 20.

(*p*) The lords spiritual, acting in their capacity as lords of Parliament, vote upon any stage of a Bill of Attainder. For their position in impeachments, see p. 621, *ante*.

(*q*) The procedure upon a Bill of Pains and Penalties, which is also an exercise of the judicial power of Parliament in a legislative form, is the same as that upon a Bill of Attainder; see 4 Hatsell, Precedents of Parliament, ed. 1818, pp. 331—346.

(*r*) The Lords have always claimed that Bills of this description should originate in their House; see the declaration of the House in the case of Sir C. Stanley's Bill in 1664—65 (Journals of the House of Lords, 1664—65, Vol. XI., p. 674), and the Report from the Select Committee of the House appointed to consider the subject in 1702, on the occasion of a Bill to reverse the attainders against Lord Bophin and Lord Carlingford being introduced in the Commons (see Journals of the House of Lords, 1702, Vol. XVII., pp. 118, 119). Compare House of Lords Manuscripts, Vol. V. (New Series), Introduction, p. xlii.; 3 Hatsell, Precedents of Parliament, ed. 1818, pp. 67, 69.

(*s*) May, Parliamentary Practice, 11th ed., p. 862.

SECT. 5. Private Bills and Bills to Confirm Provisional Orders.

parties, who require parliamentary powers for the object or undertaking which they have in view, and therefore include Bills in relation to specified railways, harbours, piers, roads or tramways, supply of gas, water or electricity, improvements, sanitary or police matters in local districts. A general Bill dealing with any of these subjects would be a public Bill; but where it is desired to apply or extend a general law in the case of a locality, or to give exemption from it, this is done by a private Bill (*t*).

(2) Personal Bills, which affect only the interests or property of the individuals to whom they relate (*u*).

The practice and procedure with regard to private Bills is laid down in a series of standing orders which are almost identical in both Houses, although each House has a few orders peculiar to itself.

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(*t*) See also p. 702, *ante*. In the Standing Orders of the two Houses, all such Bills are divided into two classes, according to the subjects to which they relate, namely: 1ST CLASS.—Burial ground (making, maintaining or altering); charters and corporations (enlarging or altering powers of); church or chapel (building, enlarging, repairing or maintaining); city or town (paving, lighting, watching, cleansing or improving); company (incorporating, regulating, or giving powers to); county rate; county or shire hall, courthouse; Crown, Church or corporation property, or property held in trust for public or charitable purposes; electricity supply; ferry, where no work is to be executed; fishery (making, maintaining or improving); gaol or house of correction; gas work; improvement charge, unless proposed in connection with a second class work to be authorised by the bill; land (inclosing, draining or improving); letters patent; local court (constituting); market or market-place (erecting, improving, repairing, maintaining or regulating); pilotage; police; poor (maintaining or employing); poor rate; powers to sue and be sued (conferring); stipendiary magistrate, or any public officer (payment of); trolley vehicle system; and continuing or amending an Act passed for any of the purposes included in this or the second class, where no further work than such as was authorised by a former Act is proposed to be made. 2ND CLASS.—Making, maintaining, varying, extending or enlarging any aqueduct, archway, bridge, canal, cut, dock, drainage (where it is not provided in the Bill that the cut shall not be more than eleven feet wide at the bottom), embankment for reclaiming land from the sea or any tidal river, ferry (where any work is to be executed), harbour, motor road, navigation, pier, port, public carriage road, railway, reservoir, sewer, street, subway, tramway, tramroad, tunnel, waterwork. (The lists differ in the two Houses, *e.g.*, the House of Lords list commences the 1st Class with "Arbitration in respect of the affairs of any Company, Corporation, or person," and "City or town" reads "City, Borough, Town, or district." It is sometimes a matter of considerable difficulty to decide in which of these two classes a Bill should be placed, because the subjects dealt with in each class are merely specified by name, and it is not clearly stated that certain Bills are to be included in one class and all others in the other class. In any doubtful case, however, the Examiner (see p. 740, *post*) to whom the matter is referred decides in which class the Bill is to be placed. For forms of Bills and clauses in Bills, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 240—248, 251—287; for forms of procedure under the Borough Funds Acts, 1872 (35 & 36 Vict. c. 91), and 1903 (3 Edw. 7, c. 14), see Encyclopædia of Forms and Precedents, Vol. IX., pp. 169—180; for forms relating specifically to electric lighting and power, see *ibid.*, pp. 213, 242, 264; gasworks, *ibid.*, p. 187; local government, *ibid.*, pp. 200, 201, 240, 293, 298, 308, 322; railways, *ibid.*, pp. 181, 185, 189, 191, 199, 208, 241, 249, 287; tramways, *ibid.*, pp. 181, 184, 185, 189, 322; water and watercourses, *ibid.*, pp. 186, 293, 298.

(*u*) Personal Bills (see p. 758, *post*) include all estate Bills, divorce Bills, naturalisation Bills, and name Bills; see Standing Orders of the House of Lords, 1911 (Private Business), No. 149.

SUB-SECT. 2.—*Parliamentary Agents.*

SECT. 5.
**Private Bills and Bills to Confirm Provisional Orders.**

Work of parliamentary agents.

**1354.** The work connected with the promotion of private Bills, and also with the opposition to all legislation of this kind, is performed by parliamentary agents, who in each House are held personally responsible for the due observance of the rules and orders of the House which have been drawn up for their guidance and for the regulation and management of private business (*w*).

Qualifications of parliamentary agent.

**1355.** In neither House may any person act as a parliamentary agent until he has subscribed a declaration before one of the clerks in the Private Bill Office, engaging to observe and obey the rules, regulations, orders, and practice of the House, and also to pay and discharge all fees and charges due and payable in respect of any petition or Bill upon which he may appear as agent. In addition to subscribing this declaration, he must enter into a recognisance or bond, if required, in the penal sum of £500, with two sureties of £250 each, to observe the said declaration (*x*).

SUB-SECT. 3.—*Preliminary Procedure with regard to Private (Local) Bills.*

(i.) *Petition.*

Preliminaries to presentation of petition.

**1356.** A petition must be presented to the House of Commons by the promoters of any private Bill for leave to introduce their Bill into Parliament (*a*). But, before such a petition is presented, intending applicants to Parliament must comply with various rules and formalities which are laid down in the standing orders of the two Houses as necessary preliminaries before the introduction of any such Bill (*b*).

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(*w*) In either House, a parliamentary agent who wilfully acts in violation of the rules and practice of Parliament, or of any rules prescribed for his guidance, or is guilty of professional misconduct, may be suspended either absolutely or temporarily from acting as a parliamentary agent. No person who has been suspended or prohibited from practising as a parliamentary agent, or who has been struck off the roll of solicitors or disbarred by any of the Inns of Court, may be registered as a parliamentary agent without the express authority of the Lord Chairman of Committees in the House of Lords or of the Speaker in the House of Commons. As to barristers generally, see title BARRISTERS, Vol. II., pp. 357 *et seq.* As to solicitors, see title SOLICITORS.

(*x*) In each House, the name of every person who has qualified himself to act as a parliamentary agent is entered in a register kept for the purpose. It is only necessary for one member of a firm to subscribe the required declaration, but the names of the other members of the firm must be entered in the register. If a person, who is not a qualified solicitor or writer to the signet, wishes to act as a parliamentary agent, he must make application in writing and must produce a certificate of his respectability.

(*a*) Standing Orders of the House of Commons (Private Business), 1911, Nos. 32, 193. For forms, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 199, 200. The petition, signed by some of the promoters, and with a printed copy of the proposed Bill annexed to it, must be deposited at the Private Bill Office in the House of Commons on or before the 17th December (Standing Orders of the House of Commons (Private Business), 1911, No. 32). No Bill for which a petition has not been presented to the House of Commons may be brought into the House of Lords, unless a petition is first presented to that House (Standing Orders of the House of Lords (Private Business), 1911, No. 86). The presentation of a petition before a private Bill may be presented to Parliament emphasises the distinction between it and a public Bill; see p. 702, *ante*.

(*b*) The examination of such petitions by the Examiners (see p. 740, *post*)

SECT. 5.

**Private Bills and Bills to Confirm Provisional Orders.**

Notice in the *Gazette* etc.

(ii.) *Notice.*

**1357.** In all cases where it is proposed to bring in a private Bill, the promoters, either in the month of October or before the 27th November previous to their intended application to Parliament, must publish in the London, Edinburgh, or Dublin *Gazette*, as the case may be, a notice stating the objects of the proposed Bill.

Where a Bill relates to any particular city, borough, town, or urban or rural district, or is to authorise the construction of works or the taking or compulsory user of land in any county, or to extend the time fixed by a previous Act of Parliament for such purposes, notices must also be inserted, upon two separate occasions in two consecutive weeks, in a newspaper published in the town or locality to which the provisions of the proposed Bill refer (*c*).

**1358.** In addition to the notice published in the *Gazette* and local newspapers, the promoters must send, before the 15th December, an application in writing to the owner, lessee, or occupier of any land which they propose to acquire compulsorily for the purposes of their Bill, inquiring whether he assents, dissents, or is neuter in respect of such application (*d*).

**1359.** Promoters of a Bill to authorise the laying down of a tramway must obtain the consent of the local authority of the district or districts through which it is proposed to construct the tramway, and, if in any district there is a road authority other than the local authority and it is proposed to break up the road, they must also obtain the consent of such road authority (*e*).

enables the two Houses to find out whether the promoters of the proposed Bill have obeyed the regulations contained in the standing orders with regard to it.

(*c*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 3—9; Standing Orders of the House of Commons (Private Business), 1911, Nos. 3—9. As to bills involving the compulsory purchase of land, generally, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 6 *et seq.* In the case of any tramway or underground railway or trolley vehicle system Bill, which necessitates the alteration or disturbance of any street or road, in addition to the published notices, a notice must be posted for fourteen consecutive days in any such street or road; see Standing Orders of the House of Lords (Private Business), 1911, No. 10; Standing Orders of the House of Commons (Private Business), 1911, No. 10.

(*d*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 11, 12; Standing Orders of the House of Commons (Private Business), 1911, Nos. 11, 12. This application should be as nearly as possible in the form which is set forth in Appendix (A) to the Standing Orders of each House (*ibid.*). For forms of notice to owners etc., see Encyclopædia of Forms and Precedents, Vol. IX., pp. 181—189.

(*e*) Standing Orders of the House of Lords (Private Business), 1911, No. 22; Standing Orders of the House of Commons (Private Business), 1911, No. 22. The order further provides that where it is proposed to lay down a tramway in two or more districts, the consents of the local and road authorities having jurisdiction over two-thirds in length of the streets and roads required for the purpose shall be deemed sufficient. If the consent required to be given under this order is refused, the refusal constitutes an absolute bar to the construction of the proposed tramway, unless the standing order committees of both Houses decide to dispense with the standing order. For form of consent, see Encyclopædia of Forms and Precedents, Vol. IX., p. 189.

**1360.** The promoters of a Bill to authorise the laying down of a tramway must also send notices in writing before the 15th December (1) to all owners, lessees, or occupiers (*f*) of premises which front the new tramway line, in cases where it is intended that a less space than 9 feet 6 inches shall intervene between the outside of the foot-path on either side of the road and the nearest rail of the tramway, and (2) to the owners or lessees of any railway, tramway, or canal the interests of which would be affected or interfered with by the proposed new tramway (*g*).

Notices in case of a tramway Bill.

**1361.** In the same way (1) the promoters of any Bill by which it is proposed to abstract water from any stream for the purpose of supplying any cut, canal, reservoir, aqueduct, navigation or water-work, must give notice in writing to the owner, lessee, or occupier of any mill, manufactory, or other work, who makes use of the water of the stream for a distance of twenty miles below the point at which it is intended to take the water for the purposes of the Bill (*h*); and (2) the promoters of any Bill for constructing gas-works or sewage works or a sewage farm, or for erecting a station for generating electrical energy or for other purposes calculated to affect injuriously the amenities of the neighbourhood, must serve a notice upon the owner, lessee, or occupier of any dwelling-house within 300 yards of the site to be used for the purposes of the proposed Bill (*i*).

Notices in case of waterworks, gasworks, sewage works and electric power Bills.

**1362.** The promoters of any Bill by which it is intended to relinquish works the construction of which has been already authorised by Parliament must give notice, before the 15th December, to any owner, lessee, or occupier of property who would be affected by the provisions of the proposed Bill (*j*).

Notice of abandonment of works.

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(*f*) The standing orders of the House of Lords do not insist upon a notice being sent to occupiers in this case or in the cases mentioned in the two following paragraphs; see the text, *infra*.

(*g*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 13, 13*a*; Standing Orders of the House of Commons (Private Business), 1911, Nos. 13, 13*a*. (For a form, see Encyclopædia of Forms and Precedents, Vol. IX., p. 184.) Under the second of these standing orders, the promoters of a Bill to provide trolley vehicles are also required to give similar notice to the owner or reputed owner, or lessee or reputed lessee, of any railway, tramway, or canal which their undertaking may affect or interfere with. As to tramways, see title TRAMWAYS AND LIGHT RAILWAYS. As to railways and canals, see title RAILWAYS AND CANALS.

(*h*) Standing Orders of the House of Lords (Private Business), 1911, No. 14; Standing Orders of the House of Commons (Private Business), 1911, No. 14. As to water supply, see title WATER SUPPLY.

(*i*) Standing Orders of the House of Lords (Private Business), 1911, No. 15; Standing Orders of the House of Commons (Private Business), 1911, No. 15. As to the grant of statutory powers to construct gasworks, see title GAS, Vol. XV., p. 311. As to sewage works, see title SEWERS AND DRAINS. As to electric power Acts, see title ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 627 *et seq.* For forms of notice, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 186, 187, and compare, *ibid.*, p. 213.

(*j*) Standing Orders of the House of Lords (Private Business), 1911, No. 16; Standing Orders of the House of Commons (Private Business), 1911, No. 16; see Encyclopædia of Forms and Precedents, Vol. IX., pp. 187, 398; for form of Bill, see *ibid.*, p. 249. Notice in writing must be given before the 21st December to owners etc. of property when it is proposed to repeal or alter

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

Service of applications and notices.

**1363.** The promoters of a Bill are required to serve any application which they make and any notice which they send in conformity with a standing order of either House of Parliament, either by delivering it personally to the party entitled to receive it, or by leaving it at his usual place of abode if he is resident within the United Kingdom, or with his agent if he is abroad, or by sending it to him by post in a registered envelope and in conformity with such regulations as from time to time may be drawn up by the Postmaster-General (*k*).

(iii.) *Plans and Sections.*

Preparation of plans, sections and book of reference.

**1364.** The promoters of a private Bill are required to prepare a plan and section of any works which they propose to construct, and, in the event of any land being required for the purposes of the Bill, they must also prepare a book of reference, containing a description of the property to which allusion is made on the plan, the county and the parish or township in which it is situated, and the names of the owners, lessees, and occupiers of the required land (*l*).

any statutory provisions which are already in existence for their protection, and to any railway company over whose line it is proposed to take compulsory running powers; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 17, 18; Standing Orders of the House of Commons (Private Business), 1911, Nos. 17, 18; see also Encyclopædia of Forms and Precedents, Vol. IX., pp. 188, 189. When it is intended to introduce a Bill to alter or repeal any statutory provision relating to nuisance arising on any land, notice in writing must also be given, before the same date, to the owner and lessee of every dwelling-house situated within 300 yards of the land; see Standing Orders of the House of Lords (Private Business), 1911, No. 17*a*; Standing Orders of the House of Commons (Private Business), 1911, No. 17*a*.

(*k*) Standing Orders of the House of Lords (Private Business), 1911, No. 19; Standing Orders of the House of Commons (Private Business), 1911, No. 19. Evidence of the application having been made, or of the notice having been sent, is furnished either by the written acknowledgment of the party interested, or by the production of the post office receipt if the application was made or the notice sent in a registered letter. A notice served or application made on a Sunday, Christmas Day, Good Friday, or Easter Monday, or before 8 o'clock in the forenoon, or after 8 o'clock in the afternoon on any day, is deemed invalid, except in the case of the delivery of letters by post; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 20 and 21; Standing Orders of the House of Commons (Private Business), 1911, Nos. 20 and 21.

(*l*) The method in which plans and sections should be prepared, and the particulars which should be contained in books of reference, are set out in the standing orders of the two Houses; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 40—55; Standing Orders of the House of Commons (Private Business), 1911, Nos. 40—55; Encyclopædia of Forms and Precedents, Vol. IX., p. 218. A plan and also a duplicate thereof, with a book of reference, and a section and also a duplicate thereof, in respect of every local Bill of the second class (see note (*t*), p. 728, *ante*), and a plan and also a duplicate thereof, with a book of reference, in respect of a local Bill of the first class in which it is proposed to take or use any lands compulsorily, or of any Bill in which it is proposed to impose a charge upon any lands or houses, must be deposited by the promoters for public inspection, on or before the 30th November, at the office of the clerk of the peace for every county, riding, or division in England or Ireland, or in the office of the principal sheriff clerk of every county in Scotland, which is affected by the proposed Bill; see Standing Orders of the House of Lords (Private Business), 1911, No. 24; Standing Orders of the House of Commons (Private Business), 1911, No. 24.

**1365.** A copy of every such plan, section, and book of reference, together with a copy of the *Gazette* notice, in respect of any petition for any Bill to be introduced in the ensuing session of Parliament, must be deposited at the office of the Clerk of the Parliaments and at the Private Bill Office of the House of Commons on or before the 30th November (*m*).

Deposit of plans etc.

In addition to depositing copies of their plans etc. in the two Houses of Parliament, in certain cases the promoters of a Bill must deposit, on or before the 30th November, duplicate copies of such plans etc. at various Government offices, and also with the local authorities of the cities, boroughs, or districts to which the provisions of their proposed Bill refer (*n*).

(iv.) *Deposit of Bill and Petition.*

Deposit of printed copies of Bill and of petition.

**1366.** A printed copy of every private Bill which it is proposed to introduce into Parliament in the following session must be deposited in the office of the Clerk of the Parliaments, and in the

(*m*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 25, 31; Standing Orders of the House of Commons (Private Business), 1911, Nos. 25, 31. In addition to a plan, section, and book of reference, the promoters of a railway Bill must also deposit a copy of the ordnance map with their line of railway delineated thereon. The promoters of a tramway or trolley vehicle system are required to deposit an ordnance map of the district through which they propose to run their tramway or trolley vehicles on a scale of not less than 6 inches to the mile; see Standing Orders of the House of Lords (Private Business), Nos. 25, 25*a*; Standing Orders of the House of Commons (Private Business), Nos. 25, 25*a*. In cases of railway, tramway, and trolley vehicle system Bills, and Bills for the supply of electrical energy, and Bills which would affect tidal lands, the promoters must supply the Board of Trade with marked copies of the ordnance map on or before the 30th November. In cases where the provisions of a Bill affect the banks, foreshore or bed of a river, a copy of so much of the plans and sections which refer to the river, and also a map, must be supplied by the promoters to the conservators of the river, if there are any, and to the Board of Agriculture and Fisheries if the river is in England, to the Secretary for Scotland if the river is in Scotland, and to the Chief Secretary to the Lord-Lieutenant if the river is in Ireland; see Standing Orders of the House of Lords (Private Business), 1911, No. 26*b*; Standing Orders of the House of Commons (Private Business), 1911, No. 26*b*. In the case of any Bill by which it is intended to take, collect or impound water for the purpose of water supply, the promoters must deposit at the office of the Clerk of the Parliaments and at the Local Government Board a marked copy of the ordnance map; see Standing Orders of the House of Lords (Private Business), 1911, No. 25*c*.

(*n*) Plans etc. with regard to any railway, tramway or canal Bill must be deposited at the Board of Trade; with regard to any Bill which seeks power to take any churchyard, burial ground, or cemetery, at the Home Office; and with regard to any Bill by which it is proposed to take any common land, at the Board of Agriculture and Fisheries; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 27, 30; Standing Orders of the House of Commons (Private Business), 1911, Nos. 27, 30. Where a Bill refers to works which will be situated in London, the plans etc. must be deposited at the office of the London County Council, and, in every case, where it is proposed in any Bill to make, maintain, vary, extend or enlarge any work, or take any land or houses compulsorily, or to impose any improvement charge, the plans etc. must be deposited with the local authority of the city, borough, or district to which the Bill refers; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 28, 29; Standing Orders of the House of Commons (Private Business), 1911, Nos. 28, 29.

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

Private Bill Office of the House of Commons; on or before the 17th December in any year (*o*), and every petition for a private Bill, with a signed declaration by the agents for the proposed Bill, must also be deposited in the Private Bill Office of the House of Commons on or before the same date (*p*).

Deposit at Government offices and with local authorities.

**1367.** A printed copy of every Bill must also be deposited at His Majesty's Treasury and the General Post Office; a printed copy of every Bill relating to England at the Home Office and also at the Local Government Board; and a printed copy of every Bill relating to Scotland or to Ireland at the office of the Secretary for Scotland or at the Irish Office, as the case may be.

A printed copy of any Bill, the provisions of which relate to Crown property or to matters over which any Government department exercises a particular jurisdiction or control, must be deposited at that department (*q*).

A printed copy of any Bill belonging to the second class of local Bills (*r*), when it relates to London, must be deposited at the office of the London County Council, and a printed copy of any Bill belonging to the first class of such Bills (*r*) by which it is proposed to break up, or to interfere with, any road must be deposited with the road authority of the place or district in question (*s*).

(v.) *Deposit of Estimates.*

Deposit of estimates by promoters.

**1368.** The promoters of any Bill belonging to the second class of local Bills (*t*) must make and sign an estimate of the expense of the undertaking proposed in their Bill, and such estimate must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons on or before the 31st December (*u*).

(*o*) Standing Orders of the House of Lords (Private Business), 1911, No. 32; Standing Orders of the House of Commons (Private Business), 1911, No. 32.

(*p*) The petition must be headed by a short title descriptive of the objects proposed in the Bill, and the declaration of the agents must state to which of the two classes of local Bills the measure belongs, and also the powers for which the promoters are seeking the sanction of Parliament. The petition and declaration are open to the inspection of all parties. For form of declaration, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 197, 198.

(*q*) Standing Orders of the House of Lords (Private Business), 1911, No. 33; Standing Orders of the House of Commons (Private Business), 1911, No. 33. The order of the House of Lords states that the copy of the Bill must be deposited on or before the 21st December; that of the House of Commons states that the deposit must be made on or before the 18th December. In other respects the orders are practically identical, except that by the order of the House of Commons a copy of a Bill affecting charities or charitable trusts must be deposited at the office of the Charity Commission and at the office of the Board of Education. The order of the House of Lords does not contain this direction.

(*r*) See note (*s*), p. 728, *ante*.

(*s*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 34, 34*a*; Standing Orders of the House of Commons (Private Business), 1911, Nos. 34, 34*a*.

(*t*) See note (*t*), p. 728, *ante*.

(*u*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 35,

SECT. 5. Private Bills and Bills to Confirm Provisional Orders.

In the case of a Bill by means of which any local authority in England or Wales is seeking to obtain powers to construct works of a permanent character, the estimate of the expense of the proposed undertaking must also be deposited at the Board of Trade or the Local Government Board, as the case may be (*r*).

(vi.) *Deposit of Money.*

Deposit of money by promoters in case of ordinary private Bill.

**1369.** The promoters of all Bills (other than the promoters of railway and tramway Bills who have complied with the conditions set out in the next paragraph), are required, before the 15th January, to make a deposit of not less than 4 per cent. upon the amount of the estimate of expense with the Paymaster-General for and on behalf of the Supreme Court of Judicature in England, if the work is to be done in England or Wales, or for and on behalf of the Court of Exchequer in Scotland, if the work is to be done in Scotland; or with the Accountant-General of the Supreme Court of Judicature in Ireland, if the work is to be done in Ireland.

Deposit of money by promoters in case of railway or tramway Bill.

**1370.** In the case of a railway or tramway Bill authorising the construction of works by a company which is not incorporated by Act of Parliament, or which does not possess a railway or tramway already opened for public traffic, or which has not during the preceding year paid dividends on its ordinary share capital, or which proposes under the Bill to raise a capital greater than its existing authorised capital, the promoters must deposit a sum of not less than 5 per cent. upon the amount of the estimate of expense of the undertaking (*w*).

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36, 56; Standing Orders of the House of Commons (Private Business), 1911, Nos. 35, 36, 56.

(*v*) Standing Orders of the House of Lords (Private Business), 1911, No. 36*a*; Standing Orders of the House of Commons (Private Business), 1911, No. 36*a*. Together with the said estimates, a statement must be deposited showing the following particulars with respect to the district of the local authority, that is to say: (a) area of the district; (b) population according to the last census; (c) rateable and assessable value according to the last valuation list; (d) rates made in the district during the last preceding financial year; (e) the sum of the balances of outstanding loans contracted by the local authority; and (f) the amount of the outstanding loans to which the limitation of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 234, applies. The form in which estimates should be drawn up is set out in the standing orders; see Encyclopædia of Forms and Precedents, Vol. IX., pp. 190, 191.

(*w*) Standing Orders of the House of Lords (Private Business), 1911, No. 57; Standing Orders of the House of Commons (Private Business), 1911, No. 57. The payment, investment, and repayment of all deposits made in pursuance of the standing orders is regulated by statute (Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20); Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27)). In cases (1) where the proposed work is to be made wholly or partly out of money to be raised upon the credit of present surplus revenue belonging to any society or company, or under the control of directors, trustees, or commissioners of any public work, such parties, if they are promoting the Bill and comply with certain regulations, are entitled to make a declaration instead of making a deposit of money, and (2) where the promoters of a Bill do not propose to obtain any private or personal pecuniary profit or advantage by the proposed measure, and where the work is to be made out of money to be raised upon the security of the rates, duties, or revenue under their control, they are allowed to deposit a declaration and estimate of the amount of rates required instead of depositing money; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 58, 59;

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

**1371.** The monetary deposit required to be made by the promoters of a Bill constitutes a fund out of which a person injuriously

Objects sought in requiring deposits of money by promoters of Bills.

Standing Orders of the House of Commons (Private Business), 1911, Nos. 58, 59. For forms, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 192—194. The deposit is repayable at the end of the session, or when the petition or Bill is rejected or withdrawn (Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20), s. 5). In the latter case, the certificate of the Chairman of Committees of the House of Lords or the Speaker of the House of Commons is required (*ibid.*, s. 5). The certificate of the Deputy Speaker has been accepted (*Ex parte Stocksbridge Railway Bill* (1866), L. R. 2 Eq. 364). The provisions of the Parliamentary Deposits Act, 1846 (9 & 10 Vict. c. 20), as to the repayment of deposits are superseded in the case of any railway, tramway or subway Bills by which the construction of a new line is authorised, or the time allowed for the construction of an authorised line is extended, by the insertion in every such Bill of a clause providing that, if the railway etc. is not opened for public traffic within the period of time allowed by the Bill, the deposit shall not be repaid, but shall be available for compensation to landowners or other persons whose property has been interfered with, for the recoupment of road authorities for certain defined purposes, and for meeting the claims of creditors of the company (see Standing Orders of the House of Lords (Private Business), 1911, No. 115; Standing Orders of the House of Commons (Private Business), 1911, No. 158*a*; Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1 (1), (2), (3)). Under the Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27), s. 8, the deposit is available, in the case of a Bill the preamble of which has not been proved, for meeting the costs of the Bill and any sums payable under that Act. The deposit may be made with borrowed funds (*Scott* v. *Oakeley* (1864), 33 L. J. (CH.) 612, C. A.), but an agreement for its repayment in full, if the Bill failed to pass, was not upheld (*Clements* v. *Bowes* (1858), 1 Eq. Rep. 553). As to the funds in which the deposit may be invested, see *Re Manchester, Huddersfield and Great Grimsby Rail. Co.* (1846), 4 Ry. & Can. Cas. 204; *Ex parte Newport, Abergavenny and Hereford Rail. Co.* (1847), 11 Jur. 160; *Ex parte South Eastern Rail. Co.* (1845), 9 Jur. 650; *Re Southwold Rail. Co.'s Bill, Ex parte Depositors* (1876), 1 Ch. D. 697; *Ex parte Great Northern Railway* (1870), L. R. 9 Eq. 274. As to investment by a private broker, see *Ex parte Bolton Junction Rail. Co.* (1876), 24 W. R. 451; *Ex parte West Riding of Yorkshire Rail. Co.* (1876), 34 L. T. 168. As to the meaning of creditors, see *Ex parte Bradford and District Tramways Co.*, [1893] 3 Ch. 463; *Re Manchester, Middleton and District Tramways Co.*, [1893] 2 Ch. 638. The jurisdiction of the court with respect to the release of the deposit does not arise until the expiration of the period of time allowed for completion of the work (*Ex parte Chambers*, [1893] 1 Ch. 47). As to the jurisdiction to restrain an attempt to charge the deposit, see *Beecham* v. *Lastingham and Rosedale Light Rail. Co.*, [1907] W. N. 101. As to the persons to whom the deposit may be paid, see *Ex parte Boston and Sheffield Rail. Co.* (1846), 4 Ry. & Can. Cas. 230; *Goodman* v. *De Beauvoir* (1846), 10 Jur. 938; *Re London and Portsmouth Direct Rail. Co., Ex parte Wilkinson* (1845), 4 Ry. & Can. Cas. 78; *Bryson* v. *Warwick and Birmingham Canal Co.* (1853), 4 De G. M. & G. 711, C. A.; *Re Birmingham and Lichfield Junction Rail. Co.* (1885), 1 T. L. R. 241; *Re Manchester, Middleton and District Tramways Co., supra; Ex parte Bradford and District Tramways Co., supra; Re Peckham, East Dulwich and Crystal Palace Tramways Bill*, [1910] 2 Ch. 1, C. A.; *Re Enniskillen and Bundoran Rail. Co.* (1890), 25 L. R. Ir. 472; *Re Manchester and Milford Rail. Co.* (1881), 45 L. T. 129; *Re Bradford Tramways Co.* (1876), 4 Ch. D. 18, C. A.; *Re Uxbridge and Rickmansworth Rail. Co.* (1890), 43 Ch. D. 536, C. A.; *Guest* v. *Poole and Bournemouth Rail. Co.* (1870), L. R. 5 C. P. 553; *Re Ennis and West Clare Rail. Co.* (1885), 15 L. R. Ir. 180; *Re Brampton and Longtown Rail. Co.* (1870), L. R. 10 Eq. 613. As to the release of stock or money included in deposit when further progress of a Bill is suspended by order of Parliament till the following session, see *Re Central London Railway Bill* (1901), [1901] W. N. 177; and when further progress is impossible according to the rules of either House, see *Re Widnes Rail. Co.* (1872), L. R. 15 Eq. 108. An application for the repayment of deposit is Long Vacation business (*Re Wigan Junction Railways Act*, 1875 (1875), 10 Ch. App. 541).

affected by the Bill may receive compensation, and is intended also to act as a check on the speculative promotion of Bills, by affording some security that the promoters genuinely intend to carry out the objects for which they are demanding parliamentary powers (*a*).

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

(vii.) *Bills Promoted for the Purpose of Raising Money by the London County Council.*

Special procedure in case of a Bill promoted for raising money by the London County Council.

**1372.** In both Houses there are special standing orders with regard to Bills promoted by the London County Council for the purpose of raising money either by the creation of stock or upon loan (*b*).

A Bill of this kind must be introduced as a public Bill, unless the county council only seeks parliamentary powers to borrow money: (1) for the special purposes recited in the preamble of its Bill for the execution or extension of the powers conferred by the Bill, or already sanctioned by Parliament (*c*); (2) for a period ending on the 30th September, after the expiration of the then financial year of the Council; (3) to be repaid within a period fixed by the Bill or by the Local Government Board (*d*).

The petition for a Bill to raise money which is promoted by the London County Council and complies with the requirements of the standing orders, together with the declaration of the agents for the Bill and a printed copy of the Bill, must be deposited in the Private Bill Office of the House of Commons on or before the 14th April, or the first day on which the House meets after the recess at Easter (*e*).

(*a*) See 2 Clifford, Private Bill Legislation, pp. 777 *et seq.*; see also *Re Birmingham and Lichfield Junction Rail. Co.* (1885), 28 Ch. D. 652, *per* CHITTY, J., at p. 660. For a case where an owner was held not to be entitled to claim compensation out of the deposit on the ground that, by reason of abandonment of the works, his property was not rendered loss valuable, see *Re Southport and Lytham Tramroads Act*, 1900, *Ex parte Hesketh*, [1911] 1 Ch. 120, C. A., applying *Re Ruthin and Cerrig-y-Druidion Railway Act* (1886), 32 Ch. D. 438, C. A.

(*b*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 69—69*d*; Standing Orders of the House of Commons (Private Business), 1911, Nos. 194—194*d*. See, further, title METROPOLIS, Vol. XX., pp. 445, 446.

(*c*) A Bill may authorise the borrowing of money, for which an estimate is not recited in the preamble, if the maximum sum to be borrowed is fixed, or if a provision is inserted requiring that the sanction of the Local Government Board shall be obtained for every borrowing.

(*d*) Standing Orders of the House of Lords (Private Business), 1911, No. 69 (1), (2), (3); Standing Orders of the House of Commons (Private Business), 911, No. 194 (1), (2), (3). In the case of a Bill to confer or to extend any power involving the expenditure of money after the financial period, the standing orders do not require that it shall be introduced as a public Bill if the estimates recited in the preamble show the total amount of money which is required, as well as the particular amount to be borrowed and expended during the financial period; see Standing Orders of the House of Lords (Private Business), 1911, No. 69 (4); Standing Orders of the House of Commons, (Private Business), 1911, No. 194 (4).

(*e*) Standing Orders of the House of Lords (Private Business), 1911, No. 69*b*; Standing Orders of the House of Commons (Private Business), 1911, No. 194*b*. No Bill promoted by the London County Council may authorise any alteration of the Consolidated Loans Fund, or of borrowing by the council, unless a report from the Treasury dealing with the subject is presented to the House; see Standing Orders of the House of Lords (Private Business), 1911, No. 69*c*;

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

Copies of the Bill must also be deposited in the office of the Clerk of the Parliaments, at His Majesty's Treasury, and at the Local Government Board (*f*).

(viii.) *Bills involving Acquisition of Working-Class Houses.*

Deposit of information regarding working-class houses proposed to be acquired compulsorily.

**1373.** If the promoters of any private Bill propose to acquire land compulsorily which involves the taking of houses occupied either wholly or partially by thirty or more persons of the working class, they must deposit, before the 21st December, in the office of the Clerk of the Parliaments, in the Private Bill Office of the House of Commons, and also with the Local Government Board, or with the Secretary for Scotland, or with the Local Government Board for Ireland, as the case may be, full information with regard to such houses and a copy of so much of their deposited plans as refer to them (*g*).

(ix.) *Bills Promoted by Companies etc.*

Proof of consents in case of Bills promoted by companies.

**1374.** In addition to the standing orders already referred to, there are further standing orders proof of compliance with which must be given by the promoters in the case of any private Bill promoted: (1) by a company already constituted by Act of Parliament; (2) by any company, society, association, or co-partnership formed or registered under the Companies Act, 1862 (*h*), or the Companies (Consolidation) Act, 1908 (*i*); and (3) by any company, society, association, or co-partnership constituted otherwise than by Act of Parliament (*k*).

Standing Orders of the House of Commons (Private Business), 1911, Nos. 194*c*, 194*d*.

(*f*) Standing Orders of the House of Lords (Private Business), 1911, No. 69*b* (2), (3); Standing Orders of the House of Commons (Private Business), 1911, No. 194*b* (2), (3). The notice for the Bill must be published either in February or March, and the Council is permitted to prepare such plans and specifications as it thinks fit.

(*g*) Standing Orders of the House of Lords (Private Business), 1911, No. 38; Standing Orders of the House of Commons (Private Business), 1911, No. 38. The houses to which these orders refer must be situated in a local area, which, as respects London, is defined as "the Administrative County of London"; see title METROPOLIS, Vol. XX., pp. 392, 393; as respects England and Wales (outside London), as "any borough or other urban district," and elsewhere than in a borough or other urban district, as "any parish"; as respects Scotland, as "any district within the meaning of the Public Health (Scotland) Act, 1897"; and as respects Ireland, as "any urban district" (*ibid.*); see, further, title PUBLIC HEALTH AND LOCAL ADMINISTRATION. As to provisional order confirmation Bills, see p. 740, *post*.

(*h*) 25 & 26 Vict. c. 89; see title COMPANIES, Vol. V., pp. 1 *et seq.*

(*i*) 8 Edw. 7, c. 69; see title COMPANIES, Vol. V., pp. 1 *et seq.*

(*k*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 62—67; Standing Orders of the House of Commons (Private Business), 1911, Nos. 62—67. In the House of Lords, proof of compliance with these orders must be given before the second reading of the Bill, whether it originates in the House of Lords or the House of Commons. In the House of Commons, in the case of a Bill originating in that House, proof of compliance with the orders must be given within five weeks of the date on which the petition for the Bill was indorsed by the Examiner (see pp. 740, 741, *post*); in the case of a Bill brought from the Lords, no period is laid down within which the Examiner is

In the first of these cases, Parliament requires that the promoters of the Bill should submit the measure, as introduced or proposed to be introduced into Parliament, to the proprietors of the company at a meeting held specially for the purpose, and that the Bill should be approved by the proprietors present in person or by proxy at such meeting, and holding at least three-fourths of the paid-up capital of the company (*l*).

In the second case, the promoters of the Bill are required by Parliament to obtain a special resolution of the company approving of the measure as introduced or proposed to be introduced into Parliament (*m*).

In the third case, Parliament requires that the Bill, as introduced or proposed to be introduced into Parliament, should be consented to by a majority of three-fourths in number, and (where applicable) in value, of the members of the company, society, association, or co-partnership, present in person or by proxy, at a meeting specially convened for the purpose (*n*).

Proofs of consents to subscriptions in aid of other companies.

**1375.** In the case of a Bill introduced by a company incorporated by Act of Parliament, which contains a provision authorising the company or any class of holders of share or loan capital in the company to guarantee or to raise any money in aid of the undertaking of another company, the promoters are required by Parliament to furnish proof that the company or the class of holders of share or loan capital so authorised has consented to such subscription (*o*).

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required to report as to the compliance or non-compliance with the orders. For the forms required under the standing orders, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 287—292; and for a form of declaration as to share capital, see *ibid.*, p. 190.

(*l*) Such meeting must be advertised in some newspaper published in London, Edinburgh, or Dublin, as the case may be, and also in some newspaper published in the county in which the principal office of the company is situated, and a notice, enclosing a form of proxy, must be sent to each proprietor on the register of the company. Any proprietor present at the meeting may demand a poll, and, in the event of a poll being taken, a statement giving the number of votes recorded must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons; see Standing Orders of the House of Lords (Private Business), 1911, No. 62; Standing Orders of the House of Commons (Private Business), 1911, No. 62. As to forms, see note (*k*), *supra*.

(*m*) Standing Orders of the House of Lords (Private Business), 1911, No. 63; Standing Orders of the House of Commons (Private Business), 1911, No. 63.

(*n*) A poll may be demanded by any member present at such meeting. A copy of the resolution of the meeting approving the Bill, and, if a poll is taken, a statement of the number of votes recorded, must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons; see Standing Orders of the House of Lords (Private Business), 1911, No. 63; Standing Orders of the House of Commons (Private Business), 1911, No. 63. As to forms, see note (*k*), *supra*.

(*o*) Standing Orders of the House of Lords (Private Business), 1911, No. 66; Standing Orders of the House of Commons (Private Business), 1911, No. 66. Such proof must be given to the Examiner before the second reading of the Bill in the House of Lords; in the House of Commons, within five weeks of the date on which the petition for the Bill was indorsed by the Examiner (see p. 741, *post*). The consent of the company or of the holders of share or loan capital, as the case may be, is obtained in the same way as in the case of a Bill introduced by a company already constituted by Parliament; see the text, *supra*.

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

—SECT. 4.—*Proceedings Preliminary to Introduction of Provisional Order Confirmation Bills.*

Procedure preliminary to introduction of provisional order confirmation Bills.

**1376.** The procedure preliminary to the introduction of a provisional order confirmation Bill is subject to rules and regulations drawn up and enforced by the Government department which is responsible for the Bill, and consequently the majority of the standing orders of the two Houses which are applicable in the case of a private Bill before it may be submitted to Parliament do not apply in the case of a provisional order confirmation Bill (*p*). Where it is proposed, however, by any order to take compulsorily any land upon which there are houses occupied wholly or partially by thirty or more persons of the working class, a statement must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons in the same way as in the case of a private Bill (*q*), and where a plan, section, or book of reference is prepared for the purposes of any order, a duplicate of such plan, section, or book of reference must be deposited, on or before the 30th November, in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons (*r*).

SUB-SECT. 5.—*Examiners.*

The Examiners.

**1377.** In each House of Parliament there is an official whose duty it is to examine all petitions for private Bills, and to certify whether the standing orders of the House have been complied with by the promoters. In the House of Lords, this official is called the Examiner of Standing Orders, and is appointed by the House, on the nomination of the Chairman of Committees (*s*); in the House of Commons, he is called the Examiner of Petitions for Private Bills, and is appointed by the Speaker (*t*). The two Examiners

(*p*) In some cases, the Act of Parliament under the powers conferred by which a department grants an order, in other cases, the instructions issued by the department, provide (1) that an advertisement shall be published stating the objects for which it is intended to obtain an order, and (2) that a preliminary local inquiry, at which opponents of the scheme may be heard, shall be held by an official appointed to inquire into the merits of the proposed undertaking. By these means the interests of individuals are safeguarded in the same way as they are safeguarded in the case of a private Bill; see May, Parliamentary Practice, 11th ed., pp. 863, 864; compare Report from the Select Committee on Private Business, 1902, House of Commons Paper, 378, Appendix, No. 10, pp. 183—188. For forms relating to the procedure in connection with provisional order confirmation bills, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 325—334 (electric lighting); 337—345 (gas and water); 346—356 (harbours); 358—390 (light railways); 397 (tramways). For forms of provisional orders, see *ibid.*, pp. 334, 363, 386, 389.

(*q*) Standing Orders of the House of Lords (Private Business), No. 38; Standing Orders of the House of Commons (Private Business), No. 38; see pp. 733, 734, *ante*.

(*r*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 38, 39; Standing Orders of the House of Commons (Private Business), 1911, Nos. 38, 39.

(*s*) Standing Orders of the House of Lords (Private Business), 1911, No. 2; Journals of the House of Lords, 1890, Vol. CXXII., p. 493.

(*t*) Standing Orders of the House of Commons (Private Business), 1911, No. 2. For the duties of the Examiners with regard to provisional order confirmation and hybrid Bills, see note (*d*), p. 703, *ante*, and p. 741, *post*.

are, however, officers of both Houses, and consequently may act for each House.

SECT. 5. Private Bills and Bills to Confirm Provisional Orders.

Examination of petitions.

**1378.** On the 18th January every year, the two Examiners begin the examination of all petitions for private Bills which have been duly deposited in the Private Bill Office of the House of Commons (*u*). The petitioners and their agents appear before one or other of the Examiners in order to prove that the requirements of the standing orders of the two Houses have been complied with; and any parties, upon the presentation of a memorial complaining that any standing order has not been complied with by the promoters, are entitled to appear before the Examiner either personally or by their agents, in support of their contention, provided that the matter of which they complain is specifically stated in the memorial (*v*).

Certificate and report of Examiner.

**1379.** It is the duty of one or other of the Examiners to certify by indorsement upon each petition whether or not the standing orders have been complied with (*w*). In the event of the standing orders not having been complied with, the Examiner must draw up a report stating the particulars in which the promoters of the Bill have failed to carry out the rules prescribed by Parliament, and he must also state any special circumstances in the case (*x*).

Effect of compliance or non-compliance with standin orders.

**1380.** If the necessary standing orders precedent and incidental to a petition for a Bill have been complied with, the Bill may be presented to the House of Parliament in which it has been decided that it is to originate. If, however, the Examiner reports that the promoters have not complied with the standing orders, the petition for the Bill, together with the Examiner's report with regard to it, is referred in the House of Lords to the Standing Orders Committee, in the House of Commons to the Select Committee on Standing Orders (*y*).

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(*u*) Standing Orders of the House of Lords (Private Business), 1911, No. 70; Standing Orders of the House of Commons (Private Business), 1911, No. 69. The Examiner must give at least seven clear days' notice of the day upon which he proposes to examine each petition; see Standing Orders of the House of Commons (Private Business) 1911, No. 70.

(*v*) Standing Orders of the House of Commons (Private Business), 1911, No. 74. The memorial must be signed by the person or persons who propose to appear before the Examiner, and must be deposited in the Private Bill Office of the House of Commons. For forms, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 196, 219, 292.

(*w*) Standing Orders of the House of Commons (Private Business), 1911, No. 71.

(*x*) Standing Orders of the House of Lords (Private Business), 1911, No. 76; Standing Orders of the House of Commons (Private Business), 1911, No. 71. The Examiners certify every case of compliance or non-compliance to the House of Lords, whether the Bill originates in that House or in the House of Commons. Every such certificate is laid upon the table of the House by the Clerk of the Parliaments, and the Lord Chancellor acquaints the House of the fact; see Standing Orders of the House of Lords (Private Business), 1911, No. 79. The Examiners report to the House of Commons every case of non-compliance with the standing orders, but they report cases of compliance only in respect of Bills which originate in the House of Lords, as the indorsement on the petition (see the text, *supra*) is considered equivalent to a report when the Bill originates in the House of Commons. Reports from the Examiners are laid upon the table of the House by the Speaker.

(*y*) The Examiner's certificate and report as to non-compliance with standing

SECT. 5.

**Private Bills and Bills to Confirm Provisional Orders.**

In certain cases, if the Examiner feels any doubt as to the due construction of any standing order, he is required to make a special report of the facts without deciding whether or not the standing orders in question have been complied with (*a*).

Examination of petition for additional provisions in a Bill, and of certain Bills before second reading.

**1381.** In each House, in addition to the original petition for a private Bill, every petition for the insertion of an additional provision in a Bill which has already been introduced is referred to the Examiner (*b*), and every private Bill, promoted by a company, to which the standing orders require the consent of the proprietors to be signified, is referred to the Examiner after it has been read a first time (*c*).

In each House also any railway Bill by which the payment of any moneys is directly or contingently charged upon the poor rate or any other local rate in Ireland (*d*), and any Bill, originating in the other House, for the purpose of establishing a company for carrying on any work or undertaking, in which any person is specified as manager, director, or proprietor (*e*), and any public Bill, to which it appears that any standing orders applicable to a private Bill might apply, is referred to the Examiner before it is read a second time (*f*).

orders is referred to the committee in each House immediately. In this way the promoters of a Bill are spared the risk of having their Bill thrown out in the second House on the ground of non-compliance with standing orders after they have gone to the expense of carrying it through the first House, in which their non-compliance with standing orders may have been condoned.

(*a*) Standing Orders of the House of Lords (Private Business), 1911, No. 78; Standing Orders of the House of Commons (Private Business), 1911, No. 78. Such special reports, which are very rare, are referred to the Standing Orders Committee in the House of Lords and to the Select Committee on Standing Orders in the House of Commons. As to these committees, see p. 743, *post*.

(*b*) Standing Orders of the House of Lords (Private Business), 1911, No. 71; Standing Orders of the House of Commons (Private Business), 1911, No. 72.

(*c*) See pp. 738, 739, *ante*.

(*d*) Standing Orders of the House of Lords (Private Business), 1911, No. 67; Standing Orders of the House of Commons (Private Business), 1911, No. 67. In the House of Lords, the order states that the Bill must be referred to the Examiner before its second reading; in the House of Commons, that it must be referred to him again within five weeks of the date on which the petition for the Bill was indorsed by him. In a Bill of this kind, the promoters are required by Parliament to submit their proposed Bill to the county council or local authority empowered to make such rate, and to give notice of their intention of submitting it once in each of two consecutive weeks in a newspaper published in Dublin. The Bill must be approved by a majority of the members present at the meeting of the council which considers it, and the resolution of the council approving the Bill must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons.

(*e*) Standing Orders of the House of Lords (Private Business), 1911, No. 68; Standing Orders of the House of Commons (Private Business), 1911, No. 68. Proof must be given to the Examiner that the person in question subscribed his name to the petition for the Bill, or to a printed copy of the Bill as brought into the House.

(*f*) See pp. 703, 740, *ante*. In a case of this kind, the Examiner, to whom the Bill is referred, assumes that any orders applicable to a private Bill may apply to the said Bill, and inquires which orders are applicable and whether they have been complied with.

SECT. 5. Private Bills and Bills to Confirm Provisional Orders.

Every private Bill, and also every provisional order confirmation Bill, which has been passed by one House is referred to the Examiners by the other House before it can be read a second time, in order that they may report whether any further compliance with standing orders is necessary (*g*).

SUB-SECT. 6.—*Standing Orders Committees.*

Of the House of Lords.

**1382.** The Standing Orders Committee of the House of Lords consists of the Chairman of Committees and forty other peers who are appointed by the House, upon the motion of the Chairman of Committees, at the beginning of every session

Of the House of Commons.

**1383.** The Select Committee on Standing Orders of the House of Commons is composed of eleven members who are nominated by the House at the beginning of every session (*i*).

Duties.

**1384.** The duty of each of these committees is to take into consideration the Examiner's certificates of non-compliance with the standing orders (*j*), and to report to the House whether or not the standing orders with which the promoters of a Bill have not complied should be dispensed with (*k*).

(*g*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 71A, 87, 88; Standing Orders of the House of Commons (Private Business), 1911, No. 72. One of the Examiners is required to give two clear days' notice of the day on which any private Bill referred to them after its first reading or any additional provision is to be examined; in the case of a provisional order confirmation Bill, such notice is not to be given until the Bill has been printed and circulated; see Standing Orders of the House of Lords (Private Business), 1911, No. 72; Standing Orders of the House of Commons (Private Business), 1911, No. 73.

(*h*) Standing Orders of the House of Lords (Private Business), 1911, No. 80; and see p. 642, *ante*. As to the Chairman of Committees, see p. 630, *ante*.

(*i*) Standing Orders of the House of Commons (Private Business), 1911, No. 91; and, as to procedure, see pp. 746 *et seq.*, *post*.

(*j*) In the House of Commons, the committee also considers and reports to the House with regard to cases of non-compliance with the standing orders in respect of petitions against Bills. In the House of Lords, a petitioner against a Bill who has not complied with the standing orders must obtain the permission of the Chairman of Committees before the House will allow him to present his petition.

(*k*) In both Houses, the reports of the Examiner are held to be conclusive on the question of any non-compliance with standing orders reported therein, and, in any case where the Examiner has made a special report setting forth a statement of facts without deciding whether the standing orders have, or have not, been complied with, the report is held to be conclusive as to the facts so set forth. In the House of Lords, three clear days' notice must be given before the meeting of the Standing Orders Committee. The promoters of any Bill which has been referred to its consideration must deposit in the office of the Clerk of the Parliaments a printed statement setting forth the reasons on account of which the standing orders with which they have not complied ought to be dispensed with, and, in the event of there being any opposition, the opponents must deposit, before 3 o'clock in the afternoon on the second day after the order for the meeting of the committee has been fixed, a printed statement embodying their reasons against any dispensing with the standing orders. If there is no opposition, the Chairman of Committees conducts the proceedings of the committee alone; if there is any opposition, the whole committee is summoned, but three lords, with the Chairman of Committees, constitute a quorum. The agents for the Bill and the agents for the opponents

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

Refusal to dispense with standing

**1385.** If the committee in either House refuses to dispense with the standing orders, the promoters cannot proceed any further with their Bill or that part of it which does not comply with the standing orders.

SUB-SECT. 7.—*Further Proceedings with regard to Private (Local) Bills and Provisional Order Confirmation Bills.*

(i.) *In General.*

Allocation of Bills between the two

**1386.** A private Bill may originate in either House of Parliament (*l*). A meeting is held on or before the 28th January every year between the Chairman of Committees in the House of Lords or his Counsel and the Chairman of Ways and Means or the Counsel to the Speaker, when it is decided which Bills are to be introduced in each House (*m*).

Procedure in second House.

**1387.** When a private Bill or a provisional order confirmation Bill has passed through all its stages in one House, it is sent to the other House, where the procedure is the same as if it had been introduced in that House. If amendments are made, the Bill is returned, as amended, to the House in which it originated. If the amendments which have been made to the Bill are agreed to, the measure is ready to receive the Royal Assent (*n*).

appear in support of their respective statements, which are submitted to the consideration of the committee (see Standing Orders of the House of Lords (Private Business), 1911, Nos. 80—85). For forms, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 196, 219, 292. In the House of Commons, the agents for the Bill, as a general rule, do not appear before the Select Committee on Standing Orders, but, if the committee desires to hear arguments, it can summon parties to appear. The full committee is summoned whether there is opposition or not, and parties are required to deliver in their statements. The agents are required, in all cases where statements are to be delivered in to the committee, to deposit them at the residence of each member of the committee, in the Committee Office of the House of Commons, and with the agents for other parties, not later than 1 o'clock in the afternoon on the day preceding the meeting of the committee; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 91—97, and also the resolutions of the House with reference to the proceedings of the Select Committee on Standing Orders.

(*l*) A personal Bill is usually introduced in the House of Lords; see p. 758, *post*.

(*m*) In the House of Commons, a report is made by the Chairman of Ways and Means of the Bills which are to originate in the House of Lords; see Standing Orders of the House of Commons (Private Business), 1911, No. 79. A provisional order confirmation Bill may also originate in either House.

(*n*) See p. 723, *ante*. As soon as a private Bill is ready to receive the Royal Assent, a correct signed copy of the Bill is supplied by the agents for the Bill to the officials in the office of the Clerk of the Parliaments. From this copy a proof of the Act is prepared, which is carefully compared with the House copy of the Bill. The House copy of every provisional order confirmation Bill is also carefully examined in the Parliament Office in order to see whether any amendments which have been made since the introduction of the Bill have been inserted. Two vellum copies of every private Act and provisional order confirmation Act are printed and are then signed by the Clerk of the Parliaments or his deputy. One of these copies is preserved in the Victoria Tower, the other in the Record Office. As to public Bills, see p. 725, *ante*.

Fees and charges.

**1388.** There are certain fees and charges incidental to the preparation, bringing in, and carrying through Parliament of any private Bill or provisional order confirmation Bill, and certain fees must also be paid by any person who presents a petition either in favour of or against any such Bill. A list of such fees and charges is drawn up, in the House of Lords, by the Clerk of the Parliaments; in the House of Commons, by the Speaker (*o*).

Taxation of costs.

**1389.** Costs, which in each House are taxed by an officer appointed for the purpose, are taxed either under statutory authority (*p*), or upon a requisition of one of His Majesty's principal Secretaries of State, or of a Government department, or of any court in England, Scotland, or Ireland, or in his own discretion at the request of the parties interested in the same.

Duty of taxing officer.

**1390.** The duty of the taxing officer in each House (*q*) is to allow the authorised fees and to award costs of such taxation against either party thereto in such proportion as he may think fit (*r*). In the House of Lords the taxing officer reports his taxation to the Clerk of the Parliaments; in the House of Commons to the Speaker.

Memorial against report of taxing officer.

**1391.** If either party to a taxation is aggrieved by the decision contained in the report of the taxing officer, he may deposit a memorial addressed to the Clerk of the Parliaments, or to the Speaker, as the case may be, complaining of such report, and the Clerk of the Parliaments, or the Speaker, may then require the taxing officer to make a further report. If no memorial is presented against a report from the taxing officer, or, if such a memorial has been presented, as soon as the matters complained of have been disposed of, the Clerk of the Parliaments, or the Speaker, as the case may be, may issue a certificate of the amount found due, and such certificate has the effect of a warrant to confess judgment (*s*).

(*o*) House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69), s. 4.; House of Lords Costs Taxation Act, 1849 (12 & 13 Vict. c. 78), s. 4. The schedule of fees to be charged in the House of Lords with regard to local, personal, and provisional order confirmation Bills, and the general fees and fees on taxation, is printed in the Appendix to the Standing Orders of the House relative to private Bills, 1911. A table of the fees to be charged in the House of Commons upon the same subjects appears in the Appendix to the Standing Orders of the House relative to Private Bills, 1911.

(*p*) House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69); House of Lords Costs Taxation Act, 1849 (12 & 13 Vict. c. 78); Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27).

(*q*) In the House of Lords this officer is appointed by the Clerk of the Parliaments (House of Lords Costs Taxation Act, 1849 (12 & 13 Vict. c. 78), s. 3; in the House of Commons, by the Speaker (House of Commons Costs Taxation Act, 1847 (10 & 11 Vict. c. 69), s. 3).

(*r*) Under *ibid.* (both Acts), ss. 5 and 6, the taxing officer is empowered to examine parties and witnesses on oath, and to call for books and papers.

(*s*) *Ibid.* (both Acts), ss. 8 and 9. In a case where costs are awarded by a private Bill committee (see note (*g*), p. 756, *post*), the certificate of the taxing officer in each House is conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party stated to be liable to pay (Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27) s. 3).

SECT. 5.

**Private Bills and Bills to Confirm Provisional Orders.**

(ii.) *First Reading.*

First reading.

**1392.** In both Houses the first reading of a private Bill is a purely formal matter. The Bill is laid upon the table of the House in which it is to be introduced, and is deemed to have been read a first time (*t*).

In the House of Lords, the first reading of a provisional order confirmation Bill is also a formal matter, but the Bill is presented to the House by a Minister representing the department of the Government which is responsible for it, who moves that it be read a first time. In the House of Commons, notice must be given before such a Bill may be presented.

(iii.) *Second Reading.*

(1) *In the House of Lords.*

Interval of time between first and second reading in the House of Lords.

**1393.** In the House of Lords, a private Bill which originates in that House, unless the standing orders have not been complied with (*a*), or unless it is a Bill which has to be referred to the Examiners after first reading (*b*), must be set down for second reading not earlier than the fourth day or later than the seventh day after it has been read a first time (*c*).

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(*t*) In both Houses, a House copy of every provisional order confirmation Bill and every private Bill is prepared in the same shape and style as in the case of a public Bill; see p. 706, *ante*. Every private Bill (except a name Bill, which usually is not printed) must also be printed at the cost of the promoters, and must be obtainable by peers and members of the House of Commons; see Standing Orders of the House of Commons (Private Business), Nos. 201, 203. Every printed copy of a private Bill which is presented to the House of Commons must be indorsed with the names of two members of the House. Every private Bill which originates in the House of Lords must be read a first time not later than three clear days after the Examiner's certificate has been laid on the table of the House; see Standing Orders of the House of Lords (Private Business), 1911, No. 86*a*. In the House of Commons, every private Bill which originates in that House must be presented not later than one clear day after the Examiner has indorsed the petition for the Bill "Standing Orders complied with"; or, if the House is not sitting when such indorsement is made, not later than one clear day after the next sitting of the House. If the standing orders with regard to a Bill have not been complied with, the Bill must be presented not later than one clear day after the House, acting upon a report from the Select Committee on Standing Orders (see p. 743, *ante*) dispensing with the standing orders in question, has given leave for the Bill to proceed; see Standing Orders of the House of Commons (Private Business), 1911, No. 196.

(*a*) In the case of a Bill with regard to which the standing orders have not been complied with, the second reading must take place not later than the second sitting day after the report dispensing with the standing orders has been received from the Standing Orders Committee; see Standing Orders of the House of Lords (Private Business), 1911, No. 91.

(*b*) As to such Bills, see pp. 703, note (*d*), 742, *ante*. In the case of a Bill which must be referred to the Examiner after first reading, the second reading must take place not later than the fourteenth day after the first reading; in the event of the standing orders not having been complied with, the time allowed for the second reading is extended; see Standing Orders of the House of Lords (Private Business), 1911, No. 91.

(*c*) *Ibid.* Notice must be given in the Minutes of Proceedings of the day upon which the second reading of a Bill is going to be taken. To meet the convenience of the promoters, who sometimes find it difficult to comply with the requirements of the standing order, it has become the practice to put down

The motion to read a Bill a second time is occasionally opposed. In such case it is usual for the peer who wishes to prevent the further progress of the measure to move that it be read a second time this day three months.

(2) *In the House of Commons.*

**1394.** In the House of Commons, not less than three or more than seven clear days are allowed to elapse between the date of the first reading of a provisional order confirmation Bill or of a private Bill and the date on which it is set down for second reading. A Bill which has been referred to the Examiner after its first reading must be set down for the second reading not later than seven clear days after the Examiner's report, or, in case the standing orders have not been complied with, the report from the Select Committee on Standing Orders, has been laid before the House (*d*).

Interval of time between first and second reading in the House of Commons.

If the motion for the second reading of a private Bill is opposed, the second reading must be postponed until the next day upon which the House sits (*e*). It is open to any member to move the rejection of a private Bill; in such event, the usual motion is that the Bill may be read a second time this day three or six months (*f*), but a reasoned amendment against the question for the second reading of the Bill may also be moved.

(iv.) *Petitions in Opposition.*

**1395.** Opponents of a private Bill or of any order which is included in a provisional order confirmation Bill may present petitions to Parliament praying to be heard by counsel against any such Bill or order (*g*), and all such petitions, if they have been

Petitions against private Bills and provisional order confirmation Bills.

the notice for the second reading, by order of the House, for a later day than the last day on which, according to the standing order, it could be taken. In these cases an order of the House is held to override the standing order, although in words the standing order is not formally suspended.

(*d*) Standing Orders of the House of Commons (Private Business), 1911, No. 204. In the House of Commons, three clear days' notice of the day proposed for the second reading of any private Bill must be given to the clerks in the Private Bill Office in whose custody the Bill is kept; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 233—235. If the period of seven days mentioned in the text, *supra*, should expire during an adjournment of the House (other than an adjournment from Friday to the following Monday), notice for the second reading of a private Bill may be given for the day on which the House meets after such adjournment; see Standing Orders of the House of Commons (Private Business), 1911, No. 224*a*.

(*e*) Standing Orders of the House of Commons (Private Business), 1911, No. 207. This order also applies when a private Bill is opposed on consideration or on third reading.

(*f*) In neither House is it possible to say, as can be said in the case of a public Bill, that the principle of a private Bill is either affirmed or rejected by the House on the second reading stage; see p. 706, *ante*. The House only agrees to the second reading of a private Bill upon the understanding that the reasons for passing the Bill into law are proved to the satisfaction of the committee which is appointed to inquire into its merits. For a statement on the merits, see Encyclopædia of Forms and Precedents, Vol. IX., p. 239.

(*g*) In the House of Lords, all petitions against a private Bill, or an order in a provisional order confirmation Bill, are referred to the committee appointed to

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deposited in accordance with the standing orders, are referred in each House to the committee appointed to consider the Bill (*h*).

Petitioners who pray to be heard against a private Bill, or against any order in a provisional order confirmation Bill, must specify distinctly in their petitions the grounds of their opposition to the proposed measure (*i*).

Deposit of petitions in House of Lords.

**1396.** In the House of Lords, a petition against a private Bill originating in that House must be deposited before 3 o'clock in the afternoon, on or before the 19th February, and, against a late private Bill (*j*), or an order in a provisional order confirmation Bill originating in that House, on or before the seventh day after the day on which the Bill has been read a second time (*k*). Petitions against a private Bill or against an order contained in a provisional order confirmation Bill which is brought up from the House of Commons must be deposited before 3 o'clock in the afternoon on or before the seventh day after the day on which such Bill has been read a first time (*l*).

Deposit of petitions in House of Commons.

**1397.** In the House of Commons, petitions against private Bills originating in that House must be deposited on or before the 12th

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consider the Bill in question by the order of the House appointing the committee. In the House of Commons, all such petitions stand referred to the committee appointed to consider the opposed Bill as soon as they have been deposited in the Private Bill Office of the House; see Standing Orders of the House of Commons (Private Business), 1911, No. 210. For forms of petition, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 293—312, 322, 356. For an agreement withdrawing opposition, see *ibid.*, pp. 224, 231; and for a form of withdrawal, see *ibid.*, p. 197.

(*h*) It is also open to any person or persons, who are interested in a private Bill or order in a provisional order confirmation Bill which is opposed, to present a petition against the alteration of the measure as it is presented to the committee appointed to consider the Bill.

(*i*) Standing Orders of the House of Commons (Private Business), 1911, No. 127. Petitions to the House of Lords should be superscribed, "To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled"; to the House of Commons, "To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled." A general designation of the parties to the petition should follow. "The humble petition of [names and designations of petitioners] sheweth." The general allegations of the petitioners should then be set forth, followed by the prayer in which they humbly pray the House not to allow the Bill to pass into law. To the petition are added the words, "And your petitioners will ever pray etc.," followed by the signatures of the petitioners. In the House of Lords, a petition may be written or printed, or lithographed either on parchment or paper. In the House of Commons, a printed or lithographed petition is not received. At least one signature must be upon the same sheet or skin upon which the petition is written. The signatures must not be pasted on. Petitions of corporations should be under their common seal.

(*j*) A late private Bill is a Bill the petition for the introduction of which has not been presented to the House of Commons in the usual manner, and for which, therefore, a petition must be presented to the House of Lords before it may be introduced. The permission of the Chairman of Committees must be obtained before such a petition will be received by the House.

(*k*) Standing Orders of the House of Lords (Private Business), 1911, No. 92.

(*l*) *Ibid.*, No. 93. If the period laid down by the standing orders for the deposit of petitions will expire during a recess, an order is made by the House, before such recess, suspending the standing orders in question and extending the time for the deposit of petitions to the first day on which the House shall sit again after the recess.

SECT. 5. Private Bills and Bills to Confirm Provisional Orders.

February, and, against an order in a provisional order confirmation Bill originating in that House, not later than seven clear days after the notice has been given of the day on which the Bill is to be considered by the Examiner. But petitions against any Bill sent down from the House of Lords, or any Bill as to which compliance with the standing order as to the time for depositing the Bill has been dispensed with, or any Bill promoted by the London County Council for the purpose of raising money by the creation of stock or on loan (*m*), may be deposited at any time not later than ten clear days after the Bill has been read a first time (*n*).

(v.) *Locus Standi of Petitioners.*

Standing orders conferring *locus standi.*

**1398.** In both Houses there are standing orders which give to certain classes of petitioners a definite *locus standi* or right to appear in opposition against any Bill the provisions of which may affect them injuriously (*o*). These standing orders, however, do not cover by any means all the cases in which an individual or body of individuals may be permitted to ask a committee on a private Bill in either House of Parliament to refuse to sanction or to amend it.

The right of any petitioner whose claim to be heard in opposition to a private Bill is not definitely recognised in the standing orders must depend upon the merits of his individual case, and, as a general principle, therefore, it may be stated that any person or body of persons whose interests or property are or may be affected adversely by a provision in any private Bill, or in any order contained in a provisional order confirmation Bill, will be allowed to oppose the proposed measure in both Houses of Parliament.

Cases where *locus standi* of petitioners against a Bill is objected to.

**1399.** In the event of the *locus standi* of any petitioner to be heard before a committee on a private Bill being disputed by the promoters of the Bill (*p*), the procedure in the two Houses is different.

In the House of Lords, in such cases, it is left to the committee to which the Bill is committed to decide, after hearing arguments on both sides, whether or not the petitioner has sufficient grounds of complaint to justify his being heard in opposition to the proposed measure (*q*).

In the House of Commons, if the *locus standi* of any petitioner against a private Bill, or an order in a provisional order

(*m*) See p. 737, *ante*.

(*n*) Standing Orders of the House of Commons (Private Business), 1911, No. 128. If this period expires during an adjournment (other than an adjournment from Friday to the following Monday), the period for depositing such petitions is extended to the first day on which the House sits again after such adjournment; see Standing Orders of the House of Commons, 1911 (Private Business), No. 224*a*.

(*o*) Standing Orders of the House of Lords (Private Business) 1911, Nos. 105, 105*a*—100*d*; Standing Orders of the House of Commons (Private Business), 1911, Nos. 75, 131, 132, 134*a*, 134*c*, 135.

(*p*) For forms of notice of objections to *locus standi*, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 316, 318, 320.

(*q*) There are no rules in the House of Lords on the subject of *locus standi*; each case as it arises is dealt with on its merits.

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confirmation Bill, which has been presented to the House, is objected to by the promoters within eight days after the petition in question has been lodged, the matter must be submitted to the consideration of the Referees on private Bills. This body, which has the assistance of the Counsel to the Speaker, consists of the Chairman of Ways and Means, the Deputy Chairman, and seven other members of the House appointed by the Speaker (*r*). It is the duty of the Referees, after hearing arguments from not more than one counsel on each side, to decide whether or not or to what extent the petitioner is to be allowed to appear before the committee to which the Bill is to be referred (*s*).

(vi.) *Committees.*

(1) *In the House of Lords.*

Commitment.

**1400.** In the House of Lords, every unopposed private Bill (with the exception of a Divorce Bill (*t*)) and every unopposed order in a provisional order confirmation Bill (*u*) is referred to the Committee on unopposed private Bills, that is, to the Chairman of Committees (*v*); every private Bill and every order in a provisional order confirmation Bill which is opposed is referred to a committee of five lords (*w*) nominated by the Committee of Selection (*x*).

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(*r*) Standing Orders of the House of Commons (Private Business), 1911, No. 87. As to the Chairman of Ways and Means, and the Deputy Chairman, see p. 666, *ante*.

(*s*) The duties of the Referees are laid down by the House; see Standing Orders of the House of Commons (Private Business), 1911, No. 89. Their practice and procedure are regulated by the Chairman of Ways and Means in accordance with *ibid.*, No. 88. The rules made by him are printed and can be obtained upon application at the office of the Referees. The procedure before the court of Referees is much the same as that before a committee on a private Bill in the House of Commons; see p. 753, *post*. The court of Referees is empowered to administer oaths to witnesses, and award costs in certain cases (Parliamentary Costs Act, 1867 (30 & 31 Vict. c. 136), ss. 1, 3).

(*t*) For the procedure on a Divorce Bill, see p. 762, *post*.

(*u*) Standing Orders of the House of Lords (Private Business), 1911, No. 102*b*. In the House of Lords, if a provisional order confirmation Bill contains some orders which are opposed and some which are not, the Bill is divided during the committee stage. The opposed orders are referred to a committee of five lords, and those which are unopposed to the Chairman of Committees in the Committee on unopposed private Bills (see the text, *infra*). The orders may be reported separately to the House, but, as soon as all the orders contained in the Bill have been reported, the Bill is reunited and is then recommitted as a whole to a committee of the whole House. As to committees of the whole House, see p. 713, *ante*.

(*v*) The Chairman of Committees (see p. 630, *ante*) is assisted by his Counsel. The agents or solicitors for the Bill appear before him to answer any inquiries which he may make with regard to any of its provisions, or to any alterations which have been made to it since it was presented to the House. Witnesses are also called to prove the accuracy of the statements in the preamble, and any other statements in the Bill which may require confirmation. As soon as the Chairman of Committees is satisfied that the provisions of the Bill conform to the requirements of the House and embody any suggestions which he may have made to the promoters prior to the committee stage, he reports the Bill to the House either with or without amendments, as the case may be.

(*w*) Standing Orders of the House of Lords (Private Business), 1911, No. 96.

(*x*) The Committee of Selection consists of the Chairman of Committees

(2) *In the House of Commons.*

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**Private Bills and Bills to Confirm Provisional Orders.**

Commitment.

**1401.** In the House of Commons, all private Bills (with the exception of divorce Bills (*y*)), and all provisional order confirmation Bills (*a*), after they have been committed, stand referred either to the Committee of Selection (*b*), or to the General Committee on Railway and Canal Bills (*c*), and are then referred by these committees either to the consideration of the Committee on unopposed Bills (*d*) or, if opposed, to that of a committee constituted in accordance with the standing orders of the House relating to private Bills (*e*).

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and such other lords as the House may appoint (usually about seventeen in number). The committee is appointed early in each session; see Standing Orders of the House of Lords (Private Business), 1911, No. 97. Its principal duties are to propose to the House the names of lords to serve on committees on private Bills, to appoint the chairmen of such committees, to fix the day for the first meeting of each committee, and to settle the Bills which are to be referred to its consideration. As to committees of the House of Lords generally, see pp. 637 *et seq.*, *ante*.

(*y*) Divorce Bills are committed to a committee specially appointed to consider them; see p. 762, *post*. In exceptional circumstances a private Bill may be committed to a specially constituted committee; see p. 686, *ante*. As to committees of the House of Commons generally, see pp. 682, *et seq. ante*.

(*a*) In the House of Commons, if any order in a provisional order confirmation Bill is opposed, the Bill as a whole is referred to a private Bill committee, which considers all the orders contained in it, whether opposed or unopposed. It is open to the committee, however, if it deems it expedient, to divide the Bill into two Bills, the one containing the opposed and the other the unopposed orders, and to report each Bill separately to the House; see Standing Orders of the House of Commons (Private Business), 1911, No. 208; compare, as to procedure in the House of Lords, note (*u*), p. 750, *ante*.

(*b*) The Committee of Selection is nominated by the House at the beginning of every session. It consists of eleven members, three of whom constitute a quorum. Copies of all private bills, not being railway and canal Bills, are laid before this committee, whose duty it is to form groups of such Bills when they are opposed, and to decide the order in which they are to be considered by the select committee to which they are referred; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 98—103, 105—114, 116, 136, 208, 209.

(*c*) The General Committee on Railway and Canal Bills is nominated every session by the Committee of Selection, which has also the power of appointing the chairman and of discharging members and substituting new ones. Copies of all railway and canal Bills are laid before this committee, and its duties with regard to them are practically the same as those of the Committee of Selection with regard to other private Bills; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 99, 106, 208, 209, 236, note (*b*), *supra*, and see note (*d*), *infra*.

(*d*) The Committee on unopposed Bills is composed of five members, namely, the Chairman of Ways and Means, who is *ex officio* chairman of the committee; the Deputy Chairman of Ways and Means, two members of the House selected by the Chairman of Ways and Means, from a panel appointed by the Committee of Selection, and the Counsel to the Speaker; see Standing Orders of the House of Commons (Private Business), 1911, No. 109. No member of the committee who is locally or otherwise interested in a Bill may vote on any question which may arise; see Standing Orders of the House of Commons (Private Business), No. 138. A committee on a group of railway and canal Bills consists of four members. The chairman of such a committee is appointed by the General Committee on Railway and Canal Bills (see note (*c*), *supra*), and the other members are appointed by the Committee of Selection; see Standing Orders of the House of Commons (Private Business), 1911, No. 115.

(*e*) Standing Orders of the House of Commons (Private Business), 1911,

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

Local Legislation Committee.

**1402.** In conformity with an order of the House which is made at the beginning of e ery session (*f*), the Committee of Selection nominates a select committee, not exceeding fifteen members, which is called the Local Legislation Committee (*g*), to which are committed all private Bills promoted by municipal and other local authorities, by which it is proposed to create powers relating to police, sanitary, and other local government regulations in conflict with, deviation from or excess of, the provisions of the general law (*h*).

This committee, of which four is a quorum, elects its own chairman, and may divide itself into two committees if it thinks it advisable (*i*).

(3) *Joint Committees of the Two Houses.*

Appointment of joint committees.

**1403.** A private Bill and also a provisional order confirmation Bill, after it has been read a second time in either House, may be referred to a joint committee of Lords and Commons.

If it is thought desirable to adopt this procedure (*k*), the House in which the Bill is under consideration sends a message to the other House, stating that it has agreed to a resolution that it is advisable that the Bill in question should be referred to a joint committee and asking for the concurrence of the other House.

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Nos. 108, 115. A committee on opposed private Bills other than railway and canal Bills is composed of four members who are appointed by the Committee of Selection ; see Standing Orders of the House of Commons (Private Business), 1911, No. 116.

(*f*) See Journals of the House of Commons, 1909, Vol. CLXIV., p. 43.

(*g*) This committee was first appointed in 1882, and has been appointed every year since 1884, except in 1901 and 1902, when its work was performed by two ordinary private Bill committees and the Committee on unopposed Bills. Until 1909 the committee was called the Police and Sanitary Committee ; in that year the order of reference was extended to include local government provisions, and the title of the committee was changed to the present one.

(*h*) At the beginning of the session, the Speaker's Counsel makes out a list of all Bills containing such regulations, and all such Bills are referred to the committee, and any other Bill may be added if, in the opinion of the Committee of Selection, it is one which should be considered in conjunction with any Bill that has been referred to the Local Legislation Committee. Portions also of a Bill which is being considered by a private Bill committee may be referred to the Local Legislation Committee.

(*i*) The procedure in the Local Legislation Committee is practically the same as in a private Bill committee (see p. 753, *post*), but as it is a select committee, Standing Orders of the House of Commons (Private Business), 1911, Nos. 115—124 and 126, which refer to private Bill committees, do not apply ; see p. 684, *ante*. The legal adviser of the Local Government Board usually acts as the official adviser of the committee, and makes out a report on all clauses in the Bills referred to it which are covered by its terms of reference. It is customary for the committee to make a sessional report to the House giving a general survey of its work during the year.

(*k*) The object of referring a private Bill of unusual importance, either because of the large interests which it involves or because of the matters with which it deals, or a group of such Bills, to the consideration of a joint committee, is to economise the time of Parliament and to save, as far as possible, expense to the parties interested. The practice of referring private Bills to a joint committee dates from 1873, when the Railway etc. (Transfer and Amalgamation) Bills of that session were committed to a joint committee after being read a second time in the House of Commons, and since that date both private Bills and also provisional order confirmation Bills have not infrequently been referred by both Houses to the consideration of joint committees.

When a message has been sent agreeing to this proposal, the Bill is committed, each House appoints a committee and nominates the members who are to serve upon it. The day and hour for the first meeting of the committee is fixed by the House of Lords (*l*), and the procedure in a joint committee on a private Bill is the same as that adopted in a committee on a private Bill in that House (*m*). When the consideration of a Bill before a joint committee has been concluded, a report is made to each House, and the Bill is then proceeded with in the House in which it originated (*n*).

(4) *Procedure in Committees.*

Constitution of committees.

**1404.** Neither peers nor members of the House of Commons who are interested, either locally or otherwise, in any Bill may serve upon the committee which is appointed to consider it (*o*).

All peers or members who are appointed to serve upon any committee on opposed private Bills and provisional order confirmation Bills are required to attend every sitting of the committee (*p*). Such committees sit from day to day until they have disposed of all the Bills in the group which has been referred to them (*q*). In both Houses, these committees usually meet at eleven o'clock in the morning and adjourn, in the House of Lords, at four o'clock, and in the House of Commons, at three o'clock, in the afternoon (*r*).

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(*l*) The number of members appointed by each House to serve on a joint committee is the same, and is fixed by the House which sends the message suggesting the desirability of appointing the committee. In both Houses, although a joint committee on a private Bill is usually nominated by the Committee of Selection, the committee is empowered to choose its own chairman from among the members who are named. A joint committee on a private Bill has the same powers as are possessed by a committee on opposed private Bills in the two Houses; see pp. 750, 751, *ante*, the text, *infra*, and pp. 754, 755, *post*. The fees which are incurred by the promoters of a Bill before a joint committee, and by the petitioners against it, are paid to the House in which the Bill originates.

(*m*) See the text, *infra*, and pp. 754, 755, *post*.

(*n*) A private Bill or a provisional order confirmation Bill is reported from a joint committee in the same way as a public Bill; see p. 716, *ante*. Its subsequent stages in the House in which it originates are the same as those of any other private Bill or provisional order confirmation Bill. In the second House, after the Bill in question has been read a second time, an order is made dispensing with the committee stage, and the Bill is ordered to be read a third time, or to be considered as if it had been reported from a committee.

(*o*) Standing Orders of the House of Lords (Private Business), 1911, No. 98; Standing Orders of the House of Commons (Private Business), 1911, No. 117. In the House of Commons, every member who is appointed to serve on a private Bill committee must sign a declaration to the effect that his constituents have no local, and that he has no personal, interest in the Bills to be considered by the committee.

(*p*) Standing Orders of the House of Lords (Private Business), 1911, No. 100; Standing Orders of the House of Commons (Private Business), 1911, No. 119. The standing orders of both Houses, however, allow committees to continue to sit in the absence of one of their members. In the House of Lords, this practice is only permitted if the promoters and opponents of the Bill under consideration raise no objection (Standing Orders of the House of Lords (Private Business), 1911, No. 101). In both Houses, the absence of a member of a committee must be reported to the House (*ibid.*; Standing Orders of the House of Commons (Private Business), 1911, No. 122).

(*q*) See note (*b*), p. 751, *ante*. In each House, the Bills in a group should be considered in the order in which they are arranged.

(*r*) Standing Orders of the House of Lords (Private Business), 1911, No. 99

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Proceedings in committees.

**1405.** The actual procedure adopted in these committees is much the same in each House (*s*). The first day of meeting of the committee the agents for the Bill must provide each member of the committee with a filled up copy of the Bill containing all the amendments and alterations in it proposed since its introduction in the House (*t*). Any report from a Government department dealing with the Bill is also laid before the committee (*a*). Counsel (*b*) are then heard on behalf both of the promoters and also of any opponents who have petitioned in due form to be heard

In the House of Lords, a private Bill committee is forbidden to sit after four o'clock without obtaining the leave of the House or reporting the matter to the House. In the House of Commons, such committees may continue to sit, except whilst the House is at prayers; see Standing Orders of the House of Commons (Public Business), 1911, No. 54. Committees in both Houses usually adjourn for half an hour for luncheon.

(*s*) The official minutes of the proceedings of the committee are kept by the clerk of the committee, and a verbatim report of the evidence is drawn up by an official shorthand writer. In cases where the committee lasts for more than one day, the evidence is printed at the expense of the promoters for the use of the committee and of the parties. In the House of Commons, the standing orders state that a record is to be kept by the clerk of the members of the committee who are present and of the manner in which they vote, and also that the minutes of proceedings shall be laid before the House; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 139, 152. In neither House is it the function of a private Bill committee to inquire into the compliance of the promoters with standing orders required to be proved before the Examiners; see Standing Orders of the House of Lords (Private Business), 1911, No. 103; Standing Orders of the House of Commons (Private Business), 1911, No. 140.

(*t*) Standing Orders of the House of Commons (Private Business), 1911, No. 137. In both Houses, there is also a standing order which provides that a copy of any Bill, as it is proposed to be submitted to the consideration of a committee, must be laid before the Chairman of Committees or the Chairman of Ways and Means, as the case may be, two clear days before the meeting of the committee; see Standing Orders of the House of Lords (Private Business), 1911, No. 140*b*; Standing Orders of the House of Commons (Private Business), 1911, No. 82. The object of this order is to enable the Chairman of Committees or Chairman of Ways and Means, as the case may be, to draw the attention of the committee to any points in the Bill which may require elucidation or particular attention; see Standing Orders of the House of Commons (Private Business), 1911, No. 80.

(*a*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 89, 106, 106*a*, 113, 175*a*; Standing Orders of the House of Commons (Private Business), 1911, Nos. 154—157, 212. In certain cases committees of the House of Commons are directed to report specially to the House with regard to such reports; see Standing Orders of the House of Commons (Private Business), 1911, Nos. 150, 154—158*b*.

(*b*) Peers are not allowed to appear as counsel before parliamentary committees, although it has been decided that they may appear in that capacity on an appeal at the bar of the House; see report from the Committee for Privileges with regard to this matter, 6th July, 1905, Journals of the House of Lords, 1905, Vol. CXXXVII., p. 230. Members of the House of Commons are debarred by various resolutions of the House from appearing as counsel before parliamentary committees, or from engaging either by themselves or by their partners in the conduct of any private Bill; see Journals of the House of Commons, 1666, Vol. VIII., p. 646; 1830, Vol. LXXXV., p. 107; 1858, Vol. CXIII., p. 247. Formerly, it used to be necessary for a member to obtain the leave of the House before appearing as counsel at the bar of the House of Lords: this is no longer the case. See, further, title BARRISTERS, Vol. II., pp. 370 *et seq.*

by counsel against the proposed measure (*c*), and witnesses on both sides may be called and examined (*d*). As soon as the case both for and against the principles of the Bill which are set out in the preamble has been fully heard, the committee decides whether or not the Bill is to be allowed to proceed (*e*). In either House, if a committee refuses to sanction the preamble of a Bill, it must report the fact to the House, and no further proceedings can be taken with regard to the proposed measure during the same session of Parliament, unless an order for the re-commitment of the Bill is made by the House (*f*). If the committee approves the preamble, the clauses of the Bill are then severally considered, and, if any of them are opposed, counsel are again heard for the promoters and the opponents before the committee comes to a decision with regard to the clause in question (*g*).

(*c*) Before any person may appear or be heard before a committee, he or his agent must enter an appearance in the Private Bill Office of the House in which the Bill is being considered, and a certificate of such appearance must be handed to the clerk of the committee. The name of the agent and of the counsel who appear for the petitioner must be entered on this certificate.

(*d*) Witnesses before committees on private Bills are examined upon oath, but, if any witness objects to taking the oath, he may affirm; see May, Parliamentary Practice, 11th ed., pp. 825, 848. In either House, if it is found necessary to compel the attendance of a witness before a private Bill committee, an order of the House must be obtained. An official witness, *i.e.*, a representative of any Government department, when called to give evidence before a private Bill committee, used formerly to be exempt from cross-examination by counsel. At the present time, however, an official witness is subject to cross-examination, except when he is called upon to speak as to the practice and policy and parliamentary precedent of his department; see *ibid.*, p. 815, note 2.

(*e*) When the time has arrived for the committee to give its decision upon any point, the room is usually cleared. In a private Bill committee, as in any other committee of either House (see p. 713, *ante*), all questions are decided by a majority. In the case of an equality of voting, the chairman of a private Bill committee in the House of Commons has a second or casting vote; see Standing Orders of the House of Commons (Private Business), 1911, No. 124. In the House of Lords, the chairman has no second vote, but a case of equal voting in a private Bill committee cannot occur, as such a committee consists of five members; see p. 750, *ante*.

(*f*) In the House of Commons, it is the duty of the chairman of a committee to sign a printed copy of every Bill which is approved by the committee; see Standing Orders of the House of Commons (Private Business), 1911, No. 147. In both Houses, it is the duty of the clerk of the committee to see that all the amendments which have been made in a Bill by the committee are inserted upon a copy of the Bill known as "the committee Bill."

(*g*) In both Houses, committees must report Bills which have been referred to them in all cases to the House. When, therefore, the promoters of a Bill inform the committee that they do not propose to proceed further with the measure, the committee to which it is referred must report the fact to the House; see Standing Orders of the House of Commons (Private Business), 1911, No. 149. In both Houses also, the standing orders further provide that, with regard to certain Bills in certain cases, committees should make special reports to the House; see Standing Orders of the House of Lords (Private Business), 1911, Nos. 108, 113; Standing Orders of the House of Commons (Private Business), 1911, Nos. 159, 167, 171, 173*a*, 188*a*. In the House of Lords, when no parties appear in opposition to a private Bill which has been referred to a committee on opposed Bills, the committee reports the Bill to the House, and it is re-committed to the Committee on unopposed Bills (Standing Orders of the House of Lords (Private Business), 1911, No. 102). In the House of Commons, a Bill to which no parties appear in opposition is referred back by the committee

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As soon as the consideration of the Bill is concluded by the committee, it must be reported to the House, either with or without amendments, as the case may be (*h*).

(vii.) *Report and Third Reading.*

Procedure in the House of Lords subsequent to committee stage.

**1406.** In the House of Lords, after a private Bill has been reported from the committee to which it has been referred (*i*), an order is usually made for it to be read a third time (*k*). A Bill may

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to the Committee of Selection, or, if the Bill is a railway or canal Bill, to the General Committee on Railway and Canal Bills; see p. 751, *ante*. The Bill is then dealt with as an unopposed Bill; see Standing Orders of the House of Commons (Private Business), 1911, No. 136. If a committee of either House reports unanimously that a petitioner against a private Bill or an order in a provisional order confirmation Bill has been unreasonably and vexatiously subjected to expense in defending his rights against the promoters of the Bill, or that the promoters of a Bill have been vexatiously subjected to expense by the opposition of any petitioner, it may award costs to such petitioner or such promoters, as the case may be. In the first case, the petitioner is entitled to recover from the promoters such costs as the committee may think fit, or the committee itself may award such sum for costs as it thinks fit, with the consent of the parties affected. In the second case, the promoters are entitled to recover from the petitioner such portion of the costs of the promotion of the Bill as the committee may think fit, or such sum as the committee itself may determine, with the consent of the parties affected. A committee cannot award costs against a person not appearing as a petitioner even if he is the real petitioner (see *Mallet* v. *Hanly* (2) (1887), 18 Q. B. D. 787, C. A.). All costs awarded by a committee are taxed by the taxing officer of the House in which the proceedings take place; and see p. 745, *ante*. No landowner, who *bonâ fide* at his own sole risk and charge opposes a Bill by which it is proposed to take any portion of his land, is liable to any costs in respect of his opposition to the measure (Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27), ss. 1, 2; Parliamentary Costs Act, 1871 (34 & 35 Vict. c. 3), s. 2). An injunction to restrain proceedings being taken upon the taxing officer's certificate of costs awarded by a committee will be refused (see *Hanly and Fisher* v. *Mallet* (1886), 3 T. L. R. 71) A plaintiff who has been awarded costs can obtain summary jurisdiction as of course under the Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27), but the defendant may move to set aside the judgment on the ground that the certificate of the taxing officer is invalid inasmuch as the committee has exceeded its powers in awarding the costs (see *Mallett* v. *Hanly* (1886), 18 Q. B. D. 303, C. A., *per* Lord ESHER, M.R., at pp. 308—310).

(*h*) If two or more Bills which contain competitive schemes are under consideration, the committee usually reserves its decision until it has heard the case for each Bill.

(*i*) When a Bill has been amended in a committee, the amendments which have been made by the committee are entered in the House copy of the Bill by the clerk of the committee (see also note (*s*), p. 754, *ante*), and the Bill, as amended, must be reprinted by the agents, who must deposit copies of it in the Committee Office of the House of Lords before the day appointed for the third reading. The committee copy of every opposed Bill, as soon as it has been reported from a committee, is always examined by the Counsel to the Chairman of Committees, and the Bill is not reported to the House until his sanction has been obtained. A copy of any Bill which has been amended in committee must be deposited at every office at which it was deposited under standing orders Nos. 33 and 34 (see p. 734, *ante*) three days before it is read a third time. Proof of compliance with this order is given by means of a certificate deposited in the office of the Clerk of the Parliaments; see Standing Orders of the House of Lords (Private Business), 1911, No. 143.

(*k*) A Bill may be re-committed by the House either to a committee of the whole House on a motion made by the Chairman of Committees (see Standing Orders of the House of Lords (Private Business), 1911, No. 142), or to the Committee on unopposed Bills, or to the same committee which has already

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be amended further on third reading, but no amendments may be moved at this stage, unless they have been first submitted to the Chairman of Committees and copies of them deposited in the office of the Clerk of the Parliaments one clear day at least before the Bill is to be read a third time (*l*).

In the House of Lords, as soon as a provisional order confirmation Bill has been reported to the House from the committee to which it has been referred or from the Committee on unopposed Bills, it is re-committed to a committee of the whole House, and the procedure with regard to it during its remaining stages through the House is the same as that with regard to a public Bill (*m*).

Procedure in House of Commons subsequent to committee stage.

**1407.** In the House of Commons, after a provisional order confirmation Bill or any private Bill, except a railway or canal Bill, has been reported to the House without amendments from a private Bill committee or from the Committee on unopposed Bills, it is ordered to be read a third time (*n*).

The procedure is different in the case of a railway or canal Bill, or of a provisional order confirmation Bill or private Bill to which amendments have been made in the committee to which it has been referred (*o*). In such cases, the report from the committee is

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considered it (see Standing Orders of the House of Lords (Private Business), 1911, No. 141). A Bill may be re-committed for the purpose of taking further proofs and for the insertion of consequential amendments, or to enable certain agreed amendments to be inserted in the Bill, if, in the opinion of the committee, they are desirable, or simply for the further consideration of the measure. A motion may also be made for the re-commitment of a Bill with regard to which the committee has reported that it is inexpedient to proceed; see cases of the Rochdale Corporation Water Bill in 1898, and the London County Council (Spitalfields Market) Bill in 1900 (Journals of the House of Lords, 1898, Vol. CXXX., p. 226; 1900, Vol. CXXXII., pp. 261, 300). When a Bill has been re-committed, further amendments may be made, which must be reported to the House before the Bill can be read a third time.

(*l*) In the case of any private Bill which affects Crown lands or lands belonging to the Duchy of Cornwall, the consent of the Sovereign or of the Prince of Wales, as the case may be, must be signified in the House before the Bill may be read a third time.

(*m*) In the House of Commons, as in the House of Lords, a private Bill or a provisional order confirmation Bill, after it has been reported from a committee, may be re-committed either to the committee which has already considered it, or to a specially constituted committee, or even to a committee of the whole House. The order of the House for the re-commitment of a Bill is usually accompanied by an instruction. A Bill may be re-committed either generally or for the purpose of re-considering a negatived preamble or for some special purpose, such as the insertion of a new clause; see case of the Dublin and Central Ireland Electric Power Bill, 1908 (Journals of the House of Commons, 1908, Vol. CLXIII., p. 201).

(*n*) Standing Orders of the House of Commons (Private Business), 1911, No. 213. When a Bill has been amended in committee, a copy of it must be deposited at every office at which it was deposited under Standing Orders Nos. 33 and 34 (see p. 734, *ante*) at least three days before it is read a third time; see Standing Orders of the House of Commons (Private Business), 1911, No. 84.

(*o*) A correct copy of any Bill which has been amended by a private Bill committee in the House of Commons is supplied by the clerk of the committee to the clerks in the Private Bill Office of the House, whose duty it is to see that the Bill, as reprinted by the agents after the committee stage, compares accurately with the Bill delivered to them by the committee clerk; see Standing Orders of the House of Commons, 1911, Nos. 240, 241; and see note (*i*), p. 756, *ante*.

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ordered to lie on the table. A provisional order confirmation Bill is ordered to be considered, as amended, on the following or some subsequent day, but, in the case of a private Bill, three clear days must elapse before the House can consider the Bill (*p*). Amendments of substance may be made in the House upon the consideration of any private Bill, and verbal amendments may be moved on the third reading (*q*), but, in neither case, may any amendments be offered unless the Chairman of Ways and Means is satisfied that they are amendments which should be entertained by the House without first referring them to the Select Committee on Standing Orders (*r*).

SUB-SECT. 8.—*Personal Bills.*

(i.) *In General.*

Personal Bills in House of Lords.

**1408.** It is customary for all private Bills of a personal character—that is, estate Bills, naturalisation Bills, name Bills, divorce Bills, and other Bills which do not belong to either class of local Bills (*s*)—to originate in the House of Lords. The standing orders of that House provide that the promoters of any such Bill must present a signed petition (to which a printed copy of the proposed Bill must be annexed) praying for the leave of the House to introduce the measure (*t*). A copy of the Bill must also be delivered to all persons who may be affected by its provisions before the second reading takes place (*u*).

The promoters are not called upon to present a further petition when the Bill reaches the House of Commons, and the proofs and evidence which they have produced in the House of Lords are accepted by the other House.

(*p*) One clear day's notice of the intention to move any amendment to a Bill which is ordered to lie on the table, or which is to be read a third time, must be given in the Private Bill Office, and the agents must also give one clear day's notice in writing to the same office of the day upon which it is proposed to take the third reading of any Bill; see standing orders of the House of Commons (Private Business), 1911, Nos. 242, 243.

(*q*) A private Bill may not be considered by the House, unless the Chairman of Ways and Means has signified in writing to the Speaker that the Bill contains the several provisions required by the standing orders; see Standing Orders of the House of Commons (Private Business), 1911, No. 215.

(*r*) Standing Orders of the House of Commons (Private Business), 1911, No. 216. Such amendments must be printed, unless the Chairman of Ways and Means considers that it is unnecessary to print them; see Standing Orders of the House of Commons (Private Business), 1911, No. 217. If it is thought desirable to refer any amendment to the Select Committee on Standing Orders (see p. 743, *ante*), no further proceedings on the Bill may be taken until the report from that committee has been brought up; see Standing Orders of the House of Commons (Private Business), 1911, No. 218.

(*s*) See note (*t*), p. 728, *ante;* and as to these various classes of Bills, see pp. 759 *et seq.*, *post.*

(*t*) Standing Orders of the House of Lords (Private Business), 1911, Nos. 150, 151.

(*u*) Standing Orders of the House of Lords (Private Business), 1911, No. 152. Notice of an estate Bill must also be given to every mortgagee on the estate before the second reading of the Bill; see Standing Orders of the House of Lords (Private Business), 1911, No. 157.

(ii.) *Procedure.*

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**1409.** The actual procedure in both Houses in respect of personal Bills, other than divorce Bills (*v*), after their introduction, is practically the same as that which has already been described in respect of local Bills.

Procedure in both Houses with regard to personal Bills other than divorce Bills.

In neither House is there a standing order prescribing any definite time between the first and second reading. In the House of Lords ten clear days must elapse between the second reading of an estate Bill and the committee stage (*a*). There is no standing order on this point with regard to other personal Bills. In the House of Commons the standing orders provide that three clear days, and not six clear days as in the case of a local Bill, must elapse between the second reading and the committee stage of a personal Bill (*b*).

As a rule, personal Bills are not opposed, and in each House, therefore, are referred, after they have been read a second time, to the Committee on unopposed Bills (*c*).

SUB-SECT. 9.—*Estate Bills.*

Estate Bills.

**1410.** An estate Bill is a measure relating to the real or personal estates of private persons, so as to effect arrangements which are deemed to be beneficial to all interests concerned and cannot be effected under the instruments affecting the property or by application to the court (*d*).

Bill referred to judges.

**1411.** As soon as a petition for an estate Bill has been presented to the House of Lords, it is referred to two judges (*e*). If the Bill refers to estates in land in England, the judges are required to report to the House whether, in their opinion, the provisions of the proposed Bill will effect the objects for which the measure is intended and whether amendments are desirable (*f*). If the Bill is one

(*v*) See p. 761, *post*.

(*a*) Standing Orders of the House of Lords (Private Business), 1911, No. 158.

(*b*) Standing Orders of the House of Commons (Private Business), 1911, No. 211. Six clear days must elapse, however, between the second reading and the committee stage of an estate Bill which relates to Crown, church, or corporation property, or to property held in trust for charitable or public purposes.

(*c*) In the event of an estate Bill being opposed, petitions against it may be presented at such times and such proceedings may be had thereon as the Chairman of Committees in each case may direct; see Standing Orders of the House of Lords (Private Business), 1911, No. 159.

(*d*) A common case is that of spendthrift tenants for life or heirs of entail, where the Bill in effect makes a re-settlement on terms which may save the estate from sale or enables funds to be raised to meet an emergency. Another case is that of wills which are so ill-drawn as to render the estate incapable of administration except at the risk of heavy litigation; here Parliament in effect amends the will, following as nearly as may be the intentions of the testator. See, further, titles SETTLEMENTS; WILLS.

(*e*) This refers to petitions for English and Scottish estate Bills; petitions for Irish estate Bills are only referred to the judges if the petitioners desire it and the Chairman of Committees so determines; see Standing Orders of the House of Lords (Private Business), 1911, No. 155.

(*f*) Standing Orders of the House of Lords (Private Business), 1911, No. 153. If the Bill refers to an estate in England or Wales, it is referred to two

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concerning estates in land in Scotland or Ireland, the judges are required to summon before them all parties whose interests may be affected by the Bill. They are also required to take such proofs of the allegations contained in the Bill and such consents and acceptances of trust as may be tendered to them, and are then to report to the House the state of the case and their opinion with regard to the proposed measure.

No estate Bill may be read a first time until the report of the judges (*g*) with regard to it has been received by the Chairman of Committees (*h*).

Appearance of consenting parties to an estate Bill.

**1412.** When an estate Bill is under the consideration of a committee, any person concerned in the settlement or will affected by it must be present to give his consent to the Bill (*i*), and a trustee who is appointed by the Bill must also be present in person to signify his acceptance of the trust imposed upon him (*k*).

No notice may be taken of a consent to an estate Bill, or of an acceptance of a trust under its provisions, unless the consenting party appears in person before the committee, except when it is proved to the satisfaction of the committee that the party in question is unable to attend. In such case, the evidence of two credible witnesses is required to prove that the necessary consent has been given, and a copy of the Bill signed by the consenting party must be laid before the committee (*l*).

Procedure in House of Commons.

**1413.** In the House of Commons, as soon as an estate Bill has been read the first time, it is sent to the Examiners (*m*). The committee to which the Bill is referred, after the Examiner has made his report to the House, is required to make a special report to the House if the measure contains provisions extending either the term or the area of any settlement of land (*n*).

judges of the High Court; if in Scotland, to two judges of the Court of Session; if in Ireland, to two judges of the High Court of Justice in Ireland (Standing Orders of the House of Lords (Private Business), 1911, Nos. 154, 155).

(*g*) *Ibid.*, Nos. 154, 155, 169—173.

(*h*) *Ibid.*, No. 156.

(*i*) *Ibid.*, No. 163. Every infant interested in the consequences of an estate Bill must be represented by a guardian or protector appointed by the Lord Chancellor; see *ibid.*. In cases where the petitioners for, and the consenting parties to, the Bill are together competent to bar the entail, the consent of persons entitled in remainder is not required; see *ibid.*, No. 162. All persons whose interests are affected by the Bill are named in the Bill, and they are the only persons bound by its provisions.

(*k*) *Ibid.*, No. 168. The personal consent of an existing trustee is required in any case where the Bill provides that money is to pass through his hands; see *ibid.*, No. 165.

(*l*) *Ibid.*, No. 166. This rule does not apply in the case of a trustee for a charity whose consent may be proved by one credible witness and the production of a copy of the Bill signed by the consenting trustee; see *ibid.*, No. 167. The same rules with regard to the personal attendance of consenting parties apply in Scotland and Ireland when the consents are proved before the judges (*ibid.*, Nos. 169—173).

(*m*) Standing Orders of the House of Commons (Private Business), 1911, No. 72.

(*n*) *Ibid.*, No. 188*a*. Amendments are sometimes inserted in the House

### SUB-SECT. 10.—*Naturalisation Bills.*

Naturalisation Bills.

**1414.** A naturalisation Bill (*o*) is a Bill to grant to and confer upon an alien all the rights, privileges, and capacities of a natural-born British subject. The procedure with regard to a Bill of this kind is referred to elsewhere (*p*).

### SUB-SECT. 11.—*Name Bills.*

Name Bills.

**1415.** A name Bill, which is a Bill to enable an individual to assume a new name (*q*) with the authority of Parliament, is brought into the House of Lords on petition, and the standing orders of that House with regard to personal Bills must be complied with, so far as they are applicable to such a Bill (*r*). In the House of Commons a name Bill is not printed, nor is it referred to the Examiners.

### SUB-SECT. 12.—*Divorce Bills.*

Requirements precedent to introduction of divorce Bill.

**1416.** The standing orders of the House of Lords provide (*s*) (1) that no petition praying for leave to bring in a divorce Bill may be presented to the House, unless an official copy of the previous proceedings with regard to the case are delivered in upon oath at the bar at the same time as the petition is presented (*a*); (2) that no Bill grounded upon a petition to dissolve a marriage for the cause of adultery, and to enable the petitioner to marry again, may be introduced which does not contain a clause making it unlawful for the person whose marriage with the petitioner is to be dissolved to marry the person with whom he or she has committed adultery (*b*); and (3) that in any case in which a trial at *nisi prius* has been had, or in which a writ of inquiry has been executed, within the United Kingdom wherein the petitioner for the Bill has been a party, a report of the proceedings in such trial or inquiry

of Commons which necessitate the giving of further consents. In any such case, when the Bill is returned to the House of Lords, it is referred to a committee to take such consents.

(*o*) Since the passing of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), and subsequent Acts (as to which see title ALIENS, Vol. I., pp. 313—315), the necessity for applying for personal naturalisation Acts no longer exists, and consequently Bills for this purpose are rare; see May, Parliamentary Practice, 11th ed., pp. 860, 861.

(*p*) See title ALIENS, Vol. I., p. 316; Standing Orders of the House of Lords (Private Business), 1911, Nos. 179, 180.

(*q*) See also title NAME AND ARMS, CHANGE OF, p. 352, *ante*.

(*r*) The House of Lords sometimes refers a petition for leave to bring in a name Bill to the judges for them to report whether a Bill is necessary for the purposes desired in the petition; see Journals of the House of Lords, 1865, Vol. XCVII., p. 65.

(*s*) The standing orders of the two Houses relate to divorce Bills generally, but since the passing of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), and subsequent Acts, and of the Indian Divorce Act (Act No. IV. of 1869), s. 7, in India, applications for such Bills at the present time come principally from Ireland, where the High Court of Justice may grant a divorce *a mensâ et thoro*, but cannot dissolve a marriage and enable the parties to marry again; see title COURTS, Vol. IX., p. 20; May, Parliamentary Practice, 11th ed., pp. 858—860. As to matrimonial causes in England, see title HUSBAND AND WIFE, Vol. XVI., pp. 462 *et seq.*

(*a*) Standing Orders of the House of Lords (Private Business), 1911, No. 175.

(*b*) *Ibid.*, No. 176. This clause is always struck out in committee.

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

must be laid on the table of the House before the second reading of the Bill (*c*).

Procedure in House of Lords.

**1417.** The procedure in respect of a divorce Bill is judicial in character, and differs entirely from that in respect of any other private Bill. The Bill is presented by the Lord Chancellor, and not by the Chairman of Committees. Counsel may be heard and witnesses examined both at the time when the petition is presented and also on the second reading of the Bill. The Bill is not referred to a private Bill committee, and any amendments which may be necessary are made in committee of the whole House.

Procedure in House of Commons.

**1418.** When a divorce Bill reaches the House of Commons, a message is sent to the House of Lords to request that the minutes of evidence taken before that House, together with the proceedings and the documents in the case, may be sent to the House of Commons (*d*).

As soon as the Bill has been read a second time it stands referred to the Select Committee on Divorce Bills (*e*), whose duty it is to obtain evidence that an action for damages has been brought by the petitioner in the proper court, or to receive an explanation if no such action has been brought, and to report the Bill to the House (*f*).

SUB-SECT. 13.—*Scottish Private Legislation.*

Private Legislation Procedure (Scotland).

**1419.** In Scotland, any public authority or any persons who desire to obtain legislative powers for any object affecting public or private interests in that country, for which they would be entitled to apply to Parliament for leave to bring in a private Bill, are required to present a petition to the Secretary for Scotland praying him to issue a provisional order in accordance with the terms of a draft order submitted to him or with such modifications as may be necessary (*g*).

Regulation of procedure.

**1420.** The Chairman of Committees in the House of Lords and the Chairman of Ways and Means, acting jointly with the Secretary for Scotland, are empowered to draw up, and from time

(*c*) Standing Orders of the House of Lords (Private Business), 1911, No. 177.

(*d*) As soon as the Bill has passed the House of Commons, these documents are returned to the House of Lords.

(*e*) Standing Orders of the House of Commons (Private Business), 1911, No. 208. The Select Committee on Divorce Bills is nominated at the beginning of every session. The committee consists of nine members, of whom three constitute a quorum; see *ibid.*, No. 189. In 1896 the committee was ordered to consist of ten members.

(*f*) Standing Orders of the House of Commons (Private Business), 1911, Nos. 190, 192. If the petitioner has appeared in person before the House of Lords on the second reading of the Bill, he must also attend the select committee in the House of Commons; see *ibid.*, No. 191.

(*g*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 1 (1). The Act does not apply to estate Bills as defined in the standing orders of the two Houses, nor does anything contained in it confer upon the Secretary for Scotland power to make provisional orders to authorise and regulate the supply of electricity for lighting and other purposes, or affect the right of any other Government department to make orders under powers conferred upon it by Parliament; see *ibid.*, s. 16 (2), (3).

SECT. 5
**Private Bills and Bills to Confirm Provisional Orders.**

to time to vary, if they think fit, general orders for the regulation of the procedure to be adopted (*h*). Every such general order must be laid before both Houses of Parliament, and ceases to have any force if either House agrees to a resolution to that effect (*i*).

Deposit of draft order.

**1421.** A copy of every draft order which is submitted to the Secretary for Scotland must be deposited in the office of the Clerk of the Parliaments and in the Private Bill Office of the House of Commons (*k*), and the Secretary for Scotland must inform the Chairman of Committees and the Chairman of Ways and Means of any opposition to any such order (*l*).

The two Chairmen report upon all such draft orders and, if it appears from their report that either of the Chairmen is of opinion that the matters to which any draft order refers ought not to be dealt with by means of a provisional order, or do not refer wholly or mainly to Scotland, the Secretary for Scotland must, without further inquiry, refuse to issue the provisional order (*m*).

Introduction of private Bill in lieu of draft order.

**1422.** The promoters of any draft order, which the Chairmen consider should not be issued by the Secretary for Scotland, if they wish, may introduce a private Bill (*n*) after giving notice of their intention to the opponents of the draft order (*o*). In such case the notices which were published, served, and made for the draft order are deemed to have been published, served, and made for the substituted Bill, and the petition to the Secretary for Scotland for the provisional order is deemed and taken to be the petition for the Bill (*p*).

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(*h*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 15 (1). These general orders, which are based on the standing orders on private business of the two Houses, are published by the authority of the Secretary for Scotland. In the event of the Examiner reporting that the promoters of a draft order have not complied with the general orders, the matter is referred to the two Chairmen, and they must report to their respective Houses whether or not the general orders may be dispensed with; see Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 3 (2).

(*i*) *Ibid.*, s. 15 (3).

(*k*) *Ibid.*, s. 1 (2).

(*l*) *Ibid.*, s. 2 (1).

(*m*) *Ibid.*, s. 2 (2); Standing Orders of the House of Lords (Private Business), 1911, Nos. 183, 184; Standing Orders of the House of Commons (Private Business), 1911, Nos. 251, 252. A copy of every such report is laid upon the table in each House.

(*n*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 2 (2); Standing Orders of the House of Lords (Private Business), 1911, No. 187; Standing Orders of the House of Commons (Private Business), 1911, No. 255. The promoters are not obliged to insert all the provisions which were contained in the draft order in the substituted Bill, but they may not add any new provisions to the Bill; see Standing Orders of the House of Lords (Private Business), 1911, No. 189; Standing Orders of the House of Commons (Private Business), 1911, No. 257.

(*o*) The service of such notices must be proved before the Examiner; see Standing Orders of the House of Lords (Private Business), 1911, No. 188; Standing Orders of the House of Commons (Private Business), 1911, No. 256

(*p*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 2 (4); Standing Orders of the House of Lords (Private Business), 1911, No. 188; Standing Orders of the House of Commons (Private Business), 1911, No. 256. All petitions in favour of or against a draft order which have been deposited at the office of the Secretary for Scotland pursuant to general orders

SECT. 5. **Private Bills and Bills to Confirm Provisional Orders.**

On or before the seventh day after the Secretary for Scotland has refused to issue a provisional order, the promoters must deposit a copy of any substituted Bill which they intend to introduce in every public office where a copy of the draft order was deposited (*q*).

Issue of order and confirmation by Parliament.

**1423.** If the two Chairmen raise no objection to the draft order and if there is no opposition to it, the Secretary for Scotland either issues the order as it has been submitted to him or with such modifications as may be necessary to meet recommendations made by the two Chairmen or objections raised by any public department affected by the provisions contained in the order (*r*).

No provisional order, however, which is issued by the Secretary for Scotland has any validity until it has been confirmed by Parliament (*s*). A Bill to confirm any such order or orders must, therefore, be introduced by the Secretary for Scotland either in the House of Lords or in the House of Commons. As soon as a Bill of this kind has been presented in either House, it is deemed to have passed through all its stages up to and including committee.

Inquiry by commissioners.

**1424.** If there is opposition to any draft order which the two Chairmen have allowed to proceed, or if the Secretary for Scotland for any reason considers that an inquiry is necessary, he directs that an inquiry shall be held by four commissioners as to the propriety of assenting to the prayer contained in the petition for the order (*t*).

Appointment of commissioners.

**1425.** All of these commissioners should be members either of the House of Lords or of the House of Commons; but if at any inquiry it is impossible to procure the attendance of any, or of the requisite number of, parliamentary commissioners, other commissioners, who are qualified by experience to act as commissioners, may be appointed to hold the inquiry.

The parliamentary commissioners are appointed by the two Chairmen (*a*); the extra-parliamentary commissioners are appointed by the Secretary for Scotland from a panel of twenty persons qualified by experience of affairs to act as commissioners and nominated by him and the two Chairmen to act as commissioners for a period of five years.

are treated as if they had been deposited in favour of or against the substituted Bill; see Standing Orders of the House of Lords (Private Business), 1911, No. 189*a*; Standing Orders of the House of Commons (Private Business), 1911, No. 259.

(*q*) Standing Orders of the House of Lords (Private Business), 1911, No. 187; Standing Orders of the House of Commons (Private Business), 1911, No. 255.

(*r*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 7. By *ibid.*, ss. 7 (2), 8 (1), it is provided that if any modifications are made in a draft order, a copy of the amended order must be deposited in every public office in which the order was originally deposited.

(*s*) *Ibid.*, s. 7 (2).

(*t*) *Ibid.*, ss. 3 (1), 5 (1).

(*a*) *Ibid.*, s. 5 (3), (4), (5). In each House, the standing orders provide that fifteen members shall be selected, from whom the commissioners to go to Scotland shall be proposed to the House; see Standing Orders of the House of Lords (Private Business), 1911, No. 185; Standing Orders of the House of Commons (Private Business), 1911, No. 253.

Report of commissioners.

**1426**. It is the duty of the commissioners thus appointed to hold an inquiry, and, after hearing evidence, to report to the Secretary for Scotland whether in their opinion the proposed provisional order should be issued as prayed for or with modifications, or should be refused. If the commissioners report that a provisional order ought not to be issued, the Secretary for Scotland refuses to issue such order (*b*); but if they recommend that a provisional order should be issued, the Secretary for Scotland issues such order, without any modification, or with such modifications as may be deemed expedient, and then submits to Parliament the necessary confirming Bill (*c*).

Procedure on a confirming Bill in the House in which it is introduced.

**1427**. In whichever House the necessary confirming Bill is introduced, a period of seven days must elapse between its first and second reading, during which period a petition may be presented against an order which it contains (*d*). If such a petition is presented, any member may give notice of his intention to move for the committal of the Bill to a joint committee of the two Houses (*e*). Such a motion must be made immediately after the Bill has been read a second time, and, if it is carried, the Bill stands committed to a joint committee composed of three members of each House (*f*).

If no petition is presented against the Bill, or if no motion is carried for committing it to a joint committee, the Bill is deemed to have passed the stage of committee and is ordered to be considered as if it had been reported from a committee. It is then ordered for third reading (*g*).

Procedure in the second House.

**1428**. When a Bill which has been committed to a joint committee, or against which a petition has been presented, and no motion for its committal to a joint committee has been made or such motion has been negatived, reaches the second House, it is deemed to have passed the committee stage as soon as it has been read a second time (*h*).

(*b*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 8 (1).

(*c*) *Ibid.*, s. 8.

(*d*) *Ibid.*, s. 9 (1).

(*e*) It has been held that if no petition against an order is presented in the House in which the confirming Bill originated, the Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), gives no power to an opponent to present a petition when the Bill reaches the second House.

(*f*) A message is sent by the House in which the Bill is being considered to inform the other House that the Bill has been referred to a joint committee. Up to the present time the Leith Corporation Tramways Order Confirmation Bill, 1904, is the only Bill which has been referred to a joint committee under the Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 9. The proceedings before a joint committee appointed to consider a Bill of this kind are the same as those which have already been described before a joint committee on any other provisional order confirmation Bill or private Bill; see p. 752, *ante*.

(*g*) Private Legislation Procedure (Scotland) Act, 1899 (62 & 63 Vict. c. 47), s. 9.

(*h*) Standing Orders of the House of Lords (Private Business), 1911, No. 186; Standing Orders of the House of Commons (Private Business), 1911, No. 254.

# Part VI.—The Financial Work of Parliament.

## SECT. 1.—*Initiation of Taxation and Expenditure.*

SECT. 1.
Initiation of Taxation and Expenditure.

Statutory authority essential.

**1429.** No tax may be levied or financial burden of any kind imposed upon the people, unless it has been agreed to by their representatives in the House of Commons and has received statutory sanction (*i*). All the supplies for the public service, therefore, and any sum or sums of money out of the public revenue which may be required for any purpose by the executive Government, must be authorised by statute (*j*).

Recommendation of Crown to grants of public money or charges.

**1430.** It is the function of the House of Commons to grant money to the Crown; but the House will not receive a petition for any sum relating to the public service, or proceed upon any motion for a grant or charge of any kind upon the revenue of the United Kingdom or of India, unless it has been recommended by the Crown (*k*). Nor will the House make any such grant, or consider any such petition, or proceed upon any motion for an address to the Crown praying for the issue of public money (*l*), except in a committee of the whole House, to which the proposed grant or petition or motion for an address must be referred (*m*).

Procedure upon Bill creating charge upon public revenue.

**1431.** Whenever it is proposed, therefore, to introduce a Bill, the main object of which is to create a charge upon the public revenue, the same procedure is adopted. The expenditure proposed in the Bill must first be sanctioned in committee of the whole House. A committee of the whole House for this purpose is appointed on motion to meet on a future day to consider the matter specified in

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(*i*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 379, 380. As to the right to initiate financial legislation, see *ibid.*, p. 390, and pp. 795 *et seq.*, *post*.

(*j*) A Bill for this purpose may acquire the force of law without being passed by the House of Lords (Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (1)); see p. 776, *post*.

(*k*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 66, 70; see title REVENUE.

(*l*) There is an exception to the rule that the House of Commons will not consider any proposal for the expenditure of public money unless it has been recommended by the Crown. It is open to any member of the House to move for the appointment of a committee of the whole House to consider a resolution for an address to the Crown praying for the issue of a sum of money for the purpose specified in the address and ending with an assurance "that this House will make good the same"; see May, Parliamentary Practice, 11th ed., p. 571. This method of obtaining money has generally been adopted when Parliament has decided to erect a statue in memory of a deceased statesman, *e.g.*, in the case of Mr. Gladstone in 1898 (Journals of the House of Commons, 1898, Vol. CLIII., p. 224), the Marquess of Salisbury in 1904 (Journals of the House of Commons, 1904, Vol. CLIX., p. 198), and Sir Henry Campbell-Bannerman in 1908 (Journals of the House of Commons, 1908, Vol. CLXIII., p. 191).

(*m*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 67, 69. If, therefore, any motion is made in the House of Commons which would involve a new charge of any kind on the public revenue, the debate must be adjourned, and the matter must be referred to a committee of the whole House before the House itself will take the matter into its consideration; see *ibid.*, No. 71. As to committees of the whole House, see pp. 710, 713, *ante*.

SECT. 1. Initiation of Taxation and Expenditure.

the motion. As soon as the question upon a motion of this kind has been proposed from the chair, a Minister of the Crown intimates that the motion is recommended by the Crown. In the committee a resolution (which must be within the terms of the motion recommended by the Crown upon which the committee was appointed) is proposed and, when agreed to, is ordered to be reported to the House. Upon such resolution, when agreed to by the House, a Bill is ordered to be brought in (*n*).

Circumstances in which recommendation of Crown unnecessary.

**1432.** But although the House of Commons by its standing orders thus puts a check upon its own power of adding to the charges upon the public revenue, it does not apply the same rules to a financial proposal which is submitted to its consideration when such a proposal is not a new and distinct charge involving a fresh burden upon the people. In cases, therefore, where it is proposed to authorise advances on the security of public works out of moneys which have been already set apart by Parliament for such purposes (*o*), or where, although a Bill proposes to intercept money which would otherwise be paid into the Consolidated Fund, yet it does not impose any new charge upon that fund, or where a proposal is made to vary the proceeds of an existing charge upon the public revenue without creating a new charge, no recommendation from the Crown is deemed to be necessary.

## SECT. 2.—*The Consolidated Fund.*

Consolidated Fund and Exchequer Account.

**1433.** At the present time practically the entire public revenue is paid into one general account called the Consolidated Fund or the Exchequer Account, out of which the whole of the public expenditure is paid. This account is kept at the Bank of England and the Bank of Ireland and is under the control of a permanent official known as the Comptroller and Auditor-General

When the financial provisions of a Bill are subsidiary to its principal objects the Bill is introduced without a preliminary committee, but, before the financial clauses are considered in the committee on the Bill, they must have been sanctioned by a resolution of a committee of the whole House, appointed upon the Royal recommendation, and agreed to by the House on report; see May, Parliamentary Practice, 11th ed., p. 560.

(*o*) The National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), empowers the National Debt Commissioners to issue to the various commissioners mentioned in the Act sums required for local loans to an amount not exceeding that authorised by Parliament. The Act also created a Local Loans Fund, which was placed under the control of the National Debt Commissioners, and made the Consolidated Fund a security in case of any deficiency. The resolution by which this liability was imposed upon the Consolidated Fund was voted in committee of the whole House, and the standing orders of the House were thus complied with. This compliance is held applicable to all public works loans Bills which are introduced to carry out the purposes of the National Debt and Local Loans Act, 1887 (50 & 51 Vict. c. 16), because the particular mode of application of the sums advanced by the National Debt Commissioners does not increase the total amount available for loans, and all such Bills, therefore, are introduced without preliminary recommendation by the Crown; see May, Parliamentary Practice, 11th ed., pp. 568, 569.

See title [illegible]

SECT. 3. **Public Expenditure.**

## SECT. 3.—*Public Expenditure.*

### SUB-SECT. 1.—*Classification of Services*

Distinction between fixed and annual charges on Consolidated Fund.

**1434.** The ordinary public expenditure for the year is divided into two categories. The first category includes the Consolidated Fund services fixed charges, that is to say, charges which do not require the annual sanction of Parliament (*q*). These are charges for more than the term of one year which have already been authorised by the Legislature, and constitute a permanent and first charge on the Consolidated Fund. They are accordingly paid out of the Consolidated Fund each year until the expiration of the period for which Parliament has sanctioned them, or until the repeal of the statute which created them. The second category includes the ordinary charges of the navy, army, civil services, and revenue departments (*r*). These charges are known as the Supply services, and are granted annually (*s*).

### SUB-SECT. 2.—*Estimates and Grants.*

#### (i.) *Classification.*

Estimates of expenditure.

**1435.** Each year estimates to meet the demands of the public service are submitted by the Government to the consideration of the House of Commons. These estimates are grouped under three different heads, namely: (1) the navy estimates; (2) the army estimates, which include the ordnance factories estimates; and (3) the civil services and revenue departments' estimates.

The estimates for the navy, the army, and the ordnance factories are prepared by the finance departments in the Admiralty and War Office, and are then submitted to the Treasury to receive the approval of that department before they are presented to the House of Commons (*t*). The estimates for the civil services and revenue departments, namely, the Customs and Excise, the Inland Revenue, and the Post Office, are framed by the Treasury.

Division of estimates into votes.

**1436.** The army and navy estimates are divided into a series of votes, each of which deals with a definite branch of expenditure. Each of these votes, as well as the vote stating the number of

(*q*) For a list of the fixed charges on the Consolidated Fund, see title REVENUE.

(*r*) Prior to 1854 the charges for collecting the revenue were deducted by each department from the gross sums collected, and estimates were not presented in respect of the revenue departments.

(*s*) The financial year terminates on the 31st March (Public Revenue and Consolidated Fund Charges Act, 1854 (17 & 18 Vict. c. 94), s. 2), and on the evening of that day the books of the Exchequer are closed for the year. Before 1854 the financial year ended on the 5th January. The date was altered in order to make the financial year correspond with the period for which supplies were taken.

(*t*) For the control which is exercised by the Treasury over the Admiralty and War Office, see Report from the Select Committee of the House of Commons on National Expenditure, 1902, House of Commons Paper, 387, Appendix No. 3; see also title REVENUE. For the method in which the annual estimates are prepared and the form in which they are arranged, see *ibid.*, Appendix No. 1.

men to be maintained for each service, is submitted separately to the committee of supply (*u*).

The civil services estimates are divided into classes according to the character of the expenditure for which provision has to be made (*a*). Each class contains a series of votes showing the sum required for each department or service specified in the title of the vote. Each civil service vote is submitted separately to the committee of supply (*b*).

Form of vote.

**1437.** Each vote in the estimates which are laid before the committee of supply contains: (1) an estimate of the amount required to be granted by Parliament for the purposes of the service to which the vote relates; (2) a list of the sub-heads under which the vote is to be accounted for by the department that is responsible for it; and (3) the details of each sub-head.

Supplementary estimates.

**1438.** In addition to the ordinary estimates, which are submitted to the House of Commons as early as possible in each session, the various departments are often compelled to present further estimates for expenditure which was not foreseen at the time when the original estimates were prepared. Such supplementary or additional estimates, as the case may be, are presented to the House of Commons as soon as possible (*c*). If the original estimate for the department in question has not been already disposed of in committee of supply, the supplementary sum is incorporated with the sum remaining to be voted for that department; if, however, the original vote has been agreed to, the additional money required is voted separately. In either case, the sum voted for the purposes of the supplementary estimate is included with the other estimates in the Appropriation Act (*d*).

Votes on account.

**1439.** Owing to the fact that the financial year ends on the 31st March, it is obviously impossible for the House of Commons, which usually does not meet until the middle of January or the beginning of February, to grant the whole of the annual supplies for the ensuing year before the 1st April. At the same time Ministers of the

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(*u*) For the appointment and functions of this committee, see pp. 771, 772, *post*.

(*a*) The estimates for civil services for the year ending the 31st March, 1912, were divided into seven classes, namely, (1) public works and buildings; (2) salaries and expenses of civil departments; (3) law and justice; (4) education, science and art; (5) foreign and colonial services; (6) non-effective and charitable services; (7) miscellaneous.

(*b*) The amount which Parliament is asked to vote is the total estimated expenditure of the year, less the estimated amount of the appropriations in aid. These are sums of money which are received annually by various departments, either by the sale of publications, or of old or surplus stores, or by fees, fines etc. The amount estimated to be received for such appropriations in aid is stated in the estimate.

(*c*) Towards the close of the financial year circumstances generally arise which render it necessary for one or other of the Government departments to submit further supplementary estimates to Parliament. Such additional supplementary estimates are laid before the House of Commons as soon as it meets, and must receive the sanction of Parliament before the end of the financial year.

(*d*) See p. 775, *post*.

SECT. 3. Public Expendi-

Crown must be supplied with money for the purpose of carrying on the government of the country. As a matter of practice, therefore, Parliament is obliged every year to grant in advance some of the money which is demanded by the Crown for the expenses of the various departments before the whole of the estimates for the year have been agreed to by the House of Commons. The ordinary procedure is for the House of Commons to grant the votes stating the number of men to be employed in the navy and the army, and one or two other votes on the estimates for each of these services, and a vote on account of each of the civil services and revenue departments' votes (*e*).

Excess grants.

**1440.** If a department exceeds in any year the amount of money which Parliament has allowed it to spend, it must obtain a vote of the House of Commons for such extra expenditure. This is obtained by means of an additional grant, called an excess grant, which should be sanctioned by Parliament as soon as possible after the excess of expenditure has been ascertained (*f*).

Votes of credit.

**1441.** Besides the supply grants of the session (*g*), Parliament is sometimes called upon to make other grants to the Crown. Occasions may arise when the Government may suddenly require money to meet an unlooked-for demand caused by some national emergency. In such cases, Ministers must obtain the necessary

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(*e*) As a matter of practice in the early part of the year, the Admiralty and the War Office apply the money which has been granted to them in this way by the House of Commons to any navy or army service, and not necessarily to the particular vote, or votes, in their estimates for which the expenditure has been sanctioned; and see title REVENUE. The same practice is not applicable to the various departments of the civil service. Money which is granted on the vote for one civil service department is not available for another department of the civil service. A vote on account is necessary, therefore, for the maintenance of each of these departments during the first part of each financial year. In the event of a dissolution of Parliament before the business of supply has been completed, grants on account may be necessary for all the departments of the Government, including the Admiralty and the War Office, to enable them to carry on until the meeting of the new Parliament. The Admiralty and the War Office, after obtaining the sanction of the Treasury, have also the privilege of applying any savings which they may have effected upon certain votes towards making good any surplus expenditure that they may have incurred upon other votes, provided always that the total expenditure which has been sanctioned by Parliament for the navy or army services, as the case may be, is not exceeded. The application of these savings by the two departments is also subject to parliamentary control, because it must be sanctioned by a committee of the House of Commons which is specially set up for the purpose, and, after being agreed to by the House on report, receives legislative authority by a provision in the Appropriation Act; see p. 775, *post*.

(*f*) An excess grant must be voted in Committee of Supply, but, before the estimate for such a grant is presented to the House of Commons, the demand for the excess grant must be brought before the Public Accounts Committee (see p. 684, *ante*, and p. 777, *post*) and receive its sanction. In consequence of the privilege of using savings effected upon certain votes to defray surplus expenditure incurred upon other votes, which is enjoyed by the Admiralty and the War Office (see note (*e*), *supra*), an excess grant is seldom required by these two departments. If, however, the expenditure of either of these departments in the course of the year exceeds the total amount granted by Parliament, an excess vote to sanction such increased expenditure must be obtained.

(*g*) See pp. 768, 769, *ante*, and the text, *supra*.

funds from the House of Commons, but at the time it may be impossible to give any detailed estimate of the proposed expenditure. They are obliged, therefore, to ask the House to grant them a vote of credit for the total sum of money of which they are in need (*h*).

SECT. 3. Public Expenditure.

**1442.** The Crown also finds it necessary from time to time to demand from Parliament a definite sum of money for some particular purpose, either to meet the cost of some great national or Imperial undertaking which does not form part of the ordinary expenditure of the year (*i*), or to reward the services of some distinguished servant of the State (*k*), or to maintain the dignity and well-being of the Sovereign or a member of the Royal Family (*l*). In such cases the House of Commons is asked to make an exceptional or special grant to satisfy the object for which the money is required (*m*).

Exceptional or special grants.

(ii.) *Procedure.*

(1) *Speech from the Throne.*

**1443.** In the Speech from the Throne at the opening of each session of Parliament the Sovereign refers the estimates for the ensuing year to the consideration of the House of Commons, and it is the duty of that House to examine them and to grant the money which is required to carry on the government of the country.

Crown's demand for supplies in the Speech from the Throne.

(2) *Committee of Supply and Committee of Ways and Means.*

**1444.** As soon as the debate on the address in answer to the Speech from the Throne has been brought to a conclusion in the

Committees to deal with financial proposals.

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(*h*) The last occasions when the Government of the day found it necessary to ask the House of Commons for votes of credit were in 1882, when Mr. Gladstone obtained £2,300,000 for the purpose of strengthening the forces in the Mediterranean (see Journals of the House of Commons, 1882, Vol. CXXXVII., p. 407); and in 1885, when the same Minister obtained a vote of credit for £11,000,000 at the time of the threatened trouble with Russia with regard to the Penjdeh incident (see Journals of the House of Commons, 1885, Vol. CXL., pp. 180, 200).

(*i*) *E.g.*, the purchase of the Suez Canal shares by Mr. Disraeli's Government in 1875 (see Journals of the House of Commons, 1876, Vol. CXXXI., p. 53).

(*k*) *E.g.*, the grants to Earl Roberts in 1901; to Viscount Kitchener in 1902; and to the Earl of Cromer in 1907 (see Journals of the House of Commons, 1901, Vol. CLVI., p. 352; 1902, Vol. CLVII., p. 261; 1905, Vol. CLXII., pp. 353—354).

(*l*) *E.g.*, grant to the Prince of Wales in 1863 (see Journals of the House of Commons, 1863, Vol. CXVIII., p. 69).

(*m*) Demands for exceptional grants are brought to the notice of Parliament by means of a message from the Crown under the Sign Manual, which is conveyed to each House by a Cabinet Minister. In the House of Lords, an address is moved in reply to the gracious message stating the willingness of the House to concur in such measures as may be suitable to the occasion. In the House of Commons, no address is made in reply to the Royal message, but the demand for an exceptional grant is brought before the House either by a resolution proposed in a committee of the whole House appointed to sit on a future day, or by the presentation of an estimate in Committee of Supply. In some cases, an exceptional grant has been considered partly in a committee of the whole House set up for the purpose and partly in Committee of Supply. Grants voted in Committee of Supply are dealt with in the Appropriation Bill of the year (see p. 775, *post*); grants voted in a committee of the whole House, appointed for the purpose, are dealt with in a separate Bill; see May, Parliamentary Practice, 11th ed., pp. 555, 556.

SECT. 3. Public Expenditure.

House of Commons, two committees of the whole House are appointed to deal with the financial proposals of the year. The first of these committees is known as the Committee of Supply "to consider of the supply to be granted to His Majesty" (*n*); the second is called the Committee of Ways and Means "to consider of the ways and means for raising the supply to be granted to His Majesty" (*o*). Both of these committees are kept open until all the financial business of the session is brought to a conclusion

Days appointed for Committees of Supply and Ways and Means.

**1445.** The Committee of Supply and the Committee of Ways and Means are appointed to sit on Mondays, Wednesdays and Thursdays, but either of the committees may also be appointed for any other day upon which the House meets for the dispatch of business. On Thursdays, unless the House otherwise orders upon a motion made by a Minister of the Crown, the business of supply is always the first order of the day.

Number of days in session allotted to business of supply.

**1446.** Twenty days before the 5th August in each session are now set apart for the consideration of the ordinary naval, military and civil services estimates for the year; but three more days may be allotted either before or after the 5th August (*q*).

(3) *Procedure in Committee of Supply.*

Motion for Committee of Supply.

**1447.** Before the House goes into supply for the first time in any session either upon the estimates for the navy, the army, or the civil services, or for a vote of credit, the question must be proposed "That Mr. Speaker do now leave the chair?" to which an amendment may be proposed and a debate may be initiated upon the estimates for the service which it is proposed to consider in committee of supply. After the House, however, has once resolved itself into Committee of Supply upon any particular group of estimates, on any subsequent occasion when that group of estimates is to be taken in Committee of Supply, the Speaker leaves the chair upon the order of the day being read, without putting any question to the House (*r*).

(*n*) The work of the Committee of Supply is to consider the estimates for the year, which are submitted to it by the Ministers who represent the various departments of the Government in the House of Commons, and to vote the necessary money.

(*o*) Standing Orders of the House of Commons (Public Business), 1911, No. 14.

(*p*) If the Committee of Supply has been closed and subsequently it is found necessary by the Government to ask for further grants, it can only be re-opened by means of a second Speech from the Throne, or by a Royal message making a demand for further supplies, or by the presentation of an additional estimate.

(*q*) Standing Orders of the House of Commons (Public Business), 1911, No. 15. The days allotted do not include any day upon which the question has to be put that the Speaker do leave the chair, nor any day upon which the business of supply does not appear as the first order of the day. Days upon which estimates supplementary to those of a previous session are considered, or upon which any vote of credit or any financial proposal of the Government not forming part of the ordinary estimates, is taken, are not included amongst the twenty days.

(*r*) Standing Orders of the House of Commons (Public Business), 1911, No. 17; see May, Parliamentary Practice, 11th ed., p. 608; and see p. 665, *ante*.

Debate.

**1448**. Discussion in Committee of Supply is subject to the same rules of debate as in any other committee of the whole House (*s*), and the general procedure of the Committee, except with regard to the manner in which amendments are put from the chair, is the same as that which is adopted in the House itself.

Notice of estimates to be considered.

**1449**. Notice of the estimates, and of the particular votes in the estimates which it is proposed to take in Committee of Supply, must be placed on the orders of the day, but otherwise the Government decide the order in which they will take the various estimates and the particular votes which they will submit to the consideration of the Committee (*t*).

Resolutions in Committee of Supply.

**1450**. Each vote of supply which is laid before the Committee is moved in the form of a resolution for a grant of money to the Sovereign, and must state both the amount which is demanded and the object for which it is required. When the question is proposed from the chair with regard to any such resolution, it is open to any member of the Committee to move an amendment either to reduce the amount of the whole grant or to leave out or to reduce any of the items which the estimate for it contains. It is not in order, however, for a member to propose an amendment which, if carried, would either increase in amount the sum which has been demanded or would alter the object for which it is intended.

Interruption of business in Committee.

**1451**. When the sitting of the Committee of Supply is concluded either by the interruption of business under the standing orders (*u*), or by a motion to report progress, the Chairman leaves the chair and reports any resolutions to which the Committee has come, or reports progress (*v*). If the supply for the year is not concluded, he also asks that the Committee may have the leave of the House to sit again. Orders are then made appointing a day upon which the House will receive the report of any resolutions agreed to in the Committee and fixing a day for the next sitting of the Committee (*w*).

Close of sittings in Committee of Supply

**1452**. The proceedings of the Committee of Supply are brought to a conclusion on the last day but one of the days allotted to supply. At 10 o'clock on that day the Chairman proceeds to put forthwith any questions necessary to dispose of the vote then under discussion in the Committee, after which he puts a series of questions for granting to the Crown the sums necessary to defray any charges outstanding (that is, not yet voted) in each class of the estimates for the civil services (*x*), and of the estimates for the navy and army (*x*), the revenue departments (*x*), and any special vote. In these

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(*s*) See pp. 710, 713, *ante*.

(*t*) In practice, the votes to be taken in committee are selected by the various parties in opposition for the time being.

(*u*) See p. 673, *ante*.

(*v*) See pp. 712, 713, *ante*.

(*w*) The agreement of the House with a resolution of the Committee of Supply is secured by means of a motion "That this House doth agree with the Committee in the said resolution?" A motion of this kind is made after the resolution in question has been read a second time and any amendments thereto in regard to the amount specified in the resolution have been disposed of.

(*x*) See p. 768, *ante*.

SECT. 3. Public Expenditure.

questions any supplementary sum or new service still not voted by the Committee is included.

On the last day allotted for supply, the Speaker at 10 o'clock first puts the questions necessary to dispose of the report of the resolution of the Committee of Supply then under discussion by the House, and then puts a series of questions by which the House is asked to agree with any outstanding reports from the Committee.

(4) *Procedure in Committee of Ways and Means.*

Function of Committee.

**1453.** The effect of resolutions which have been passed by the Committee of Supply when they have been agreed to by the House is to authorise the expenditure proposed by the Government (*y*), but the task of making grants of money out of the Consolidated Fund (*z*) to meet the expenditure which has been sanctioned belongs to the Committee of Ways and Means.

When the House has resolved itself into Committee of Ways and Means, resolutions are brought forward by a Minister of the Crown asking the Committee to authorise the issue of the necessary grants of money out of the Consolidated Fund (*z*) to make good the supply which has been granted to the Crown.

As soon as these resolutions have been agreed to in the Committee of Ways and Means, they are reported to the House (*a*), and must be considered by the House on a subsequent day. After the resolutions have been agreed to by the House, an order is made for a Bill to be brought in to give legislative effect to them.

Budget.

**1454.** In addition to authorising grants out of the Consolidated Fund, it is the function of the Committee of Ways and Means to take into consideration and vote any taxes not already permanently imposed which the Government propose to provide for the necessary expenditure of the year. It is usually in this Committee, therefore, that the Chancellor of the Exchequer, as early as possible in each financial year, opens his Budget (*b*).

In his speech upon this occasion, the Chancellor of the Exchequer informs the Committee with regard to the financial results of the previous year, makes an estimate of the probable income and expenditure of the coming year, explains the intentions of the Government with regard to the continuance, the increase or the reduction, of existing taxes, and sets forth their proposals if they find it necessary to impose new taxes.

Public Accounts and Charges Act, 1891 (54 & 55 Vict. c. 24), s. 2 (1).

(*z*) See pp. 767, 768, *ante* ; and title REVENUE.

(*a*) If any resolutions of the Committee of Supply have been reduced by the House, or have not been agreed to, on report, when the resolution of the Committee of Ways and Means, based upon them, comes up for consideration by the House, a motion to amend the resolution of the Committee of Ways and Means must be made in order that the resolution, as finally agreed to by the House, may not exceed in amount the resolutions of the Committee of Supply to which the House has agreed.

(*b*) The word "Budget" is derived from the French "*bougette*" and Latin *bulga* (a small bag), used for the purpose of carrying papers or accounts. A statement, in the nature of the present Budget, has been made annually in the House of Commons since the Revolution of 1688.

SECT. 3. Public Expenditure.

Budget resolutions.

**1455.** The financial proposals of the Government are carried in the form of resolutions moved by the Chancellor of the Exchequer or some other Minister in the Committee of Ways and Means. These resolutions require confirmation by an Act of Parliament and the assent of the Crown before they have the force of law, but, in order to safeguard the revenue and to prevent forestalment, any resolution for the imposition of a new tax or the renewal of an old one, or for the increase of a duty, is acted upon as soon as it has been agreed to by the Committee of Ways and Means (*c*).

(iii.) *Consolidated Fund Bills.*

Consolidated Fund Bills.

**1456.** A Bill which has been introduced to give effect to resolutions of the Committee of Ways and Means (*d*) authorising the issue of money out of the Consolidated Fund is known as a Consolidated Fund Bill. One such Bill must be passed before the close of the financial year to authorise the necessary issues of money for the opening period of the ensuing financial year, and to make good any supplementary sums for the expiring financial year. Other Consolidated Fund Bills are passed from time to time during the course of the year if required by the exigencies of the public service.

As soon as a Consolidated Fund Bill has received the Royal Assent, the money which it authorises to be expended for the public service may be issued out of the Consolidated Fund (*e*).

Appropriation Bill.

**1457.** When all the supplies for the service of the financial year have been granted in Committee of Supply, and the necessary resolutions in Committee of Ways and Means have been agreed to by the House, a further Consolidated Fund Bill to authorise the issue from the Consolidated Fund of the sums still required and to appropriate all the supply granted during the session is passed, and is known as the Appropriation Act (*f*).

(iv.) *Finance Bills.*

Finance Bills.

**1458.** When all the resolutions proposed by the Government for the imposition or alteration of taxes have been agreed to by the Committee of Ways and Means, they are reported to the House, and, when they have been agreed to by the House, an order is made for a Bill embodying them to be brought in.

The annual Finance Bill, which is introduced by the Chancellor of the Exchequer in pursuance of this order, contains practically all the financial arrangements of the year (*g*). In both Houses, the various stages of the Finance Bill are the same as those of any other public Bill, but, in the House of Commons, as the Bill is

(*c*) As to this practice, see, further, title REVENUE.

(*d*) See p. 774, *ante*.

(*e*) See, further, title REVENUE.

(*f*) In it are set out all the services for which grants have been agreed to by the House of Commons, and the amounts of such grants which are thus appropriated to them by the authority of Parliament, and also the sum of money authorised to be issued out of the Consolidated Fund; see, further, title REVENUE.

(*g*) This practice dates from 1861; see note (*a*), p. 793, *post*.

SECT. 3. Public Expenditure.

brought in upon a resolution agreed to in a committee for the grant of public money, no two stages of it may be taken on the same day, and it is not permissible for any member to propose an amendment on report or third reading, which, if carried, would augment the charges which have been agreed to in Committee of Ways and Means (*h*).

SUB-SECT. 3.—*Passing into Law of Money Bills to which the House of Lords has not Agreed.*

Power of the House of Lords as to money Bills.

**1459.** If a money Bill (*i*), which has been passed by the House of Commons and sent up to the House of Lords at least one month before the end of the session, is not passed without amendment by that House within one month after it has received it, the Bill, unless the House of Commons directs to the contrary, is to be presented to the Sovereign for the Royal Assent, and is to become an Act of Parliament as soon as such Assent has been signified, notwithstanding the fact that it has not been agreed to by the House of Lords (*k*).

Speaker's certificate required to money Bills.

**1460.** Every money Bill when it is sent up to the House of Lords, and also when it is presented for the Royal Assent, must be indorsed with a certificate signed by the Speaker stating that the measure is in his opinion a money Bill (*l*). Before giving this certificate the Speaker is required, if practicable, to consult two members of the House of Commons, who are nominated for the purpose from the Chairmen's panel (*m*) by the Committee of Selection (*n*) at the beginning of each session (*o*).

SUB-SECT. 4.—*Public Accounts.*

(i.) *Control of Parliament.*

Audit and examination of public accounts.

**1461.** The control of Parliament over the national finances does not cease when it has given its sanction in a legislative form to any expenditure of public money. The accounts of all the departments of the Government which are entrusted with the

(*h*) See pp. 717, 719, *ante*.

(*i*) A "money Bill" is defined as a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with all or any of the following subjects, namely:—the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. The expressions "taxation," "public money," and "loan" respectively in this definition do not include any taxation, money, or loan raised by local authorities or bodies for local purposes (Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (2)).

(*k*) *Ibid.*, s. 1 (1). For the words of enactment in such a case, see *ibid.*, s. 41 (1); and see title STATUTES.

(*l*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (3).

(*m*) Compare note (*d*), p. 751, *ante*.

(*n*) See note (*b*), p. 751, *ante*.

(*o*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (3).

spending of money must be audited and examined by the Comptroller and Auditor-General, whose duty it is to see that any money which has been granted by Parliament has been used for the purposes for which it was intended (*p*).

### (ii.) *Appropriation Accounts.*

Submission to Comptroller and Auditor-General.

**1462.** Accounts showing the expenditure of the various departments for each financial year (called the Appropriation Accounts) must be submitted to the Comptroller and Auditor-General before the 30th November following the expiration of that financial year (*q*). That officer then draws up a report upon the accounts of each department, in which he calls attention to any irregularity which may have occurred.

Submission of accounts to Public Accounts Committee.

**1463.** When Parliament meets in the following January or February, these reports are presented to the House of Commons together with the Appropriation Accounts, and are then considered by a sessional committee called the Committee of Public Accounts, whose duty it is to examine the accounts and to report upon them to the House (*r*). It is also the duty of the Committee to consider proposed changes in the customary form of the estimates (*s*).

# Part VII.—Privileges of Parliament.

## SECT. 1.—*Nature and Origin.*

Necessity for claim to rights and privileges.

**1464.** The House of Lords and the House of Commons, which together constitute the High Court of Parliament, claim for their members, both collectively and individually, certain rights and privileges without which it would be impossible for either House to maintain its independence of action or the dignity of its position (*t*).

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(*p*) As to the functions of the Comptroller and Auditor-General, see title REVENUE.

(*q*) As the account of the Exchequer issues for the year includes only the issues actually made in the year, so the appropriation account of a vote for any department for the year is charged only with the payments ordered within the year. Thus, if a salary is due or a purchase is made on or before the 31st March, but payment for it is not ordered until or after the 1st April, the service in question, although it belongs to the expired year, is charged to the new year.

(*r*) Standing Orders of the House of Commons (Public Business), 1911, No. 75. For the constitution and procedure of this committee, see p. 682, *ante*, and see title REVENUE.

(*s*) See the first Report from the Committee in 1867, House of Commons Paper (333), and the third Report in 1881, House of Commons Paper (350). Alterations in the form of the estimates should be restricted, therefore, to such re-arrangement as involves no question of principle, unless the committee is previously consulted; see the third Report from the Committee in 1888, House of Commons Paper (405), and also the first Report in 1890, House of Commons Paper (71).

(*t*) In the past, both Houses of Parliament have insisted upon privileges

SECT. 1. **Nature and Origin.**

Nature of claim.

**1465**. Each House is the guardian of its own privileges, and claims (1) to be the sole judge of any matter that may arise which in any way infringes upon them (*u*), and (2), if it deems it advisable, to punish, either by imprisonment or reprimand, any person whom it considers to be guilty of contempt (*v*).

Origin.

**1466**. The privileges of Parliament are based partly upon custom and precedents which are to be found in the Rolls of Parliament and the Journals of the two Houses and partly upon certain statutes which have been passed from time to time for the purpose of making clear particular matters wherein the privileges claimed which they have now ceased to claim or of which they have been deprived by Act of Parliament, and each House has frequently asserted its privileges in a manner which has led to disputes with the other House. The action of the House of Commons in asserting its privileges has also constantly brought that House into collision with the courts of law. No attempt is made here to examine the rulings of the courts or to inquire into the arguments used either in favour of or against the claims of the Commons in the various leading cases dealing with this subject, except in so far as they help to throw light upon the privileges of Parliament as they exist at the present time. Although the position and extent of parliamentary privilege is difficult to define and its application must depend upon each case as it arises, the result of past cases may be summed up as establishing the following general principles, namely:—(1) that neither House of Parliament, in order to assert its privileges, has the right to do anything or cause anything to be done which is in contravention of the law of the land (see judgment of the House of Lords on a writ of error in *Ashby* v. *White* in 1704, Journals of the House of Lords, 1704, Vol. XVII., p. 369, also reported (1704), 3 Ld. Raym. 320, 1 Smith, L. C. 11th ed., 240; 1 Bro. Parl. Cas. 45, reversing S. C. (1703), 2 Ld. Raym. 938; see also *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1); (2) that the courts of law will not interfere in the interpretation of a statute by either House of Parliament so far as the regulation of its own proceedings within its own walls is concerned (see *Bradlaugh* v. *Gossett* (1884), 12 Q. B. D. 271, 281); and (3) that the courts of law will not admit any person to bail or inquire into the reasons for which he has been adjudged guilty of contempt and committed by either House, when the order or warrant upon which he has been arrested does not state the causes of his arrest; for in any such case it is presumed that the order or warrant has been duly issued, unless the contrary appears on the face of it (see *Burdett* v. *Abbot* (1811), 14 East, 150; *Ex parte Van Sandau* (1846), 1 Ph. 605).

(*u*) It is obviously impossible to give a complete or accurate list of offences which would be considered by either House of Parliament to constitute breaches of its privileges, but such offences may be summed up under the following heads, namely:—(1) Any act of disrespect to the House itself on the part of one of its members or by some person who is not a member; (2) an act of disrespect to, or an assault upon, an individual member of the House, or a reflection upon his character; (3) any interference with the procedure of the House or one of its committees; (4) any interference with an officer of the House, or other person employed by the House, in the performance of his duties; (5) a refusal to obey an order of the House or of one of its committees; or (6) an attempt to induce or procure another person to commit any such act.

(*v*) The power of the House of Lords to commit any person who is guilty of a breach of its privileges was questioned in the case of the Earl of Shaftesbury in 1675 and again in the case of Flower in 1779, but has always been admitted by the courts. The claim of the House of Commons to a similar power was expressly admitted by the House of Lords in a conference with the Commons in 1704, in *Ashby* v. *White*, *supra;* see Journals of the House of Lords, 1704, Vol. XVII., p. 714. Since then the right of the Commons has been established beyond dispute by usage and custom; see May, Parliamentary Practice, 11th ed., p. 64. As to procedure for enforcement of privilege, see pp. 790 *et seq.*, *post.*

by either House of Parliament have come in contact either with the prerogatives of the Crown or with the rights of individuals (*w*).

## SECT. 2.—*Classification.*

### SUB-SECT. 1.—*In General.*

In general.

**1467.** The privileges of Parliament may be conveniently treated under two main headings—(1) privileges which are common to both Houses, and (2) privileges which are peculiar either to the House of Lords or to the House of Commons.

### SUB-SECT. 2.—*Privileges Claimed by both Houses.*

Freedom from arrest.

**1468.** Whilst Parliament is sitting, and during the time within which the privilege of Parliament extends (*x*), no peer (*y*) or member

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(*w*) It is customary for the Speaker at the beginning of every Parliament to demand on behalf of the House of Commons the confirmation by the Crown of certain of its privileges, which the Sovereign, through the Lord Chancellor, formally confirms (see p. 694, *ante*; for the origin of this practice, see May, Parliamentary Practice, 11th ed., p. 60). The House of Lords appears to have enjoyed its privileges from the earliest times upon the ground that the lords "have place and voice in Parliament," and consequently the House does not demand the confirmation of its privileges by the Crown at the beginning of each Parliament. Neither House of Parliament has power to create a new privilege "not warranted by the known laws and customs of Parliament"; see the resolution of the Lords in 1704 upon this point, to which the Commons agreed (Journals of the House of Lords, 1704, Vol. XVII., p. 677; Journals of the House of Commons, 1704, Vol. XIV., pp. 555, 560. In the House of Lords, there are also various standing orders which limit and regulate the rights of peers to claim their privilege in certain cases; see Standing Orders of the House of Lords, Nos. 65, 66, 68, 69, 76, 77, 78, 79, 82, 83. As to the effect upon privilege of the commission of an act of bankruptcy, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 321.

(*x*) There is no statutory definition of the period during which the privilege of Parliament extends. By the privilege of the peerage (see title PEERAGES AND DIGNITIES), which rests upon ancient custom and has been recognised by various Acts of Parliament, the person of a peer "is for ever sacred and inviolable"; but, in addition to their privileges as peers, members of the House of Lords claim a special immunity from arrest as lords of Parliament. By Standing Orders of the House of Lords (Public Business), 1902, No. 64, this immunity extends whilst Parliament is sitting or within the usual times of privilege of Parliament. By Standing Orders of the House of Lords (Public Business), 1902, No. 67, in which the House of Lords claims the same immunity from arrest for the servants of peers, the period during which the privilege is to extend is declared to begin twenty days before the return of the writ of summons in the beginning of every Parliament and to continue twenty days before and after every session of Parliament, except in cases where Parliament has otherwise provided. In the case of the House of Commons, it has been held that a member cannot be arrested for a period of forty days before and after the meeting of Parliament (*Goudy* v. *Duncombe* (1847), 1 Exch. 430). It has also been held that a member is immune from arrest for a period of forty days even after the dissolution of the Parliament of which he was a member (see the case of Mr. Fortescue Harrison, M.P., *Re Anglo-French Co-operative Society* (1880), *Times*, 16th April, *per* HALL, V.-C.; compare May, Parliamentary Practice, 11th ed., p. 123). A member who is in custody at the time of his election to Parliament is liberated upon his election, in virtue of his privilege, unless he is undergoing a term of imprisonment for an indictable offence or for a criminal contempt of court; see Journals of the House of Commons, 1819, Vol. LXXIV., p. 44; 1820, Vol. LXXV., p. 230 (*Phillips* v. *Wellesley* (1830), 1 Dowl. 9).

(*y*) Privilege of Parliament is not allowed to peers whilst they are minors, or to noblewomen or widows of peers, but all such persons are entitled to the

SECT. 2. Classification.

of the House of Commons may be imprisoned or restrained without the order or sentence of the House of Lords or House of Commons, as the case may be, unless it be for treason or felony, or for refusing to give security for the peace (*a*).

Exemption from service on juries.

**1469.** Both Houses have always claimed that their members are exempt from serving upon juries (*b*), and a statutory exemption from such service has been definitely conferred upon peers and members

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privilege of peerage, except in the case of a widow of a peer who has married a commoner; see Standing Orders of the House of Lords (Public Business), 1902, No. 65. A peer is not entitled to the privilege of Parliament in a case in which he is acting as a trustee; see *ibid.*, No. 66. Peers of Scotland and Ireland, even if they are not lords of Parliament, are entitled to the same privileges as lords of Parliament under the provisions of the Acts of Union; see note (*k*), p. 624, *ante*. A person who is under arrest at the time he succeeds to a peerage may claim his discharge on the plea of privilege. A peer who has not taken the oath, and is consequently disqualified for sitting or voting in the House of Lords, may claim his privilege from arrest; but see Journals of the House of Lords, 1720, Vol. XXI., p. 327. It would appear that the same rule applies in the case of a member of the other House; see *European and American Finance Corporation* v. *M.P.* (1865), 13 L. T. 447.

(*a*) Standing Orders of the House of Lords (Public Business), 1902, No. 79, directs that no peer or lord of Parliament has privilege against obedience to a writ of *habeas corpus* directed to him, and neither House of Parliament claims, or ever has claimed, freedom from arrest for any of its members who is charged with a criminal offence. In 1626 the Lords agreed to a resolution, which is now a standing order of the House, "That the privilege of this House is, that no peer of Parliament, sitting in Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety of the peace" (Journals of the House of Lords, 1626, Vol. III., p. 562). In 1675 the Commons agreed to a resolution of a similar character (Journals of the House of Commons, 1675, Vol. IX., p. 342); and in 1697 agreed to a further resolution "That no member of this House has any privilege in case of breach of the peace, or forcible entries, or forcible detainers" (Journals of the House of Commons, 1697, Vol. XI., p. 784). In 1763 both Houses agreed to a resolution "That privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of laws in the speedy and effectual prosecution of so heinous and dangerous an offence" (Journals of the House of Commons, 1763, Vol. XXIX., p. 689). A peer or member of the House of Commons may be committed for an offence under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 124, in spite of the privilege of Parliament (*Re Armstrong, Ex parte Lindsay*, [1892] 1 Q. B. 327; see also pp. 622, 658, *ante*), and may also be committed for a criminal or *quasi*-criminal contempt of court (*Wellesley* v. *Beaufort* (*Duke*), *Long Wellesley's Case* (1831), 2 Russ. & M. 639; see May, Parliamentary Practice, 11th ed., pp. 119—123; see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 320, 321). In any case, however, in which a member of either House has been arrested upon a criminal charge, the House of which he is a member should be informed of his arrest. This information is supplied to the House of Lords by means of a letter addressed by the magistrate by whom the member has been remanded in custody or committed. When a true bill for any felony or misprision of felony has been returned against a peer, information of the fact is supplied by the judge of the court in which such bill has been returned. As to the trial of a peer by his peers, see p. 653, *ante*. The House of Commons is similarly informed of the arrest of one of its members by means of a letter addressed to the Speaker. In the event of the condemnation of one of its members, the House is also informed in the same manner of the nature of his offence, and the duration of the sentence which has been imposed upon him; and see p. 657, *ante*, and pp. 787, note (*s*), p. 791, *post*.

(*b*) See 1 Hatsell, Precedents of Parliament, ed. 1818, pp. 112, 171, 174; see also the action taken by the House in the cases of Mr. Holford and Mr. Ellice, in 1826, Journals of the House of Commons, 1826, Vol. LXXXI., pp. 82, 87.

of the House of Commons and the officers of the two Houses of Parliament (*c*).

SECT. 2. Classification.

Protection of witnesses and others.

**1470.** Witnesses who appear to give evidence before either House of Parliament, or before any Parliamentary committee (*d*), and also counsel, solicitors, agents, and others who are engaged upon the business of Parliament (*e*), are protected from arrest or from any other form of molestation by the House upon whose business they are engaged (*f*).

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(*c*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, Sched. ; see also title JURIES, Vol. XVIII., pp. 230, 231. Neither House any longer maintains for a member the privilege of refusing to obey a subpœna to appear as a witness in the courts of law ; see 1 Hatsell, Precedents of Parliament, ed. 1818, pp. 96, 97, 169 ; compare May, Parliamentary Practice, 11th ed., p. 114. Each House, however, is careful to preserve its privilege upon this point in any case in which one of its members is required to give evidence before the other House of Parliament. In the House of Lords, there is a standing order which forbids any peer to go down to the House of Commons or send his answer in writing, or appear by counsel to answer any accusation there, upon penalty of being committed to the custody of the Black Rod or to the Tower ; see Standing Orders of the House of Lords (Public Business), 1902, No. 71. The House has also maintained that a peer who is not a lord of Parliament need not obey a summons to attend the House of Commons ; see Resolution of the House of Lords in the case of Lord Teignmouth, Journals of the House of Lords, 1806, Vol. XLV., p. 812. At the present time, when one House desires the attendance of a member of the other House as a witness either before the House itself or before one of its committees, the practice is to send a message requesting the House to which the member belongs to give leave to the member in question to give evidence. If the member is willing, leave is given to him to give evidence, and a message is sent to inform the other House of the fact. If either House desires an officer of the other House to appear as a witness before it, the same procedure is adopted, except that in such case the message which is returned by the House to which the officer belongs merely states that leave has been given to the officer in question to obey the wishes of the other House.

(*d*) Both Houses have the power to compel, if necessary, the attendance of witnesses (*Gosset* v. *Howard* (1847), 10 Q. B. 359, 411, Ex. Ch.). In the House of Lords a witness is summoned by means of an order signed by the Clerk of the Parliaments ; in the House of Commons, by an order signed by the Clerk of the House. For the method of serving such an order and the proceedings which are taken in the event of a witness refusing to obey the order of either House, see May, Parliamentary Practice, 11th ed., pp. 424, 425.

(*e*) An officer of either House is protected from arrest within the precincts of the House to which he belongs. He is also protected when engaged upon the service of the House, and any interference with him when thus engaged will be punished as a breach of privilege. Nor will either House permit one of its officers to be served with a subpœna by any court to give evidence with regard to any proceedings in Parliament ; or to be compelled to produce documents which are in the custody of the House until he has received its permission. Formerly, the privilege of Parliament used to attach to the personal servants of peers and of members of the House of Commons, and also to other persons acting as their agents or upon their behalf, and, consequently, no such persons might be arrested or otherwise molested whilst Parliament was sitting or during the time when the privilege of Parliament was in operation. This privilege was tacitly surrendered by the House of Commons in 1770, when an Act was passed to prevent any stay or delay in the prosecution of suits against peers, members of Parliament or their servants, by or under colour or pretence of any privilege of Parliament. A provision was inserted in this Act to the effect that the measure was not to subject the person of any member of the House of Commons to be arrested or imprisoned upon any suit or proceeding, but no such exception was made for the servants of members (Parliamentary Privilege Act, 1770 (10 Geo. 3, c. 50), s. 2).

(*f*) There is a sessional order of the House of Commons declaring that it is

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Each House will also treat it as a breach of its privileges if legal proceedings are commenced or other action is taken against any person upon account of anything which he may have said, or evidence which he may have given, in the course of any proceedings in the House itself or before one of its committees (*g*).

Freedom of speech.

**1471.** The privilege claimed by both Houses with regard to the freedom of speech in Parliament (*h*) is referred to elsewhere (*i*).

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a high crime and misdemeanour for any person to tamper with a witness in respect of his evidence to be given before the House, and stating that the House will proceed with the utmost severity against any such offender. A further sessional order states that any witness who has given false evidence in any case before the House will be punished with the utmost severity. Every person also who threatens or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person who gives evidence before either House, unless such evidence was given in bad faith, is guilty of a misdemeanour under the Witnesses (Public Inquiries) Protection Act, 1892 (55 & 56 Vict. c. 64), s. 2. An action for libel will not lie against a person in respect of evidence given by him before either House of Parliament or before a committee of either House; see *Goffin* v. *Donelly* (1881), 6 Q. B. D. 307; title LIBEL AND SLANDER, Vol. XVIII., pp. 678 *et seq.*

(*g*) See resolution of the House of Commons upon this subject in 1818 (Journals of the House of Commons, 1818, Vol. LXXIII., p. 389).

(*h*) The freedom of the debates in the House of Lords from external interference or control has never been questioned. The Commons, as early as the reign of Henry IV., obtained a recognition from the Crown of the freedom of the proceedings in their House, when they succeeded in inducing that Sovereign to annul the judgment which had been passed in the previous reign against one of their number, named Haxey, who had been condemned as a traitor for introducing a Bill condemning the excessive expenditure incurred by Richard II. upon the Royal Household; see Rotuli Parliamentorum, Vol. III., s. 430. In the reign of Henry VIII., an Act of Parliament (stat. (1512) 4 Hen. 8, c. 8) was passed to declare null and void a judgment of the Stannary Court given against a member of the House of Commons named Strode, who had brought forward a Bill to regulate the tin industry in Cornwall and had been fined and imprisoned in consequence. Despite these successful assertions of the freedom of its proceedings, the privilege of the House in this respect was constantly attacked by the Tudor and Stuart kings, who chose to regard stat. (1512) 4 Hen. 8, c. 8, as a particular and not a general statute. The attitude of the Crown during this period was defined by the Lord Keeper in 1593, when, in confirming on behalf of Queen Elizabeth the Speaker's usual request for the privileges of the House, he said: "Liberty of speech is granted you, but you must know what privilege you have; not to speak everyone what he listeth, or what cometh in his brain to utter; but your privilege is 'aye' or 'no'"; see Parliamentary History, Vol. I., p. 862. In 1621 the Commons passed a resolution affirming "That every member hath freedom from all impeachment, imprisonment, or molestation, other than by censure of the House itself, for or concerning any Bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament business," but, in spite of this assertion of their privilege, the Crown continued to take notice of the proceedings in the House and to punish members for speeches which they had delivered in Parliament. After the Restoration, in 1667, the Commons carried a resolution declaring that stat. (1512) 4 Hen. 8, c. 8, was a general law extending to all members of both Houses of Parliament, and that it was "a declaratory law of the ancient and necessary rights and privileges of Parliament" (Journals of the House of Commons, 1667, Vol. IX., p. 19); and, by the Bill of Rights (1 Will. & Mar., sess. 2, c. 2, art. 9), they obtained a statutory guarantee that their debates and proceedings should not be questioned in any court or place outside Parliament. Subsequent to the

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(*i*) For note (*i*) see next page.

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Control over publication of

**1472.** It is within the power of either House of Parliament, should it deem it expedient, to prohibit the publication of its proceedings (*k*).

In the House of Lords, it is a breach of privilege (*l*) for any person to print or publish anything relating to the proceedings of the House without its permission.

The House of Commons, upon many occasions, has declared the publication of its proceedings without the authority of the House to be a breach of privilege, and the House has never formally rescinded the orders which from time to time it has made with regard to this subject (*m*).

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passing of the Bill of Rights, there were a few instances during the eighteenth century in which the privilege of the House of Commons with regard to freedom of speech was infringed, notably in the cases of the elder Pitt, who was dismissed from his cornetcy of horse in 1735, and of General Conway and Colonel Barré, who were deprived of their commands in 1764 for speeches delivered in the House of Commons against the Government of the day.

(*i*) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 461; LIBEL AND SLANDER, Vol. XVIII., p. 683.

(*k*) The standing order of the House of Lords upon this subject dates from 1698; see Journals of the House of Lords, 1698-9, Vol. XVI., p. 391. The jealousy of the House of Commons with regard to the privacy of its proceedings dates from the Long Parliament, and was due to the antagonism which existed between that assembly and the King. The object of the House at that time was to prevent its own members or officers from supplying the King with information which might incriminate its members; see Resolutions of the House of Commons of the 13th July, 1641 (Journals of the House of Commons, 1641, Vol. II., p. 209). It was not until after the Revolution of 1689 that the House came in contact with unofficial reporters who furnished, for the news letters of the day, reports, often prejudiced and generally inaccurate, of the proceedings of the Commons. In 1738 the House passed a resolution stating that it was "an high indignity to, and a notorious breach of privilege of, this House, for any news writer, in letters or other papers (as minutes, or under any other denomination), or for any printer or publisher of any printed newspaper of any denomination to insert in the said letters or papers, or to give therein any account of the debates or other proceedings of this House or any committee thereof, as well during the recess, as the sitting of Parliament; and that this House will proceed with the utmost severity against such offenders" (Journals of the House of Commons, 1738, Vol. XXIII., p. 148; Parliamentary History, Vol. X., pp. 799—811). This resolution was repeated in 1753 and 1762; see Journals of the House of Commons, 1753, Vol. XXVI., p. 754; 1762, Vol. XXIX., pp. 206, 207. But, in spite of the attitude of the House, unofficial reports of the proceedings of the House of Commons were still published, and in 1771, during the disturbances caused by John Wilkes, the claim of the House to forbid the publication of its debates led to a struggle between the Commons and the City of London which, although it resulted in the committal to prison of the Lord Mayor and two aldermen, practically put an end to the attempts of the House of Commons to prevent the publication of its debates. For a historical summary with regard to the publication of debates, see Redlich, Procedure of the House of Commons, Vol. II., pp. 36—38.

(*l*) Standing Orders of the House of Lords (Public Business), 1902, No. 80. There has been a reporters' gallery in the House of Lords since the 15th October, 1831; see May, Parliamentary Practice, 11th ed., p. 73, n. Since 1889, an official reporter has been accommodated with a seat in the House itself immediately behind the clerks at the table. Since 1908 the official reporter has been employed in the direct service of the House; see Journals of the House of Lords, 1908, Vol. CXL., p. 285.

(*m*) Although, since 1835, when a gallery of the House was set apart for the use of the Press, it has tacitly permitted the presence of unofficial reporters at its debates; see May, Parliamentary Practice, 11th ed., p. 73, n. Since 1908 the debates of the House of Commons, like those of the other House, have

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At the present time, however, neither House will consider a report of its proceedings in a newspaper or other publication to be a breach of its privileges, unless such report is manifestly inaccurate or untrue (*n*).

Each House regards a report from any one of its committees as being strictly privileged, and will punish any person who publishes or causes to be published, any such report before it has been presented to the House (*o*).

Power to exclude strangers.

**1473.** Both Houses used to exercise a rigorous control with regard to the admission of strangers, and, by the custom of Parliament, no stranger is supposed to be present during the sittings of either House.

In the House of Lords, there is a standing order which prohibits any persons but those who have a right to be in the House to be present whilst the House is sitting (*p*); but this order is practically obsolete, as the House recognises the presence of strangers in another standing order, by which it permits them to remain in the galleries and the space within the rails of the Throne, even whilst a division is in progress (*q*).

The House of Commons also, as a rule, no longer attempts to prevent strangers from being present at its sittings. But the House is careful to preserve its privilege of maintaining the privacy of its debates, by empowering the Speaker or the Chairman if the House is in Committee, when he is in the chair, at any time to order the removal of strangers from any part of the House, and it is also open to any member of the House, during a sitting of the House or when the House is in committee, to take notice that strangers are present. In such a case the Speaker or the Chairman, as the case may be, must put the question "That strangers be

been reported by reporters in the direct service of the House. The proceedings of each day are published on the following day.

(*n*) The proprietor of a newspaper is not liable for publishing a faithful report of a debate in Parliament in his newspaper; see *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73, 89; title LIBEL AND SLANDER, Vol. XVIII., p. 698.

(*o*) See resolution of the House of Commons on this subject (Journals of the House of Commons, 1837, Vol. XCII., p. 282; compare May, Parliamentary Practice, 11th ed., pp. 74, 75, 416). All reports and proceedings of either House are also privileged in another way, inasmuch as any civil or criminal proceedings which have been commenced against any person for publishing any papers printed by order of either House of Parliament must be stayed upon the delivery of a certificate and affidavit to the effect that such publication was by order of either House of Parliament (Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 1; see title LIBEL AND SLANDER, Vol. XVIII., p. 683). It has been held that a person who without malice publishes an extract from a command paper (see note (*l*), p. 618, *ante*) presented to Parliament is protected by the Parliamentary Papers Act, 1840 (3 & 4 Vict., c. 9), against any action for libel in respect of such extract; see *Mangena* v. *Wright*, [1909] 2 K. B., 958.

(*p*) Standing Orders of the House of Lords (Public Business), 1902, No. 8. There are further standing orders which prohibit any doorkeeper attending the House from presuming to come or stay within the doors of the House while it is sitting, unless particularly ordered to do so, and forbidding any person, unless a nobleman or attendant of the House, from coming into the lobby or a committee room; see Standing Orders of the House of Lords (Public Business), 1902, Nos. 9, 10.

(*q*) *Ibid.*, No. 32.

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ordered to withdraw?" without permitting any debate or amendment (*r*). Strangers are allowed to remain in the galleries of the House whilst a division is taking place, but are required to withdraw from below the bar.

Right of access to the Sovereign.

**1474.** Every peer is an hereditary counsellor of the Sovereign, and as such may claim the right of individual access to the person of the Sovereign (*s*).

The privilege of access to the Sovereign which is claimed for the House of Commons by the Speaker at the beginning of every Parliament (*a*) is a collective right, and enables the House as a body to accompany the Speaker whenever an address is presented to the Sovereign by the whole House (*b*), but does not enable an individual member to claim access to the Sovereign (*c*).

SUB-SECT. 3.—*Privileges Peculiar to the House of Lords.*

Privileges of peers.

**1475.** Members of the House of Lords are entitled, either as lords of Parliament, or as peers of the realm, to certain privileges, namely:—

(1) It is the right of peers to be tried in full Parliament, or, in case Parliament is not sitting, in the Court of the Lord High Steward, upon any charge of treason, felony, misprision of treason, or misprision of felony (*d*).

(2) The House claims that peers and lords of Parliament, whether they be plaintiffs or defendants, are to answer and be examined in all courts upon protestation of honour only, and not upon the common oath (*e*).

(3) No oath is to be imposed, by any Bill or otherwise, upon

(*r*) Standing Orders of the House of Commons (Public Business), 1911, No. 90. In 1908 the Speaker, in consequence of disturbances, caused the strangers' gallery and the ladies' gallery to be closed to the public, and these galleries were not reopened until the following year. Members are forbidden to introduce strangers into any part of the House or gallery appropriated to members of the House whilst the House or a committee of the whole House is sitting, and the Serjeant-at-Arms is empowered to take into his custody any stranger who is in any part of the House appropriated to members, or who misconducts himself in any part of the House to which he has been admitted, or refuses to withdraw when ordered to do so; see Standing Orders of the House of Commons (Public Business), 1911, Nos. 88, 89. For a summary of the attitude which has been adopted by the House of Commons with regard to the admission of strangers, see Redlich, Procedure of the House of Commons, Vol. II., pp. 34, 35.

(*s*) See First Report on the Dignity of a Peer of the Realm, 25th May, 1820, p. 14; see also Pike, Constitutional History of the House of Lords, pp. 251—254; see title CONSTITUTIONAL LAW, Vol. VI., p. 391.

(*a*) See p. 694, *ante*.

(*b*) See p. 694, *ante*, and p. 804, *post*.

(*c*) Individual members of the House of Commons have access to the person of the Sovereign, if they happen to be Privy Councillors or members of the Royal Household.

(*d*) Standing Orders of the House of Lords (Public Business), 1902, No. 72; see pp. 653, 654, *ante*; titles CONSTITUTIONAL LAW, Vol. VI., pp. 352, 354; COURTS, Vol. IX., pp. 19, 26; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 270.

(*e*) Standing Orders of the House of Lords (Public Business), 1902, No. 74; see p. 652, *ante*; but see title EVIDENCE, Vol. XIII., p. 592.

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peers the refusal to take which entails the loss of their places or votes in Parliament, or curtails the liberty of debate in the House of Lords (*f*).

Privileges of the House of Lords.

**1476.** The House of Lords has successfully proved its right to insist upon a writ of summons being sent to any peer who is qualified to receive it (*g*), and the House has also established its right to decide, if it deems it advisable, whether or not a newly-created peer is entitled to sit and vote in the House of Lords (*h*); this latter privilege, however, does not empower the House to decide upon the validity of the claim of any person to a peerage which is already in existence or to a peerage which is in abeyance, unless such claim is referred to it by the Crown (*i*). The House of Lords has also power to decide various matters with regard to Scottish and Irish peerages (*k*).

Voting by proxy.

**1477.** The privilege of voting in a division by proxy, of which in the past use was constantly made both by lords spiritual and lords temporal (*l*), although it has never been surrendered by the House of Lords, has not been exercised since 1868, when the House, acting upon the report of a committee appointed in the previous year, agreed to the adoption of a standing order by which the practice of calling for proxies on a division was discontinued (*m*).

(*f*) Standing Orders of the House of Lords (Public Business), 1902, No. 75.

(*g*) See the case of the Earl of Bristol in 1626, Journals of the House of Lords, 1626, Vol. III., p. 537. As to the right by which a peer receives a writ of summons to sit and vote in the House of Lords, see title PEERAGES AND DIGNITIES. As to the modern practice by which a peer proves his right to receive such a writ, see p. 623, *ante*.

(*h*) The House of Lords successfully asserted its privilege upon this point in 1856, when it refused to allow Sir James Parke, who had been created Baron Wensleydale "for and during the term of his natural life," to sit in the House of Lords. Upon this occasion, the letters patent creating the new peer were referred by the House to the Committee for Privileges, which reported "that neither the said letters patent, nor the said letters patent with the usual writ of summons, enable the grantee to sit and vote in Parliament." This report was agreed to by the House, after the Government of the day had intimated that they would not oppose its confirmation; see Journals of the House of Lords, 1856, Vol. LXXXVIII., pp. 38, 39; see also Parliamentary Debates (Third Series), Vol. CXL., pp. 1289—1311.

(*i*) A claim to a peerage or a request for the determination of a peerage in abeyance must be presented by means of a petition through the Secretary of State for the Home Department to the Crown. Any such claim, together with a report from the Attorney-General thereon, is usually presented by command of the Crown to the House of Lords. It is then referred by the House to the Committee for Privileges, which reports to the House whether or not the claim has been established; see p. 641, *ante*; see also Journals of the House of Lords, 1892, Vol. CXXIV., pp. 124, 141, 188, 207; 1900, Vol. CXXXII., pp. 387—389; see titles CONSTITUTIONAL LAW, Vol. VI., p. 457; PEERAGES AND DIGNITIES.

(*k*) See pp. 624, 626, *ante*.

(*l*) For a short account of the origin and history of voting by proxy, see Pike, Constitutional History of the House of Lords, pp. 243—245.

(*m*) Standing Orders of the House of Lords (Public Business), 1902, No. 34. The order provides that two days' notice shall be given of any motion for its suspension. Various standing orders are still in existence for the regulation and limitation of the use of proxies; see *ibid.*, Nos. 104—110.

SUB-SECT. 4.—*Privileges Peculiar to the House of Commons.*

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Privilege of the Commons in relation to the constitution of their own body.

**1478.** In addition to possessing a complete control over the regulation of its own proceedings and the conduct of its members (*n*), the House of Commons claims the exclusive right of providing, as it may deem fit, for its own proper constitution (*o*).

Power of expulsion.

**1479.** Although the House of Commons has resigned its right to be the judge in controverted elections (*p*), it retains its right to decide upon the qualifications of any of its members to sit and vote in Parliament.

If in the opinion of the House, therefore, a member has conducted himself in a manner which renders him unfit to serve as a member of Parliament, he may be expelled from the House (*q*); but, unless the cause of his expulsion by the House constitutes in itself a disqualification to sit and vote in the House of Commons, it is open to his constituency to re-elect him (*r*).

The expulsion of a member from the House of Commons is effected by means of a resolution, submitted to the House by means of a motion upon which the question is proposed from the chair in the usual way (*s*).

(*n*) See *Bradlaugh* v. *Gosset* (1883), 12 Q. B. D. 271; *Burdett* v. *Abbot* 14 East, 1, 148; *Bradlaugh* v. *Erskine* (1883), 47 L. T. 618. For the rules which regulate the procedure of debate and for the powers which the House confers upon the Speaker and the Chairman, as the case may be, to maintain order in the House or in a committee of the whole House, see pp. 678—681, *ante*. For the privileges claimed by the House of Commons with regard to the control of taxation and public expenditure generally, see pp. 792—794, *post*.

(*o*) Formerly, the House used to claim an exclusive right to decide all matters touching the election of its own members, and used itself to be the judge in all controverted elections, but, in 1868, it delegated its authority in these matters to the courts of law. A petition against the return of a member to the House of Commons is presented to the High Court of Justice, and the case is tried in the borough or county in which the election took place, in England by two judges of the High Court, in Scotland by two judges of the Court of Session, and in Ireland by two judges of the High Court; see Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), as amended by the Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. c. 75), s. 2; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 70, and the Expiring Laws Continuance Acts (see Expiring Laws Continuance Act, 1911 (1 & 2 Geo. 5, c. 22)). For the method of procedure, see title ELECTIONS, Vol. XII., pp. 408—483. With respect to the rota of judges, see also Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 13.

(*p*) See note (*o*), *supra*.

(*q*) Members have been expelled from the House of Commons upon various grounds, *e.g.*, as being rebels, or as having been guilty of forgery, of perjury, of misappropriation of public money, of corruption in the administration of justice or in public offices, or in the execution of their duties as members of the House, or of contempts and other offences against the House itself; see May, Parliamentary Practice, 11th ed., pp. 56—58.

(*r*) See the case of John Wilkes in 1769, Journals of the House of Commons, 1769, Vol. XXXII., pp. 228, 229. Compare also the case of Mr. Bradlaugh in 1882, when no question as to the validity of his election was raised upon his re-election to the House by the electors of Northampton after his expulsion from the House of Commons; see Journals of the House of Commons, 1882, Vol. CXXXVII., p. 62.

(*s*) In a case in which a member has been tried and convicted for a misdemeanour in a court of law, the judge who presided at the trial and gave

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Power to fill vacant seat.

**1480.** When, during the course of a session, a seat in the House of Commons becomes vacant by reason of the death (*t*) or expulsion (*u*) from the House of one of its members, or of his accession to the peerage, or of his acceptance of an office of profit under the Crown (*v*) or other office which disqualifies him from continuing to sit or vote in the House of Commons, the House, upon motion made (*w*), orders the Speaker to issue his warrant empowering the Clerk of the Crown in Chancery, or the Clerk of the Crown and Hanaper in Ireland, as the case may be, to make out a new writ to fill the vacancy

Power to fill vacancy caused by member becoming insane.

**1481.** When a vacancy is caused owing to a member of the House being placed in a lunatic asylum, the Speaker, as soon as he receives the usual certificate informing him of the fact (*y*), sends it to the Commissioners in Lunacy (*a*), whose duty it is to furnish him with two reports as to the mental condition of the member in question, the first at the date of the receipt of the certificate by the Speaker, the second after the lapse of six months.

If the second of these reports is to the effect that the member is still of unsound mind, it is the duty of the Speaker to lay it upon the table of the House and to issue his warrant directing the Clerk of the Crown in Chancery, or the Clerk of the Crown and Hanaper

sentence informs the Speaker by letter of the offence for which the member has been convicted, and of the term of imprisonment to which he has been sentenced. The Speaker, as soon as possible, informs the House of the receipt of this letter, and a motion is then made that an humble address be presented to His Majesty praying him to give directions for a copy of the record of the trial to be laid before the House. On some subsequent day the letter addressed to the Speaker by the judge is taken into consideration by the House, after which a motion is made for the expulsion of the convicted member. As to informing the House of the arrest of a member, see note (*a*), p. 780, *ante*.

(*t*) See p. 662, *ante*.

(*u*) See p. 787, *ante*.

(*v*) See p. 662, *ante*.

(*w*) A motion of this kind is usually made by one of the whips of the party to which the late member belonged. No notice in ordinary cases is required for such a motion, which may be made immediately after prayers on any sitting day, or as soon as private business has been disposed of, or at the conclusion of questions to members; as to these stages, see pp. 673—677, *ante*. If the vacancy has been caused, however, as a result of a report from the judges appointed to try an election petition (see note (*o*), p. 787, *ante*), notice of a motion to move for the issue of a new writ has usually been required, a sessional order being made for the purpose; and, in cases where notorious bribery and corruption have been shown to exist, the issue of a new writ has constantly been suspended by the House to enable the institution of further inquiries and, if necessary, the disfranchisement of the constituency; see May, Parliamentary Practice, 11th ed., pp. 660—662. The investigation of corrupt practices in an election is entrusted to a commission of inquiry which is appointed by the Crown upon an address from both Houses of Parliament (Election Commissioners Act, 1852 (15 & 16 Vict. c. 57), s. 1; see title ELECTIONS, Vol. XII., pp. 463—472).

(*x*) See title ELECTIONS, Vol. XII., pp. 257 *et seq*. At the beginning of every new session, the Speaker is required to appoint, for the duration of the Parliament, certain members of the House to execute his duties with regard to the issue of writs in the event of his death, vacation of seat, or absence from the country. The members thus appointed must not exceed seven nor be fewer than three in number (Recess Elections Act, 1784 (24 Geo. 3, sess. 2, c. 26), s. 5).

(*y*) See p. 656, *ante*.

(*a*) For the Commissioners in Lunacy, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 466, 467.

in Ireland, as the case may be, to issue a writ for the election of a new member (*b*).

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Power to fill vacant seat during prorogation or adjournment.

**1482.** During a prorogation or adjournment of the House the Speaker may issue his warrant empowering the Clerk of the Crown in Chancery, or the Clerk of the Crown and Hanaper in Ireland, as the case may be, to make out a writ for the election of a new member in the following circumstances (*c*) :—

When a vacancy is caused by the death of a member, or by his accession to the peerage, or by his acceptance of an office which necessitates his resignation of his seat in the House of Commons (*d*), during a prorogation or an adjournment, the fact is brought to the notice of the Speaker by means of a certificate, signed by two members of the House and sent to the Speaker, requesting him to issue his warrant authorising the making out of a writ for the election of a new member.

Upon the receipt of a certificate of this kind, the Speaker may issue the necessary warrant, subject to the following restrictions and conditions, namely: (1) the warrant must not be issued until six days after the Speaker has caused notice of the receipt of the certificate to be published in the *London Gazette*; (2) the return of the writ of the late member must have been brought into the office of the Clerk of the Crown in Chancery at least fifteen days before the end of the last preceding sitting day of the House; (3) sufficient time must be allowed by the applicants for the issue of a new writ to allow of its being issued before the day appointed for the next meeting of the House; (4) the Speaker's warrant must not be issued if a petition was pending against the election of the late member at the time when the House was adjourned or prorogued; and (5) in the case of a vacancy caused by the acceptance of office, the member who accepts such office must notify his acceptance thereof to the Speaker either in writing under his hand or by countersigning the certificate which is sent to the Speaker.

When, during a prorogation or an adjournment, a vacancy is caused by reason of a member being adjudged a bankrupt, the usual certificate is sent to the Speaker by the court (*e*), upon the receipt of which the Speaker must cause notice of it to be published in the *London Gazette*, and, after six days from the date of such publication, unless the House meets before the expiration of

(*b*) Lunacy (Vacating of Seats) Act, 1886 (49 & 50 Vict. c. 16). It would appear that the Speaker can only issue his warrant for the making out of a new writ under the provisions of this Act whilst the House is sitting; see May, Parliamentary Practice, 11th ed., pp. 637, 638).

(*c*) Recess Elections Act, 1784 (24 Geo. 3, sess. 2, c. 26); Election of Members during Recess Act, 1858 (21 & 22 Vict. c. 110), as amended by the Elections in Recess Act, 1863 (26 & 27 Vict. c. 20); and see the text, *infra*.

(*d*) A new writ cannot be issued during a recess, if a member vacates his seat during such recess by reason of his acceptance of any one of the following offices, namely, the office of steward or bailiff of His Majesty's three Chiltern Hundreds of Stoke Desborough and Burnham, or of the manor of East Hendred, or of the manor of Northstead, or of the manor of Hempholme, or of escheator of Munster (Election of Members during Recess Act, 1858 (21 & 22 Vict. c. 110), s. 4).

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II. p. 88, note (*s*).

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this period, he may issue his warrant for the making out of a new writ (*f*).

## SECT. 3.—*Procedure for Enforcement of Privilege etc.*

In general.

**1483.** The procedure with which the two Houses enforce a due observance of their privileges and punish any breach of them is practically the same (*g*).

When any alleged breach of its privileges is reported to either House, it is the practice of the House whose privileges have been attacked to send for the offender to answer the charge of contempt.

Procedure in the House of Lords.

**1484.** In the House of Lords, an order is usually made by the House for the person charged with the breach of privilege to attend at the bar of the House (*h*). If he refuses to attend, a further order is made for him to be attached by the Gentleman Usher of the Black Rod (*i*) and to be kept in that officer's custody until the House makes a further order with regard to him. When the offender is brought to the bar, he is examined by the Lord Chancellor and is dealt with as the House may direct. He may be either committed to the custody of the Gentleman Usher of the Black Rod (*k*) or reprimanded and discharged upon payment of fees.

Procedure in the House of Commons.

**1485.** In the House of Commons, an order is made by the House for the offender to attend at the bar of the House to answer the charge of contempt (*l*). If he refuses to obey, a further order is made empowering the Speaker to issue a warrant to the Serjeant-at-Arms giving authority to him to bring the offender in

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 33; Bankruptcy Frauds and Disabilities (Scotland) Act, 1884 (47 & 48 Vict. c. 16), s. 6; Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), ss. 42, 43, 44.

(*g*) As to such punishment, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 318 *et seq.*; see also May, Parliamentary Practice, 11th ed., p. 63.

(*h*) The order, which is signed by the Clerk of the Parliaments, is merely a summons to the offender, and does not state the nature of the breach of privilege which he has committed.

(*i*) The House of Lords may commit an offender either for a definite or indefinite period, and, in neither case, is a prisoner who has been committed by the House released by a prorogation of Parliament; see 1 Anson, Law and Custom of the Constitution, 4th ed., p. 232. The courts will not discharge a person, who has been imprisoned by the House of Lords, by a writ of *habeas corpus* (*R.* v. *Flower* (1799), 8 Term Rep. 314; see title CROWN PRACTICE, Vol. X., pp. 48, 52). Both Houses used formerly to impose fines upon offenders in addition to committing them to prison; see May, Parliamentary Practice, 11th ed., pp. 91—93. The last instance in which the Commons imposed a fine was in the case of Thomas White in 1666; see Journals of the House of Commons, 1666-7, Vol. VIII., p. 690.

(*k*) The House of Lords will not allow any interference with its officers or other persons entrusted with the carrying out of its orders, and upon several occasions has punished for contempt persons who have attempted to do so, or who have taken action against an agent of the House for the performance of duties entrusted to him by the House; see Journals of the House of Lords, 1827, Vol. LIX., pp. 199, 206.

(*l*) If the person whose conduct has been complained of is a member of the House, he is ordered to attend in his place.

custody to the bar (*m*). When the offender appears at the bar he is examined by the Speaker and is dealt with as the House may direct (*n*). He may be either sent to prison (*o*) or discharged after receiving a reprimand or admonition from the Speaker (*p*).

SECT. 3. Procedure for Enforcement of Privilege etc.

# Part VIII.—Relations between the Houses of Parliament.

## SECT. 1.—*In General.*

**1486.** Under any Constitution which recognises two independent Houses of Parliament, each enjoying distinct powers and privileges, circumstances sometimes must arise to cause disagreement between the two branches of the Legislature. Without attempting to inquire into the political and social causes which from time to time have led to disputes between the House of Lords and the House of Commons, and have materially affected the relative positions of the two Houses (*q*), it is sufficient here to deal with the principal matter

Differences of opinion between the two Houses.

(*m*) Under the Speaker's warrant a house may be broken open in order to effect an arrest (*Burdett* v. *Abbot* (1817), 5 Dow, 165, H. L.), but the officers of the House acting upon such warrant have no right to remain in a house after they have searched it (*Howard* v. *Gossett* (1842), Car. & M. 380). Any resistance to the Serjeant-at-Arms in the execution of his duties is treated by the House as a breach of its privileges, and the person who resists may be punished for contempt. The civil authorities must assist the Serjeant-at-Arms when he is entrusted with the Speaker's warrant to take any person into custody; see May, Parliamentary Practice, 11th ed., pp. 66, 67. If an action is brought against the Serjeant-at-Arms for any act which he may have done by order of the House, the matter is reported to the House, and an order is usually made giving the Serjeant-at-Arms leave to plead and defend the action; see *Lines* v. *Russell* (*Lord C.*) (1852), 19 L. T. (o. s.) 364, Journals of the House of Commons, 1852, Vol. CVII., pp. 64, 68, and *Bradlaugh* v. *Gosset* (1884), 12 Q. B. D. 271; Journals of the House of Commons, 1883, Vol. CXXXVIII., pp. 364, 370.

(*n*) If the offence is a slight one, the House sometimes resolves to proceed no further in the matter: in such a case, the resolution of the House is communicated to the offender by the Speaker, and he is discharged from further attendance without receiving a reprimand.

(*o*) During the session the courts will not discharge, by a writ of *habeas corpus*, a member or any other person who has been committed by the House for a breach of privilege (*Brass Crosby's Case* (1771), 2 Wm. Bl. 754; *R.* v. *Hobhouse* (1820), 2 Chit. 207); nor can the courts bail any person who has been thus committed (*Murray's Case* (1751), 1 Wils. 299). When a person is sent to prison by the House of Commons as a punishment for contempt, no period of imprisonment is fixed by the House. As a rule, the offender is kept in prison until he presents a petition praying for his release and expressing his regret for his behaviour to the House. He is then brought to the bar of the House, and discharged after receiving an admonition from the Speaker. A prorogation of Parliament has the effect of releasing immediately any person who has been imprisoned upon an order of the House of Commons. At the present time, no order is made by the House for the payment of fees by an offending person, unless the circumstances of the case are exceptional.

(*p*) In former times, the offender used to kneel whilst receiving a reprimand from either House, but this is no longer the practice.

(*q*) See Redlich, Procedure of the House of Commons, Vol. II., pp. 79—88; May, Parliamentary Practice, 11th ed., pp. 436—443.

SECT. 1. In General.

which has led to differences of opinion between the two branches of the Legislature, and has largely influenced the procedure of Parliament namely, the control of public money.

The Parliament Act, 1911 (*r*), has considerably altered the position of equality in matters of legislation which previously existed between the two Houses, by furnishing a statutory remedy in favour of the House of Commons in cases of disagreement with the other House. But although that Act (*r*) has made it possible in certain circumstances for a Bill which has been passed by the House of Commons to become law in the course of a single Parliament without having been agreed to by the other House, yet it must be borne in mind that the Act only affects the established procedure of Parliament in cases where an absolute deadlock has occurred between the two Houses, and expressly states that none of its provisions shall diminish or qualify the existing rights and privileges of the House of Commons (*s*).

The following paragraphs, therefore, state the privileges to which reference is made, and explain the attitude of the House of Lords and the practice of Parliament with regard to them (*t*).

## SECT. 2.—*Control of Public Money.*

Editorial note.

**1487.** [*NOTE.*—It would be inappropriate to the purpose of this Work to enter controversially into the political and historical question of the right of the House of Lords to deal with finance in any way whatever. Until the preamble of the Parliament Act, 1911 (*r*), is acted upon, one must wait to see whether the interference of the House of Lords may be authorised in any way.—HALSBURY.]

Privileges claimed by House of Commons with regard to control of public money.

**1488.** The privileges which the House of Commons claims with regard to the control of public money may be summed up under the following heads, namely :—

(1) That the Commons grant demands for money made by the Crown, and consequently that all Bills for granting aids and supplies to the Crown must originate in the House of Commons (*u*) ;

(*r*) 1 & 2 Geo. 5, c. 13; as to the provisions of which with regard to the curtailment of the powers of the House of Lords, see pp. 722, 776, *ante*.

(*s*) Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 6.

(*t*) See the text, *infra*, and pp. 793, 794, *post*.

(*u*) In the early days of parliamentary government, each estate of the realm used to make its own grant when an aid was demanded by the Crown (see 3 Hatsell, Precedents of Parliament, ed. 1818, pp. 95—97). The clergy continued to tax themselves in convocation until 1664, but from an early date the Lords and Commons appear to have made their grants jointly, and in the reign of Richard II. grants made to the King are already described as grants made by the Commons with the assent of the Lords (see Pike, Constitutional History of the House of Lords, p. 339). In the following reign, as a result of a dispute between the Lords and Commons, the doctrine that supplies should be granted to the Crown by the Commons with the assent of the Lords was definitely agreed to by the King (see the document entitled Indemnity of the Lords and Commons, 1407, Rotuli Parliamentorum, Vol. III., p. 611). From this time onwards the Commons constantly asserted that the right to grant supplies to

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(2) That it is the sole right of the Commons to impose and remit taxes, and to frame Bills of supply in such a way as to secure their right to grant aids and supplies to the Crown in such manner, measure and time, as may seem advisable to them; and consequently that the Lords ought not to amend or alter any grant which has been made by the Commons (*a*);

the Crown was their privilege. As early as 1581 the Journals of the House show that the Commons claimed that a subsidy Bill was on a different footing to any other Bill, and that it was their privilege that a Bill of this description should be sent back to the House of Commons after it had been passed by the Lords in order that it might be brought up by the Speaker to receive the Royal Assent (see Journals of the House of Commons, 1581, Vol. I., p. 136). In 1628 the Commons succeeded in establishing a distinction between the preamble of such Bills and other Bills, which has continued ever since. In that year the House of Commons appointed a committee to draw up the preamble to a Bill for granting a subsidy to the King, and the words "Most Gracious Sovereign, we your Majesty's most faithful Commons have given and granted to your Majesty" were agreed upon by the House. The Lords took exception to this form of preamble, and a conference upon the subject was held between the two Houses, but eventually the House of Lords passed the Bill without altering the preamble (see Journals of the House of Lords, 1628, Vol. III., pp. 858, 860, 862, 879; Journals of the House of Commons, 1628, Vol. I., pp. 910, 914, 919). Immediately after the Restoration, the Commons took the earliest opportunity of reasserting their privilege in this matter (see Journals of the House of Commons, 1660, Vol. VIII., pp. 98, 101).

(*a*) During the course of the seventeenth and eighteenth centuries there are numerous instances of disputes between the two Houses with regard to amendments made by the Lords to Bills of supply and Bills imposing taxes upon the people. (For a summary of the Bills which were the subjects of such disputes, see Report from the Select Committee of the House of Commons on Tax Bills, 1860, Appendix, Part I., sect. A, pp. 4—38, House of Commons Paper (414)). With few exceptions, it would appear that the Commons invariably insisted upon reserving to themselves an exclusive power over such Bills by not admitting the right of the Lords either to amend in any way, or to alter the mode of collecting, any charge agreed upon by the House of Commons. Thus, in 1671, when the Lords amended a Bill for placing an imposition on foreign commodities, the Commons refused to accept the amendments and unanimously resolved that in all aids given to the Crown by the Commons the rate or tax ought not to be altered by the Lords (see Journals of the House of Commons, 1671, Vol. IX., p. 235). Again, in 1678, when the Lords inserted some amendments in a supply Bill for disbanding the forces, the Commons carried three resolutions which, after reasserting their claims that all aids and supplies to the Crown were the sole gift of the House of Commons and that all Bills for granting such aids and supplies should originate in that House, declared that no grant made by the Commons ought to be changed or altered by the House of Lords (see Journals of the House of Commons, 1678, Vol. IX., p. 509). In 1689 the Lords altered a Bill for collecting a duty upon coffee and chocolate by inserting an amendment for the abatement of the proposed duty, but the Commons refused to accept the amendment and resolved "that they had always taken it for their undoubted privilege (of which they have ever been jealous and tender) that in all aids given to the King by the Commons the rate or tax ought not to be in any way altered by the Lords" (see Journals of the House of Commons, 1689, Vol. X., pp. 236, 238, 239, 242). The Commons insisted upon the application of the same rule in 1693, when the Lords amended a land tax Bill by inserting a provision that the rates or taxes to which peers were liable under the Bill should be received by collectors nominated by themselves. The Commons disagreed to the amendment upon the ground that, as it was their privilege not only to grant supplies to the Crown, but also to limit any grant they might make in such way as they deemed fit, the action of the Lords in amending a tax Bill was a manifest invasion of their rights (see Journals of the House of Commons, 1692-3, Vol. X.,

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(3) That no public Bill containing provisions which would involve the imposition of a charge upon the people by way of taxes or rates should be introduced in the House of Lords (*b*); and

(4) That the Lords ought not to amend or alter any legislative proposal which is contained in any public Bill sent up for their concurrence by the Commons in such a way as to alter the amount of any charge upon the people, or the mode of levying it, or its duration, distribution, management, or collection (*c*).

Attitude of the House of Lords with regard to measures of finance.

**1489.** At the present time, the House of Lords in practice tacitly admits the privilege claimed by the House of Commons with regard

p. 780). Finally, in 1860, after the Lords had rejected the Paper Duties Repeal Bill, the Commons agreed to resolutions in which they again asserted their privileges with regard to the initiation and framing of Bills dealing with taxation and supply (see Journals of the House of Commons, 1860, Vol. CXV., p. 360). In 1861 the Commons adopted the practice, which has since been invariably followed, of presenting the whole of the financial proposals for the year in one Bill instead of in several measures, thus rendering it extremely difficult for the Lords to amend the financial arrangements agreed to by the Commons without rejecting the whole Budget for the year; see p. 795, *ante*.

(*b*) In the reign of Charles II., whilst the controversy with regard to Bills of supply and Bills to impose taxation was in progress between the two Houses, the question was first raised whether other Bills which did not fall strictly into either of the above categories, but some of the provisions of which would impose a charge upon the people, could originate in the House of Lords. Thus, in 1661, the Commons laid aside a Bill for paving, repairing or amending the streets and highways of Westminster, which was sent to them by the Lords, because the Bill would lay a charge upon the people, and they conceived that it was their privilege that a Bill of that nature ought to originate in their House (see Journals of the House of Commons, 1661, Vol. VIII., p. 311). Again, in 1665, the Commons adopted a similar course with regard to a Bill for regulating and ordering of buildings and for amending of highways in towns, stating as their reason for so doing that as the Bill was to impose and continue a tax upon the people it ought to have begun in their House (see Journals of the House of Commons, 1664-5, Vol. VIII., p. 602). From this time onwards the Commons have always maintained that all Bills which would operate as a charge upon the people ought, like Bills of supply, to originate in their House. Their practice, therefore, has been to lay aside such Bills, though, in cases where the Bills have appeared to them desirable, they have often ordered a Bill similar to the one they laid aside to be introduced in their House. With regard to private Bills, however, the Commons have defined by standing orders certain cases in which they will not insist upon their privileges; see p. 798, *post*.

(*c*) Whilst admitting the right of the Lords to amend any provision in a public Bill, although the measure in question may incidentally impose a charge upon the people, when such provision does not refer to such charge, the Commons have consistently denied to the Lords the right of altering or amending any provision in such Bill when it actually refers to the charge, or to the mode of levying it, or to its duration or distribution, or to the management or collection of it. The right of the Lords to reject a Bill (see pp. 795, 796, *post*) which they cannot amend without infringing the privileges of the Commons would appear also to enable them to reject the financial provisions in a Bill, if such provisions are rejected as a whole; see remarks of Earl Grey and Viscount Eversley on this point, the 30th July, 1867 (Parliamentary Debates, Vol. CLXXXIX., Third Series, pp. 415—417). For a summary of Bills with regard to which the question of the right of the Lords to amend financial provisions was raised, see Report from the Select Committee of the House of Commons on Tax Bills, 1860, Appendix, Part II., sect. A, pp. 49—59, House of Commons Paper (414).

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to the control of public money so far as it relates to the right of that House to initiate and settle the provisions of Bills which impose charges upon the people or make grants of public money—that is to say, Bills of supply, or Bills to impose or remit taxes, or Bills for the appropriation of supplies (*d*)—and no such Bills, therefore, are introduced in the House of Lords or amended by that assembly.

The House, however, can reject or postpone (*e*) any such Bill

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(*d*) In the seventeenth and eighteenth centuries there were frequent disputes between the two Houses with regard to the exclusive control claimed by the House of Commons over the granting and appropriation of supply. The House of Lords claimed, and adduced precedents to prove, its right to a share in the control of the national finances. In the year 1628, when the Lords complained that the Commons had altered the form of the preamble to a subsidy Bill (see note (*u*), p. 793, *ante*), they requested that the old form of preamble should be used, because "as the Commons give their subsidies for themselves, and for the representative body of the kingdom, so the Lords have the disposition of their own" (see Journals of the House of Lords, 1628, Vol. III., p. 860), and, although they subsequently passed the Bill without altering the preamble, they appear to have asserted their privilege with regard to it by not returning it to the Commons to be carried up to receive the Royal Assent by the Speaker, to which much exception was taken by the Commons (see Journals of the House of Commons, 1628, Vol. I., p. 919), but the Speaker presented it to the King (see Journals of the House of Lords, 1628, Vol. III., p. 879). After the Restoration the Lords do not seem to have raised any objection to the altered form of preamble, but they continued to assert their right to amend and alter Bills of supply and Bills to impose and remit taxes. Thus, in 1671, in answer to the Commons' reasons for disagreeing to their amendments to a Bill for placing an imposition on foreign commodities, the Lords resolved that the power to make such amendments was their undoubted right from which they could not depart, and they assigned reasons and adduced a series of precedents dating from the days of Edward I. to prove that they had always taken their share in granting aids to the Crown (see Journals of the House of Lords, 1671, Vol. XII., pp. 503–505). In 1692 a dispute arose between the two Houses with regard to amendments made by the Lords to a Bill for appointing and enabling commissioners to examine, take, and state the public accounts of the kingdom. The Commons denied the right of the Lords to touch the Bill because "the disposition, as well as granting money by Act of Parliament, has ever been in the House of Commons." The Lords, in the reasons which they submitted for insisting on their amendments, refused to admit the claim of the other House (see Journals of the House of Commons, 1691-2, Vol. X., pp. 646, 653). In 1693 the Lords, although they did not insist upon certain amendments which they had made to the land tax Bill (see note (*a*), p. 793, *ante*) to which the Commons had objected, resolved "That the making of amendments and abatements of rates of Bills of supply sent up from the House of Commons is a fundamental, inherent, and undoubted right of the House of Peers from which their Lordships can never depart" (see Journals of the House of Lords, 1692-3, Vol. XV., p. 191). Numerous other instances might be cited to show that during the seventeenth and eighteenth centuries the Lords never admitted the absolute control claimed by the Commons over Bills of supply etc., and constantly asserted their right to amend such Bills. In some of these cases the Lords did not insist upon their amendments; in others, the disagreement between the two Houses, or a timely prorogation, resulted in the loss of the Bill in dispute; but this was not invariably the case, as a practice arose by which the Commons, whilst dropping the actual measure which the Lords had amended, immediately introduced a new Bill incorporating the alterations made by the Lords or omitting the provisions to which they had objected.

(*e*) For the alterations in the powers of the House of Lords with regard to the permanent rejection of public Bills and of Bills certified as money Bills by the Speaker, effected by the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), see pp. 722, 776, *ante*.

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which is submitted to its consideration (*f*), and does not fail to regard it as a breach of its privileges if the Commons attempt to annex or tack to a Bill of this kind any clause or clauses the matter of which is foreign to and different from the matter of the said Bill (*g*).

Attitude of House of Lords with regard to measures not purely financial.

**1490.** With regard to public Bills involving the expenditure of public money other than those to which allusion has been made (*h*), the attitude of the House of Lords is different, for the House claims the right to alter or amend in such way as it deems advisable the provisions of any Bill which effects a change in public policy, when such Bill has not been introduced as a measure of finance pure and simple, even when the provisions in question impose or remit a charge upon the people (*i*).

(*f*) The right of the House of Lords to reject or postpone a Bill, whether dealing with supplies or levying or remitting a charge upon the people, has not been taken away by the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), but if the House were to exercise its right and reject or postpone a Bill which had been certified by the Speaker as a money Bill within the meaning of that Act, the measure could become law notwithstanding its rejection or postponement by the House of Lords (see p. 776, *ante*). In the past the House of Lords has made use comparatively seldom of its power to reject or postpone Bills of a financial character. Thus, between 1708 and 1859, the House appears to have rejected or postponed seventeen Bills of supply or Bills for the imposition of taxes (see Report from the Select Committee of the House of Commons on Tax Bills, 1860, Appendix, Part I., sect. B., p. 39, House of Commons Paper (414)), and subsequently it has exercised its power only upon two occasions, namely, in 1860, when it threw out the Paper Duty Repeal Bill (see Journals of the House of Lords, 1860, Vol. XCII., p. 348), and in 1909, when it refused to pass the Finance Bill of the year until the measure had been submitted to the judgment of the country (see *ibid.*, 1909, Vol. CXLI., p. 451).

Standing Orders of the House of Lords (Public Business), 1902, No. 59. The first occasion upon which the Lords appear to have taken exception to the practice of tacking was in 1700, when the Commons inserted, in a Bill for granting an aid to His Majesty by sale of the forfeited and other estates and interests in Ireland, and by a land tax in England, provisions dealing with other matters. The Lords refused to agree to these provisions on the ground that "the joining together in a money Bill things so totally foreign to the methods of raising money, and to the quantity or qualifications of the sums to be raised, is wholly destructive of the freedom of debates, dangerous to the privileges of the Lords, and to the prerogative of the Crown. For, by this means, things of the last ill consequence to the nation may be brought into Money Bills; and yet neither the Lords, nor the Crown, be able to give their negative to them, without hazarding the public peace and security" (see Journals of the House of Commons, 1700, Vol. XIII., p. 321). When the Lords have considered it advisable to reject a Bill on the ground of tacking, the practice of the House has been for a motion to be made that the standing order upon the subject be now read. As soon as this has been done, the further progress of the Bill is negatived (see the procedure on the Malt Duties Bill and the Customs Fees (Ireland) Bill in 1807, Journals of the House of Lords, 1807, Vol. XLVI., pp. 32, 342). Henceforward the probability of tacking must be affected to some extent by the provision of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13), s. 1 (3), defining the Bills which the Speaker can certify as money Bills.

(*h*) See p. 795, *ante*.

(*i*) The attitude of the House of Lords with regard to its right to amend a Bill in such a way as to affect its financial proposals, where a matter of public policy is concerned, is set forth in the resolution agreed to by the House with regard to its amendments to the Old Age Pensions Bill in 1908. Upon that occasion the House, although not insisting upon its amendments to which the

SECT. 2. Control of Public Money.

**1491.** It is obvious that if the Commons invariably insisted upon a strict interpretation of their privileges with regard to the control of public money, the Lords would be practically excluded from taking any effective part in legislation, for scarcely any public Bill of importance can be introduced into Parliament some of the provisions of which do not raise either directly or indirectly questions of a financial character. The object of both Houses consequently has been to devise a method of procedure which should prevent as far as possible disputes arising between them, and which, whilst doing nothing to curtail the financial privileges of the House of Commons, should allow to the House of Lords its fair share in legislation.

Effect of strict insistence upon its privileges by the Commons.

This object has been very largely effected by the practical recognition upon the part of the House of Lords of the functions with regard to finance peculiar to the other House (*k*), and by the relinquishment upon the part of the House of Commons of certain of the privileges which it formerly claimed, and by the practice by which that House does not insist in many cases upon a rigid observance of its privileges with regard to amendments made by the Lords (*l*).

## SECT. 3.—*Pecuniary Penalties.*

**1492.** The House of Commons formerly maintained that it was its sole right in all cases to appoint in any Bill the amount and the distribution of all pecuniary penalties or forfeitures (*m*); but it

Relinquishment of privilege as to pecuniary penalties.

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Commons had disagreed upon the score of privilege, refused to consent to the Commons reasons, because in the opinion of the House, the Bill was not one to grant aids and supplies to the Crown and involved questions of policy in which both Houses were concerned, and with which the House of Lords had in the past been accustomed to deal; see Journals of the House of Lords, 1908, Vol. CXL., p. 345. Previously, in 1906, the Lords, whilst not insisting upon certain of their amendments to the Labourers (Ireland) Bill, to which the Commons had disagreed, agreed to a resolution stating that the House maintained its right to legislate with regard to the principles of valuation upon which property might be taken for public purposes; see Journals of the House of Lords, 1906, Vol. CXXXVIII., p. 336.

(*k*) Although, as a general rule, the Lords confine themselves to concurring with the financial arrangements made by the Commons, they do not fail in debates and by resolutions of the House, and by means of inquiries by select committees, to express their opinion with regard to the expenditure of public money and the methods of taxation proposed by the Government of the

(*l*) The Commons do not claim an exclusive control over Bills dealing with funds set apart for purposes of general but not of public utility, *e.g.*, Bills dealing with the property and land revenues of the Crown, the proceeds of which are not consigned by statute to the Consolidated Fund; Bills applying for various purposes the fund created by the Irish Church Act, 1869 (32 & 33 Vict. c. 42); or Bills comprising charges upon the property or revenues of the Church; see May, Parliamentary Practice, 11th ed., pp. 582, 583.

(*m*) See reasons assigned by the Commons for disagreeing to the Lords' amendments to the Punishing Mutiny and Desertion Bill in 1691 (Journals of the House of Commons, 1621-2, Vol. X., p. 693). The Lords, although in some cases they gave way with regard to particular Bills, always maintained that they were entitled to alter any pecuniary penalties imposed by the Commons; see the reasons given by the Lords for insisting upon their amendments to the India Silks Bill in 1696 (Journals of the House of Commons, 1697,

SECT. 3. Pecuniary Penalties.

no longer insists upon the observance of this privilege in the case of any Bill, whether public or private, originating in the House of Lords or amended by that House, whereby any pecuniary penalty, forfeiture, or fee is authorised, imposed, appropriated, regulated, varied, or extinguished (1) where the object of such pecuniary penalty or forfeiture is to secure the execution of the Act or the punishment or prevention of offences; and (2) where such fees are imposed in respect of benefit taken or service rendered under the Act and in order to the execution of the Act, and are not made payable into the Treasury or Exchequer or in aid of the public revenue (*n*).

The House of Commons also no longer insists upon its privilege in the case of any private Bill or provisional order confirmation Bill sent down from the Lords which refers to tolls and charges for services performed and are not in the nature of a tax, or which refers to rates assessed and levied by local authorities for local purposes (*o*).

### SECT. 4.—*Acceptance of Amendments.*

Relinquishment of privilege as to amendments.

**1493**. In addition to relinquishing its privileges in the cases already mentioned (*a*), the House of Commons usually accepts amendments made by the House of Lords if they do not materially infringe the rights of the House and are not otherwise objectionable. In any such case, however, the Speaker usually gives directions for a special entry to be made in the Journals of the House explaining the grounds which have led the House to waive its privilege upon the occasion in question (*b*).

Expedients to avoid infringement of Commons' privileges.

**1494**. In order also to facilitate legislation and to enable Bills containing any provisions which would operate as a charge upon the people, and so might be held by the House of Commons to infringe upon its privileges, to be introduced into the House of Lords, a practice has arisen by which every public Bill which originates in the House of Lords is examined by the officers of the two Houses with a view to ascertaining whether any of its provisions appear likely to constitute a breach of the privileges of the House of Commons. If it is considered that the Commons might take exception, on the score of privilege, to any clause or words in the Bill, amendments are drawn up proposing the omission of such clause or words, and are then proposed by the lord in charge of the Bill as soon as the measure has been read a third time (*c*).

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Vol. XI., p. 739; see also the dispute between the two Houses which occurred in 1702 with regard to the alterations made by the Lords in the clause dealing with penalties proposed by the Commons in the Occasional Conformity Bill, Journals of the House of Lords, 1702-3, Vol. XVII., pp. 192, 195, 206—231, 257, 262; Journals of the House of Commons, 1702-3, Vol. XIV., pp. 78, 80, 83, 86, 183; compare House of Lords Historical Manuscripts, Vol. V. (New Series), pp. 157—159).

(*n*) Standing Orders of the House of Commons (Public Business), 1911, No. 44.

(*o*) *Ibid.* (Private Business), 1911, No. 226,

(*a*) See p. 797, *ante*, and the text, *supra*.

(*b*) See May, Parliamentary Practice, 11th ed., pp. 576—578.

(*c*) The effect of the insertion of these amendments by the House is to take out of the Bill any provisions to which the Commons might have objected, for

SECT. 4. Acceptance of Amendments.

The Bill as it has been agreed to by the Lords is submitted to the consideration of the Commons, who can then reinsert any provisions which have been left out by means of the privilege amendments.

In the case of a Bill which has originated in the House of Commons, when the Lords find it necessary to insert an amendment of such a nature that it might be held to be an infringement of the Commons' privileges, an attempt is sometimes made to avoid raising the question of privilege by means of the insertion of another amendment which negatives or renders ineffective the amendment to which objection might be taken. If the Commons are agreeable to the proposal made by the Lords, they agree to the first amendment, but disagree to the second amendment. In a case of this kind the original amendment made by the Lords stands part of the Bill, but the second amendment is left out, as the Lords do not insist upon its retention when the Bill is returned to them.

Message communicating disagreement of Commons to Lords' amendments infringing privilege.

**1495.** When the House of Commons decides, upon the ground of privilege, not to accept an amendment made to one of its Bills by the House of Lords, it is customary for the House, in the message in which it communicates its disagreement to the Lords, after explaining that the amendment interferes in some way either with the public revenue or with the application of taxes or local rates, as the case may be, and consequently infringes upon the privileges of the House, to inform the Lords that the Commons consider it is unnecessary upon their part to offer any further reason for their disagreement, hoping that the reason which they have given will be deemed sufficient by the Lords.

Effect of message on insistence on amendment.

Upon the receipt of a message of this kind, the House of Lords as a rule does not insist upon the amendment to which objection has been taken, but, if it insists, it returns a message to the other House informing it of the fact, and the practice of the Commons then is to order either that the Lords' amendments to the Bill be laid aside or that they be considered after the lapse of a period of six months, either of which courses results in the loss of the Bill.

the provisions in question do not appear in the official House copy of the measure which is sent down to the House of Commons. In the copies of the Bill, however, which are printed by order of the House of Commons for the use of its members, the privilege amendments, as they are termed, are printed within brackets and with a line under them. See, further, p. 718, *ante*.

# Part IX.—Communications between the Crown and Parliament and between the House of Lords and the House of Commons.

SECT. 1. **From the Crown to Parliament.**

## SECT. 1.—*From the Crown to Parliament.*

### SUB-SECT. 1.—*In General.*

Necessity for communications between the Sovereign and the two Houses.

**1496.** Except when he comes to the House of Lords for the purpose of opening or proroguing Parliament, it is no longer customary for the Sovereign to be present in person in Parliament (*d*). But, in addition to the Speech from the Throne which is usually delivered upon these occasions (*e*), circumstances arise from time to time which necessitate direct communications being sent from the Crown to one or other of the Houses of Parliament or to both Houses.

### SUB-SECT. 2.—*Methods of Communication.*

Methods of communication.

**1497.** There are several ways by which such communications may be made, any one of which may be sent in conformance with the established usage of Parliament, and is recognised by both Houses as a constitutional declaration of the wishes of the Sovereign, acting upon the advice of his Ministers (*f*).

Written or verbal message.

**1498.** The most usual method by which the Sovereign makes a communication to Parliament is by means of a written message under the Royal Sign Manual (*g*), although in certain cases a verbal message is sometimes sent (*h*). A message under the Royal Sign Manual or a verbal message is usually sent to both Houses, and, if

(*d*) In legal theory, the Sovereign is always supposed to be present in the High Court of Parliament, and in earlier times the Kings of England used constantly to be present during the sittings of the House of Lords; see Journals of the House of Lords, 1670, 1671, Vol. XII., pp. 317, 413. Queen Anne, however, was the last Sovereign who attended a debate in the House of Lords, for the practice was discontinued upon the accession of George I.

(*e*) See pp. 695, 700, *ante*.

(*f*) See May, Parliamentary Practice, 11th ed., p. 450.

(*g*) A message of this kind is sent when it is necessary to announce an event of public importance which requires the attention of Parliament, or to inform the two Houses when some sudden emergency necessitates the calling out of the army reserve, or to request Parliament to make financial provision for some member of the Royal Family, or to grant a pecuniary reward to some eminent public servant.

(*h*) A verbal message must be delivered in either House by a Minister of the Crown. This form of message is employed in the case of the election of a Speaker during the course of a session; see Journals of the House of Commons, 1905, Vol. CLX., p. 249; see also note (*c*), p. 693, *ante*. It would also be used in the event of a peer or a member of the House of Commons being arrested and held in custody in order to his being tried by military court-martial; see Journals of the House of Commons, 1815, Vol. LXX., p. 70; compare May, Parliamentary Practice, 11th ed., pp. 451, 452.

SECT. 1. From the Crown to Parliament.

possible, on the same day (*i*), and is delivered in each House by a Minister of the Crown (*j*).

In the House of Lords, the peer who is entrusted with the Royal message comes to the table of the House and announces that he has a message under the Royal Sign Manual which His Majesty has commanded him to deliver to their lordships. He then hands the message to the Lord Chancellor, who reads it to the House, all the lords present uncovering whilst it is being read (*k*).

In the House of Commons, the member entrusted with the Royal message stands at the bar of the House and informs the Speaker that he has a message from the King to the House signed by the King himself. The Speaker desires him to bring the message to the chair, and the member then advances up the floor of the House and hands the message to the Speaker, who reads it to the House, all the members present remaining uncovered whilst it is being read (*l*).

Reply to message.

**1499.** In each House it is customary to reply to a message under the Royal Sign Manual by means of an address (*m*) humbly thanking His Majesty for his gracious message, and assuring him of the readiness of the House to carry out his recommendations or request (*n*).

Additional methods of communicating Sovereign's message.

**1500.** In addition to written and verbal messages, the Sovereign makes known his wishes to the two Houses of Parliament in various other ways, namely:—

(1) "The pleasure of the Crown" is signified by the Lord Chancellor (i.) at the beginning of every Parliament, when he directs the Commons to choose a Speaker, and also when he informs the Speaker-elect of His Majesty's approbation and confirmation of his election (*o*); and (ii.) whenever, in virtue of the powers

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(*i*) A message, when it is accompanied by original papers, is occasionally sent to one House and not to the other. If one House does not happen to be sitting on the day when it has been found necessary to deliver a message from the Sovereign to the other House, the message is delivered to it the day it reassembles.

(*j*) In neither House does the Minister who is the bearer of a message under the Royal Sign Manual or a verbal message from the Sovereign appear in uniform. In the House of Commons, the member of the Royal Household entrusted with the Sovereign's unsigned answer to an address appears in uniform. The Lords with White Staves, namely, the Lord Steward and the Lord Chamberlain of His Majesty's Household, who perform the same duty in the House of Lords, used also to appear in uniform; but this practice has been discontinued lately.

(*k*) A message under the Royal Sign Manual may be taken into consideration forthwith; but the more usual course is for the House to appoint a day for its consideration.

(*l*) See Journals of the House of Commons, 1882, Vol. CXXXVII., p. 112.

(*m*) An address from the House of Lords is usually presented to the Sovereign by the Lords with White Staves, although occasionally certain peers are specially nominated by the House for this duty. An address from the House of Commons is presented by members of the House being Privy Councillors or members of the Royal Household.

(*n*) It is not the practice of the House of Commons to present an address to the Sovereign in answer to a message for any kind of pecuniary aid or exceptional provision or grant, the prompt attention by the House to the matter in question being considered a sufficient answer to the demand made by the Crown.

(*o*) See pp. 692, 694, *ante*.

SECT. 1. From the Crown to Parliament.

conferred upon him by a Royal commission, he opens or prorogues Parliament (*p*).

(2) The consent of the Sovereign is signified in either House by a Minister of the Crown (*q*) to any Bill (i.) which affects in any way the hereditary revenues or personal property of the Crown (*r*); or (ii.) which touches any of the Royal prerogatives (*s*).

(3) The recommendation from the Crown (*t*) which is required by the House of Commons before the House will receive a petition for any sum relating to public service or creating a charge upon the revenues of India, or before it will proceed upon any motion for a grant or charge upon the public revenue, not included in the annual estimates, whether payable out of the Consolidated Fund or out of money to be provided by Parliament, or upon the revenues of India, is signified by a Minister of the Crown (*u*).

## SECT. 2.—*From Parliament to the Crown.*

### SUB-SECT. 1.—*In General.*

Communication from Parliament to

**1501.** A communication from the two Houses of Parliament to the Crown (*v*) is usually made by means of an address (*a*), which may be either (1) a joint address from the two Houses, or (2) an address from either House singly (*b*).

(*p*) See pp. 692, 700, *ante*.

(*q*) In the House of Commons, the consent of the Crown in a case of this kind may also be signified by a member who is a Privy Councillor, when the authority of the responsible department has been obtained.

(*r*) In the case of a Bill which affects the property of the Duchy of Cornwall, the consent of the Prince of Wales, as Duke of Cornwall (or of the Crown, if the Prince is not of age), is signified in the same way.

(*s*) It would appear that the Royal consent may be given at any stage of a Bill during its progress through either House; see second Report from the Select Committee of the House of Lords appointed to search for precedents upon this point in 1844, Journals of the House of Lords, 1844, Vol. LXXVI., p. 478. In the case of the House of Lords Reconstitution Bill, in the session of 1911, however, the House of Lords decided that it was more in accordance with the usage of Parliament for the consent of the Crown to be signified before the introduction of any Bill affecting its prerogative; see Parliamentary Debates, Fifth Series, House of Lords, Vol. VII., pp. 764—780.

(*t*) See p. 766, *ante*.

(*u*) Standing Orders of the House of Commons (Public Business), 1911, Nos. 66, 70.

(*v*) An address is only presented to the reigning Sovereign or the regent. Both Houses, however, send messages usually of congratulation or condolence to other members of the Royal Family. Such messages are entrusted in each House to members specially deputed for the purpose, who make known to the House replies which they receive.

(*a*) Resolutions of the House of Commons have sometimes been presented to the Crown not in the form of an address. The procedure with regard to the presentation of such resolutions and to the reply of the Sovereign is the same as that adopted with regard to an address.

(*b*) A joint address or an address to the Sovereign from either House may be presented upon almost any subject connected with the administration or well-being of the country at home or abroad, or may be used as a means of expressing the congratulations or the condolences of Parliament. It is not in accordance with Parliamentary usage, however, for an address to refer to a Bill at the time under the consideration of either House of Parliament; see May, Parliamentary Practice, 11th ed., p. 454.

SUB-SECT. 2.—*Joint Address.*

SECT. 2.

**From Parliament to the Crown.**

Procedure in voting a joint address.

**1502.** A joint address originates in a resolution, or series of resolutions, which may be made in either House. When a motion for an address of this kind has been agreed to by one House, it is communicated to the other House by means of a message setting out the resolution or resolutions, and desiring the concurrence of the other House to the presentation of a joint address (*c*).

If the second House agrees to the proposal of the first House, it sends a message expressing its agreement, and an order is then made by each House with regard to the manner in which the address is to be presented (*d*).

Presentation.

**1503.** An address from both Houses of Parliament may be presented by the Lords and Commons in a body (*e*), or by a deputation usually consisting of two lords and four members of the House of Commons, or by the Lord Chancellor and the Speaker, acting on behalf of their respective Houses (*f*).

SUB-SECT. 3.—*Address from the House of Lords.*

Procedure.

**1504.** An address from the House of Lords is agreed to by the House on motion, and an order is then made for its presentation to the Sovereign by the whole House (*g*), or by the Lords with White Staves (*h*), or by certain lords specially nominated for the purpose (*i*).

**1505.** On the day when the address is to be presented the House adjourns during pleasure and proceeds to the place

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(*c*) The form of the address is settled by the two Houses. In the message a blank is left for the insertion of the title of the second House, the necessary words being inserted in the message by which that House signifies its willingness to join in the address.

(*d*) It is customary for the House of Lords, whether the address has originated in that House or not, to ascertain the time and place at which the Sovereign will be pleased to receive the address. As soon as the Lords with White Staves have declared His Majesty's pleasure on these points, a message is sent to acquaint the House of Commons.

(*e*) When an address is presented by the two Houses as a body, the Lord Chancellor and the Speaker advance towards the Sovereign side by side, but the Lord Chancellor reads the address and receives the King's answer.

(*f*) For other methods of presenting joint addresses, see May, Parliamentary Practice, 11th ed., p. 453.

(*g*) See Journals of the House of Lords, 1897, Vol. CXXIX., p. 255. If the address is to be presented by the whole House, the Lords with White Staves are ordered to wait on the Sovereign to find out when he will be graciously pleased to receive the address.

(*h*) This is the usual method employed for the presentation of an address. When the House has made an order for an address to be thus presented, a copy of the address, signed by the Clerk of the Parliaments, is sent to the Lord Steward or Lord Chamberlain, as the case may be, together with a copy of the order of the House, also signed by the Clerk of the Parliaments. As soon as he has presented the address and received the King's answer, the Lord Steward or the Lord Chamberlain, as the case may be, reports the answer to the House on the first convenient occasion. The Sovereign's answer to an address may be reported any sitting day before any public business is taken; and see p. 677, *ante*.

(*i*) See Journals of the House of Lords. 1882, Vol. CXIV., p. 58.

SECT. 2. From Parliament to the Crown.

appointed by the Sovereign. The address is read by the Lord Chancellor, who then kneels and delivers it to the Sovereign. After a reply to the address has been read by the Sovereign and handed to the Lord Chancellor, the lords retire. At the next meeting of the House, the Lord Chancellor reports that the House has waited on His Majesty with the address, and reads the King's answer to the House (*k*).

Presentation.

SUB-SECT. 4.—*Address from the House of Commons.*

Procedure.

**1506.** An address from the House of Commons is agreed to by the House on motion made in the House itself, or in a committee of the whole House and afterwards agreed to by the House, and is then ordered to be presented to the Sovereign either by the whole House (*l*), or by members of the House being Privy Councillors or members of the Royal Household (*m*), or by certain members specially nominated for the purpose by the House (*n*).

Presentation.

**1507.** The proceedings upon the presentation of an address by the House of Commons as a body are the same as those which have already been described in the case of the presentation of an address by the other House (*o*). The Speaker reads the address and receives the answer from the Sovereign, which, upon his return to the House of Commons, he reads to the House.

SECT. 3.—*Between the Houses of Parliament.*

Communications between the Houses.

**1508.** As the two Houses of Parliament are entirely distinct and independent bodies, it is necessary that there should be frequent communications between them with regard to the ordinary legislative and other business of the session.

Three methods of formal communication.

**1509.** According to the practice of Parliament, direct communication between the House of Lords and House of Commons can be effected either by means of written messages or by means of meetings between representatives appointed by each House which are known as conferences (*p*) or free conferences (*q*). Written messages have

When the Lord Chancellor attends the Sovereign to deliver an address of the House of Lords, he wears his state robes, and the peers who accompany him wear levée dress.

(*l*) See Journals of the House of Commons, 1897, Vol. CLII., p. 299.

(*m*) This is the usual method employed for the presentation of an address from the House of Commons. The address is generally presented by the Vice-Chamberlain or Treasurer of the Household, who, as soon as possible after receiving the Sovereign's answer, appears at the bar of the House and is called by the Speaker. He then comes to the table and there reads the King's answer and hands it in. The proceedings of the House may be interrupted (see p. 673, *ante*) in order that an answer to an address may be read; see Journals of the House of Commons, 1879, Vol. CXXXIV., p. 23.

(*n*) See Journals of the House of Commons, 1882, Vol. CXXXVII., p. 94.

(*o*) See the text, *supra*. Members of the House of Commons who go with the Speaker to present an address to the Sovereign are not required to wear levée dress; see 2 Hatsell, Precedents of Parliament, ed. 1818, p. 390, n.

(*p*) At a conference, the managers (see note (*s*), *infra*), who are appointed by each House respectively to conduct the proceedings on its behalf, act simply as messengers, and their duty is merely to deliver or receive resolutions or, in case of a conference with regard to a disagreement as to a Bill, to return

For note (*q*) see next page.

superseded (*r*) both the other modes of communication, and are employed upon all occasions when direct intercourse between the two Houses is rendered necessary (*s*).

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or to receive the Bill with the reason or reasons for disagreement. They have no authority given to them to discuss with each other the resolutions of which they may be the bearers, or to attempt to arrive at an agreement between the two Houses with regard to a Bill.

(*q*) A free conference differs from a conference in one important respect, namely, that the managers are the agents and not merely the messengers of their respective Houses. As such they are empowered to discuss with each other and, if possible, to arrive at some agreement with regard to the matters in dispute between the two Houses; compare note (*p*), *supra*. A free conference can be demanded in the first instance or after the failure of a conference or of two conferences.

(*r*) Since 1851, when the two Houses decided that, unless for any reason a conference were preferred, written messages should be employed by either House as a means of informing the other House of its reasons for disagreeing with amendments made to its Bills or for insisting upon amendments which it had itself made to Bills; see resolutions proposed by the Lords and agreed to by the Commons after conferences between the two Houses, Journals of the House of Lords, 1851, Vol. LXXXIII., pp. 158, 159, 177, 178; Journals of the House of Commons, 1851, Vol. CVI., pp. 210, 217, 223.

(*s*) Since this agreement was arrived at, there has been only one instance of a conference being held in a case where a message would have been admissible, namely, on the occasion of a difference of opinion arising between the two Houses with regard to the Oaths Bill in 1858. But although the practice of holding conferences has thus fallen into desuetude, it would still be possible for one House to demand a conference or a free conference with the other House, not only for the purpose of submitting reasons for disagreeing to a Bill, but also to communicate a resolution or an address to which the concurrence of the other House is desired, or to discuss the privileges of Parliament, or to require or to communicate a statement of the facts upon which a Bill has been passed by the other House; see May, Parliamentary Practice, 11th ed., p. 437. The method employed for the appointment of, and the procedure adopted in, a conference or a free conference is practically the same. When the Commons demand a conference, they send a message to the Lords desiring a conference and stating the subject-matter of the conference. A motion is then made in the House of Lords "That this House do agree to a conference as desired by the Commons and do appoint the same presently [or at some fixed time] in the [matter mentioned by the Commons]." When this motion has been agreed to, the Commons are informed, by means of a message, of the Lords' willingness to hold a conference. Each House then appoints managers, usually seven in number, to conduct the proceedings on its behalf. It is always the privilege of the Lords to fix the hour and name the place of meeting for the conference, and during the actual proceedings of a conference it has been customary for the Lords present to wear their hats and remain seated, and for the Commons to be uncovered and stand. As soon as a conference is finished, the managers return to their respective Houses (which have adjourned during pleasure whilst the conference has been in progress), and the senior manager in each House reports what has taken place at the conference. In both Houses a report from the managers of a conference or of a free conference may be considered forthwith or a subsequent day may be appointed for its consideration. If the conference has taken place in respect of a Bill, the Bill itself with the amendments, together with the reasons on account of which the House in which the Bill originated refuses to accept them, are left, after a conference, in the possession of the House which made the amendments. If this House does not insist upon its amendments, it sends a message to inform the other House of the fact and there are no further proceedings. But, if the House is unwilling to withdraw all or some of its amendments, a further conference can be held, at which it communicates its reasons for insisting. The Bill is then once again in the pos-

of the House in which it originated, and it remains for that House to

SECT. 3. Between the Houses of Parliament.

Messages.

**1510.** It is the practice for one House to send a message to the other House—

(1) To inform it (i.) that it has passed a Bill and desires the concurrence of the other House to the proposed measure; (ii.) that it agrees to a Bill which has been sent to it by the other House; (iii.) that it insists, or does not insist, upon its amendments to a Bill, in case the other House objects to them; (iv.) that it proposes new amendments in lieu of those to which the other House has disagreed; (v.) that it cannot agree to the amendments made to one of its Bills by the other House (*t*):

(2) To request the attendance of members or officials of the other House as witnesses, or the interchange of documents, reports, or evidence (*a*):

(3) To suggest the appointment of a joint committee (*b*), or to make proposals with regard to any matter connected with the business or procedure of Parliament to which the assent of both Houses is required (*c*).

Procedure.

**1511.** A message, together with the Bills or other documents to which it refers, is carried from one House to the other by one of the clerks at the table (*d*). The delivery of a message is a purely formal matter which is attended by no ceremony, and, therefore, as a rule, causes no interruption to a debate in either House if one happens to be in progress at the time of its arrival. The clerk who is the bearer of the message, when he reaches the bar of the other House, hands the message to the clerk of that House who comes to the bar to receive it.

In the House of Lords a message is read at the table by the Clerk of the Parliaments as soon as conveniently may be after it has been received; in the House of Commons a message is usually

decide whether or not it will give way. If it is still not prepared to accept the amendments, but is anxious to save the Bill, it may demand a free conference, for by the accepted usage of Parliament it is not permissible to hold a third conference. If, after a free conference has been held, neither House is willing to give way, there are no further communications between them, and the Bill with regard to which the dispute has arisen drops; but, if concessions are made upon either side, further free conferences can be held until a compromise is effected or until it has been made apparent that no satisfactory solution of the points at issue can be arrived at.

(*t*) For procedure when differences arise between the two Houses with regard to amendments on public Bills, see pp. 721, 722, *ante*.

(*a*) See also note (*c*) and (*e*), p. 781, *ante*.

(*b*) See pp. 640, 752, *ante*.

(*c*) *E.g.*, a joint address from the two Houses to the Sovereign; see p. 803, *ante*.

(*d*) Before 1855 the Lords used to employ the masters in Chancery, or, on special occasions, the judges, to carry their messages to the Commons, whilst messages from the House of Commons used to be brought up to the Lords by a member deputed for the purpose by the Commons. In 1855 the Lords agreed to a resolution that in addition to the then existing practice with regard to messages between the two Houses, one of the clerks of either House might be the bearer of a message from one House to the other. This resolution was communicated to the Commons at a conference and agreed to by that House; see Journals of the House of Lords, 1855, Vol. LXXXVII., pp. 159, 165, 169; Journals of the House of Commons, 1855, Vol. CX., pp. 253, 254; Standing Orders of the House of Lords (Public Business), 1902, No. 100.

recorded as having been communicated to the House by the Speaker, but if proceedings thereon are to be taken forthwith it is communicated formally to the House by the Speaker (*e*).

(*e*) See Journals of the House of Commons, 1907, Vol. CLXII., p. 461.

# PARLIAMENTARY AGENTS.

*See* PARLIAMENT.

# PARLIAMENTARY ELECTIONS.

*See* ELECTIONS.

# PAROCHIAL CHAPEL.

*See* ECCLESIASTICAL LAW.

# PAROCHIAL CHARITIES.

*See* ALLOTMENTS; CHARITIES.

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*See* CONTRACT; EVIDENCE.

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# PARSONS AND PARSONAGES.

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# PART PERFORMANCE.

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# PARTICULARS.

*See* COUNTY COURTS; PLEADING; PRACTICE AND PROCEDURE; SET-OFF AND COUNTERCLAIM.

# PARTICULARS OF SALE.

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# PARTIES.

*See* BILLS OF SALE; CONTRACT; FAMILY ARRANGEMENTS; LANDLORD AND TENANT; MORTGAGE; PRACTICE AND PROCEDURE; SALE OF LAND; SETTLEMENTS.

# PARTITION.


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# Part I.—Definition and Nature.

## SECT. 1.—*Definition and Description.*

Definition.

**1512.** The legal term "partition" (*a*) is applied to the division of lands, tenements and hereditaments belonging to co-owners (*b*), and the allotment among them of the parts (*c*), so as to put an end to community of ownership between some or all of them (*d*).

(*a*) Besides this meaning of "partition" the term was at one time applied to the severance of a joint tenancy (see Co. Litt. 167 b, and Hargrave's note thereto), and to the agreements for alternate enjoyment of property referred to in Co. Litt. 164 b, 165 a; see also title EQUITY, Vol. XIII., p. 40. For joint tenancy and its severance, see title REAL PROPERTY AND CHATTELS REAL.

(*b*) The co-owners may be joint tenants, tenants in common or coparceners; as to the creation and incidents of these forms of co-ownership, see title REAL PROPERTY AND CHATTELS REAL. They must be co-owners in one of these senses, and not owners of separate parts the boundaries between which have been lost; see *O'Hara* v. *Strange* (1847), 11 I. Eq. R. 262; in the latter case the proper course is some method of ascertaining boundaries; see title BOUNDARIES, FENCES AND PARTY WALLS, Vol. III., pp. 107 *et seq.*

(*c*) Thus if three persons are co-owners, tenants in fee simple, of Blackacre, Whiteacre, and Greenacre, the transaction by which one of them becomes sole owner tenant in fee simple of Blackacre, another of Whiteacre, and the third of Greenacre, is a partition.

(*d*) Thus in the example given in note (*c*), *supra*, a transaction by which

SECT. 1. Definition and Description.

**1513.** A strict partition must involve a division of the property into portions which are aliquot parts of the whole. In some cases, however, the partition may be made to suit the convenience of the property and of the co-owners by a division into unequal parts, not necessarily aliquot parts of the whole, those owners who take a larger share than their due making compensation in money or other property to those who take less than their due (*e*). This compensation is called money or compensation for equality of partition (*f*).

Equal and unequal partition.

**1514.** Partition can be effected though the estates of the co-owners are not the same, for example, where one co-owner is lessee for years of one share and another tenant in fee simple of another share (*g*), or between tenants for life and in fee simple (*h*). In such a case the partition will be limited to the period of the lesser estate.

Parties between whom partition may be effected.

No partition, however, can be effected unless the parties are interested in ascertainable shares (*i*).

**1515.** The property must be divisible; if it is not, in order to divide their interests, the owners must either agree to exercise their rights in turns, or must obtain a sale (*k*): an agreement for the exercise of rights in turns has no effect on the community of ownership, which remains undivided (*l*), except in the statutory case of an advowson (*m*).

Indivisible property.

**1516.** The right to partition may be lost by agreement between the parties for disposal of the property in a different manner (*n*), or

Right to partition lost.

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one person becomes sole owner of Blackacre, while the other two remain co-owners of Whitcacre and Greenacre, is a good partition. This can only be by agreement of those persons between whom a community of ownership is left subsisting (*Hobson* v. *Sherwood* (1841), 4 Beav. 184; *Peers* v. *Needham* (1854), 19 Beav. 316; *Richardson* v. *Feary* (1888), 39 Ch. D. 45).

(*e*) The extent to which this kind of partition can be effected in any case depends on the mode of obtaining partition adopted, the nature of the property, and the parties entitled: it is strictly partition *plus* sale (*Porter* v. *Lopes* (1877), 7 Ch. D. 358, *per* JESSEL, M.R., at p. 366). The power of giving compensation for equality of partition conferred on the Board of Agriculture and Fisheries is limited (see p. 828, *post*), and in other cases there may be difficulty in raising the sum required; see *Rowe* v. *Gray* (1876), 5 Ch. D. 263, *per* HALL, V.-C., at p. 265.

(*f*) The expression "owelty of partition" formerly in use is now obsolete.

(*g*) *Baring* v. *Nash* (1813), 1 Ves. & B. 551.

(*h*) *Wills* v. *Slade* (1801), 6 Ves. 498.

(*i*) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533; *Miles* v. *Jarvis* (No. 2) (1883), 50 L. T. 48.

(*k*) As to sale by order of the court, see p. 834, *post*.

(*l*) *Corbet's Case* (1600), 1 Co. Rep. 83 b, 87 a, b, *per* WALMESLEY, J., and note (z) thereto. Actions to protect the property must therefore be brought in the names of all parties.

(*m*) Advowsons Act, 1708 (7 Anne, c. 18).

(*n*) *Peck* v. *Cardwell* (1839), 2 Beav. 137. A partnership may be such an agreement (*ibid.*; *Dale* v. *Hamilton* (1846), 5 Hare, 369, 389; *Redwood* v. *Redwood* (1908), 28 New Zealand Law Reports, 260). In *Dimsdale* v. *Robertson* (1844), 7 I. Eq. R. 536, the parties had agreed to partition the property in unequal shares, appropriating other lands for equality of partition; on the latter proving insufficient for the purpose, the court refused to set aside the agreement or order a different partition.

SECT. 1. Definition and Description.

by the title of the co-owner claiming partition being barred by the Statutes of Limitations (*o*).

No implied condition.

**1517.** A partition does not imply any condition relating to the of the parties (*p*).

## SECT. 2.—*Modes of Effecting Partition.*

**1518.** There are four modes of obtaining partition:—

By agreement.

First, if all the parties are *sui juris* or have power conferred on them by law or by act of a predecessor in title, they may make a partition by agreement between themselves (*q*).

By Board of Agriculture and Fisheries.

Secondly, partition may be made by the Board of Agriculture and Fisheries; in some cases partition by this method is compulsory, at the instance of the co-owners desiring partition against those who do not desire it (*r*).

By the court.

Thirdly, partition may be made by the court in an action commenced by any party for that purpose (*s*); this is a method in which partition is compulsory at the instance of any co-owner in all cases, subject to the powers of the court under the Partition Acts (*a*) to order sale instead (*b*).

By Act of Parliament.

Fourthly, an Act of Parliament may be obtained (*c*); this method is employed if none of the above methods is available, or if the transaction is complicated by features not appertaining to partition which cannot be otherwise carried into effect (*d*).

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(*o*) *Thornton* v. *France*, [1897] 2 Q. B. 143, 158; see *Corea* v. *Appuhamy*, [1912] A. C. 230, P.C.; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 24; title LIMITATION OF ACTIONS, Vol. XIX., pp. 137, 138.

(*p*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4. As to the condition and warranty implied in partitions made before 1st October, 1845, the date mentioned in this Act, see Preston, Shep. Touch. ed. Preston, 186; 4 Barton's Elements of Conveyancing, 200; Co. Litt. 174 a; 4 Bythewood and Jarman, Precedents in Conveyancing, 4th ed., 128.

(*q*) See pp. 813 *et seq.*, *post*.

(*r*) See pp. 824 *et seq.*, *post*.

(*s*) See p. 834, *post*.

(*a*) Partition Acts, 1868 (31 & 32 Vict. c. 40), and 1876 (39 & 40 Vict. c. 17).

(*b*) See p. 842, *post*.

(*c*) The procedure in this method follows the ordinary course of private Bills dealing with estates; see title PARLIAMENT, p. 759, *ante*. Since the Partition Acts there have been few such Bills.

(*d*) Thus an Act must be obtained where the limitations of a settled share do not allow a partition under the other methods; see, *e.g.*, the Private Act (1769), 9 Geo. 3, c. *16*, and Private Act (1825), 6 Geo. 4, c. *42*; or where certain interests are to be cancelled or charges shifted, see the Private Act (1845), 8 & 9 Vict. c. *28*; and Brandon's Estate Act (1860), 23 & 24 Vict. c. *3*. Where charges are shifted, or charged on one allotment, it is important that the Act should accurately define the charges; see *A.-G.* v. *West* (1858), 27 L. J. (CH.) 789, C. A., as to the Private Act (1819), 59 Geo. 3, c. *4*. Similarly, an Act may be necessary if new interests are to be created in persons not previously interested; see Lloyd's Estates (Partition) Act (1866), 29 & 30 Vict. c. *10*. If there are no such complications, and the only difficulty is that there is no person able to effect partition as to one or more shares, the modern practice is for the private Act to confer a power of partition on a body of trustees either generally or by reference to the powers of a tenant for life under the Settled Land Acts (see note (*r*), p. 818, *post*, and title SETTLEMENTS); see the Scarisbrick Estate Act (1877), 40 & 41 Vict. c. *6*, and the De

# Part II.—Partition by Agreement between the Parties.

## SECT. 1.—*Parties Necessary and Competent.*

SECT. 1. Parties Necessary and Competent.

### SUB-SECT. 1.—*In General.*

General rule.

**1519.** Partition may be made by agreement where all the parties are either *sui juris* or have power conferred on them, either by statute or by any instrument. The parties are such as would be necessary to make an assurance *inter vivos* of each share of the property (*e*).

Interests bound by the partition.

No other interest in the property than that held in common is affected unless the parties have power to determine it (*f*) or the persons entitled thereto concur (*g*).

### SUB-SECT. 2.—*Parties Sui Juris.*

Validity.

**1520.** Parties *sui juris* are limited in their powers of partition only by the nature of the property (*h*). An agreement between

Trafford Estate Act, 1904 (4 Edw. 7, c. *3*). A private Act enacting a specific partition operates as a conveyance of the legal estate, and no other instrument is then necessary (5 Davidson, Precedents in Conveyancing, 2nd ed., 474). Where the Act merely confers the power to effect partition, the partition must be completed by instruments accordingly.

(*e*) *Anon. in Chancery* (1742), 3 Swan. 139, n. (ed. 1827); 6 English Reports, 807. The competent parties are dealt with in the text, *infra*, and on pp. 815 *et seq.*, *post*.

(*f*) Thus, to bind the issue in tail, the entail must be effectually barred (*Oakeley* v. *Smith* (1759), 1 Eden, 261; and as to the method of barring entail, see title REAL PROPERTY AND CHATTELS REAL), and though Sir Edward Coke speaks of a partition made by coparceners of lands entailed as binding their issues if it be equal (Co. Litt. 166 a), and Littleton's Tenures, s. 257, speaks of an allotment of lands of equal yearly value by way of partition between the husbands of coparceners as not being capable of being defeated afterwards (see Co. Litt. 171 a), this must be understood as meaning that the court will not, at the suit of remaindermen, disturb an equal partition, because it cannot make a better. To this effect would appear to be the decisions in *Burton* v. *Jeux* and *Rose* v. *Rose* (both undated), cited in *Thomas* v. *Gyles* (1691), 2 Vern. 232. If the statements in Coke and Littleton are to be understood in any wider sense, the decision of Lord HARDWICKE, L.C., in *Ireland* v. *Rittle* (1739), 1 Atk. 541, is, as pointed out by the reporter in his note to that case, directly contrary; see, however, the note thereon in Co. Litt. 171 a (Butler's ed.). It is on this principle, namely, that no better partition can be made, that the court binds the interest of unborn children in an action for partition by a tenant for life or other limited owner (*Gaskell* v. *Gaskell* (1836), 6 Sim. 643; compare *Hobson* v. *Sherwood* (1841), 4 Beav. 184). Where the parties can put an end to a trust for sale and elect to take the property unconverted, the trust is no objection to a partition (*Pearson* v. *Lane* (1809), 17 Ves. 101).

(*g*) Thus a lessee of an undivided share, without the concurrence of his lessor, can obtain partition to take effect only during his term (*Baring* v. *Nash* (1813), 1 Ves. & B. 551). Similarly an incumbrancer on the share must concur unless provided for.

(*h*) As to the indivisibility of certain kinds of property, see p. 823, *post*.

SECT. 1. Parties Necessary Competent. Exceptions.

such persons for partition is mutually enforceable by and against the parties and persons deriving title under them by action for specific performance (*i*).

An exception, reservation, or grant may be made, whether of easements (*k*), mines or minerals (*l*), or other rights, not merely dependent on ownership (*m*).

Modes of obtaining

**1521.** The division of the property into parts may be effected either by the co-owners themselves (*n*), or by a third party nominated by all (*o*); and in either case the allotment of the parts among the co-owners may be determined either by the choice of the parties (*p*), the award of the third party (*q*), or by lot (*r*).

Order of choice.

In the case of coparceners, in the absence of agreement to the contrary, the right of first choice among the parts, or of drawing the first lot, devolves in order of seniority (*s*). The privilege is not available after the death of a coparcener in favour of her issue, husband (tenant by the curtesy) or assignee (*t*), except in case of an advowson (*a*). A coparcener chooses last of all where she is the person chosen to divide and allot the property (*b*).

Award of the person chosen to divide parties.

**1522.** Where the division is by a third party nominated for the purpose he must be impartial, and consider the interests of all parties to the partition (*c*). His award alone does not complete

(*i*) *Knollys* v. *Alcock* (1800), 5 Ves. 648; *Pearson* v. *Lane* (1809), 17 Ves. 101; *Heaton* v. *Dearden* (1852), 16 Beav. 147; *Paine* v. *Ryder* (1857), 24 Beav. 151. The agreement is enforceable although the court has no jurisdiction to make partition (*Bolton* v. *Ward* (1845), 4 Hare, 530 (copyholds, a case before the statutory power (see p. 836, *post*) was conferred); *Paine* v. *Ryder*, *supra*). Where the assurance, though intended as a partition agreement, is ineffectual to bar an entail, those claiming under the entail will not be bound specifically to perform the agreement (*Oakeley* v. *Smith* (1759), 1 Eden, 261). But in the case of a parol agreement for partition, in the nature of a family arrangement, the parties may be compelled to give effect to it by barring the entail (*Neale* v. *Neale* (1837), 1 Keen, 672); compare Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74); title REAL PROPERTY AND CHATTELS REAL. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*k*) Compare Bro. Abr. (1586), tit. Particion, pl. 7, where it is stated that a deed is not necessary between co-parceners; compare note (*f*), p. 813, *ante*.

(*l*) As in *Darvill* v. *Roper* (1855), 3 Drew. 294.

(*m*) *Charlesworth* v. *Gartsed* (1863), 3 New Rep. 54, *per* KNIGHT BRUCE, L.J., at p. 55.

(*n*) Littleton's Tenures, s. 243.

(*o*) *Ibid.*, 244. An agreement for partition according to this method will be found in Encyclopædia of Forms and Precedents, Vol. IX., p. 425.

(*p*) Littleton's Tenures, s. 243.

(*q*) *Ibid.*, s. 244.

(*r*) *Ibid.*, s. 246.

(*s*) *Ibid.*, ss. 244, 245; the part of the eldest (*eigne* or *eisne*) was called *enitia pars*.

(*t*) Co. Litt. 166 b.

(*a*) *Ibid.*; *Harris and Haies* v. *Nichols* (1583), Cro. Eliz. 19, by a majority of the judges, ANDERSON, C.J., confining the rule to the tenant by the curtesy.

(*b*) Littleton's Tenures, s. 245.

(*c*) Co. Litt. 166 b; this being the ground of the rule that the eldest coparcener, when she is the person chosen to make the partition, must

the partition, conveyances being necessary in pursuance of the award (*d*): these conveyances may be directed by the award (*e*).

**1523.** Compensation for equality of partition may be given in any form agreed upon (*f*). If it is a lump sum, the rights and liabilities as to payment devolve as for unpaid purchase-money on a sale (*g*).

Equality of partition.

SUB-SECT. 3.—*Persons and Bodies acting under Statutory Powers.*

**1524.** A married woman is subject in respect of partition to the same disability, if any, as she is under in respect of sale or other disposition of her property (*h*); and accordingly, where neither the marriage took place nor the title to the property accrued on or after the 1st January, 1883, and the property is not settled to her separate use, she can only partition her real and personal estate by deed acknowledged with the concurrence of her husband (*i*), while her husband has an absolute power of partition of her leasehold property (*j*). Where, however, either the marriage took place or the title to the property accrued on or after 1st January, 1883, she holds her real and personal estate as her separate property and can dispose of it by way of partition as a *feme sole* (*k*).

Married woman absolutely entitled.

Where the interest of a married woman is such as would have

Married woman tenant for life.

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choose last instead of first. The person chosen should generally be a surveyor: his duties are similar to those of commissioners under a commission of partition (see p. 858, *post*). He should consider all the circumstances of the parties and their property, and the best interests of the family, if that relationship exists.

(*d*) 1 Roll. Abr., tit. Arbitrament (A.), 3.

(*e*) *Knight* v. *Burton* (1704), 6 Mod. Rep. 231; *Johnson* v. *Wilson* (1741), Willes, 248; where awards of partition were held defective for want of directing conveyances; both cases, however, were at law; see now, note (*i*), p. 814, *ante*.

(*f*) In *Ireland* v. *Rittle* (1739), 1 Atk. 541, the owner of one part agreed to pay the taxes on both parts. A rentcharge is often granted. The rule that such a grant can be made between coparceners without a deed (Co. Litt. 169 a, b) is abrogated by the Statute of Frauds (29 Car. 2, c. 3).

(*g*) *Hulbert* v. *Hart* (1683), 1 Vern. 133. In that case the compensation was an annuity payable under a bond to the grantee, his executors or administrators: it was held that the executor had the benefit of the bond. As to rights and liabilities in respect of purchase-money on sale of land generally, see title SALE OF LAND.

(*h*) See title HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.* Where the property is settled for the separate use of a woman, married before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), *i.e.*, 1st January, 1883, she should be described as entitled thereto "for her separate use"; where she is entitled by virtue of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), she should be described as entitled thereto "as her separate property" (*Broad* v. *Askham*, [1909] W. N. 236); and where there is no such settlement, and the marriage took place before 1st January, 1883, the description should be, "A. B. (husband) and C. D. (wife) entitled in fee simple in right of the said C. D." (*Barrett* v. *Watts*, [1909] W. N. 237).

(*i*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 77; see title HUSBAND AND WIFE, Vol. XVI., p. 381.

(*j*) See title HUSBAND AND WIFE, Vol. XVI., pp. 323 *et seq.*

(*k*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 2, 5; see title HUSBAND AND WIFE, Vol. XVI., p. 348.

SECT. 1. Parties Necessary and Competent.

conferred on an unmarried owner the powers of a tenant for life under the Settled Land Acts (*l*), then if she is entitled for her separate use or for her separate property, or as a *feme sole* (*m*), she alone without her husband, or, if she is entitled otherwise than as aforesaid, she and her husband together (*n*), may exercise the power of partition under the Acts (*l*), whether she is restrained from anticipation or not (*o*).

Infants absolutely entitled.

Infant tenants for life.

**1525.** Where an infant (*p*) in his own right is seised of or entitled in possession to land, then the land is settled land for the purposes of the Settled Land Acts (*l*), and the infant is deemed tenant for life thereof (*q*). Where a tenant for life, or the person having the powers of a tenant for life under the Settled Land Acts (*l*), is an infant, or an infant would, if he were of age, be a tenant for life, or have the powers of a tenant for life under the Acts (*l*), such powers may be exercised on his behalf by the trustees of the settlement, or, if there are none, by such persons and in such manner as the court, on the application of the infant's guardian or next friend, either generally or in a particular instance orders (*r*).

Lunatics absolutely entitled.

**1526.** On behalf of a lunatic, whether so found by inquisition or not, a partition may be made of any property in which he is

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(*l*) See note (*r*), p. 818, *post*, and title SETTLEMENTS.

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (2).

(*n*) *Ibid.*, s. 61 (3).

(*o*) *Ibid.*, s. 61 (6); see p. 818, *post*, and title SETTLEMENTS. A married woman entitled absolutely subject to a restraint on anticipation, not being a tenant for life under the Settled Land Acts (see note (*l*), *supra*), cannot exercise the statutory power of partition (*Bates* v. *Kesterton*, [1896] 1 Ch. 159). But to effect a partition where it appears to be for her benefit, her interest may, by order of the court, be bound for the purpose under the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 7 (*Re Currey, Gibson* v. *Way* (1887), 56 L. T. 80); and see title HUSBAND AND WIFE, Vol. XVI., p. 372.

(*p*) As regards partition of an infant's land independently of the Settled Land Acts (see note (*l*), *supra*). Sir Edward Coke says, in Co. Litt. 171 a, that in the case of an infant, if the partition be equal at the time of allotment, it shall bind him for ever, because he is compellable by law to make partition, and he shall not plead infancy in an action for partition; and even when the infant has an unequal share in the partition, yet the partition is not void but voidable, and if he affirms the partition after coming of age the partition is made good for ever. To the same effect, see Bac. Abr., tit. Guardian (G.), where it is stated that a guardian or next friend may bind an infant by partition if it be equal, because the division of the infant's part from the others, so far from being a prejudice to the infant, is really for his benefit and advantage. So in *Whaley* v. *Dawson* (1805), 2 Sch. & Lef. 367, the court refused to disturb a partition by parol made by the guardian of an infant which had been affirmed by the infant after he had attained twenty-one, but directed conveyances to be executed to carry out the parol partition. Guardianship in socage, to which Bacon refers (see Bac. Abr., tit. Guardian (G.)), is now practically obsolete (see title INFANTS AND CHILDREN, Vol. XVII., p. 121), and in view of the provisions in the Settled Land Acts (see the text, *infra*) and the extended powers of the court to order partition so as to bind infants, no prudent man would rely upon a partition by a guardian of an infant at the peril of its being set aside if it is shown to be unequal.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 59; see title INFANTS AND CHILDREN, Vol. XVII., p. 94. As to partition of settled land, see p. 818, *post*.

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60.

SECT. 1. Parties Necessary and Competent.

interested as absolute owner by order of the Judge in Lunacy (*s*). The power is exercised, in case of a lunatic so found, by the committee of the estate, and in case of a lunatic not so found, by a person appointed by the judge (*t*).

A contract for partition entered into before lunacy may be ordered to be performed (*u*).

The transaction takes effect subject to any prior charge affecting the property at the date of the order (*a*).

Money for equality of partition may by order of court be given or received (*b*), and may be raised by mortgage (*c*). Money so received devolves, as between the real and personal representatives of the lunatic, in the same way as the property partitioned (*d*).

Lunatic tenants for life.

If a tenant for life or the person having the powers of a tenant for life under the Settled Land Acts (*e*) is a lunatic, the committee of the estate under an order in lunacy, if the lunatic be so found (*f*), or the person appointed by the court, if the lunatic be not so found (*g*), may exercise the power of partition under the Settled Land Acts (*e*) on his behalf.

Charities.

**1527.** The trustees of a charity, subject to the jurisdiction of the Charity Commissioners (*h*), may with the authority of the Commissioners make partition (*i*), and for equality of partition apply any funds belonging to the charity for that purpose, or raise the amount by mortgage of any land acquired on the partition (*k*). The expenses of and incident to applying for and procuring an order of the Commissioners are paid, as the Commissioners may direct,

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(*s*) Luna y Act, 1890 (53 & 54 Vict. c. 5), s. 120 (b), as to lunatics so found, made applicable to lunatics within the meaning of *ibid.*, s. 116, by the Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 445.

(*t*) As to the practice in obtaining the order, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 452, 456. Powers to execute assurances and carry the order into effect are given under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124; and the order generally gives directions accordingly (*Re Bloomar, Singleton* v. *Hopkins, Basford* v. *Hopkins* (1857), 2 De G. & J. 88, C. A.). Authority will be given to execute a disentailing deed; see *Re Sherard, Lowther* v. *Cuffe* (1863), 1 De G. J. & Sm. 421, C. A.; *Re Pares, Lillingston* v. *Pares* (1879), 12 Ch. D. 333, C. A.

(*u*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (*i*).

(*a*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 124.

(*b*) *Ibid.*, s. 120 (b).

(*c*) *Ibid.*, ss. 117, 118 (1).

(*d*) *Ibid.*, s. 123; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 449.

(*e*) For a list of the Settled Land Acts, see note (*r*), p. 818, *post*, and title SETTLEMENTS. As to partition of settled land, see p. 818, *post*.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62; and see p. 862, *post*.

(*g*) Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1, which renders obsolete the decisions in *Re Baggs* (*a Person of alleged Unsound Mind*) (1893), [1894] 2 Ch. 416, n., C. A.; *Re S. S. B.* (*a Person of Unsound Mind not so found by Inquisition*), [1906] 1 Ch. 712, C. A., and *Re De Moleyns' and Harris's Contract*, [1908] 1 Ch. 110; and see p. 822, *post*.

(*h*) See title CHARITIES, Vol. IV., p. 303.

(*i*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 38. No express authority is given by the statute, but this section validates partitions made with the consent of the Commissioners; see, further, title CHARITIES, Vol. IV., p. 233.

(*k*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 32.

SECT. 1. Parties Necessary and Competent.

by the trustees of the charity or the other parties to the transaction Money received for equality may, with the consent of the Commissioners, be invested in the purchase of land without any licence in mortmain (*m*).

Ecclesiastical Commissioners.

**1528.** The Ecclesiastical Commissioners have power to convey by way of partition any lands vested in them, and to borrow the amount payable for equality of partition on mortgage; and where a trustee with power of sale and the Commissioners hold land in undivided shares, they are empowered to concur in a partition of the lands (*n*).

Ecclesiastical corporations.

**1529.** Any ecclesiastical corporation, aggregate or sole, except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and except any ecclesiastical hospital or the master thereof (*o*), has power to convey by way of partition any lands belonging to the ecclesiastical corporation (*p*), with the consent, in the case of an incumbent of a benefice, of the patron (*q*), and with the approval in all cases of the Ecclesiastical Commissioners testified by deed under their common seal (*p*), where it appears to them to be for the permanent advantage of the estate or endowments of the corporation.

Tenants for life.

**1530.** Tenants for life or persons who have the powers of tenants for life under the Settled Land Acts (*r*) may partition (*s*) the settled land (*a*). The power is exercisable in cases of disability of the tenant for life, as already shown (*b*). In cases where the same person is tenant for life of one undivided share, and as regards the other undivided share or shares is either absolute owner or tenant for life under a different settlement, the power is exercisable (*c*) by the trustees of the settlement for the purposes of the Acts (*d*).

(*l*) Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 34.
(*m*) *Ibid.*, s. 35.
(*n*) Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), s. 32. As to the Ecclesiastical Commissioners generally, see title ECCLESIASTICAL LAW, Vol. XI., pp. 794 *et seq.*
(*o*) Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 1; see title ECCLESIASTICAL LAW, Vol. XI., p. 793.
(*p*) Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), s. 1.
(*q*) *Ibid.* In case of copyholds no consent of the lord of the manor is required, as under the Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), s. 20.
(*r*) Settled Land Acts, 1882—1890 (45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69). The tenant for life is defined by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5), (6), (7), and the persons having the powers of tenants for life by *ibid.*, s. 58; see, generally, as to the exercise of the powers of a tenant for life, title SETTLEMENTS.
(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iv.).
(*a*) Defined by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (3), as land and any estate or interest in land which is the subject of a settlement. "Settlement" is defined by *ibid.*, s. 2 (1), as any instrument etc. under which land stands limited to or in trust for any persons by way of succession.
(*b*) See pp. 815, 816, *ante*.
(*c*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 12.
(*d*) Defined by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (8),

SECT. 1
Parties Necessary and Competent.

Prior to the making of any partition, statutory notices of his intention must be given by the tenant for life (*e*).

Notice to trustees.

The tenant for life may enter into a preliminary agreement for partition (*f*).

Preliminary agreement.

The partition need not be equal, and money may be received or paid for equality (*g*). The consideration, whether land alone, or land and money, must be the best that can reasonably be obtained (*h*). Money received for equality will be capital money, and is capital money arising under the Settled Land Acts (*i*), and must accordingly be paid to the trustees of the settlement or into court at the option of the tenant for life (*k*); it is considered of the nature of land, and devolves as the land partitioned (*l*). Money paid for equality may be raised out of capital moneys (*m*) arising under the Settled Land Acts (*i*), or out of money paid into court under any Act, and liable to be laid out in the purchase of land to be made subject to the settlement (*a*), or out of moneys in the hands of the trustees liable to be so laid out (*b*), or by mortgage of the settled land or any part thereof by way of conveyance or creation of a term of years or otherwise (*c*).

Equality of partition.

Consideration.

The surface and the mines and minerals may be dealt with apart from each other, and thereupon powers of working, wayleaves, and other privileges connected with mining purposes may be granted (*d*). Where they are not dealt with apart from each other,

Mines and minerals.

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and the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 16; see title

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45; Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5. For precedents of notices which may be adapted to meet any case, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 711.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31; see *ibid.*, s. 4 (5); Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 6. In the Encyclopædia of Forms and Precedents, Vol. XVI., p. 447, the general editor of that work expresses with hesitation the opinion that there is no power for the tenant for life to agree to the property being partitioned by the award of an independent person, on the ground that it is a delegation of the power; see *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429, 436, 437, C. A.; *Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50; and note (*a*), p. 820, *post*.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iv.).

(*h*) *Ibid.*, s. 4 (2).

(*i*) As to the Settled Land Acts, see note (*r*), p. 818, *ante*; title SETTLEMENTS.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (1). Where the tenant for life is an infant and persons are appointed to exercise the powers (see p. 816, *ante*), and there are no trustees, the order should direct payment into court; see *Re Dudley's (Countess) Contract* (1887), 35 Ch. D. 338.

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22.

(*m*) *Ibid.*, s. 21 (iv.)

(*a*) *Ibid.*, s. 32.

(*b*) *Ibid.*, s. 33.

(*c*) *Ibid.*, s. 18. For a form of such a mortgage, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 578, and for a form of mortgage of copyholds, *ibid.*, p. 623.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 17. As to mining rights generally, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 497, 510 *et s*

SECT. 1. Parties Necessary and Competent.

any restriction or reservation may be made with respect to mines and minerals, or for the more beneficial working of them (*e*).

Restrictions and easements.

Any restriction or reservation for such purpose, or with regard to building on land or other user of land, may be made binding on the tenant for life, and the settled land or any part thereof, or on the other co-owners, and the land given on partition to them, as far as the law permits (*e*). Any easements, rights, and privileges of any kind may also be reserved or granted (*f*).

Shifting incumbrances.

If there is an incumbrance affecting the particular land given by the tenant for life on partition, he may, with the consent of the incumbrancer, charge the incumbrance on any other part of the settled land in exoneration of that particular land (*g*).

The assurance.

The tenant for life may execute a deed conveying or creating the estates and interests, rights and privileges in the manner requisite to give effect to the partition (*h*).

Effect upon the land acquired.

Land acquired on a partition is conveyed so as to become subject to the settlement (*i*); it may be made a substituted security for money, actually raised and remaining unpaid, which was a charge on the settled land before partition and was released in order to complete the partition (*k*), but it is not to be subjected to any charge not charged previous to partition on the part of the settled land partitioned (*l*). The person conveying by the direction of the tenant for life, so as to subject the land to a charge, is not concerned to inquire as to the propriety of making the land so subject (*m*).

SUB-SECT. 4.—*Donees of Express Powers.*

Powers authorising partition.

**1531.** A power of, or trust for, sale in the usual form, involving as it does a monetary consideration, does not authorise a partition, but a power of exchange does authorise a partition, at all events where there are not more than two co-owners (*a*).

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (6).
(*f*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5.
(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 5.
(*h*) *Ibid.*, ss. 20 (1), 55 (2). As to the effect of such an assurance, see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2), and title SETTLEMENTS. As to copyholds, see title COPYHOLDS, Vol. VIII., p. 108.
(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (2), (3); see Encyclopædia of Forms and Precedents, Vol. IX., pp. 419, 436, 440, 447, 450.
(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (4).
(*l*) *Ibid.*, s. 24 (5).
(*m*) *Ibid.*, s. 24 (6).
(*a*) The much debated question whether powers of sale and exchange authorise partition is now, in view of the very wide statutory powers of partition conferred on tenants for life and other limited owners (see p. 815, *ante*), of little more than academic interest; for, where there is any doubt as to the extent of the powers conferred on the trustees, partition can be effected by their *cestuis que trust* or the persons empowered to act for them when under disability. The statement in the text, *supra*, is the effect of the decisions in *M'Queen* v. *Farquhar* (1805), 11 Ves. 467, and *Re Frith and Osborne* (1876), 3 Ch. D. 618. In *Re Frith and Osborne, supra*, JESSEL, M.R., reviewed the earlier authorities and following *Doe* d. *Knight* v. *Spencer* (1848), 2 Exch. 752, came to the conclusion that a power of exchange authorised a partition between two co-owners, and

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Surface and minerals separated.

**1532.** In cases where a power of partition, conferred on a trustee or other person, does not in any way authorise a partition of the surface and minerals separately (*b*), the High Court (*c*), and, within their respective jurisdictions, the palatine and county courts (*d*), may sanction a partition of the land with an exception or reservation of any minerals, with or without rights and powers of or incidental to the working, getting, or carrying away the minerals, or a partition of the minerals separately from the surface (*e*).

intimated his opinion (see *Re Frith and Osborne* (1876), 3 Ch. D. 618, 629) that it also authorised a partition between any number of co-owners. In New South Wales it has been decided accordingly; see *Re Thompson's Trusts, Perpetual Trustee Co., Ltd.* v. *Thompson* (1908), 9 New South Wales State Reports, 38, in which case it was said that the opinions expressed to the contrary in *Doe* d. *Knight* v. *Spencer* (1848), 2 Exch. 752, 769, were founded on a misapprehension of *Eton College* (*Provost*) v. *Winchester* (*Bishop*) (1774), 3 Wils. 468, 497. In *A.-G.* v. *Hamilton* (1816), 1 Madd. 214, a title depending on the question whether a power of exchange authorised partition was held too doubtful to be forced on a purchaser; and compare *Brassey* v. *Chalmers, Seacome* v. *Holme* (1853), 4 De G. M. & G. 528, C. A.; though in *Abell* v. *Heathcote* (1793), 4 Bro. C. C. 278, and *Bradshaw* v. *Fane* (1856), 2 Jur. (N. S.) 247, powers of sale and exchange in somewhat special form were held to authorise a partition. Of course where a power of sale includes the acceptance of a consideration other than monetary the result may be to authorise a partition; and similarly where there is a power of sale and a power to reinvest the proceeds in land, the same result as a partition may be attained by selling the undivided moiety proposed to be allotted to the other co-owner and purchasing the moiety proposed to be taken in exchange. In the Encyclopædia of Forms and Precedents, Vol. XVI., p. 447, the general editor of that work expresses the opinion that (in the absence of express power, and notwithstanding the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 21) trustees with an express power of partition cannot agree to partition by means of an award of a third person (see p. 814, *ante*), on the ground that it would be a delegation of the power; and as to such delegation, see title TRUSTS AND TRUSTEES. The partition in *Brassey* v. *Chalmers, Seacome* v. *Holme, supra*, was effected in this manner, but was attacked on another ground, and the point was not argued. In the United States such a partition is certainly valid where not prohibited by statute or otherwise (*Phelps* v. *Harris* (1879), 101 United States Reports, 370, 383). Partition by trustees under a power appears to differ from the exercise of a discretionary power, in that partition may be compulsory on them at the suit of their co-owners.

(*b*) *E.g.*, as in *Buckley* v. *Howell* (1861), 29 Beav. 546, following *Cholmeley* v. *Paxton* (1825), 3 Bing. 207. If the minerals are already partly leased or disposed of separately, the case may be different, as in that case it appears that such a power is implied (*Rowbotham* v. *Wilson* (1860), 6 Jur. (N. S.) 965, H. L.; and see *Re Rutland's* (*Duke*) *Settled Estates, Rutland* (*Duke*) v. *Bristol* (*Marquis*), [1900] 2 Ch. 206, *per* BYRNE, J., at p. 210 (a case of a power to lease under a settlement), following *Re Gladstone, Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, C. A. (a case of the powers of leasing under the Settled Land Acts).

(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44 (1), re-enacting the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), and amended by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 3.

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 46; see titles COUNTY COURTS, Vol. VIII., p. 691; COURTS, Vol. IX., pp. 122, 126.

(*e*) The application in the High Court and Chancery of Lancaster is made by petition by the trustee or donee of the power (R. S. C., Ord. 54B, rr. 2, 3; Chancery of Lancaster (Trustee Act) Rules, 1893, rr. 1, 2). The petition should be served on beneficiaries, including remaindermen (*Re Hardstaff*, [1899] W. N. 256, following *Re Woodcock's Trustees* (1893), 37

SECT. 1. Parties Necessary and Competent.

Afterwards the trustee or other person may from time to time partition any such land or minerals without any further application to the court, unless forbidden by the instrument creating the trust or power (*f*).

Consent of tenant for life.

The consent of the tenant for life under the Settled Land Acts (*g*), if any, is necessary in all cases, except where the settlement is by way of trust for sale (*h*); but the consent of one of several persons constituting the tenant for life is sufficient (*i*).

Lunatics.

**1533.** A power of partition may be exercised, or consent to the exercise thereof may be given, on behalf of a donee or tenant for life who is of unsound mind, whether so found or not, by order of the Court in Lunacy (*j*).

SECT. 2.—*Property which may be Partitioned by Agreement.*

Corporeal hereditaments.

**1534.** Land of any tenure (*k*), and all kinds of corporeal hereditaments and any estate therein (*l*), may be partitioned by agreement.

Incorporeal hereditaments.

**1535.** Certain incorporeal hereditaments, in respect of which one of several owners has remedies to enforce his rights independently of the others, may be partitioned by agreement, for example, rent-

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Sol. Jo. 250; and see *Re Brown's Trust Estate* (1862), 11 W. R. 19; *Re Palmer's Will* (1872), L. R. 13 Eq. 408). In *Re Wadsworth's Trust* (1890), 63 L. T. 217, and *Re Skinner*, [1896] W. N. 68, service on certain beneficiaries was dispensed with; and in *Re Pryse's Estates* (1870), L. R. 10 Eq. 531, followed in *Re Nagle's Trusts* (1877), 6 Ch. D. 104, service on remaindermen was held unnecessary.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44 (2). The order of court may give a general sanction, *i.e.*, without regard to any proposed partition; see *Re Wynn's Devised Estates* (1873), L. R. 16 Eq. 237; *Re Stamford and Warrington's (Earl) Trusts* (1896), 40 Sol. Jo. 771.

(*g*) As to the Settled Land Acts, see note (*r*), p. 818, *ante*, and title SETTLEMENTS.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56 (2); Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6 (1).

(*i*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6 (2); but where the shares in the land are settled separately, the tenants for life do not constitute together the tenants for life of the whole within this provision, and accordingly all their consents are necessary (*Re Osborne and Bright's, Ltd.*, [1902] 1 Ch. 335); and see title SETTLEMENTS.

(*j*) Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 120 (*l*) (lunatics so found); Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1 (lunatics not so found); see title LUNATICS AND PERSONS OF UNSOUND MIND., Vol. XIX., p. 448; and see p. 817, *ante*.

(*k*) Leaseholds may be thus partitioned even in a case where the court would refuse to make partition (*North* v. *Guinan* (1829), Beat. 342). For a form of apportionment of rent between part owners of leaseholds, compare Encyclopædia of Forms and Precedents, Vol. II., p. 12. The exceptions, under this head, of castles necessary for the defence of the realm and villeins, mentioned in Co. Litt. 164 b, 165 c, and land held for services abroad (Bracton's Note Book, pl. 703) are of mere antiquarian interest.

(*l*) *E.g.*, estates in reversion and remainder in corporeal hereditaments (*Oakeley* v. *Smith* (1759), 1 Eden, 261). Agreements for the partition of mere expectancies were enforced in *Beckley* v. *Newland* (1723), 2 P. Wms. 182; *Wethered* v. *Wethered* (1828), 2 Sim. 183. As to partition of lands subject to leases, see title LANDLORD AND TENANT, Vol. XVIII., p. 590.

charges (*m*). So easements, where the tenement in respect of which they are enjoyed is partitioned, may usually be exercised by the separate owners (*n*). Advowsons also may be partitioned (*o*). Other incorporeal hereditaments cannot be partitioned (*p*). The co-owners of such hereditaments may agree to exercise their rights in turns (*q*), or in any other manner to secure equality (*r*); but the only way to obtain severance of the co-ownership is for one owner to purchase the rights of the other co-owners (*s*).

SECT. 2. **Property which may be Partitioned by Agreement.**

### SECT. 3.—*Formalities.*

**1536.** The formalities are the same as for an assurance on sale (*t*), and a deed is necessary to effectuate the partition in the case of land and hereditaments, other than copyholds (*a*). In practice a preliminary agreement is usually made, providing for the method of making partition (*b*), and for other matters of title and adjustment of rights between the parties (*c*).

Preliminary agreement and assurance.

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(*m*) Co. Litt. 164 b. The land is subject to separate distresses for each part of the rent (*Rivis* v. *Watson* (1839), 5 M. & W. 255). For forms, see Encyclopædia of Forms and Precedents, Vol. II., pp. 16, 18; and as to rentcharges generally, see title RENTCHARGES AND ANNUITIES.

(*n*) *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133, C. A., *per* JESSEL, M.R., at p. 141; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 253, 274. As against the owner of the servient tenement, the usual rule will apply, that no greater or more extended right can be enjoyed than if the whole remained undivided; see *Menzies* v. *Macdonald* (1856), 2 Jur. (N. S.) 575, H. L. In *Morland* v. *Cook* (1868), L. R. 6 Eq. 252, explained in *Austerb rry* v. *Oldham Corporation* (1885), 29 Ch. D. 750, 774, C.A., an obligation to maintain a sea wall was imposed on the owners of aliquot shares of land after partition, and secured by a charge on the shares.

(*o*) By alternate presentations (Advowsons Act, 1707 (7 Anne, c. 18)); see title ECCLESIASTICAL LAW, Vol. XI., p. 572.

(*p*) *E.g.*, *profits à prendre* of uncertain character, fisheries etc., franchises of ferry, market etc., fealty, the seignories of manors and inheritances of honour and dignity (Co. Litt. 164 b).

(*q*) Co. Litt. 165 a.

(*r*) *E.g.*, by taking equal quantities of the produce (Co. Litt. 164 b, 165 a). This was done in *Re Trimmer, Crundwell* v. *Trimmer* (1904), 91 L. T. 26 (shares in the New River Company).

(*s*) Co. Litt. 164 b, 165 a.

(*t*) See title SALE OF LAND.

(*a*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3. For forms, see Encyclopædia of Forms and Precedents, Vol. IX., pp. 419 *et seq.* As to the effect of a conveyance by a tenant for life under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20, see title SETTLEMENTS.

(*b*) According to the methods mentioned in p. 814, *ante*.

(*c*) For a form of such an agreement, see Encyclopædia of Forms and Precedents, Vol. IX., p. 425, and the modifications thereof, *ibid.*, Vol. XVI., p. 447, where trustees or tenants for life are concerned (see note (*a*), p. 820, *ante*). In making such a preliminary agreement, the considerations applicable to a family arrangement will often arise; see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 539 *et seq.* The liability to pay the costs of completion of the assurance, as between the specific devisees and the general personal estate of a co-owner who dies before completion, and in the absence of direction by him, falls on the devisees (*Re Tann, Tann* v. *Tann, Gravatt* v. *Tann* (1) (1869), L. R. 7 Eq. 434). As to the division of easements on partition apart from express provision, see *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133, C. A., *per* JESSEL, M.R., at p. 141.

SECT. 3. Formalities.

Copyholds.

**1537.** In the case of copyholds (*d*) a partition, as a rule, is only complete on surrender and admittance (*e*), which may, it seems, be compelled as against the lord of the manor (*f*).

Land in registration district.

**1538.** With regard to any part of the land which is situated in a district in which registration under the Land Transfer Acts, 1875 and 1897 (*g*), is compulsory on sale, the instrument should be in the official form if the land is already registered (*h*); if the land is not already registered, it does not appear to be compulsory to bring the land on to the register (*i*).

Stamp duties.

**1539.** The stamp duty chargeable on the partition, where no consideration for equality of partition is paid or where the consideration for equality does not exceed £100 in amount or value, is 10*s.* (*k*), and where such consideration does exceed that amount or value, is charged *ad valorem* on that consideration as on a sale (*l*).

Increment value duty.

A partition is not, however, a sale (*m*) within the meaning of the Stamp Acts (*n*), and accordingly increment value duty does not appear to be payable (*o*).

# Part III.—Partition by Order of the Board of Agriculture and Fisheries.

## SECT. 1.—*Jurisdiction of the Board.*

Jurisdiction.

**1540.** The Board of Agriculture and Fisheries (hereinafter called "the Board"), upon which the powers of the Inclosure Commissioners for England and Wales have devolved (*p*), has power to

(*d*) As to deeds executed by a tenant for life, see title COPYHOLDS' Vol. VIII., p. 108.

(*e*) *Oakeley* v. *Smith* (1759), 1 Eden, 261, *per* CLARKE, M.R., at p. 265; Elton, Copyholds, 2nd ed., p. 117.

(*f*) See *Bolton* v. *Ward* (1845), 4 Hare, 530.

(*g*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; see title REAL PROPERTY AND CHATTELS REAL.

(*h*) Land Transfer Rules, 1903, r. 156, and Sched. I., Form 43; Encyclopædia of Forms and Precedents, Vol. XI., p. 389.

(*i*) See Encyclopædia of Forms and Precedents, Vol. IX., p. 420.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched.

(*l*) *Ibid.*, s. 73; see *ibid.*, Sched., as altered by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 73; title SALE OF LAND.

(*m*) *Henniker* v. *Henniker* (1852), 1 E. & B. 54.

(*n*) See, generally, title REVENUE.

(*o*) For increment value duty generally, see titles REVENUE; SALE OF LAND.

(*p*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535, 536. As to the constitution of the Board, see titles AGRICULTURE, Vol. I., p. 297; CONSTITUTIONAL LAW, Vol. VII., p. 104.

SECT. 1. Jurisdiction of the Board.

make an order of partition of any land (*q*) vested in persons interested in undivided shares or as joint tenants, coparceners, or tenants in common upon their request in writing (*r*), the costs being borne by the persons interested who apply for partition in such proportions as may be ordered (*s*). Land allotted on partition is held for the same estates, uses, and trusts as the undivided shares were held (*t*), and is subject to the same tenures, customs and services (*a*).

Title.

**1541.** Partition by the Board does not determine any question of title, and any defects of title in the undivided shares are transferred to the land allotted in severalty. Further, unless the applicants for partition are persons entitled to apply, the Board has no jurisdiction, and a partition made confers no title (*b*).

Compulsory process.

**1542.** An order may be made on the application of the owners of two-thirds in value of the property, or, in the case of a partition under an inclosure award, on the application of any party interested, notwithstanding the opposition of the other parties interested (*c*).

Confirmation of uncompleted partition.

**1543.** The Board may also confirm a partition agreed upon but not completed, if the parties are in possession under such agreement (*d*).

### SECT. 2.—*Property which may be Partitioned by Order.*

Property.

**1544.** The Board may make orders for partition of the following:— Messuages, lands, and corporeal tenements and hereditaments (*e*);

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(*q*) The Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 90, was confined to land to be inclosed under the Act. The Inclosure Act, 1848 (11 & 12 Vict. c. 99), extended the powers of the Inclosure Commissioners as regards partition to land not subject to be inclosed under the Act, and to land liable to be so inclosed as to which no proceedings for inclosure were pending (Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13). The Inclosure Act, 1854 (17 & 18 Vict. c. 97), extended all the provisions of the previous Acts as regards partition to land subject to be inclosed under the Acts as to which proceedings for inclosure were pending (*ibid.*, s. 1), and extended the meaning of the word "land" to incorporeal hereditaments (*ibid.*, s. 3; see p. 826, *post*), and also extended the range of persons who could apply for partition under the Acts (Inclosure Act, 1854 (17 & 18 Vict. c. 97), ss. 4, 5; see p. 826, *post*). The Commons Act, 1876 (39 & 40 Vict. c. 56), s. 33, made the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 105, applicable to partition orders carried out by separate orders and not included in an inclosure award.

(*r*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 90.

(*s*) *Ibid.*, s. 91; and see p. 854, *post*.

(*t*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 93.

(*a*) *Ibid.*, s. 94.

(*b*) *Jacomb* v. *Turner*, [1892] 1 Q. B. 47, 51. In consequence possibly of these considerations and of the fact that there is no power to award money for equality of partition (see p. 828, *post*), the powers of the Board have been but seldom resorted to in the past.

(*c*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 7; Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 11; *Doe* d. *Knight* v. *Spencer* (1848), 2 Exch. 752, 767 (a case under the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109)).

(*d*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 5.

(*e*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 167, defining "land" under that Act.

SECT. 2. Property which may be Partitioned.

copyholds and customary freeholds, subject to the consent of the lord of the manor (*f*); cattle gates or other gates; any rights of common, whether defined by numbers or stints (*g*) or otherwise; rights of fishing, manorial and other rights, and all easements over any land; quit-rents, chief rents, heriots, tithes and rentcharges (*h*) and other incorporeal hereditaments (*i*).

## SECT. 3.—*Persons who may Apply.*

Applicants.

**1545.** The persons interested, as defined in the following provisions, may apply (*k*); if two-thirds in value of them apply, that is deemed to be the application of all persons interested or having any estate in the property (*l*).

In the case of land subject to be inclosed under the Inclosure Acts (*m*), as to which proceedings for inclosure are pending, any of the persons so interested in allotments made under the inclosure may apply, the partition being specified in the inclosure award (*n*).

Persons interested.

The term "persons interested" means (*o*):—

(1) The persons in the actual possession or enjoyment of the property, or in the actual receipt of the rents and profits, without regard to the real amount of interest of such persons (*p*).

Reversioners.

(2) Where the land is subject to a lease or agreement for a lease for life or lives or years at a rent of not less than two-thirds of the clear yearly value, or for years not exceeding fourteen from the commencement of the term, or to a tenancy from year to year or at will or sufferance, the reversioner immediately expectant on the term or

(*f*) Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 9, which relates to exchanges, and is applied to partitions by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*g*) Inclosure Act, 1846 (9 & 10 Vict. c. 70), s. 11, which relates to exchanges, and is applied to partitions by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*h*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 7.

(*i*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 3.

(*k*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13, which does not say "any persons interested," as in case of applications for inclosure generally (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 25), or for partition of lands to be inclosed under the Acts (*ibid.*, s. 90); see *Doe* d. *Knight* v. *Spencer* (1848), 2 Exch. 752. As to the application of the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13, see note (*q*), p. 825, *ante*.

(*l*) Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 7; compare Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 11; and see pp. 830, 831, *post*.

(*m*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535 *et seq.*

(*n*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 90; see Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 1.

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16.

(*p*) The parties are only entitled to partition of such lands as they are interested in (Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13), and therefore, although the statutory definition extends to persons so interested in the lands "or any part thereof," these words are only applicable to partition with the necessary modification. The parties, therefore, must comprise the persons interested in the whole of the lands to be partitioned (*Jacomb* v. *Turner*, [1892] 1 Q. B. 47, 53).

SECT. 3. Persons who may Apply.

the person for the time being entitled to the land subject to the tenancy is the person interested (*q*).

Tenants and persons in receipt of rent.

(3) Where the land is subject to a lease or agreement for a lease for life or lives, or for years exceeding fourteen from the commencement of the term, at a rent less than two-thirds of the clear yearly value, the tenant jointly with the person in actual receipt of the rent is the person interested (*r*). But it is not necessary in such a case that any lessee should join in the application by a reversioner (*s*).

Where the term was originally for over a hundred years, and it is proved that no rent or acknowledgment has been paid or given for twenty years, or that the person entitled to the rent cannot upon reasonable inquiry be ascertained, such tenant alone is the person interested (*t*).

Sequestrators etc.

(4) Where any person is in possession or enjoyment or receipt of rents and profits under any sequestration, extent, *elegit* or other writ of execution (*a*), or as a receiver under any order of court (*b*), such person, and the person who but for such writ or order would have been in possession, enjoyment or receipt of rents and profits, are jointly the persons interested (*c*).

Persons under disability.

(5) Where any person interested is an infant, lunatic, or idiot, or is a married woman to whom the provisions of the Married Women's Property Acts (*d*) do not apply, or is under any other legal disability or beyond the seas, the guardian, trustee, committee of the estate (*e*), husband (*f*) or attorney respectively, or, in default thereof, a person nominated for that purpose by the Board, is substituted for the person interested

Litigated title.

**1546.** Where litigation is pending concerning the title, then the consent of both parties to the litigation is equivalent to the consent

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16.

(*r*) *Ibid.*

(*s*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 10. The exceptions only operate to prevent certain lessees themselves applying for partition, except with the concurrence of their reversioners. The lessees in such cases cannot give notice of dissent; see p. 830, *post*.

(*t*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 4. This case is the only one in which proof of title can be required by the Board; in other cases they have no jurisdiction to inquire into the title (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 49).

(*a*) See title EXECUTION, Vol. XIV., pp. 37 *et seq.*

(*b*) The statutory expression is "a Court of Equity"; the instructions of the Board confine this case to the High Court of Justice, but there seems no doubt that it extends to all courts exercising the equity jurisdiction, including county courts and palatine courts; see title RECEIVERS.

(*c*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 16.

(*d*) See title HUSBAND AND WIFE, Vol. XVI., p. 348. In other cases the married woman alone applies.

(*e*) In the case of a lunatic not so found by inquisition it would appear that the application can be made by a *quasi*-committee appointed under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1).

(*f*) It is the practice of the Board to require the consent of both husband and wife.

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 20.

SECT. 3. Persons who may Apply.

of the actual owner (*h*), and if, according to the claim of any party to the litigation, more than one person would be or become interested in the property, the consent or (as the case may require) non-signification of dissent by such persons as would have been sufficient to give an effective consent as persons interested if the claim had been established, is equivalent to the consent of the claimant under this rule (*i*).

Shares held under separate titles.

Any person interested in more than one undivided share, held under separate titles or for distinct interests or subject to separate charges or incumbrances, may effect partition as if different persons had been interested therein (*k*).

Agent.

**1547.** Any person interested may appoint an agent for the purpose of obtaining partition by the Board (*l*); such agent has statutory power to sign, concur in, and execute any application or act and to signify consent or dissent, and to bind his principal thereby.

Uncompleted partition.

**1548.** Where persons are in possession of land under an agreement for partition not legally completed, they may apply as if they were the persons interested (*m*).

## SECT. 4.—*Equality of Partition.*

Equality of partition.

**1549.** A partition cannot be authorised where the deficiency in value of any land or hereditaments, for which compensation is required under a proposed partition, exceeds, in the opinion of the Board, one-eighth of the value thereof (*n*).

Compensation rentcharge.

**1550.** The Board is only authorised to give compensation by means of a perpetual rentcharge or perpetual rentcharges of such amount as in the opinion of the Board (or the Board's valuer in case of a partition under an inclosure award) is just (*o*). Such a rentcharge is charged on the whole or part of the lands for the excess in value of which the rentcharge is an equivalent (*p*). The amount of any such rentcharge and the lands to be charged are to be determined by the order of the Board or the inclosure award as the case may require

(*h*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 1; applied by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*i*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 2, similarly applied.

(*k*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 31.

(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 21. A simple form of power of attorney is provided, but is not compulsory; the power of attorney is free from stamp duty (*ibid.*, s. 163). As to stamp duty generally, see title REVENUE.

(*m*) Inclosure Act, 1854 (17 & 18 Vict. c. 97), s. 5.

(*n*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 8.

(*o*) *Ibid.*, s. 7. The Board does not recommend these rentcharges, as they are inconvenient in practice.

(*p*) *Ibid.*, s. 7.

(*q*) *Ibid.*, s. 9.

SECT. 4. Equality of Partition.

Priority and devolution of rentcharges.

Such a rentcharge has priority over all charges other than tithe rentcharge, land tax, local rates and taxes, quit-rents or chief rents incidental to tenure, and charges created or to be created under Drainage or Improvement Acts (*r*), and is recoverable in the same manner as tithe rentcharge (*s*).

To such a rentcharge there attach the uses, trusts, conditions, charges and incumbrances attached to the land for the deficiency in value of which it is compensation (*t*).

### SECT. 5.—*Practice and Procedure* (*a*).

Draft application.

**1551.** An application in writing (*b*) is first made by the persons interested (*c*), accompanied by a plan (*d*) and a valuation made by a competent valuer. Both application and valuation are first submitted to the Board in draft before signature, in order that all necessary alterations may be made before execution and completion. Where the lands to be partitioned are in more than one parish, the lands of each parish should be kept distinct.

Valuation.

**1552.** The valuer should be chosen by the parties applying; he should be competent (*e*) and not the agent of, or connected with, any of the parties. The parties may each choose a separate valuer, however, in which case a joint valuation should be made by the valuers. The valuation should contain all necessary information

(*r*) See title LAND IMPROVEMENT, Vol. XVIII., pp. 275 *et seq.*

(*s*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 10. As to the recovery of tithe rentcharge, see title ECCLESIASTICAL LAW, Vol. XI., pp. 748, 749.

(*t*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 11.

(*a*) The Board's Instructions, Form B $\frac{30}{A}$, should be obtained by persons intending to apply: they relate also to exchanges and divisions of intermixed lands; the provisions essential to partition appear in the text, *infra*, and pp. 830—832, *post*, and in the notes thereto.

(*b*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13.

(*c*) As to these persons, see p. 826, *ante*. For a form of application, see Encyclopædia of Forms and Precedents, Vol. IX., p. 432; forms are supplied by the Board free of charge.

(*d*) The Board requires the plan to be of a scale large enough to enable the boundaries and areas to be ascertained with accuracy, and to show details clearly; and suggests the use of the Ordnance Survey maps, latest editions, on the 1/2500 scale in rural districts, and on the 1/500 or 1/1056 scale in towns, with the necessary manuscript revisions. Boundaries not shown on the published maps should be fixed by distances measured on the ground from the nearest convenient features shown on those maps; and all boundaries of the lands referred to in each schedule should be edged with an appropriate colour, red for the first schedule, green for the second etc. The names of the owners of the lands immediately adjoining those to be partitioned should be written on the plan.

(*e*) The Board requires the valuer's name and residence to be submitted to them for approval before he begins to act; a valuer with experience of like matters is preferred, and if he has not acted in a similar capacity on a previous partition there should be given the names and addresses of two gentlemen who are competent to testify to his trustworthiness and ability as a valuer. As to valuers generally, see title VALUERS

SECT. 5. Practice and Procedure.

for the use of the Board (*f*), and a certificate to the prescribed effect (*g*).

Inquiries by Board.

**1553.** The Board has power to direct inquiries whether the proposed partition will be beneficial to the owners of the undivided shares; and no order for partition will be made unless the Board is of opinion that the partition would be beneficial and that its terms are just and reasonable (*h*).

Formal application.

**1554.** The draft application and valuation having been approved formal signature takes place, the valuation is stamped (*i*), and the application and valuation are sent to the Board.

Notice.

Notice is then given (*k*) by advertisement for two successive weeks in a local newspaper circulating in the county where the lands are situated (*l*).

Dissent.

**1555.** One month is allowed to elapse from the publication of the last of the advertisements. During the month any person entitled to any estate in or any charge upon any land included in such proposed partition may give notice in writing to the Board of his dissent. Where land or other subject-matter of partition is held under a lease at one entire rent, the lessee has no power of giving notice of dissent (*m*). If the application for partition is made by two-thirds in value of the persons interested no notice of dissent can be given by any other person (*n*).

The Board cannot confirm any order for partition of the land unless the dissent is withdrawn, or it is shown to the Board that the estate or charge of the party dissenting has ceased (*o*), or is not

(*f*) Compare Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 24 (now repealed), as to inclosures. The Board requires various particulars to be stated: thus each separate field or hereditament should be mentioned separately, and its annual rental value, fee simple value, and the number of years' purchase giving that value, should be specified, with reasons for any variations in the value per acre and the number of years' purchase from those of any other portions, or from the number of years' purchase usually adopted in the district. The nature of the soil and buildings, the value of the timber and minerals, if any, and the outgoings (tithe rentcharge, land tax, chief rents etc.), and whether payable by owner or occupier, the objects of the partition, and the circumstances which render it desirable, should all be stated, and if any lot has any special value or accommodation value to the estate to which it will be attached, the particulars should be given; see Encyclopædia of Forms and Precedents, Vol. V., p. 604.

(*g*) See *ibid.*, p. 607.

(*h*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13.

(*i*) Otherwise the Board cannot proceed (Inclosure, etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), s. 2). As to stamp duty on valuations, see title VALUERS AND APPRAISERS. As to stamp duty generally, see title REVENUE.

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 150, applied by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14, and amended by the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 19.

(*l*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 162.

(*m*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 10.

(*n*) *Ibid.*, s. 11; see Inclosure Act, 1849 (12 & 13 Vict. c. 83), s. 7, and p. 826, *ante*.

(*o*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 150, applied by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

more than one-third in value of the entirety of the property to be partitioned.

Draft order.

**1556.** On the expiration of the month, if no notice of dissent effectual to put an end to the proceedings has been received, the Board prepares a draft of the proposed order (*p*), and the necessary plans showing the lands allotted in severalty to each of the persons interested in respect of their respective undivided shares (*q*).

Payment of costs.

**1557.** The draft order and plans are sent to the parties for approval, with a note of the costs incurred, which must be paid before confirmation of the order. These costs include the fees (*r*) and expenses (*s*) of the Board and the stamp duty on the order (*t*). The valuer's charges are paid by the parties direct (*a*).

Except in the case of a partition comprised in an inclosure award (*b*), there is no provision for compelling any dissentient who is bound by the proposed order to pay his share of costs, and the whole of the costs must therefore fall on the persons making the application and on persons agreeing to share the costs with them (*c*). In case of any difference as to the amount of costs payable by any person, the Board may certify the amount (*d*), which is recoverable, on default in payment, by order of distress, to be made by two justices on the production of the certificate (*e*).

Confirmation of order.

**1558.** The draft order and plans having been returned to the Board approved by the parties, and the costs having been paid (*f*),

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(*p*) **For a form, see Encyclopædia of Forms and Precedents, Vol. IX., p. 455.**

(*q*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13.

(*r*) Inclosure, etc. Expenses Act, 1868 (31 & 32 Vict. c. 89), s. 6; these fees are at present:—where the aggregate value of the land or other property dealt with does not exceed £100, £1; where that value exceeds £100 and does not exceed £200, £2; for every further £100 or fraction of £100 not exceeding £5,000, 5*s.*; and for every £100 or fraction of £100 exceeding £5,000, 2*s.* 6*d.*; but in no case does the fee exceed £50. The fee on the amendment of any confirmed order is £2.

(*s*) These expenses include the Board's costs of advertising, of preparation of plans to be attached to the order, and of engrossment of the order, besides the expenses of the inquiries, if any; see Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 147.

(*t*) The stamp duty is payable according to the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 73, and Schedule; see p. 224, *ante*, and titles REVENUE; SALE OF LAND.

(*a*) The Board recommends an arrangement with the valuer as to his remuneration before his valuation is undertaken.

(*b*) In partitions under an inclosure award the costs are to be borne by the several proprietors or persons interested in such manner and proportion as the valuer orders, and in case of non-payment are recovered as directed for the recovery of penalties and forfeitures (Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 91), namely, before two magistrates for the county, the decision being enforceable by distress (*ibid.*, s. 159).

(*c*) In the case of partitions not made under an inclosure award, the provisions of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 147, that expenses are to be paid by the persons on whose application the order is made, are incorporated by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*d*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 151.

(*e*) *Ibid.*, ss. 151, 160.

(*f*) **The Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13, provides that**

SECT. 5. Practice and Procedure.

the order is then engrossed and confirmed by the Board, and the plans annexed thereto.

Custody and delivery of copies of order.

The original order and plans are deposited with the Board, and copies of the order under the seal of the Board are delivered to each of the parties applying, or to their authorised agents (*g*). Where it appears to the Board, from the number of the persons interested, or the nature of their interests, that this obligation to deliver copies is inapplicable, the Board may order copies to be deposited, one with the clerk of the peace of the county, and another with the church or chapel wardens of the parish containing the lands concerned (*h*). In that case any person interested may inspect and obtain copies or extracts of the order, and such copies authenticated by the signature of the clerk of the peace, or his deputy, are receivable in evidence (*i*). The Board will, however, at the request and cost of any person on whose application the order was made, furnish him with a sealed copy (*j*).

Land in registration district.

**1559.** No further deed or act is necessary, except where the property is registered in a district in which registration under the Land Transfer Acts, 1875 and 1897 (*k*), is compulsory, when the order or a sealed copy should be produced at the Land Registry together with the land certificate (*l*).

Correction of errors.

**1560.** In case of any fraudulent or other error or omission in the order, the Board may make the correction by an order, either indorsed on the original order, or separate and deposited with the original order. The expenses are payable by the party requesting the correction (*m*).

### SECT. 6.—*Effect of the Order.*

Effect of the order.

**1561.** The confirmation of the order is conclusive evidence that all the statutory directions have been complied with, and the order is not to be impeached by reason of mistake or informality in the order or any of the proceedings, or by want of statutory notices or consents, but the partition effected thereby is binding and conclusive on all persons whomsoever (*n*). The order is not conclusive, however, when made without jurisdiction; and if the parties

the order shall be framed and confirmed on the Commissioners being of opinion that the partition would be beneficial and that its terms are just and reasonable.

(*g*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 147, applied to partition by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*h*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 17, applying the provisions of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146.

(*i*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146. Fees for inspection, 2*s.* 6*d.*; copies, 3*d.* per folio (*ibid.*).

(*j*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 17.

(*k*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65: see title REAL PROPERTY AND CHATTELS REAL.

(*l*) Land Transfer Rules, 1903, r. 156, incorporating the practice under *ibid.*, r. 155, as to exchanges.

(*m*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 29.

(*n*) Commons Act, 1876 (39 & 40 Vict. c. 56), s. 33, applying the provisions of the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 105, relating to inclosure awards.

interested have no interest at all in some of the lands comprised in the partition the order is to that extent invalid (*o*).

The uses, trusts and incumbrances of each undivided share are attached to the land allotted in severalty in respect of such share (*p*).

## SECT. 7.—*Collateral Arrangements.*

Excahnge.

**1562.** An exchange as well as partition may be effected where the parties are interested in undivided shares in one property, and also interested in the entireties of other lands (*q*). The matter rests in the first place in the agreement of the parties concerned: the procedure is then the same as already indicated (*r*), including the provisions as to dissent. The effect of the order is that the land allotted under the partition is held to the same uses, and on the same trusts, and subject to the same conditions, charges, and incumbrances as the undivided share of the party concerned, and the land taken in exchange is held similarly to the land given in exchange by the party concerned.

Enfranchisement.

**1563.** In the case of copyholds or customary freeholds, with the consent of the lord of the manor, and of the parties taking the land on partition, the Board may declare the lands to be held as of freehold tenure on such terms and conditions as may be agreed upon, and as they deem just (*s*).

Mines and minerals.

**1564.** The order may make, in accordance with the application, an exception or reservation of all or any of the mines or minerals under all or any part of the land, together with rights and easements incidental to working; and rights of way and other easements, as the parties to the application may have agreed on, may also be granted and reserved (*t*).

Apportionment of rent.

**1565.** Where any land or other subject-matter of the partition is held by one entire rent, the order of partition should apportion the rent to be paid to each of the persons to whom any part may be allotted in severalty (*u*); and, after confirmation of the order, the rents and services are payable accordingly.

(*o*) *Jacomb* v. *Turner*, [1892] 1 Q. B. 47. As to the effect of the order upon title, see p. 825, *ante*.

(*p*) Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 13; and, as to partitions in an inclosure award, Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 90, 93.

(*q*) Inclosure Act, 1852 (15 & 16 Vict. c. 79), s. 32.

(*r*) See pp. 829 *et seq.*, *ante*.

(*s*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 6, which expressly referred to partitions under an inclosure award, and was applied to other partitioned lands by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14.

(*t*) Inclosure Act, 1847 (10 & 11 Vict. c. 111), s. 4, applied to partitions by the Inclosure Act, 1848 (11 & 12 Vict. c. 99), s. 14. As to mining rights, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 520 *et s eq.* As to easements generally, see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 233 *et seq.*

(*u*) Inclosure Act, 1859 (22 & 23 Vict. c. 43), s. 10.

# Part IV.—Partition, and Sale in Lieu of Partition, by Order of Court.

SECT. 1. *Courts having Jurisdiction.*

SECT. 1.
Courts having Jurisdiction.

**1566.** The courts having jurisdiction (*v*) to entertain actions for partition, or sale in lieu of partition, are (1) the Chancery Division

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Courts.

(*v*) By the common law, in the absence of agreement between the parties interested, the only method by which partition could be compelled was by the writ *de partitione faciendâ* (Fitz. Nat. Brev. 62). The writ was, according to Littleton, the origin of the name "coparceners" (Littleton's Tenures, s. 241; Co. Litt. 164 b), and was confined to freehold hereditaments held in coparcenary (Co. Litt. 167 a). This remedy was extended by the Statute of Partition (1539), 31 Hen. 8, c. 1, to the case of all joint tenants and tenants in common in their own right or in the right of their wives, and by the Statute of Partition (1540), 32 Hen. 8, c. 32, to the case of joint tenants and tenants in common for a term of life or years, and where one of the joint tenants or tenants in common held for life or for years. The writ of partition was an extremely cumbersome and difficult process (see Lord ELDON, L.C., in *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, 553; 1 Fonblanque, Treatise of Equity, 5th ed., p. 18; and Allnatt, Law of Partition, pp. 48 *et seq.*). After some attempt to simplify the process by stat. (1697) 8 & 9 Will. 3, c. 31, the writ was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36. In his note to Co. Litt. 169 a, Mr. Hargrave mentions two other writs of livery and partition applicable to lands holden *in capite* descended to coparceners. Owing to the extreme difficulty attending the process of partition at law, especially where the title was complicated and where discovery was necessary, the Court of Chancery assumed jurisdiction to decree partition, in proceedings instituted by bill, at a very early period (*Norse* v. *Ludlow* (1590), Toth. 155; *Long* v. *Miller* (1594), Toth. 155; *Mundy* v. *Mundy* (1793), 2 Ves. 122, 124); see also Selden Society Publications, Vol. X., p. 129, where is recorded a petition, in 1432—1443, to Stafford, Chancellor of England, asking for partition in a case where no remedy at law was available; cases even earlier are mentioned in (1311), Year Book, Maynard, Vol. I., p. 133; (1341), Y. B. 15 Edw. 3, Pasch. pl. 42 (Rolls Series, p. 103); and (1342), Y. B. 16 Edw. 3, Hil. pl. 44 (Rolls Series, I., p. 132). This distinction is to be noted between the common law judgment and the decree in equity, that while the former vested the legal estate, the latter had no such effect, but directed the parties themselves to execute the conveyances necessary to pass the legal estate. Although the Court of Chancery would decree specific performance of an agreement to partition copyholds (*Bolton* v. *Ward* (1845), 4 Hare, 530), or direct a partition of freeholds and copyholds so as to give the entire copyholds to one party (*Dodson* v. *Dodson* (1795), Allnatt, Law of Partition, p. 94; *Dillon* v. *Coppin* (1833), 6 Beav. 217, n.; *Bowles* v. *Rump* (1861), 9 W. R. 370), yet it had no jurisdiction prior to the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 85 (see now Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 87), to direct a partition of copyholds or customary freeholds (*Jope* v. *Morshead* (1843), 6 Beav. 213). Prior to the passing of the Partition Act, 1868 (31 & 32 Vict. c. 40), partition was a matter of right, and the court had no discretion to refuse partition or to order sale in lieu thereof (*Warner* v. *Baynes* (1750), Amb. 589; *Parker* v. *Gerard* (1754), Amb. 236). This state of the law produced numerous inconveniences and absurdities. In *Turner* v. *Morgan* (1803), 8 Ves. 143, Lord ELDON, L.C., decreed partition of a single house, and Mr. Romilly in argument cited a case of a house at Cockermouth which was partitioned by actually building a wall up the middle. This state of the law led to the passing of the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17), under which the court

SECT. 1. Courts having Jurisdiction.

of the High Court of Justice (*a*); (2) the Courts of Chancery of the Counties Palatine of Lancaster and Durham, as regards property within their respective jurisdictions (*b*); (3) the county court, when the property to which the suit relates does not exceed in value £500 (*c*); and (4) other Courts exercising equitable jurisdiction (*d*). Where the plaintiff dwells or carries on business within the district of one of the metropolitan county courts, and the defendant also dwells and carries on business within the district of one of such courts, the county court of the district in which either plaintiff or defendant dwells or carries on business has jurisdiction; in any other case the court having jurisdiction is that within the district of which the property is situate (*e*).

Litigated title.

**1567.** Such an action may be maintained although there are questions of title between the parties; and the court may decide

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has wide powers to order a sale in lieu of partition where the nature of the property or the interest of the parties makes that more convenient. See, further, title EQUITY, Vol. XIII., p. 40.

(*a*) By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3), all actions for sale or partition in the High Court are assigned to the Chancery Division, which now has exclusive jurisdiction in such matters.

(*b*) The jurisdiction in the County Palatine of Lancaster is conferred by the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 2; see also the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 3. By the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 10, the term "the court" in the Partition Act, 1868 (31 & 32 Vict. c. 40), was extended so as to include the Court of Chancery of the County Palatine of Durham. For the jurisdiction of the Palatine Court of Lancaster, see title COURTS, Vol. IX., p. 121; for that of the Palatine Court of Durham, see *ibid.*, p. 125. The jurisdiction of the Chancery Division is concurrent with that of these courts; *Birkin* v. *Smith*, [1909] 2 K. B. 112, C. A., was a partition action in the County Palatine of Durham.

(*c*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 12. The jurisdiction in such cases of the Chancery Division and the county court is concurrent. When an action is brought in the High Court which might have been commenced in the county court, it can, by order of the judge to whom it is assigned, and with or without the application of any party to the action, be transferred to the proper county court (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 69). The masters of the Chancery Division have, however, much greater facilities for conducting the inquiries which are usually necessary in partition actions, and more experience, than the registrars of county courts, and transfers from the High Court to the county court are not common, and some special reason must be shown before the court will order a transfer (*Picard* v. *Hine* (1868), 18 L. T. 705; *Sykes* v. *Firth* (1877), 46 L. J. (CH.) 627). Since the jurisdiction is concurrent, the fact that the plaintiff elects to proceed in the High Court is no ground for depriving him of the usual costs (*Brown* v. *Rye* (1874), L. R. 17 Eq. 343; *Scotto* v. *Heritage* (1866), L. R. 3 Eq. 212; *Grandin* v. *Haines*, [1873] W. N. 12). *Simons* v. *McAdam* (1868), L. R. 6 Eq. 324, is difficult to reconcile with the reasoning of JESSEL, M.R., in *Brown* v. *Rye*, *supra*. The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, does not apply to an action for partition which is not an action founded on contract, or on tort, within the meaning of that provision. For a fuller discussion of this subject, see title COUNTY COURTS, Vol. VIII., pp. 586, 675.

(*d*) As to the Mayor's Court of London, see title MAYOR'S COURT, LONDON, Vol. XX., p. 286.

(*e*) This is the result of the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 75 (2), 84, as interpreted in *R.* v. *Bloomsbury County Court Judge* (1890), 24 Q. B. D. 309; and see title COUNTY COURTS, Vol. VIII., p. 452.

SECT. 1. Courts having Jurisdiction.

such questions in the same action (*f*). Other relief besides partition may therefore be claimed (*g*), including the determination of such questions (*h*).

## SECT. 2.—*Property which may be Dealt With.*

Property.

**1568.** All lands, tenements, and hereditaments of whatever kind, whether corporeal or incorporeal, may be partitioned by the court, except those which are in their nature incapable of physical division, and even as regards these latter the court can in many cases effect the same result, either by giving the enjoyment of the indivisible hereditament to the parties interested alternately, or by giving the indivisible hereditament to one party and its equivalent in kind or money to the others (*i*).

Freeholds, copyholds, and leaseholds.

Accordingly, freeholds and lands of copyhold or customary tenure are partitionable (*k*). Leaseholds are partitionable, but where

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(*f*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (7); *Waite* v. *Bingley* (1882), 21 Ch. D. 674 (question of title); *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508 (action for damages for trespass). The Court of Chancery Act, 1852 (15 & 16 Vict. c. 86), s. 62; the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), and the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), s. 1, contained similar enactments, but were ineffectual; see *Bolton* v. *Bolton* (1868), L. R. 7 Eq. 298, n., C. A.; *Slade* v. *Barlow* (1869), L. R. 7 Eq. 296; *Giffard* v. *Williams* (1870), 5 Ch. App. 546; *Burt* v. *Hellyar* (1872), L. R. 14 Eq. 160. The court does not, however, entertain an incidental probate matter although it has jurisdiction to do so (*Pinney* v. *Hunt* (1877), 6 Ch. D. 98).

(*g*) As to the joinder of causes of action, see title PRACTICE AND PROCEDURE. A claim by the owner of a share against his own mortgagee for redemption cannot be joined with a claim for partition against another defendant (*Sinclair* v. *James*, [1894] 3 Ch. 554, 557). In *Davenport* v. *King* (1883), 49 L. T. 92, the prior mortgagees, who were defendants, consented; and see *Watkins* v. *Williams*, *Haverd* v. *Davis* (1851), 21 L. J. (CH.) 601. In *Davies* v. *Davies* (1860), 6 Jur. (N. S.) 1320, a mortgagee of the entirety, who was also entitled to a share of the property, obtained a decree for foreclosure, and, in the event of redemption, for partition.

(*h*) See *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492, which shows that even possession may be claimed. For a precedent of particulars in a county court, see County Court Forms, 1903, No. 324. In *Moore* v. *Kempston* (1870), 18 W. R. 803, the claim for partition was subsidiary, and under the old rule that questions of title could not be entertained in a partition action (see the cases referred to in note (*f*), *supra*), the action was dismissed: the decision would now be otherwise.

(*i*) Sir Edward Coke (Co. Litt. 164 b, 165 a) gives a number of instances of hereditaments which in their nature are indivisible (see note (*p*), p. 823, *ante*), and states how they are partitionable. In no case, however, is a severance of the ownership effected. Many of the cases given are now of antiquarian rather than practical interest, and in view of the power of the court to order a sale in lieu of partition, under the Partition Act, 1868 (31 & 32 Vict. c. 40), it would not nowadays be necessary to resort to some of the shifts to which recourse was had when partition was a matter of right irrespective of the inconvenience and impracticability of reasonable division.

(*k*) Copyholds were at an early date held not to be within the Statutes of Partition ((1539) 31 Hen. 8, c. 1; (1540) 32 Hen. 8, c. 32), the reason alleged being that partition would interfere with the rights of the lord in his absence by dividing his tenements, altering the accustomed rents and services, and forcing upon him a different tenant (*Jope* v. *Morshead* (1843), 6 Beav. 213; Co. Litt. 187 a, note 2; *Scott* v. *Fawcet*

SECT. 2. Property which may be Dealt With.

Advowsons.

partition would involve waste or breach of covenant, or render any of the co-owners liable to ejectment at the suit of the lessor, the court can, if requested to do so, order a sale in lieu of partition (*l*).

Advowsons are partitioned by decreeing presentation by turns. In the case of coparceners the elder has the prior right of presentation (*m*). In the case of tenants in common or joint tenants the order of presentation, in the absence of agreement, is determined by lot (*n*), unless the predecessor in title of one of the parties had the

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(1757), 1 Dick. 299; *Dillon* v. *Coppin* (1833), 6 Beav. 217; note to *Jope* v. *Morshead* (1843), 6 Beav. 213; Co. Litt. 187 a; *Horncastle* v. *Charlesworth* (1840), 11 Sim. 315). The right to decree partition of lands of copyhold or customary tenure was conferred on courts of equity by the Copyhold Act, 1841 (4 & 5 Vict. c. 35), s. 85, which was repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), a consolidating statute which enacts (*ibid.*, s. 87) that in an action for the partition of lands of copyhold or customary tenure the like order may be made as with respect to land of freehold tenure; see note (*v*), p. 834, *ante*. In *Baker* v. *Daniel* (1815), 6 Taunt. 193, and *Williams* v. *Williams* (1862), 19 W. R. 609, decrees were made for partition of lands of gavelkind tenure, and in *Osborn* v. *Osborn* (1868), L. R. 6 Eq. 338, an order for sale of lands of that tenure was made; and see Robinson, Gavelkind, 5th ed., p. 113.

(*l*) Leaseholds were made partitionable by stat. (1540) 32 Hen. 8, c. 32; but the statute provided that no partition thereunder should prejudice any person other than the parties to the partition. Under this Act the court has frequently ordered partition of leaseholds in the absence of the reversioner (*Baring* v. *Nash* (1813), 1 Ves. & B. 551; *Heaton* v. *Dearden* (1852), 16 Beav. 147; *Ames* v. *Comyns* (1867), 16 W. R. 74). In all these cases the property was held under one demise, but there is nothing in the reports to show that the landlord's rights would be adversely affected. In *North* v. *Guinan* (1829), Beat. 342, HART, L.C., refused to decree partition of a house held for a term on the ground that partition would involve waste and breach of covenant, and could be restrained by injunction at the suit of the landlord. Since the Partition Act, 1868 (31 & 32 Vict. c. 40), the court would no doubt order a sale in lieu of a partition; it is a plausible argument, however, that inasmuch as the Partition Act, 1868 (31 & 32 Vict. c. 40), only enables the court to order a sale in cases where previously it could have ordered a partition, there is no jurisdiction to order a sale where a landlord's rights would be affected by a partition; see also *Rowe* v. *Gray* (1876), 5 Ch. D. 263. Further, the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3), which assigns to the Chancery Division all actions for partition or sale of real estate, does not in terms include chattels real, though the corresponding Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 36 (5), mentions chattels real. As pointed out in note (*v*), p. 834, *ante*, the Court of Chancery has exercised jurisdiction in partition, at least since 1590. It exercised exclusive jurisdiction since the abolition of the common law writ of partition by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36, and among other matters assigned to the Chancery Division by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (2), are "all causes or matters under any Act of Parliament by which exclusive jurisdiction in respect of such causes or matters has been given to the Court of Chancery." Actions for partition or sale of leasehold property have, in fact, been entertained by the Chancery Division ever since the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66) (*Rowe* v. *Gray*, *supra*).

(*m*) 2 Roll. Abr., p. 346; Co. Litt. 166 b, 186 b; *Harris and Haies* v. *Nichols* (1583), Cro. Eliz. 19; though the elder has no prior right of selection in the case of partition by commissioners (*Canning* v. *Canning* (1854), 2 Drew. 434, 437); and see title ECCLESIASTICAL LAW, Vol. XI., p. 572.

(*n*) *Seymour* v. *Bennet* (1742), 2 Atk. 482, *per* Lord HARDWICKE, L.C., at

SECT. 2. Property which may be Dealt With.

last presentation, in which case the other will present on the first occasion after the partition on which the living becomes vacant (*o*).

Manors.

Manors may be partitioned by the court (*p*), and in such case each person to whom a share of the manor is allotted is entitled to hold a separate court in respect of that share (*q*). As regards the incidents of the manor which are indivisible, the profits of the whole will be divided, or alternate enjoyment decreed, or compensation given for the allotment of the entirety to one of the parties (*r*).

Tithes and rentcharges.

Tithes (*s*) and rentcharges (*t*) can both be partitioned by the court. In the case of rentcharges each separate owner, after the partition, has a separate remedy for enforcing the rentcharge. The same is true of an ordinary rent severed from the reversion (*u*).

Walls.

A wall separating the gardens of two adjoining houses has been partitioned vertically (*a*).

Property outside the jurisdiction.

**1569.** The property to be partitioned must be within the jurisdiction of the court. The Chancery Division has no jurisdiction to order partition of immovable property outside the jurisdiction (*b*).

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p. 483; in this case Lord Hardwicke ordered persons, who were entitled to fill up an office but could not agree as to the person to be appointed, to draw lots to decide who should have the first appointment; see also *Johnstone* v. *Baber* (1856), 6 De G. M. & G. 439; *Salisbury* (*Bishop*) v. *Philips* (1700), 1 Ld. Raym. 535.

(*o*) *Bodicoate* v. *Steers* (1737), 1 Dick. 69; *Matthews* v. *Bath and Wells* (*Bishop*) (1785), 2 Dick. 652. In *Young* v. *Young* (1870), L. R. 13 Eq. 175, n., a sale of an advowson was ordered in a partition action. By the Advowsons Act, 1708 (7 Anne, c. 18), where partition to present by turns is made, each co-owner is to be deemed severally seised of his proportionate part of the advowson; see title ECCLESIASTICAL LAW, Vol. XI., p. 572.

(*p*) *Hanbury* v. *Hussey* (1851), 14 Beav. 152, following *Sparrow* v. *Fiend* (1761), 1 Dick. 348, and *Ley* v. *Cox* (1772), quoted in 14 Beav. 156, n., where the decree is given. Manors are expressly mentioned in stat. (1539) 31 Hen. 8, c. 1.

(*q*) *Cattley* v. *Arnold* (1858), 4 K. & J. 595, *per* PAGE WOOD, V.-C., at p. 600, quoting 16 Vin. Abr. 224 (2nd ed.), the case of the *County Palatine of Wexford* (1611), Dav. Ir. (ed. 1762) 159, 167, and *Anon.* (1534), Y. B. 26 Hen. 8, Trin. Ca. 15. In the case of partition by act of the parties without the aid of the court there are numerous decisions to this effect (*Harris and Haies* v. *Nichols* (1583), Cro. Eliz. 19; *Morris* v. *Smith and Paget* (1585), Cro. Eliz. 38; *Melwich* v. *Luther* (1588), Cro. Eliz. 102; *Finch's* (*Sir Moyle*) *Case* (1606), 6 Co. Rep. 63 a). In *Heath* v. *Deane*, [1905] 2 Ch. 86, there had apparently been a partition between the freehold and copyhold parts of the manor.

(*r*) *Moor and Brown* v. *Onslow* (1600), Cro. Eliz. 759. In *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, an order was made for partition of an uninclosed moor, formerly part of a manor, over which rights of common existed.

(*s*) *Baxter* v. *Knollys* (1750), 1 Ves. Sen. 494, where Lord HARDWICKE, L.C., said that the Court of Chancery could partition many things that could not be partitioned at law.

(*t*) *Rivis* v. *Watson* (1839), 5 M. & W. 255, quoting *Colborne* v. *Wright* (1679), 2 Lev. 239; these were both cases of partition by act of the party.

(*u*) *Ards* v. *Watkin* (1599), Cro. Eliz. 637, 651.

(*a*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508.

(*b*) *Cartwright* v. *Pettus* (1676), 2 Cas. in Ch. 214, more fully reported *sub nom. Carteret* v. *Petty*, 2 Swan. 323, n. Where there is some contract or equity between the parties the court may enforce the contract or equity, as in *Penn* v. *Baltimore* (*Lord*) (1750), 1 Ves. Sen. 444, and the notes thereto, 1 White & Tud. L. C., 8th ed., 800, 814; and see title EQUITY, Vol. XIII.,

## SECT. 3.—*Persons who may Obtain Partition or Sale.*

SECT. 3. Persons who may Obtain Partition or Sale.

Parties.

**1570.** An action for partition, or sale in lieu of partition, may be maintained by coparceners (*c*), tenants in common, and joint tenants (*d*). Any co-owner may be a lessee for lives or for years (*e*), tenant in tail (*f*), tenant for life (*g*), tenant for life determinable on marriage (*h*), tenant by the curtesy (*i*), tenant in fee subject to an

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p. 75. In 2 Seton, Judgments and Orders, 6th ed., p. 1885, is given an order made in *Galloway* v. *Mackersey* (1861), for partition by commission of land in Jamaica: the land was devised by will, and the order may have been made in consequence of some equity or trust between the parties, otherwise it is not easy to see under what jurisdiction it was made. In *Tulloch* v. *Hartley* (1841), 1 Y. & C. Ch. Cas. 114, where at the suit of legatees and annuitants the court made a decree to settle boundaries in Jamaica, the order may have been made for the purpose of administration. See also title CONFLICT OF LAWS, Vol. VI., p. 199.

(*c*) By the common law, coparceners alone had the right to compel partition (Co. Litt. 167 a). The old common law writ, *de partitione faciendâ* (see note (*v*), p. 834, *ante*), was only applicable to the case of coparceners. The persons at the present day entitled to bring the action must be among those holding the property, in the words of this old writ, "*insimul et pro indiviso*"; see *Taylor* v. *Sayer* (1600), Cro. Eliz. 742; *Moor and Brown* v. *Onslow* (1600), Cro. Eliz. 759; Co. Litt. 167 a. Thus it has been held in Ontario that the executor of a will is not entitled to partition the land of his testator among the devisees (*Keefer* v. *McKay* (1881), 29 Grant, 162; and compare *Lowe* v. *Franks* (1828), 1 Mol. 137 (where the defendant was trustee for plaintiffs; the decree for partition was made, however, by consent)). A party may claim as co-owner by possessory title (*Ward* v. *Ward* (1870), 21 L. T. 699).

(*d*) Stat. (1539) 31 Hen. 8, c. 1.

(*e*) Stat. (1540) 32 Hen. 8, c. 32. Accordingly, in *Baring* v. *Nash* (1813), 1 Ves. & B. 551, a lessee for a term of 500 years in one undivided tenth part of the property obtained a decree for partition without joining his reversioners, and in *Heaton* v. *Dearden* (1852), 16 Beav. 147, a person entitled to the benefit of an agreement for a lease of minerals from the owner of an undivided moiety, obtained a decree for specific performance and partition in the same action. In *Pyne* v. *Matthew* (1669), 3 Rep. Ch. 17 [29], and *Mason* v. *Keays* (1898), 78 L. T. 33, the sole defendant was the lessee of an undivided share. See also *Cornish* v. *Gest* (1788), 2 Cox, Eq. Cas. 27.

(*f*) *Burton* v. *Jeux* (undated), and *Rose* v. *Rose* (undated), cited in *Thomas* v. *Gyles* (1691), 2 Vern. 232 (where it was said the decree bound the issue); *Brook* (*Lord*) v. *Hertford* (*Lord*) (1729), 2 P. Wms. 518 (where the plaintiff was an infant, and the execution of the necessary conveyances was delayed until he came of age; see now, however, Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 31; and p. 853, *post*); *Tuckfield* v. *Buller* (1753), Amb. 197; *A.-G.* v. *Hamilton* (1816), 1 Madd. 214; *Re Sherard, Lowther* v. *Cuffe* (1863), 1 De G. J. & Sm. 421, C. A.; *Re Pares, Lillingston* v. *Pares* (1879), 12 Ch. D. 332, C. A. In *Wills* v. *Slade* (1801), 6 Ves. 498, there was a possibility of other tenants in tail coming into existence, but this was not considered an objection to the decree.

(*g*) *Gaskell* v. *Gaskell* (1836), 6 Sim. 643 (where a tenant for life, with remainder to his first and other sons successively in tail, successfully maintained an action for partition though no issue were in existence: the agreement for partition being referred to the master to inquire whether it was for the benefit of the future issue, if any); *Wills* v. *Slade, supra*; *Williams* v. *Williams* (1899), 81 L. T. 163.

(*h*) *Hobson* v. *Sherwood* (1841), 4 Beav. 184.

(*i*) Co. Litt. 175 b; *Stanley* v. *Wrigley* (1855), 3 Sm. & G. 18; *Gibbs* v. *Haydon* (1882), 47 L. T. 184.

SECT. 3. Persons who may Obtain Partition or Sale.

executory gift over (*k*), or any person claiming under them by assignment or otherwise (*l*).

Incumbrancers.

**1571.** The rights of a mortgagee (*m*) or other incumbrancer (*n*) of the entirety cannot without his consent be affected in the action, and he is not a necessary party thereto. An owner of an undivided share, subject to a mortgage, cannot maintain the action without the concurrence of his mortgagee or on the terms of paying off the mortgage (*o*). A mortgagee of a share can sue without the concurrence of his mortgagor (*p*).

Persons under disability.

**1572.** A person of unsound mind not so found by inquisition or an infant may sue by his next friend (*q*). In the case of a person of unsound mind so found the action should be brought by the committee, and the sanction of the Judge in Lunacy should be obtained before it is commenced (*r*).

Partition may be ordered though a defendant is a lunatic not so found or an infant (*s*).

Reversioners.

**1573.** The action cannot be maintained by a reversioner alone. The plaintiff must have an estate in possession (*t*), but it is no objection to the action that the plaintiff or defendant is entitled to exclusive possession or receipt of the rents and profits of the entirety

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(*k*) *Greenwood* v. *Percy* (1859), 26 Beav. 572; *Hurry* v. *Hurry* (1870), L. R. 10 Eq. 346; *Groves* v. *Carbert* (1873), 29 L. T. 129.

(*l*) *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586 (assignee); *Davenport* v. *King* (1883), 49 L. T. 92 (mortgagees); *Fall* v. *Elkins* (1861), 9 W. R. 861 (mortgagee); *Williams* v. *Williams* (1862), 10 W. R. 609 (assignee). An agreement to assign or demise confers a sufficient interest (*Heaton* v. *Dearden* (1852), 16 Beav. 147; *Davies* v. *Davies* (1860), 6 Jur. (N. S.) 1320).

(*m*) *Swan* v. *Swan* (1820), 8 Price, 518; *Waite* v. *Bingley* (1882), 21 Ch. D. 674; *Sinclair* v. *James*, [1894] 3 Ch. 554.

(*n*) *E.g.*, annuitant (*Hixon* v. *Eastwood* (1868), 17 L. T. 489; *Poole* v. *Poole*, [1885] W. N. 15); or lessee (*O'Reiley* v. *Vincent* (1818), 2 Mol. 330).

(*o*) The reason given is that it alters the nature of his security from an undivided to a divided share (*Sinclair* v. *James*, *supra*, *per* NORTH, J., at p. 556); and that the only action which can be brought by a mortgagor against his mortgagee is one for redemption (*Watkins* v. *Williams* (1851), 3 Mac. & G. 622; *Gibbs* v. *Haydon* (1882), 47 L. T. 184; *Oatley* v. *Oatley* (1898), 19 New South Wales Law Reports (Equity), 129).

(*p*) *Robinson* v. *Aston* (1845), 9 Jur. 224; *Davies* v. *Davies* (1860), 6 Jur. (N. S.) 1320. In *Fall* v. *Elkins*, *supra*, and *Davenport* v. *King*, *supra*, the mortgagors were parties.

(*q*) *Watt* v. *Leach* (1878), 26 W. R. 475; *Porter* v. *Porter* (1888), 37 Ch. D. 420, C. A., distinguishing *Halfhide* v. *Robinson* (1874), 9 Ch. App. 373, where JAMES, L.J., at p. 375, intimated that it was irregular that a bill should be filed by a next friend, on behalf of a person of unsound mind not so found, for dealing with his real estate; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 463. The same principles apply to actions brought by infants for partition or sale which are maintainable by their next friends (*Brook* (*Lord*) v. *Hertford* (*Lord*) (1729), 2 P. Wms. 518; *Hollingworth* v. *Sidebottom* (1837), 8 Sim. 620); and see title INFANTS AND CHILDREN, Vol. XVII., p. 133. As to married women, see *Broad* v. *Askham*, [1909] W. N. 236; *Barrett* v. *Watts*, [1909] W. N. 237; p. 815, *ante*.

(*r*) *Re Notley* (1839), 3 Jur. 719.

(*s*) *Martyn* v. *Perryman* (1662), 1 Rep. Ch. 125; *Robinson* v. *Aston*, *supra*.

(*t*) *Evans* v. *Bagshaw* (1869), L. R. 8 Eq. 469; (1870), 5 Ch. App. 340,

under a lease or other instrument, or that any third person is entitled to such rights under a lease, provided such rights are preserved (*a*).

**Persons who may Obtain Partition or Sale.**

**1574.** The court has no jurisdiction where there are subsisting trusts for management vested in trustees (*b*), or a subsisting trust for sale (*c*), though a mere power of sale would not prevent the court ordering a partition or sale in lieu of partition (*d*).

Trusts.

Trustees may sue and be sued without joining their *cestuis que trustent*, whom they sufficiently represent for all purposes of the action (*e*).

**1575.** The owner of the legal estate, except a mortgagee of the entirety, or where such owner is a bare trustee for a party to the action entitled to call for a conveyance of the legal estate, is a necessary party to the action (*f*).

Legal owner.

(*a*) *E.g.*, where the defendant co-owner is a lessee of the entirety or of the shares other than his own (*Wilkinson* v. *Joberns* (1873), L. R. 16 Eq. 14; see *Hughes* v. *D'Arcy* (1873), 8 I. R. Eq. 71, where the defendant was not restrained from bringing an action of trespass against his landlord, the other co-owner), or where the plaintiff co-owner is tenant for life of the other share under a settlement of which the defendant is the trustee (*Dew* v. *Riddler* (1900), 19 New Zealand Law Reports, 281). It has been held in the United States and in Australia and Canada that the existence of a lease of the entirety (vested in a stranger) is no defence to an action for partition between co-owners of the reversion expectant on the lease (*Hunt* v. *Hazleton* (1830), 5 New Hampshire, 216; *Woodworth* v. *Campbell* (1835), 5 Paige, 518; *Willard* v. *Willard* (1892), 145 United States, 116; *Robinson* v. *Robinson* (1902). 2 New South Wales State Reports (Equity), 197; *Fitzpatrick* v. *Wilson* (1866), 12 Grant, 440; and in England it is generally so assumed; see *O'Reiley* v. *Vincent* (1818), 2 Mol. 330; *Graham* v. *Clinton* (*Lord*) (1899), 81 L. T. 717; Co. Litt. 46 a, 167 a). In *Wilkinson* v. *Joberns*, *supra*, the fact that the defendant was entitled to exclusive possession was held not a good reason against an order for sale (see p. 842, *post*). As to the extent to which a partition without the concurrence of such a lessee is binding on him, see title LANDLORD AND TENANT, Vol. XVIII., p. 596. If the lease only affects certain shares, it will be necessary to make the lessee a party by serving him with notice of the judgment or otherwise; see *Cornish* v. *Gest* (1788), 2 Cox, Eq. Cas. 27; *Herbert* v. *Eyre* (1838), 2 Jo. Ex. Ir. 803; *Whaley* v. *Dawson* (1805), 2 Sch. & Lef. 367, 372. In case of a lease affecting certain shares only, if the lessee is not a party, a partition between the reversioners on his lease and the other co-owners is not binding on the lessee; see *Monro* v. *Toronto Rail. Co.* (1904), 9 Ontario Law Reports, 299, C. A., where the court made a new partition. As to leases by co-owners generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 343, 344, 452, 472, 473.

(*b*) *Taylor* v. *Grange* (1879), 13 Ch. D. 223; affirmed (1880), 15 Ch. D. 165, C. A.; *Re Norris*, [1883] W. N. 65, C. A.; see *Lowe* v. *Franks* (1828), 1 Mol. 137.

(*c*) *Swaine* v. *Denby* (1880), 14 Ch. D. 326; *Biggs* v. *Peacock* (1882), 20 Ch. D. 200; affirmed, 22 Ch. D. 284, C. A. In *Cass* v. *Wood* (1874), 30 L. T. 670, the trust for sale was at the death or second marriage of the widow, who was still alive, and had not married again; and see *Re Dennis*, *Downey* v. *Dennis* (1887), 14 Ontario Reports, 267 (trust for sale on request where the request had been made).

(*d*) *Boyd* v. *Allen* (1883), 24 Ch. D. 622; see *Oatley* v. *Oatley* (1898), 19 New South Wales Law Reports (Equity), 122.

(*e*) R. S. C., Ord. 16, r. 8; *Stace* v. *Gage* (1878), 8 Ch. D. 451; *Simpson* v. *Denny* (1878), 10 Ch. D. 28; County Court Rules, Ord. 3, rr. 6, 33; Chancery of Lancaster Rules, 1884, Ord. 16, rr. 8, 47; *Dew* v. *Riddler*, *supra*.

(*f*) At common law the decree vested the legal state without any

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Want of parties.

**1576.** Any person entitled under the above rules to maintain an action for partition may maintain such an action against any one or more of the other persons interested without serving the other or others of those persons, and no objection can be taken on the ground of want of parties, but all persons interested in the property must, unless service is in special circumstances dispensed with, be parties to the action or served with notice of the judgment (*g*).

Ascertainment of shares.

**1577.** No action for partition, or sale in lieu of partition, can be entertained where the property is liable to be divided into an unascertained number of shares (*h*). Provided the number of shares are capable of being ascertained, the difficulty of ascertaining them (*i*), or the fact that unascertained persons may become interested in a share (*k*), are not objections to partition, or sale in lieu of partition.

SECT. 4.—*Jurisdiction to Order Sale.*

Request by owners of moiety.

**1578.** In any action in which the court has jurisdiction to order partition, if the party or parties individually or collectively interested to the extent of a moiety or upwards in the property to which the action relates request a sale, a sale and distribution of the proceeds must be ordered in lieu of partition, unless the court sees good reason to the contrary (*l*).

Burden of proof.

The burden of showing such good reason rests on those opposing a sale (*m*). Such burden will be discharged by showing that great hardship will be inflicted on one of the parties, especially when the

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conveyance, while in equity the decree directed the necessary conveyance to be executed. At common law, therefore, it was necessary to have the legal estate before the court, and in equity the necessary conveyances could not be ordered in the absence of the parties able to convey the legal estate or to compel a conveyance thereof (*Cartwright* v. *Pultney* (1742), 2 Atk. 380; *Anon.* (1742), *per* Lord HARDWICKE, L.C., referred to in note to *Blackburn* v. *Jepson* (1818), 3 Swan. 132, 139; *Miller* v. *Warmington* (1820), 1 Jac. & W. 484, *per* PLUMER, M.R., at p. 493; *Taylor* v. *Grange* (1879), 13 Ch. D. 223, *per* FRY, J., at p. 227; affirmed (1886), 15 Ch. D. 165, C. A.).

(*g*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9; Partition Act, 1876 (39 & 40 Vict. c. 17), s. 3. *Dodds* v. *Gronow* (1869), 20 L. T. 104; *Peters* v. *Bacon* (1869), L. R. 8 Eq. 125; *Hurry* v. *Hurry* (1870), L. R. 10 Eq. 346; and *Teall* v. *Watts* (1871), L. R. 11 Eq. 213, were all before the Partition Act, 1876 (39 & 40 Vict. c. 17), which enabled service to be dispensed with. The practice under these provisions is dealt with at p. 852, *post*.

(*h*) *Miles* v. *Jarvis* (No. 2) (1883), 50 L. T. 48 (where future born children of a living person were entitled to share equally with those born in the lifetime of tenant for life).

(*i*) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533 (where the interests of the parties in the land to be partitioned had to be ascertained by reference to their interests in other property, and the shares were unascertained, and difficult of ascertainment).

(*k*) *Wills* v. *Slade* (1801), 6 Ves. 498 (see note (*f*), p. 839, *ante*). So a tenant for life with remainder to his sons in tail can commence an action for partition and the judgment will bind his issue in tail when born (*Gaskell* v. *Gaskell* (1836), 6 Sim. 643; see also *Basnett* v. *Moxon* (1875), L. R. 20 Eq. 182).

(*l*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 4.

(*m*) *Lys* v. *Lys* (1868), L. R. 7 Eq. 126.

court considers that the party requesting a sale is actuated by vindictive motives (*n*); or that the property is unsaleable by reason of a right of entry, but can be partitioned (*a*); or is temporarily much depreciated in value; or is such a mere dependence on another property as to be almost valueless except in connection with that property (*b*). But good reason to the contrary is not shown by proving the mere dissent of the other persons interested (*c*); or that the owner of a moiety occupies the entirety for commercial purposes (*d*), or even as a mansion-house (*e*); or that it is an old family property (*f*).

Request by any owner where sale is more beneficial.

**1579.** In any action in which the court has jurisdiction to order partition, if any party, whatever be the amount of his interest, requests a sale (*g*), a sale and distribution of the proceeds may be ordered in the discretion of the court (*h*), notwithstanding the dissent or disability of any other party, if it appears to the court that it will be more beneficial for the parties interested:—

(1) by reason of the nature of the property to which the action relates; or

(2) by reason of the number of the parties interested or presumptively interested therein; or

(3) by reason of the absence or disability of some of the parties; or

(4) by reason of any other circumstances (*i*).

Where persons interested in less than a moiety of the property request a sale on the ground that a sale is more beneficial than a partition, they must allege and prove the facts on which they rely (*k*); for example, that the property, if sold entire, is likely to fetch a higher price than the allotments, if sold after a partition, would fetch (*l*); or that the property consists of different particulars

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(*n*) In *Saxton* v. *Bartley* (1879), 48 L. J. (CH.) 519, where there was no difficulty in effecting a partition, and a sale of the property, of which one of the co-owners was tenant for life, entitled to enjoyment of the rents *in specie*, would have largely diminished her income, BACON, V.-C., considered that the plaintiff requesting a sale was actuated by vindictive motives, and he refused to order a sale, following the observations of HATHERLEY, L.C., in *Pemberton* v. *Barnes* (1871), 6 Ch. App. 685, at p. 695. A mere reduction of income is an element to be considered (*Langmead* v. *Cockerton* (1877), 25 W. R. 315), though it must be proved before it can be taken into consideration; a mere suggestion that it will be the probable result will not weigh with the court (*Re Langdale's Estate* (1871), 5 I. R. Eq. 572, 577; *Rowe* v. *Gray* (1876), 5 Ch. D. 263, 266).

(*a*) *Re Whitwell's Estate* (1887), 19 L. R. Ir. 45.

(*b*) *Porter* v. *Lopes* (1877), 7 Ch. D. 358, *per* JESSEL, M.R., at p. 363.

(*c*) *Re Langdale's Estate*, *supra*; *Pemberton* v. *Barnes*, *supra*, at p. 694.

(*d*) *Wilkinson* v. *Joberns* (1873), L. R. 16 Eq. 14; *Roughton* v. *Gibson* (1877), 46 L. J. (CH.) 366.

(*e*) *Porter* v. *Lopes*, *supra*.

(*f*) *Pemberton* v. *Barnes*, *supra*; see also *Porter* v. *Lopes*, *supra*, *per* JESSEL, M.R., at p. 365.

(*g*) *Re Langdale's Estate*, *supra*.

(*h*) *Re Dyer*, *Dyer* v. *Paynter* (1885), 54 L. J. (CH.) 1133, C. A.

(*i*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 3.

(*k*) *Evans* v. *Evans*, *Evans* v. *Jones* (1883), 52 L. J. (CH.) 304.

(*l*) *Pemberton* v. *Barnes*, *supra*, *per* Lord HATHERLEY, L.C., at p. 69

SECT. 4. Jurisdiction to Order Sale.

of varying values which it would be difficult to divide into portions of equal value (*m*); or that agricultural property can be sold for building purposes, and so the purchase-money will be far more than the capitalised value of the rent received (*n*); or that a large sum will have to be given for equality of partition, that is, that what is substantially a sale is inevitable (*o*); or that a small property will have to be divided up into a great number of shares (*p*).

Determining factors.

In determining whether a sale is more beneficial than a partition, the court considers only the pecuniary results (*q*), disregarding matters of sentiment, and has regard to the interest of all parties interested as a whole (*r*).

Request by any owner not proving sale more beneficial.

**1580.** In any action in which the court has jurisdiction to order partition, if a request is made by persons who are interested in less than a moiety and who do not prove that a sale will be more beneficial than a division of the property among the parties interested, the court can order a sale if, for any reason in its discretion, it thinks fit, unless the parties opposing the sale undertake to purchase the shares of those desiring it (*s*). It must not be forgotten,

In *Hubbard* v. *Hubbard* (1863), 2 Hem. & M. 38, a case before the Partition Act, 1868 (31 & 32 Vict. c. 40), PAGE WOOD, V.-C., by charging an infant's share with costs, and directing sale of the entirety with the consent of all the other parties interested, being *sui juris*, in effect ordered sale in lieu of partition, where an advantageous offer had been made for the whole property; other cases to the same effect are *Thackeray* v. *Parker* (1863), 1 New Rep. 567; *Davis* v. *Turvey* (1863), 9 Jur. (N. S.) 954; *Coventry* v. *Coventry* (1865), 34 Beav. 572; *Rickards* v. *Rickards* (1867), 36 L. J. (CH.) 176; and see *Capewell* v. *Lawrence* (1863), 8 L. T. 603; *Griffies* v. *Griffies* (1863), 8 L. T. 758.

(*m*) *Pemberton* v. *Barnes* (1871), 6 Ch. App. 685.

(*n*) *Drinkwater* v. *Ratcliffe* (1875), L. R. 20 Eq. 528, *per* JESSEL, M.R., at p. 533.

(*o*) *Porter* v. *Lopes* (1877), 7 Ch. D. 358, *per* JESSEL, M.R., at p. 366.

(*p*) *Re Dyer, Dyer* v. *Paynter* (1885), 54 L. J. (CH.) 1133, C. A.; *Gilbert* v. *White* (1879), 11 Ch. D. 78. In *Rickards* v. *Rickards* (1867), 36 L. J. (CH.) 176, following *Hubbard* v. *Hubbard*, *supra*, a sale was directed in lieu of partition, where the parties interested, twelve in number, were only entitled to two-thirds of the minerals under the estate, a fact which rendered partition impracticable.

(*q*) *Drinkwater* v. *Ratcliffe*, *supra*, at p. 533.

(*r*) *Allen* v. *Allen* (1873), 21 W. R. 842; *Fleming* v. *Crouch*, [1884] W. N. 111. In *Huddersfield Corporation* v. *Jacomb*, [1874] W. N. 80, the plaintiff being a corporation, which had acquired the land for public purposes, it was said that the interests of the public had to be considered. Sale may be ordered though forbidden by the will under which the parties claim (*Thompson* v. *Richardson* (1872), 6 I. R. Eq. 596).

(*s*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 5; *Drinkwater* v. *Ratcliffe*, *supra*; *Gilbert* v. *Smith* (1878), 8 Ch. D. 548; (1879), 11 Ch. D. 78, C. A.; S. C., *sub nom. Pitt* v. *Jones* (1880), 5 App. Cas. 651, overruling *Pemberton* v. *Barnes*, *supra*, where Lord HATHERLEY, L.C., held that the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 5, was in the nature of a proviso to *ibid.*, ss. 3, 4. It is now settled that *ibid.*, s. 5, is independent of *ibid.*, ss. 3, 4, and that under *ibid.*, s. 5, unless the parties opposing are willing to buy the shares of the parties desiring a sale, the court has a discretion to order a sale, although none of the conditions exist mentioned in *ibid.*, s. 3, and the parties desiring a sale are not interested to the extent of a moiety under *ibid.*, s. 4. This is in

however, that inasmuch as the order for sale under this provision is only to be made if the court thinks fit, some reason must be shown for preferring a sale to a partition, where the majority oppose a sale, though it is not necessary to show that it is more beneficial (*t*).

Withdrawal of request.

A request for sale may be withdrawn before the order is made, and in the event of the parties objecting to a sale offering to purchase the share of the parties desiring a sale, the latter may accept or refuse the offer at any time before the undertaking to purchase has been given and made binding (*a*).

Undertaking to purchase.

Where parties ask for a sale and other parties undertake to purchase their shares and the parties asking for sale accept the undertaking (*b*), the court may order a valuation of the shares in such manner as the court thinks fit (*c*).

Pleading.

**1581.** To give jurisdiction to order a sale it is sufficient if a sale and distribution of the proceeds is claimed, and it is not necessary in terms to claim partition, and, *vice versâ*, the court may order partition though only a sale is claimed (*d*).

Cases where sale cannot be ordered.

A sale can only be ordered in cases where the court would have jurisdiction to order partition, and accordingly a sale of lands out of the jurisdiction cannot be ordered (*e*); nor can a sale be ordered at the suit of a reversioner (*f*), nor where there are outstanding trusts for management or a subsisting trust for sale (*g*), or where the property is held in an unascertainable number of shares (*h*).

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accordance with the explanation of the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 5, given in *Drinkwater* v. *Ratcliffe* (1875), L. R. 20 Eq. 528, *per* JESSEL, M.R., at p. 530.

(*t*) *Richardson* v. *Feary* (1888), 39 Ch. D. 45; see also *Allen* v. *Allen* (1873), 42 L. J. (CH.) 839. In *Dicks* v. *Batten*, [1870] W. N. 173, and *Huddersfield Corporation* v. *Jacomb*, [1874] W. N. 80, partition was granted at the request of the majority.

(*a*) *Williams* v. *Games* (1875), 10 Ch. App. 204; *Drinkwater* v. *Ratcliffe* (1875), L. R. 20 Eq. 528, 531; *Pitt* v. *Jones* (1880), 5 App. Cas. 651, 659, 663. Where the party requesting a sale is entitled to a moiety of the property, or makes out that a sale is more beneficial to the parties interested, and so brings the case within the Partition Act, 1868 (30 & 31 Vict. c. 40), ss. 3 or 4, the parties opposing cannot, by offering to purchase his share, avoid the operation of those provisions (*Morant* v. *Godden* (1902), 18 T. L. R. 421, following *Pitt* v. *Jones*, *supra*).

(*b*) *Williams* v. *Games*, *supra*, approved in *Pitt* v. *Jones*, *supra*. There is no obligation to accept the undertaking, *Pemberton* v. *Barnes* (1871), 6 Ch. App. 685, 693, being disapproved; see note (*s*), p. 844, *ante*.

(*c*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 5. So far as regards this provision, the parties asking for sale may be owners of either more or less than a moiety, not, as in the case of sale under the same section, less than a moiety; see *Pitt* v. *Jones*, *supra*, *per* Lord WATSON, at p. 663.

(*d*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 7, removing the doubts created by *Teall* v. *Watts* (1871), L. R. 11 Eq. 213; *Aston* v. *Mercdith* (1871), L. R. 11 Eq. 601; *Holland* v. *Holland* (1872), L. R. 13 Eq. 406.

(*e*) See p. 838, *ante*.

(*f*) See p. 840, *ante*.

(*g*) See p. 841, *ante*.

(*h*) *Miles* v. *Jarvis* (No. 2) (1883), 50 L. T. 48; see p. 842, *ante*. The Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17), do not extend the jurisdiction in partition, but enable the court to order a sale in lieu of partition in the cases mentioned in the Acts. This is apparent

SECT. 4. Jurisdiction to Order Sale.

The court will, if desired, make an order for sale of part of an estate, and partition of the rest (*i*).

## SECT. 5.—*General Practice.*

### SUB-SECT. 1.—*Initial Stages.*

Sale of part.

Practice generally.

**1582.** The practice and procedure generally in a partition action is the same as that applicable to other actions in the Chancery Division, the county courts, and Chancery Courts of the Counties Palatine of Lancaster and Durham, as the case may be, subject to the following special provisions (*k*).

Writ.

**1583.** The writ may claim either partition or sale and distribution of the proceeds. In an action for partition it is sufficient to claim a sale and distribution of the proceeds; and it is not necessary to claim partition in order to obtain either sale or partition (*l*).

Statement of claim.

**1584.** The plaintiff must allege his own title (*m*) to the property in question with precision (*n*); as regards shares other than his own, he need not show a complete title in the defendants (*o*); it is sufficient that they are shown to be persons interested (*p*). The

from the opening words in the Partition Act, 1868 (31 & 32 Vict. c. 40), ss. 3, 4, and 5: "In a suit for partition, where if this Act had not been passed a decree for partition might have been made"; and the observations of BACON, V.-C., in *Pryor* v. *Pryor* (1875), L. R. 19 Eq. 595, at p. 598, that these words mean only "any partition suit," must be understood to mean any properly constituted partition suit, *i.e.*, one in which a decree could be made. But an order for sale of an undivided interest in land has been made although partition thereof could not be ordered (*Holland* v. *Holland* (1872), L. R. 13 Eq. 406, where, however, the point does not appear to have been raised).

(*i*) *Roebuck* v. *Chadebet* (1869), L. R. 8 Eq. 127; see *Pennington* v. *Dalbiac* (1870), 18 W. R. 684. In *Allen* v. *Allen* (1873), 42 L. J. (CH.) 839, an order was made for a reference to chambers to partition so much of the property as it might be found could practically be partitioned, and to sell that which could not be partitioned.

(*k*) See, generally, titles PLEADING; PRACTICE AND PROCEDURE.

(*l*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 7, abrogating the practice laid down in *Teall* v. *Watts* (1871), L. R. 11 Eq. 213, and *Holland* v. *Holland*, *supra* (not following *Aston* v. *Meredith* (1871), L. R. 11 Eq. 601), that in order to obtain an order for sale, partition must be claimed.

(*m*) The reason is that he is offering to the defendant a conveyance of property, as a vendor. The statement of claim must therefore contain the necessary allegations showing the plaintiff's title (R. S. C., Ord. 19, r. 4). For a form of statement of claim, see R. S. C., Appendix C., sect. II., No. 13; Chancery of Lancaster Rules, Appendix C., No. 14; and for a form of particulars of claim in the county court, see County Court Forms, 1903, No. 324.

(*n*) Where the property is misdescribed in the statement of claim, the error being found out after the final order is made, leave to amend may be given with directions post-dating the final order, as of a date subsequent to the amendment (*Winkley* v. *Winkley* (1881), 44 L. T. 572).

(*o*) *Baring* v. *Nash* (1813), 1 Ves. & B. 551.

(*p*) *Calmady* v. *Calmady* (1795), 2 Ves. 568, explained by Lord ELDON, L.C., in *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, at p. 552; Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9: *e.g.*, in *Mason* v. *Keays* (1898), 78 L. T. 33, the defendant was a lessee merely.

title alleged should show the proper unities of title of the co-owners, that is, that each is entitled to an undivided interest in the whole (*q*), and that their shares are of ascertainable proportions (*r*).

Grounds for requesting sale.

Where the plaintiff requests a sale in lieu of partition, he should state the grounds on which he desires a sale so as to bring the case within one of those in which the court has a discretion or a duty to order sale. For example, he should state the nature of the property to which the action relates, or the number of the parties interested or presumptively interested therein, or the absence or disability of some of those parties, or any circumstances by reason whereof a sale and distribution of the proceeds is more beneficial than a division of the property among the parties interested; or he should state that he is interested to the extent of a moiety (*s*).

Defence.

In their defences the defendants should make no unnecessary denials of title (*t*); and in a simple case, even a guardian *ad litem* of an infant need not put in a defence at all (*a*).

In default of appearance or defence.

**1585.** In default of appearance or defence, the action in the Chancery Division may be set down on a motion for judgment as a short cause (*b*). If then the defendants are *sui juris*, the usual judgment (*c*) is pronounced without further proof of title, the allegations in the statement of claim being taken as admitted. If, however, the defendants or any of them are under disability, the plaintiff's title must be proved; such proof is given by means of an affidavit concisely verifying the statement of claim, and the guardian *ad litem* of an infant (*d*), or person of unsound mind (*e*), may consent to proof being given by affidavit.

When dispensed with.

Where the material allegations in the statement of claim are admitted, the usual order will be made on motion for judgment without proof of title (*f*).

(*q*) *Miller* v. *Warmington* (1830), 1 Jac. & W. 484, 493; *O'Hara* v. *Strange* (1847), 11 I. Eq. R. 262.

(*r*) *Miles* v. *Jarvis* (No. 2) (1883), 50 L. T. 48.

(*s*) His allegations should indicate the facts bringing the case within the Partition Act, 1868 (31 & 32 Vict. c. 40), ss. 3, 4, or 5 (*Evans* v. *Evans*, *Evans* v. *Jones* (1883), 52 L. J. (CH.) 304); see p. 842, *ante*.

(*t*) *Morris* v. *Timmins* (1838), 1 Beav. 411; *Pascoe* v. *Swan* (1859), 27 Beav. 508; *Wilkinson* v. *Castle* (1868), 37 L. J. (CH.) 467.

(*a*) *Re Fitzwater*, *Fitzwater* v. *Waterhouse* (1882), 52 L. J. (CH.) 83.

(*b*) R. S. C., Ord. 27, r. 11.

(*c*) See p. 848, *post*.

(*d*) *Knatchbull* v. *Fowle* (1876), 1 Ch. D. 604; affidavit evidence proving the plaintiff's title may be dispensed with where there is a defendant who is *sui juris* interested in the same share as the infant (*Ripley* v. *Sawyer* (1886), 31 Ch. D. 494; *Re Fitzwater*, *Fitzwater* v. *Waterhouse*, *supra*).

(*e*) *Piggott* v. *Toogood*, [1904] W. N. 130.

(*f*) *Gilbert* v. *Smith* (1876), 2 Ch. D. 686, C. A. In *Burnell* v. *Burnell* (1879), 11 Ch. D. 213, JESSEL, M.R., made an immediate order for sale in a simple case on admissions in the pleadings, without waiting for the usual inquiries to be answered. Apart, however, from special circumstances rendering an early sale desirable, or under R. S. C., Ord. 51, r. 1A, this practice is not now usual; see *Re Norton*, *Norton* v. *Norton*, [1900] 1 Ch. 101, 102.

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SUB-SECT. 2.—*Judgment and Interlocutory*

Usual judgment.

**1586.** Actions for partition, or sale in lieu of partition, usually come to a hearing before the rights of the parties interested have been ascertained.

Accordingly, the usual judgment for partition, or sale in lieu of partition, directs the accounts and inquiries to be taken and made which are necessary to ascertain the rights of the parties interested.

The accounts and inquiries usually directed are:—(1) Who are the persons interested in the property, and for what estates and interests, and in what shares and proportions, and whether they are parties to the action; and also the following inquiries, if and so far as any of them are applicable, that is to say: (2) an inquiry what incumbrances affect the entirety, or any and what parts thereof (*g*), and (if sale is ordered) whether such incumbrancers consent to a sale; and other inquiries as to title (*h*); (3) an account of the moneys (if any) expended by any and which of the parties interested in permanent improvements; (4) an inquiry to what extent the present value of the property has been increased by such expenditure; (5) an inquiry what would be a proper occupation rent in respect of any part of the property to be dealt with which is occupied by any of the parties; and (6) an inquiry as to any waste committed, and the value of any timber felled or minerals gotten by any of the parties.

Inquiry as to persons interested.

**1587.** No unconditional order for partition or sale can be made until the inquiry has been answered as to the persons interested and the nature of their interests, and whether they are parties to the action (*i*). This inquiry can be dispensed with only in exceptional circumstances.

In cases where the title is simple, the property of small value, and all parties interested are before the court, the court will, on proof of these facts by affidavit, dispense with the usual inquiries as to the persons interested, and direct an immediate partition, or sale in lieu of partition (*k*).

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(*g*) *Fawthrop* v. *Stocks*, [1884] W. N. 118; and see 2 Seton, Judgments and Orders, 6th ed., pp. 1882 *et seq.*; *Waite* v. *Bingley* (1882), 21 Ch. D. 674, 683; *Davenport* v. *King* (1883), 49 L. T. 92; *Graham* v. *Clinton* (*Lord*) (1899), 81 L. T. 717; *Green* v. *Hiatt* (1900), 44 Sol. Jo. 501. As to judgment and orders generally, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 175 *et seq.*

(*h*) In *Graham* v. *Clinton* (*Lord*), *supra*, an inquiry, said to be unusual, was made as to tenancies.

(*i*) *Buckingham* v. *Sellick* (1870), 22 L. T. 370; *Powell* v. *Powell* (1874), 10 Ch. App. 130, 135. In the latter case, where a sale had taken place before the certificate, the purchaser was discharged from his purchase. This was before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 70 of which protects a purchaser purchasing under an irregular order of the court; see title SALE OF LAND. Where a good title could be made independently of the Partition Acts, the purchaser was not released (*Rawlinson* v. *Miller* (1875), 1 Ch. D. 52). The interests of the parties were always ascertained by the court, and under the old practice this was never left to the Commissioners (*Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1808), 17 Ves. 533, 543; *Knox* v. *Mayo* (1858), 7 I. Ch. R. 563).

(*k*) *Burnell* v. *Burnell* (1879), 11 Ch. D. 213; *Re Stedman*, *Coombe*

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Form of order where all parties interested present.

**1588.** If parties together claiming to be entitled to the entirety are before the court, the order may be in the alternative—if it is certified that all the persons interested are parties to the action, then for partition or sale, as the case may be; and if the parties are not so entitled, then for liberty to apply, after it has been certified that all the persons interested either are parties to the action, or have been served with notice of the judgment, or that service has been dispensed with (*l*).

Order where parties interested not all present.

**1589.** In cases where all the persons interested are not parties to the action, no order for partition or sale can be made at the hearing even conditionally (*m*). In such a case liberty to apply for partition or sale is given after it has been certified that all persons interested either are parties to the action or have been served with notice of the judgment or that service has been dispensed with (*a*). The order for partition or sale is made in chambers after the inquiry as to the parties interested has been answered (*b*).

Inquiries where sale is requested.

**1590.** If a sale is claimed on the ground that it is more beneficial than partition, the judgment will direct an inquiry whether it is more beneficial to the persons entitled that the property should be sold, and the proceeds distributed, or that a division of the property be made (*c*). The court will not make any declaration whether a sale is more beneficial (*d*), unless all persons interested are parties

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v. *Vincent*, [1888] W. N. 119; *Willis* v. *Willis* (1890), 61 L. T. 610 (where a sale wholly out of court was ordered, the order containing the necessary allegations required by R. S. C., Ord. 51, r. 1A); *Crook* v. *Crook*, [1890] W. N. 26. But where the title is complicated (*Wood* v. *Gregory* (1889), 43 Ch. D. 82; *Hawkins* v. *Herbert* (1889), 60 L. T. 142), or the property considerable (*Wood* v. *Gregory*, *supra*; *Goodacre* v. *Goodacre*, [1888] W. N. 138), the court will not dispense with the usual inquiries. All the reported cases where inquiries have been dispensed with are cases where sale was ordered in lieu of partition.

(*l*) *Senior* v. *Hereford* (1876), 4 Ch. D. 494; and see *Waite* v. *Bingley* (1882), 21 Ch. D. 674; *Re Norton*, *Norton* v. *Norton*, [1900] 1 Ch. 101, 102. In *Wood* v. *Gregory*, *supra*, only liberty to apply in chambers was given; see the form of order in *Harper* v. *Bird* (1875), 32 L. T. 428, as modified in *Mildmay* v. *Quicke* (1875), L. R. 20 Eq. 537; the order so modified being followed in *Lawe* v. *Stoney*, [1876] W. N. 141.

(*m*) *Mildmay* v. *Quicke*, *supra*.

(*a*) *Gilbert* v. *Smith* (1876), 2 Ch. D. 686, C. A.; *Sykes* v. *Schofield* (1880), 14 Ch. D. 629.

(*b*) *Powell* v. *Powell* (1874), 10 Ch. App. 130, where it was pointed out that the words "on further consideration" in the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9, are used in a popular sense, as referring to any consideration which the action receives after the inquiries have been answered; see *Buckingham* v. *Sellick* (1870), 22 L. T. 370; *Mildmay* v. *Quicke*, *supra*.

(*c*) *Waite* v. *Bingley*, *supra* (see the order, *ibid.*, at p. 683); *Powell* v. *Powell*, *supra*. The certificate of the master that a sale is more beneficial than a division of the property among the parties entitled does not bind the court to order partition when the majority are opposed or other considerations give the court a discretion under the Partition Acts (*Allen* v. *Allen* (1873), 42 L. J. (CH.) 839).

(*d*) *Re Hardiman*, *Pragnell* v. *Batten* (1880), 16 Ch. D. 360. The declaration will be made when it is proved at the hearing that all persons interested

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to the action. If on the other hand it is alleged that a sale is requested by parties interested in a moiety or upwards, the answer to the inquiry as to persons interested will ascertain whether this be the fact.

Form of order accordingly.

The judgment may direct a sale conditionally, that is to say, if the answer to the inquiries is that all persons interested are parties and a sale is more beneficial, or, as the case may be, that all the persons interested are parties, and those interested to the extent of a moiety or upwards request a sale (*e*). More usually, however, and in every case in the event of some persons interested not being parties to the action, liberty is given to apply for a sale when the inquiries are answered (*f*).

Inquiry where infants are interested.

**1591.** Where infants are interested the court will direct an inquiry whether a sale is more beneficial to them than partition in cases where sale is requested on their behalf (*g*), and the court may direct such an inquiry even in cases where only partition is asked for (*h*).

The court will not make an order for sale on the request of an infant unless satisfied as to the answer to this inquiry (*i*).

Appointment of a receiver.

**1592.** The court has jurisdiction to appoint a receiver until the hearing of the action or until further order, although there is no exclusive occupation by any party, and it will do so whenever it is just and convenient (*k*). If a party to the action is in occupation, any other party may obtain a receiver of his share of the rents and profits (*l*), and in some cases of the whole (*m*).

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are parties to the action (*Young* v. *Young* (1870), L. R. 13 Eq. 175, n.; *France* v. *France* (1871), L. R. 13 Eq. 173; *Chubb* v. *Pettipher*, [1872] W. N. 110; *Willis* v. *Willis* (1889), 61 L. T. 610); but in practice this is seldom the case.

(*e*) *Waite* v. *Bingley* (1882), 21 Ch. D. 674, 683; *Davenport* v. *King* (1883), 49 L. T. 92. Various forms of orders applicable to different circumstances will be found in 2 Seton, Judgments and Orders, 6th ed., pp. 1853 *et seq.* For a form of order for sale in the county court, where sale is more beneficial than partition, see County Court Forms, 1903, No. 329, and where the plaintiff is interested in a moiety, *ibid.*, No. 330. In *Davis* v. *Ingram*, [1897] 1 Ch. 477, an order for sale was made in the event of various alternative answers to inquiries; compare *Underwood* v. *Stewardson* (1872), 26 L. T. 688.

(*f*) *Sykes* v. *Schofield* (1880), 14 Ch. D. 629 (a case where the parties requesting a sale were interested in less than a moiety); *Re Hardiman*, *Pragnell* v. *Batten* (1880), 16 Ch. D. 360 (owners of only two-fifths before the court); see *Gilbert* v. *Smith* (1876), 2 Ch. D. 686, C. A.

(*g*) *Davis* v. *Ingram*, *supra*.

(*h*) *Green* v. *Hiatt* (1900), 44 Sol. Jo. 501.

(*i*) *Rimington* v. *Hartley* (1880), 14 Ch. D. 630, 632; see also Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6.

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); *Porter* v. *Lopes* (1877), 7 Ch. D. 358, where the party in exclusive possession elected to pay an occupation rent (see the text, *infra*, and p. 851, *post*) in lieu of having a receiver appointed. *Sandford* v. *Ballard* (No. 2) (1864), 33 Beav. 401, was a case before the Judicature Act, 1873 (36 & 37 Vict. c. 66), where one tenant in common was in receipt of the rents, and the tenant was colluding with him. Instead of appointing a receiver, the court may require security from the co-owners in exclusive occupation to account for their share of the rents to the other co-owners (*Street* v. *Anderton* (1793), 4 Bro. C. C. 414). As to receivers generally, see title RECEIVERS.

(*l*) *Sandford* v. *Ballard* (1861), 30 Beav. 109.

(*m*) *Porter* v. *Lopes*, *supra*.

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Accounts of rents and expenditure.

**1593.** Accounts become necessary where the parties do not stand on an equal footing with regard to the enjoyment of the property or their expenditure on it (*n*). So where one party has been in receipt of more than his share of rents and profits, an account is directed at the instance of any other party (*o*).

Occupation rent.

**1594.** Where one party has been in exclusive occupation, the court, if desired, will order that he shall be charged an occupation rent (*p*); if he does not agree to pay such a rent a receiver will be appointed (*q*), or an inquiry will be granted as to what is a reasonable rent to be paid (*r*). The rent is not, however, set off against a legal mortgagee of the share of the person in occupation (*s*). A party ordered to pay such a rent will be allowed all sums properly expended by him in repairs (*a*).

Expenditure on improvements.

**1595.** A co-owner who has expended money in improvements may obtain an allowance for it (*b*). This allowance is not reimbursement of the amount expended (*c*), but extends to the amount by which the value of the property, estimated at the commencement of the action, has been increased, not exceeding the amount expended (*d*). The co-owner is therefore entitled to have an

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(*n*) With regard to receipts of rents and profits, the action of account was given to a co-owner by stat. (1705) 4 & 5 Anne, c. 3, s. 27; otherwise the only remedy was, and is, an action for partition; see *Thomas* v. *Thomas* (1850), 5 Exch. 28. With regard to expenditure on the property, the action of partition is at the present time the only remedy (*Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A., *per* COTTON, L.J., at p. 67). Allowance for expenditure may, however, be obtained in any action where distribution of the property, or the proceeds thereof, is to be made among the persons entitled, the rights being the same as those enforceable in a partition action (*Re Cook's Mortgage, Lawledge* v. *Tyndall*, [1896] 1 Ch. 923, where the surplus on a sale by a mortgagee was distributed among persons entitled in common to the equity of redemption); and see p. 852, *post*. Except for this, and apart from agreement, a co-owner has no right of contribution from his co-owners (*Leigh* v. *Dickeson*, *supra*), nor any lien on the property, for his expenditure (*Kay* v. *Johnson* (1856), 21 Beav. 536; *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552); he may, however, have rights in another capacity, *e.g.*, as mortgagee or trustee (*ibid.*; see titles MORTGAGE, p. 65, *ante*; TRUSTS AND TRUSTEES); and see *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.

(*o*) *Drury* v. *Drury* (1630), 1 Rep. Ch. 26; *Lorimer* v. *Lorimer* (1820), 5 Madd. 363; *Griffies* v. *Griffies* (1863), 8 L. T. 758; *Burnell* v. *Burnell* (1879), 11 Ch. D. 213; *Pascoe* v. *Swan* (1859), 27 Beav. 508.

(*p*) *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586; *Pascoe* v. *Swan* (1859), 27 Beav. 508; *Teasdale* v. *Sanderson* (1864), 33 Beav. 534. In *Griffies* v. *Griffies*, *supra*, the court refused to make such an order.

(*q*) *Porter* v. *Lopes* (1877), 7 Ch. D. 358.

(*r*) *Turner* v. *Morgan* (1803), 8 Ves. 143; see p. 852, *post*.

(*s*) *Hill* v. *Hickin*, [1897] 2 Ch. 579, where STIRLING, J., did not follow the cases of *Graham* v. *Cole* (1873), cited in 2 Seton, Judgments and Orders, 5th ed., p. 1541, and his own previous decision in *Heckles* v. *Heckles*, [1892] W. N. 188, but distinguished the latter case as being the case of an equitable mortgage, though he was "not sure that that case was well decided."

(*a*) *Williams* v. *Williams* (1899), 68 L. J. (CH.) 528, followed in *Kenrick* v. *Mountsteven* (1899), 48 W. R. 141.

(*b*) *Swan* v. *Swan* (1820), 8 Price, 518; *Parker* v. *Trigg*, [1874] W. N. 27; see note (*n*), *supra*.

(*c*) *Watson* v. *Gass* (1881), 51 L. J. (CH.) 480; see p. 852, *post*.

(*d*) *Watson* v. *Gass*, *supra*; *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461; *Williams* v. *Williams*, *supra*.

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Improvements and occupation rent.

account taken of his expenditure, and an inquiry made as to the corresponding increase in value of the property (*e*). Expenditure by the predecessors in title of the party (*f*), but not by a mere stranger (*g*), will be included. The accounts for occupation rent and for improvements are reciprocal; an owner in occupation, if made accountable for rent, is given allowance for improvements (*h*), and he is not given that allowance unless he is charged with the rent (*i*).

Waste.

**1596.** Inquiries may be directed as to acts of waste done on the property, as by felling timber or getting minerals, and accounts will be taken accordingly (*k*). The court may grant an injunction to prevent waste (*l*).

SUB-SECT. 3.—*Service of Notice of Judgment.*

Service of notice of judgment.

**1597.** All persons interested, not already parties, must be served with notice of the judgment, and are then bound by and deemed to be parties to the proceedings (*m*). Any such person may, within the time limited by rules of court (*n*), apply to the court to discharge, vary, or add to the order (*o*).

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(*e*) *Parker* v. *Trigg*, [1874] W. N. 27; *Watson* v. *Gass* (1881), 51 L. J. (CH.) 480; *Williams* v. *Williams* (1899), 68 L. J. (CH.) 528, followed in *Kenrick* v. *Mountsteven* (1899), 48 W. R. 141.

(*f*) *Williams* v. *Williams*, *supra*.

(*g*) *Heath* v. *Bostock* (1835), 5 L. J. (EX. EQ.) 20 (expenditure by the husband of a tenant for life of one share). In the New South Wales case of *Boulter* v. *Boulter* (1898), 19 New South Wales Reports (Equity), 135, expenditure by a lessee before his title as co-owner accrued was allowed. *Aliter*, where the expenditure is not by a lessee; see *Foster* v. *Emerson* (1854), 5 Grant, 135 (by devisees, during their testator's lifetime); *Lasby* v. *Crewson* (1891), 21 Ontario Reports, 255 (by remainderman, by agreement with tenant for life).

(*h*) *Pascoe* v. *Swan* (1859), 27 Beav. 508.

(*i*) *Teasdale* v. *Sanderson* (1864), 33 Beav. 534; and see *Rice* v. *George* (1873), 20 Grant, 221, 226.

(*k*) *Cooper* v. *Fisher* (1841), cited in 3 Seton, Judgments and Orders, 6th ed., p. 1886. A tenant in common is not, however, liable in an action for waste, except for acts destroying the inheritance (*Martyn* v. *Knowllys* (1799), 8 Term Rep. 145; *Jacobs* v. *Seward* (1869), L. R. 4 C. P. 328). The inquiry as to waste, therefore, appears to be granted only in special circumstances (*Griffies* v. *Griffies* (1863), 8 L. T. 758; see *Rice* v. *George*, *supra* (where the co-owner asked for allowance for improvements). As to waste generally, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq*; SETTLEMENTS.

(*l*) *Bailey* v. *Hobson* (1869), 5 Ch. App. 180, where the injunction was refused, the defendant taking only profits to which he was entitled (*Hughes* v. *D'Arcy* (1873), 8 I. R. Eq. 71). As to the remedy by injunction generally, see title INJUNCTION, Vol. XVII., pp. 197 *et seq*.

(*m*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9; and see title JUDGMENTS AND ORDERS, Vol. XVII., pp. 208, 209.

(*n*) In the High Court, one month (R. S. C., Ord. 16, r. 40); in the county courts, at the next sitting of the court or by leave of the judge at any subsequent sitting (County Court Rules, 1903, Ord. 3, r. 27); see title COUNTY COURTS, Vol. VIII., pp. 534, 675; and in the Court of Chancery of Lancaster, or the Court of Chancery of Durham, one month (Chancery of Lancaster Rules, 1884, Ord. 16, r. 41; Chancery of Durham Rules, Ord. 15, r. 41).

(*o*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 9.

The court may, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order dispense with service of notice of the judgment on any person or class of persons mentioned in the order, where it appears that such notice cannot be served, or cannot be served without expense disproportionate to the value of the property to which the action relates (*p*).

Dispensing with service.

**1598.** Instead of service of notice of the judgment or order, the court may direct advertisements to be published, at such times and in such manner as the court thinks fit, calling upon all persons claiming to be interested in the property, who have not been so served, to come in and establish their respective claims in respect thereof in chambers within a time named in the advertisement (*a*). After the expiration of that time, all persons so claiming are bound as if served with notice of the judgment (*b*).

Advertisements.

Notice of judgment and advertisements cannot, however, both be dispensed with (*c*), except in the county court (*d*), where notice and advertisements may be wholly dispensed with, and the judge may order that the parties concerned shall be bound as if served, such order being effectual, except where obtained by fraud or non-disclosure of facts (*e*).

Dispensing with advertisement.

### SUB-SECT. 4.—*Vesting Orders.*

**1599.** In making an order for partition, or sale in lieu of partition, the court may declare that any of the parties to the action are trustees of the land, or any part thereof, and may declare that the interests of unborn persons who might claim under any party to the action or under the will or voluntary settlement of any person deceased who was, during his lifetime, a person interested, are the interests of persons who, on coming into existence, would be trustees, and the court may thereupon make a vesting order relating to their rights (*f*).

Vesting order.

The vesting order has the effect of a conveyance or release by the

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(*p*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 3. For an order made on the hearing giving liberty to apply for an order dispensing with service, see *Re Hardiman, Pragnell* v. *Batten* (1880), 16 Ch. D. 360.

(*a*) For form of order in a county court, see County Court Forms, 1903, No. 327.

(*b*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 3. In terms the Act only appears to authorise a sale in such cases.

(*c*) *Hacking* v. *Whalley* (1882), 51 L. J. (CH.) 944; *Phillips* v. *Andrews* (1887), 56 L. T. 108, where KAY, J., disagreed with the decision of MALINS, V.-C., in *Barton* v. *Barton*, [1877] W. N. 23, dispensing with both notice of judgment and advertisement. The unrestricted powers to dispense with notice contained in R. S. C., Ord. 55, r. 35, relating to the High Court, and in Chancery of Lancaster Rules, Ord. 48, r. 32, do not apply to actions for partition, inasmuch as the procedure is laid down by the Partition Act, 1876 (39 & 40 Vict. c. 17), a statute subsequent to the Acts under which those rules take effect; see *Phillips* v. *Andrews, supra.*

(*d*) County Court Rules, 1903, Ord. 3, r. 30, which, it would appear, the decision in *Phillips* v. *Andrews, supra,* does not affect.

(*e*) County Court Rules, 1903, Ord. 3, r. 31.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 31, repealing (*ibid.*, s. 51, Sched.) the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 7. As to such vesting orders, see, further, title TRUSTS AND TRUSTEES.

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person or persons to whom the order relates (*g*), and in case of copyholds, if made with the consent of the lord or lady of the manor, vests the land without surrender or admittance (*h*).

Appointment of person to convey.

**1600.** If more convenient, instead of a vesting order, a person may be appointed to convey the land or release the contingent right in question (*i*), the assurance so made being effectual accordingly. In case of copyholds, the usual payments on transfer *inter vivos* are necessary (*k*).

When such orders are available.

**1601.** Such orders may be obtained where the parties are very numerous (*l*), or where a share is vested in an infant (*m*), a person out of the jurisdiction (*n*), or persons to come into existence, entitled under a limitation to a class (*o*), or as being the heirs of a living person (*p*), or where one of the persons interested is of unsound mind, whether so found or not (*a*).

SUB-SECT. 5.—*Costs.*

Discretion of court.

**1602.** All the costs of an action for partition or sale in lieu of partition are in the discretion of the court (*b*). Such discretion is exercised according to the following general rules :—

General rule.

In the absence of special circumstances, the costs are payable by

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 32.
(*h*) *Ibid.*, s. 34.
(*i*) *Ibid.*, s. 33.
(*k*) *Ibid.*, s. 34.
(*l*) *Shepherd* v. *Churchill* (1857), 25 Beav. 21 (in this case the shares of the parties were very minute and complicated, and the court, to save expense, and instead of directing a conveyance of the several shares, declared each of the parties trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee under the Trustee Acts, with directions to convey to the several parties their allotted shares). In *Lees* v. *Coulton*, *Lees* v. *Clutton* (1875), L. R. 20 Eq. 20, the court declared the parties to the suit were, and their unborn issue on coming into existence would be, trustees of their shares and interests within the meaning of the Trustee Act, 1850 (13 & 14 Vict. c. 60), but declined to make an order appointing new trustees until the first order was drawn up.
(*m*) *Higgs* v. *Dorkis* (1872), L. R. 13 Eq. 280 (vesting order) ; *Stanley* v. *Wrigley* (1855), 3 Sm. & G. 18 (appointment of person to convey) ; see also *Bowra* v. *Wright* (1851), 4 De G. & Sm. 265, *sub nom. Bowra* v. *Whight*, 15 Jur. 981 ; *St. Leger* v. *Ferguson* (1860), 10 I. Ch. R. 488 ; *Willis* v. *Willis* (1889), 61 L. T. 610. The former practice was to respite conveyance until the infant attained twenty-one (*Brook* (*Lord*) v. *Hertford* (*Lord*) (1729), 2 P. Wms. 518 ; *Tuckfield* v. *Buller* (1753), Amb. 197).
(*n*) *Beckett* v. *Sutton* (1882), 19 Ch. D. 646 ; *Caswell* v. *Sheen* (1893), 69 L. T. 854.
(*o*) *Lees* v. *Coulton*, *Lees* v. *Clutton*, *supra*.
(*p*) *Basnett* v. *Moxon* (1875), L. R. 20 Eq. 182.
(*a*) Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1. According to the law before this Act the application for such an order must have been made in lunacy, except where the person so interested was an infant or out of the jurisdiction, in which cases the High Court had power to make a vesting declaration apart from an appointment of new trustees ; see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 31 ; Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 ; Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 2. *Re M.*, [1899] 1 Ch. 79 ; *Re Watson* (1888), 58 L. T. 509, C. A. ; *Caswell* v. *Sheen* (1893), 69 L. T. 854 ; *Re Arrowsmith's Trusts*, *Re Thompson* (1858), 4 Jur. (N. S.) 1123.
(*b*) By the Partition Act, 1868 (31 & 32 Vict. c. 40), the costs up to

the parties in proportion to their interests in the property, so that in case of a sale the costs are paid out of the proceeds before any division among the parties interested is made (*c*).

Only one set of costs is allowed in respect of each share, and as between a party entitled to a share and his incumbrancer, the latter takes the set of costs allowed (*d*). Persons entitled.

In a contested case, where a sale is refused (*e*), or not asked, and a partition is objected to by the defendants (*f*), no costs are given up to the hearing. Contest.

Where there is adverse litigation in relation to one share (*g*), or the titles *inter se* of persons interested in a share are determined in the action (*h*), the costs are borne by such share. Litigated title.

Where costs have been occasioned by an unnecessary denial of title or an unwarranted claim of title (*i*), or a frivolous case has been set up, the offending party will be ordered to pay the costs so occasioned (*k*). Unnecessary costs.

In the case of a party under disability, the costs may be made a charge on his share of the proceeds of sale (*l*). Party under disability.

**1603.** Solicitor and client costs are only given by consent (*m*). Solicitor and client.

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the hearing are in the discretion of the court, and in view of R. S. C., Ord. 65, r. 1, and the practice before that Order, the court has full discretion to deal with the costs as it thinks just (*Hills* v. *Archer* (1904), 91 L. T. 166; *Simpson* v. *Ritchie* (1873), L. R. 16 Eq. 103). The rule before 1868 was that no costs were given up to the hearing, that the costs of issuing, executing and confirming the partition were borne by the parties in proportion to the values of their respective interests, and that there were no costs of the subsequent proceedings (*Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, 557).

(*c*) *Cannon* v. *Johnson* (1870), L. R. 11 Eq. 90; *Bowes* v. *Bute* (*Marquis*) (1879), 27 W. R. 750 (cases of partition); *Ball* v. *Kemp-Welch* (1880), 14 Ch. D. 512; *Belcher* v. *Williams* (1890), 45 Ch. D. 510; *Catton* v. *Banks*, [1893] 2 Ch. 221; *Graham* v. *Clinton* (*Lord*) (1899), 81 L. T. 717 (cases of sale in lieu of partition); and see the cases cited in note (*d*), *infra*.

(*d*) *Catton* v. *Banks*, *supra*; *Ancell* v. *Rolfe*, [1896] W. N. 9; *Re Vase*, *Langrish* v. *Vase* (1901), 84 L. T. 761; *Caroll* v. *Harrison*, [1910] W. N. 104, not following *Belcher* v. *Williams*, *supra*, in this respect.

(*e*) *Richardson* v. *Feary* (1888), 39 Ch. D. 45.

(*f*) *Hills* v. *Archer*, *supra*; in this case and in *Richardson* v. *Feary*, *supra*, there was a contest, and no advantage was taken of the Partition Acts.

(*g*) *Hawkes* v. *Hawkes* (1890), 63 L. T. 488; *Re Mahony's Estate*, [1909] 1 I. R. 132.

(*h*) *Jennings* v. *Foster*, [1884] W. N. 200; compare R. S. C., Ord. 65, r. 14B; *Re Whittaker*, *Denison-Pender* v. *Evans*, [1911] 1 Ch. 214.

(*i*) *Hill* v. *Fullbrook* (1822), Jac. 574; *Morris* v. *Timmins* (1838), 1 Beav. 411; *Lyne* v. *Lyne* (1856), 21 Beav. 318; *Wilkinson* v. *Castle* (1868), 37 L. J. (CH.) 467.

(*k*) *Porter* v. *Lopes* (1877), 7 Ch. D. 358, 367.

(*l*) *Smith* v. *Birch* (1868), 18 L. T. 174; *Osborn* v. *Osborn* (1868), L. R. 6 Eq. 338; and see *Thackeray* v. *Parker* (1863), 8 L. T. 602; *Singleton* v. *Hopkins* (1855), 1 Jur. (N. S.) 1199 (lunatic). Similar orders were made in *Young* v. *Young* (1870), L. R. 13 Eq. 175, n., and *France* v. *France* (1871), L. R. 13 Eq. 173. In *Davy* v. *Wietlisbach* (1872), L. R. 15 Eq. 269, however, WICKENS, V.-C., declined to follow these two cases, and made no order as to costs, but reserved further consideration, with liberty to apply.

(*m*) *Ball* v. *Kemp-Welch*, *supra*. As to taxation of solicitors' costs, see title SOLICITORS.

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The costs of an unsuccessful appeal are not costs in the action, but follow the event (*n*).

In the county court no solicitor other than the solicitor having the conduct of the sale is entitled to any costs incurred after the order for sale (*o*).

Charging orders.

The solicitors for any party may obtain a charging order on his share of the proceeds of sale, but not generally on the entirety (*p*) and a stop order; but the costs of obtaining such an order must be borne by the solicitors themselves (*q*).

## SECT. 6.—*Practice on Judgment for Partition.*

### SUB-SECT. 1.—*General Considerations.*

Right to partition.

**1604.** In the absence of a request for sale by any of the parties interested in the property, the court has no discretion, and is bound to order partition; the plaintiff, subject to proof of his title, is, in such case, entitled to partition as a matter of right (*r*).

Nature of property.

**1605.** Except where the property to be partitioned consists of one entire thing, as, for example, a single house (*s*), or set of chambers (*t*), it is not necessary that on partition every part of the estate should be divided, or an aliquot share of each part given to each co-owner. In the case of a number of houses of different value, houses of as near as possible equal value will be allotted to each of the co-owners, with sums for equality of partition given to those whose houses are of less value (*a*).

Convenience of co-owners.

**1606.** In making partition the court will take into consideration the family circumstances and convenience, and where a property to be partitioned consists of mansion, park and land, will allot the mansion-house and park to the owners of the largest share, and land as nearly as possible of equivalent value to the owners of the

(*n*) *Morant* v. *Godden* (1902), 18 T. L. R. 421.

(*o*) County Court Rules, 1903, Ord. 9, r. 11.

(*p*) *Lloyd* v. *Jones* (1879), 40 L. T. 514.

(*q*) *Mildmay* v. *Quicke* (1877), 6 Ch. D. 553.

(*r*) *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508: in his judgment NORTH, J. (*ibid.*, at p. 513), cites CLARKE, M.R., in *Parker* v. *Gerard* (1754), Amb. 236: "A bill for partition is a matter of right and there is no instance of not succeeding in it, but where there is no proof of title in plaintiff." The strongest arguments of inconvenience have not prevailed against this right; see *Warner* v. *Baynes* (1750), Amb. 589 (a partition of Cold-bath fields, including the Cold-bath and water rents in respect of the pipes laid by the New River Company); *Turner* v. *Morgan* (1803), 8 Ves. 143 (where a house was ordered to be partitioned); *Jope* v. *Morshead* (1843), 6 Beav. 213; *Hills* v. *Archer* (1904), 91 L. T. 166. As to the jurisdiction to order sale in lieu of partition, see p. 842, *ante*.

(*s*) *Warner* v. *Baynes*, *supra*; *Turner* v. *Morgan*, *supra*; and see *Benson's Case* (undated), cited by Mr. Romilly, in his argument in *Turner* v. *Morgan*, *supra*, where a partition was made by building up a wall in the middle of a house.

(*t*) *Burley* v. *Moore* (1827), 5 L. J. (O. S.) (CH.) 120 (a set of chambers where a doorway was given to one co-owner and a right of passage through the doorway to the other).

(*a*) *Clarendon* (*Earl*) v. *Hornby* (1718), 1 P. Wms. 446; *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586; *Peers* v. *Needham* (1854), 19 Beav. 316.

other shares (*b*), and in making the allotments will take into consideration the fact that the allottees have land adjoining or contiguous to that proposed to be allotted to them (*c*). Where the property has been used for business purposes (*d*), the court can impose on the allottees of portions of the property obligations securing the business advantages which were enjoyed before partition (*e*).

SUB-SECT. 2.—*Methods of Effecting Partition.*

**1607.** There are three methods which the order may adopt for effecting the partition (*f*), namely, by laying proposals before the judge in chambers for his sanction, by proceedings out of court, or by commission. Methods available.

**1608.** Most commonly the partition is made in chambers, the parties being given liberty to lay proposals before the judge in chambers (*g*), even where any party is under disability (*h*). The proposals are supported by affidavits of competent surveyors containing a valuation of the various lots respectively proposed to be allotted to the parties, together with an affidavit, where a party is under disability, that the proposals are for his benefit (*i*). In chambers.

**1609.** Secondly, with a view to avoiding expense or delay, or for other good reason, the court or a judge may order the partition to be effected by proceedings altogether out of court (*k*). This method Out of court.

(*b*) *Clarendon* (*Earl*) v. *Hornby* (1718), 1 P. Wms. 446.

(*c*) *Canning* v. *Canning* (1854), 2 Drew. 434; and see *Porter* v. *Lopes* (1877), 7 Ch. D. 358, *per* JESSEL, M.R., at pp. 365, 366.

(*d*) As in *Wilkinson* v. *Joberns* (1873), L. R. 16 Eq. 14; *Roughton* v. *Gibson* (1877), 46 L. J. (CH.) 366, where however, orders for sale were made.

(*e*) As in *Warner* v. *Baynes* (1750), Amb. 589 (where security was required from one co-owner not to convert an allotment into a competing undertaking); *Burley* v. *Moore* (1827) 5 L. J. (O. S.) (CH.) 120 (chambers). Provisions in partnership deeds for division of the property at the termination of the partnership are construed as meaning sale for the purpose of division and not division *in specie* (*Rigden* v. *Pierce* (1822), Madd. & G. 353; *Cook* v. *Collingridge* (1823), Jac. 607; see *Dean* v. *Wilson* (1878), 10 Ch. D. 136; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 44; *Re Wells* (1883), 31 W. R. 764); and as to partnership generally, see title PARTNERSHIP.

(*f*) For the purpose of confirming an invalid partition, all the parties being before the court, and in other cases where an immediate order for partition can be obtained, the judgment may contain a specific allotment among the parties; see *Brassey* v. *Chalmers*, *Seacome* v. *Holme* (1853), 4 De G. M. & G. 528; *McDonald* v. *McDonald* (1891), 47 Federal Reporter, 765. Such an order must be grounded on the consent of parties, but may be made although infants are interested; see *Stanley* v. *Wrigley* (1855), 3 Sm. & G. 18; *Greenwood* v. *Percy* (1859), 26 Beav. 572.

(*g*) *Clarke* v. *Clayton* (1860), 6 Jur. (N. S.) 1238. The procedure is applicable to land of any tenure (*Bowles* v. *Rump* (1862), 9 W. R. 370). The method is now one prescribed by R. S. C., Ord. 51, r. 1A.

(*h*) *Bull* v. *Bull* (1868), 18 L. T. 870.

(*i*) *Stanley* v. *Wrigley*, *supra*; *Greenwood* v. *Percy*, *supra*.

(*k*) R. S. C., Ord. 51, r. 1A. Where the order adopts the method of proposals in chambers, and the proposals differ, the master has no jurisdiction to refer them to a surveyor in this manner (*Howard* v. *Barnwell* (1862), 1 New Rep. 172, C. A.).

SECT. 6. Practice on Judgment for Partition.

is not adopted unless the judge is satisfied, by such evidence as he deems sufficient, that all persons interested are before the court or bound by the order, the order being prefaced by a declaration that the judge is so satisfied and a statement of the evidence ((*l*); nor unless the parties are *sui juris* and can agree as to the manner in which the property is to be divided.

Commissioners.

**1610.** The third method is by the appointment of commissioners to make the partition (*m*). A number of competent persons, generally surveyors, are appointed by the court, on the suggestion of the parties interested (*n*). The object of the commissioners is to divide and allot the property among the persons interested, in accordance with their interests as ascertained by the court; they have, therefore, no jurisdiction to ascertain those interests (*o*); their position is that of arbitrators (*p*). The division made has to be

(*l*) This procedure is therefore confined to simple cases, where the title is undisputed and the property of small value.

(*m*) This method is now never resorted to, and may be treated as practically obsolete. It is believed that no order appointing commissioners has been made for many years; and in *Clarke* v. *Clayton* (1860), 6 Jur. (N. S.) 123, as reported 2 Giff. 333, STUART, V.-C., described such an order as a relic of barbarism, though two years later, in *Howard* v. *Barnwell* (1862), 1 New Rep. 172, the same judge made such an order; see also *Howard* v. *Barnwell* (1863), 2 New Rep. 414; *Bull* v. *Bull* (1868), 18 L. T. 870; *Pryor* v. *Pryor* (1875), 10 Ch. App. 469. A *præcipe* for sealing a commission of partition is given in R. S. C., Appendix G, Form No. 18; an order for a commission to partition lands in Jamaica is given in *Galloway* v. *Mackersey* (1861), 2 Seton, Judgments and Orders, 6th ed., p. 1885; and precedents of orders are to be found in the earlier editions of Seton. Partition by commissioners is still in force in the United States (see *Claude* v. *Handy* (1896), 83 Maryland, 225, 238 (*q.v.* as to alleged undervalue by commissioners), and in Nova Scotia; see *Archibald* v. *Handley* (1904), 40 Nova Scotia Reports, 427 (*q.v.* as to refusal of a commissioner to sign the return). The following statement of the old practice is given (see the text, *supra*, and notes (*m*)—(*e*), *infra*), in case for any reason an order should be made in the future for a commission to issue, and, moreover, the old practice will be a guide when similar questions arise under the new.

(*n*) *Watson* v. *Northumberland* (*Duke*) (1805), 11 Ves. 153; where the parties interested cannot agree, each party nominates a certain number; out of the nominated persons, commissioners are chosen by the court to represent each party, and in order to secure an uneven number the court may nominate a further commissioner (*Howard* v. *Barnwell* (1863), 2 New Rep. 414; *Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586 (where the order made the power exercisable by the master)). This delegation of the powers of the court is not made under any statute, but of necessity, because of the difficulty of effecting a partition by the court itself; *per* ELDON, L.C., in *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1810), 17 Ves. 533,

(*o*) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth* (1811), 17 Ves. 533, *per* GRANT, M.R., at p. 543; *Cole* v. *Sewell* (1846), 15 Sim. 284. They are said to owe a duty to the court and to the parties to be impartial (*Watson* v. *Northumberland* (*Duke*), *supra*, at p. 160), and to make the best partition that they can for the benefit of all persons interested (*Canning* v. *Canning* (1854), 2 Drew. 434).

(*p*) *Jones* v. *Totty* (1827), 1 Sim. 136; *Manners* v. *Charlesworth* (1833), 1 My. & K. 330, *per* Lord BROUGHAM, L.C., at p. 332; *Story* v. *Johnson*, *supra*; *Canning* v. *Canning*, *supra*; see Lord REDESDALE'S opinion in *Curzon* v. *Lister*, Seton, Decrees, 1st ed., p. 194). They are also officers of the court (*Young* v. *Sutton* (1814), 2 Ves. & B. 365).

SECT. 6. Practice on Judgment for Partition.

according to value (*q*). Special directions may be given by the court (*r*); a strong case, however, is necessary to obtain a direction for division and allotment in a particular manner (*s*). Subject to any directions, the commissioners are bound to consider the best interest of the parties (*t*). They must act together (*a*), and may take evidence and examine witnesses on oath (*b*). Their division is embodied in a certificate (*c*); but if the commissioners differ they

(*q*) *Calmady* v. *Calmady* (1795), 2 Ves. 568, *per* Lord LOUGHBOROUGH, L.C., at p. 570.

(*r*) Without special directions, the commissioners may set out roads and easements, and make any part subject to the burden of repairing fences and walls (*Lister* v. *Lister* (1839), 3 Y. & C. (EX.) 540); but special directions, contained in the order of court, are necessary to enable them to charge a sum in gross or a rentcharge by way of equality of partition (*Mole* v. *Mansfield* (1845), 15 Sim. 41, where, however, an inquiry was granted whether it was proper that the sums awarded should be accepted on behalf of an infant party); or to cause them to divide and allot the property in a particular manner, as to allot a mansion-house wholly to one party, making allowance out of the land to the other party (*Clarendon* (*Earl*) v. *Hornby* (1718), 1 P. Wms. 446), or, before the court had jurisdiction to partition copyholds (see note (*k*), p. 836, *ante*), to allot the copyhold part of an estate in its entirety (*Dillon* v. *Coppin* (1833), 6 Beav. 217, n.).

(*s*) The court leaves such matters to the discretion of the commissioners. Thus in *Warner* v. *Baynes* (1750), Amb. 589, the direction was necessary in order to preserve the value of the property; in *Morris* v. *Timmins* (1838), 1 Beav. 411, an application to preserve a right of road which both parties had set out for their own convenience was refused. A person who has purchased a share in a specific part of the estate has no right to an order that some of that part should be allotted to him (*Cooper* v. *Fisher* (1841), 10 L. J. (CH.) 221); nor has his vendor any right (*Wright* v. *Vernon* (1860), 1 Drew. & Sm. 231). No directions were given where the husband of a person interested had laid out money on the property (*Heath* v. *Bostock* (1835), 5 L. J. (EX. EQ.) 20).

(*t*) *Calmady* v. *Calmady*, *supra*, *per* Lord LOUGHBOROUGH, L.C., at p. 570; *Canning* v. *Canning* (1854), 2 Drew. 434; having regard to the convenience of their property (*Story* v. *Johnson* (1837), 2 Y. & C. (EX.) 586), their family relationships and other circumstances; *e.g.*, the priority in age of an eldest daughter, although she has no prior choice as of right (Littleton's Tenures, ss. 248, 249; see p. 814, *ante*), or the fact that her husband has taken her name and intended to keep up the family seat (*Canning* v. *Canning*, *supra*). In *Wright* v. *Vernon*, *supra*, KINDERSLEY, V.-C., recommended an allotment of any specific part to any party who desired "for good and sufficient reasons" to have it allotted to him; and see *Lister* v. *Lister*, *supra*. If the commissioners can find no reason for allotting the parts one way or another, they may draw lots, but as a last resort only (*Canning* v. *Canning*, *supra*; *Ames* v. *Comyns* (1867), 17 L. T. 163; see Lord REDESDALE'S opinion in *Curzon* v. *Lister*, Seton, Decrees, 1st ed., p. 194). The allotment must strictly comply with the order of court; the commissioners have no jurisdiction to allot parts in proportions different from those ordered, even though the parties concerned consent (*Peers* v. *Needham* (1854), 19 Beav. 316).

(*a*) *Watson* v. *Northumberland* (*Duke*) (1805), 11 Ves. 153.

(*b*) *Meers* v. *Stourton* (*Lord*) (1711), 1 Dick. 21; Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16; but only in the presence of the parties (Lord REDESDALE'S opinion, in *Curzon* v. *Lister*, *supra*). They may put interrogatories to witnesses, different from those proposed by the parties (*ibid.*, approved by Lord BROUGHAM, L.C., in *Manners* v. *Charlesworth* (1833), 1 My. & K. 330).

(*c*) This is returned by the commissioners, with the commission, a record of evidence taken, and a schedule of particulars of the lands allotted, all

SECT. 6. Practice on Judgment for Partition.

make separate returns (*d*). The certificate is confirmed on further consideration in the action (*e*). A party aggrieved by the certificate may seek redress by motion to oppose the confirmation of, or to quash, the certificate and to suppress the return (*f*).

SUB-SECT. 3.—*Conveyance.*

Conveyance.

**1611.** By whichever method partition is effected it must be completed by mutual conveyances (*g*). The judgment, whether for partition or sale in lieu of partition, unless the proceedings are altogether out of court, provides that the conveyances are to be settled by the master if the parties disagree as to the form thereof (*h*).

Unless permitted by the court (*i*), a party cannot refuse to

engrossed and annexed to the certificate (*Jones* v. *Totty* (1825), 2 Sim. & St. 219). Any formal error in the return may be corrected in court (*ibid.*), but to correct other errors the certificate is sent back to the commissioners (*Rouse* v. *Barker* (1728), Bunb. 251 ; see *Manners* v. *Charlesworth* (1833), 1 My. & K. 330).

(*d*) *Canning* v. *Canning* (1854), 2 Drew. 434. If the returns are by an equal number of commissioners, the effect is to make no effectual return (*Watson* v. *Northumberland* (*Duke*) (1805), 11 Ves. 153). If one of the returns is by a majority, and the commission enables such majority to act and make a return, the return of the majority will be established on a motion by the parties or some of them to suppress the other return (*Randle* v. *Adams* (undated), cited in *Watson* v. *Northumberland* (*Duke*), *supra*, at p. 155, not followed by Lord ELDON, L.C., in *Watson* v. *Northumberland* (*Duke*), *supra*, on account of the equality of numbers of the commissioners). If there is no effective return, then either an entirely fresh commission has to be issued (as in *Corbet* v. *Davenant* (1787), 2 Bro. C. C. 251 ; *Watson* v. *Northumberland* (*Duke*) *supra*), or a further commissioner will be added by the court (*Canning* v. *Canning*, *supra*), and a new return must be made.

(*e*) An order *nisi* will be made of course, and exceptions may be taken to it ; see Forms, Seton, Decrees, 4th ed., p. 1024 ; the order made at the hearing, or on further consideration, provides for conveyances accordingly. The commissioners have no lien on the commission and certificate for their charges (*Young* v. *Sutton* (1814), 2 Ves. & B. 365).

(*f*) *Corbet* v. *Davenant*, *supra*, at p. 252 ; *Jones* v. *Totty* (1827), 1 Sim. 136 ; *Ames* v. *Comyns* (1867), 17 L. T. 163 ; and see the order in *Canning* v. *Canning*, *supra*, cited Seton, Decrees, 4th ed., p. 1024. The court does not readily set aside the certificate (*Ames* v. *Comyns*, *supra*) ; neither the valuation nor the allotment of the property made by the commissioners will be gone into unless the commissioners have gone outside their jurisdiction (as by including the wrong property (*Dacre* v. *Gorges* (1825), 2 Sim. & St. 454) ; or dividing the right property in an unauthorised manner (*Peers* v. *Needham* (1854), 19 Beav. 316) ; or have made a mistake so gross as to induce the court to infer that there is some unjust, corrupt, or fraudulent motive on their part (*Lister* v. *Lister* (1839), 3 Y. & C. (EX.) 540 ; *Jones* v. *Totty* (1827), 1 Sim. 136) ; or have otherwise failed in their duty (*Watson* v. *Northumberland* (*Duke*), *supra*).

(*g*) *Anon.*, *in Chancery* (1742), 3 Swan. 139, n. ; *Miller* v. *Warmington* (1820), 1 Jac. & W. 484, 493. The conveyances will be in the usual form of a partition deed (see p. 823, *ante*), or purchase deed (see title SALE OF LAND), except that they are made under the order of court.

(*h*) *Whaley* v. *Dawson* (1805), 2 Sch. & Lef. 367, 372 ; *A.-G.* v. *Hamilton* (1816), 1 Madd. 214. See the form in 2 Seton, Judgments and Orders, 6th ed., p. 1883.

(*i*) See *Re Molyneux, Ex parte Spencer* (1862), 4 De G. F. & J. 365, C. A.

execute a conveyance to other parties on a partition except conditionally on receiving a conveyance from him (*k*). Apart from express direction, the question who are the necessary parties to the conveyance is usually left to the master, or in the county court to the judge (*l*).

SECT. 6. Practice on Judgment for Partition.

Incumbrances.

**1612.** The conveyance on partition is made subject to the incumbrances affecting each share (*m*); and the allotted parts may be made liable *inter se* to an apportioned part of the incumbrances affecting the whole (*n*).

SUB-SECT. 4.—*Title Deeds on Partition.*

Custody.

**1613.** Such of the title deeds as relate solely to any distinct part of the hereditaments which is allotted to any party are delivered to him (*a*), and other title deeds to the party having the largest interest (*b*), or liberty to apply will be given (*c*). With regard to the deed of partition, if the claims of all parties are equal, it is given to the plaintiff, and if they are not, to the party who is likely to take the best care of it (*d*). Where many persons are interested, it is convenient that the deed should be enrolled, with liberty to any party to have a duplicate at his own expense (*e*).

## SECT. 7.—*Practice on Judgment for Sale.*

### SUB-SECT. 1.—*Request for Sale.*

Request.

**1614.** The request for sale may be, and usually is, embodied in the pleadings (*f*) of the party, but may be made independently of pleadings and in court by counsel duly authorised (*g*), or in chambers if the judgment so allows.

In county court.

In the county court, at any time after the entry of the plaint, all the parties interested may attend and accept service and sign the

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(*k*) *Orger* v. *Sparke* (1860), 9 W. R. 180.

(*l*) *A.-G.* v. *Hamilton* (1816), 1 Madd. 214; compare *Cole* v. *Sewell* (1849), 17 Sim. 40; County Court Rules, 1903, Ord. 23, r. 19.

(*m*) *Whaley* v. *Dawson* (1805), 2 Sch. & Lef. 367, 372. In *Clarke* v. *Clayton* (1860), 6 Jur. (N. S.) 1238, the mortgagees were not parties.

(*n*) In *Poole* v. *Poole*, [1895] W. N. 15, a declaration was made that the parties were *inter se* each liable to pay half an annuity charged on the entirety.

(*a*) *Jones* v. *Robinson* (1853), 3 De G. M. & G. 910, C. A.

(*b*) Compare *Griffiths* v. *Hatchard* (1854), 1 K. & J. 17, *per* PAGE WOOD, V.-C.

(*c*) *Clarke* v. *Clayton* (1860), 6 Jur. (N. S.) 1238.

(*d*) *Elton* v. *Elton*, *Bayly* v. *Elton* (1860), 6 Jur. (N. S.) 136, where the deed was given to persons entitled to one-fourth on condition that it was enrolled and that they entered into covenants for production.

(*e*) *Elton* v. *Elton* (No. 1) (1860), 27 Beav. 632. Formerly the deeds were placed in the custody of the court.

(*f*) As to pleadings, see p. 846, *ante*. As to pleading generally, see title PLEADING.

(*g*) *Crookes* v. *Whitworth* (1878), 10 Ch. D. 289. As to the authority of counsel generally, see title BARRISTERS, Vol. II., pp. 397 *et seq.*; and as to the authority in cases of a married woman not entitled as a *feme sole*, see p. 862, *post*.

SECT. 7. Practice on Judgment for Sale.

request for sale (*h*), and their signatures are attested by the registrar or by one of his clerks (*i*). When all the parties interested have signed such request, the order for sale may be made at the next court to be held, although such court may be held before the return day of the summons (*k*).

Persons under disability: (i.) Married women;

**1615.** A married woman, to whom the provisions of the Married Women's Property Act, 1882 (*l*) do not apply, may make her request for sale through her next friend or guardian *ad litem* (*m*); the request is made by her counsel, if duly authorised, without her separate examination (*n*). Such authority of counsel must be proved, his request alone being insufficient (*o*); the authority may be given by means of a letter to her solicitor authorising and requesting him to instruct counsel to ask for sale (*p*).

(ii.) infants;

On behalf of an infant, the request may be made by his next friend or guardian *ad litem* (*q*), but the court is not bound to comply with such request unless it appears that the sale is for the infant's benefit; the question of the infant's benefit may be left to an inquiry (*r*).

(iii.) lunatics.

On behalf of a person of unsound mind the request may be made

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(*h*) County Court Rules, 1903, Ord. 9, r. 10, which describes the request as made under the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 4. This request is in the statute a request by a majority, but the context in the rule shows that a mere majority is not sufficient in the case contemplated, in which all the parties interested must concur; see title COUNTY COURTS, Vol. VIII., p. 675.

(*i*) A special form of request is given in the County Court Forms; see Yearly County Court Practice, 1912, Vol. II., p. 774.

(*k*) County Court Rules, 1903, Ord. 9, r. 10. In the case where less than all of the persons interested make the request (which may be in the same form *mutatis mutandis*) the action proceeds in the usual way.

(*l*) 45 & 46 Vict. c. 75. A married woman is in the same position as any other party *sui juris*, whether she is entitled beneficially or as a trustee (Married Women's Property Act, 1907 (7 Edw. 7, c. 18); see title HUSBAND AND WIFE, Vol. XVI., p. 380.

(*m*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6. In *Higgs* v. *Dorkis* (1872), L. R. 13 Eq. 280, an order for sale was made under the Partition Act, 1868 (31 & 32 Vict. c. 40), at the request of a married woman and her husband.

(*n*) *Crookes* v. *Whitworth* (1878), 10 Ch. D. 289. Before the Partition Act, 1876 (39 & 40 Vict. c. 17), separate examination was necessary (*Leigh* v. *Edwards* (1873), 42 L. J. (CH.) 892).

(*o*) *Wallace* v. *Greenwood* (1880), 16 Ch. D. 362.

(*p*) *Grange* v. *White* (1881), 18 Ch. D. 612.

(*q*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6. This provision mentions "guardian" simply, but this means guardian *ad litem* (*Rimington* v. *Hartley* (1880), 14 Ch. D. 630). The words of the Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6, which treats of a married woman, infant, and lunatic together, and confers authority to make the request on the next friend, guardian, committee or person authorised, are not to be read *reddendo singula singulis* (*ibid.*, *per* JESSEL, M.R., at p. 631, not following *Platt* v. *Platt* (1880), 28 W. R. 533); and see title INFANTS AND CHILDREN, Vol. XVII., p. 128, note (*f*).

(*r*) See p. 850, *ante*; compare *Capewell* v. *Lawrence* (1863), 8 L. T. 603 (a case before the Partition Acts); *Grove* v. *Comyn* (1874), L. R. 18 Eq. 387; and see *Davey* v. *Wietlisbach* (1872), L. R. 15 Eq. 269; *Thompson* v. *Richardson* (1872), 6 I. R. Eq. 596. This check does not apply to other cases of disability: see *Wallace* v. *Greenwood*, *supra*, at p. 366.

by a next friend, guardian *ad litem*, the committee (if he is a lunatic so found), or the person appointed by the Court in Lunacy (if he is a lunatic not so found). In the two last cases authority must first be obtained from the Court in Lunacy (*s*). In the case of a request by a next friend or guardian *ad litem*, the court needs to be satisfied that the person is of unsound mind, and that he stands in need of protection, and it ought to be shown also that it would be for his true interest that the court should exercise its jurisdiction (*a*).

Undertaking to purchase.

**1616.** Similar considerations apply to an undertaking to purchase a share (*b*).

SUB-SECT. 2.—*Mode and Conduct of Sale.*

Modes available.

**1617.** Besides the mode of a sale by auction (*c*) under the order of the court, the sale, if ordered by the High Court or the Court of Chancery of Lancaster, may be carried out (*d*) by proposals in chambers on the submission of offers (*e*), or by proceedings out of court (*f*).

Sale out of court.

In the latter case, the reserved bid and the auctioneer's remuneration must be fixed in chambers, and the purchase-money should be paid direct into court, directions to this effect being embodied in the order (*g*). The sale will not be ordered altogether out of court unless the judge is satisfied, by such evidence as he deems sufficient, that the persons interested are before the court or bound by the order, and the order must be prefaced by a declaration that the judge is so satisfied, and a statement of the evidence upon which such declaration is made

Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6; see *Watt* v. *Leach* (1878), 26 W. R. 475 (next friend); compare *Hollingworth* v. *Sidebottom* (1837), 8 Sim. 620. The authority of the court is obtained by petition in lunacy, as in *Re Pares*, *Lillingston* v. *Pares* (1879), 12 Ch. D. 333, C. A.; and see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 445.

(*a*) *Porter* v. *Porter* (1888), 37 Ch. D. 420, C. A.

(*b*) Under the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 5; see p. 845, *ante*.

(*c*) As to sale by auction generally, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 506 *et seq.*

(*d*) R. S. C., Ord. 51, r. 1A; Chancery of Lancaster Rules, Ord. 45, r. 1A.

(*e*) See the order in *Mallinson* v. *Siddle* (1870), 2 Seton, Judgments and Orders, 6th ed., p. 1860; *Capewell* v. *Lawrence* (1863), 8 L. T. 603; *Gilbert* v. *Smith* (1879), 11 Ch. D. 78. In *Grove* v. *Comyn* (1874), L. R. 18 Eq. 387, the court approved a conditional agreement for sale at the hearing.

(*f*) *Pitt* v. *White* (1887), 57 L. T. 650, followed in *Re Stedman*, *Coombe* v. *Vincent* (1888), 58 L. T. 709. Apart from the rules mentioned in note (*d*), *supra*, there was no power to sell out of court, at any rate under the Partition Acts (*Strugnell* v. *Strugnell* (1884), 27 Ch. D. 258, not following *Chubb* v. *Pettipher*, [1872] W. N. 110, and *Hayward* v. *Smith* (1869), 20 L. T. 70). Orders for sale out of court were also made in *Willis* v. *Willis* (1889), 61 L. T. 610 (*q.v.* for form of order), and in *Crook* v. *Crook*, [1890] W. N. 26, but in the latter case, CHITTY, J., said that this course was not to be followed in all cases. Apparently there is no jurisdiction to order a sale out of court in the Chancery of Durham or in the county court.

(*g*) *Pitt* v. *White*, *supra*; *Re Stedman*, *Coombe* v. *Vincent*, *supra*; v. *Willis*, *supra*. *Hayward* v. *Smith*, *supra*, is not now followed.

(*h*) See the rules mentioned in note (*d*),

SECT. 7. **Practice on Judgment for Sale.**

The sale by auction under the order of the court takes place as usual in such sales (*i*).

Conduct of sale.

**1618.** In the county court the judge appoints one solicitor to have the conduct of the proceedings, no other solicitor being entitled to any costs incurred after such an order (*k*). In other courts the plaintiff is as a rule entitled to the conduct of the sale (*l*); if, however, the plaintiff desires to bid, and is allowed by the court to do so, the proper course is to give the conduct of the sale to an independent solicitor (*m*), but this rule is not inflexible if the parties agree otherwise (*n*). It is improper for any party, not having the conduct of the sale, to issue advertisements or other notices of the sale, or otherwise to interfere with the conduct of the sale, and he will be restrained from so doing by injunction (*o*).

Bidding.

**1619.** Any of the persons interested may be allowed (*p*) to bid at the sale on such terms as the court thinks reasonable with regard to payment of deposit, or accounting for the purchase-money or any part thereof, or any other matters (*a*). Generally, leave to bid is given to parties other than those having the conduct of the sale (*b*), but even the person who originally had the conduct of the sale may be allowed to bid, another person being appointed in his stead to have the conduct of the sale (*c*).

A receiver appointed by the court, though a part owner, cannot buy at any sale, although not made in the partition action, but under a title paramount, as by a mortgagee (*d*).

Interest.

In setting off their purchase-money against their shares, the parties will be charged interest (*e*).

(*i*) R. S. C., Ord. 51 (see Yearly Practice of the Supreme Court, 1912, pp. 717 *et seq.*); Chancery of Lancaster Rules, Ord. 45; Chancery of Durham Rules, Ord. 44; County Court Rules, 1903, Ord. 23, rr. 18 *et seq.*

(*k*) County Court Rules, 1903, Ord. 9, r. 11.

(*l*) *Davenport* v. *King* (1883), 49 L. T. 92, where mortgagees obtained judgment for sale.

(*m*) *Dean* v. *Wilson* (1878), 10 Ch. D. 136; *Roughton* v. *Gibson* (1877), 46 L. J. (CH.) 366.

(*n*) *Pennington* v. *Dalbiac* (1870), 18 W. R. 684, not followed in *Verrall* v. *Cathcart* (1879), 27 W. R. 645; in both these cases infants were defendants.

(*o*) *Dean* v. *Wilson*, *supra*.

(*p*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 6.

(*a*) *Wilkinson* v. *Joberns* (1873), L. R. 16 Eq. 14 (where the owner of a moiety was ordered to pay in half the purchase-money); *Roughton* v. *Gibson*, *supra* (where the owner of three-quarters was ordered to pay in one-half of the purchase-money to provide a margin for costs); *Re Dracup*, *Field* v. *Dracup*, [1894] 1 Ch. 59.

(*b*) *Gilbert* v. *Smith* (1879), 11 Ch. D. 78; *Verrall* v. *Cathcart*, *supra*; *Re Dracup*, *Field* v. *Dracup*, *supra*.

(*c*) *Roughton* v. *Gibson*, *supra*; *Dean* v. *Wilson*, *supra*. In *Pennington* v. *Dalbiac*, *supra*, this condition was dispensed with, but the case was not followed in *Verrall* v. *Cathcart*, *supra*. In *Porter* v. *Lopes* (1877), 7 Ch. D. 358, and *Morant* v. *Godden* (1902), 18 T. L. R. 421, leave was given for both plaintiff and defendant to bid, without any condition.

(*d*) *Nugent* v. *Nugent*, [1908] 1 Ch. 546, C. A.

(*e*) In *Re Dracup*, *Field* v. *Dracup*, *supra*, the rate charged was 3 per cent. per annum.

SUB-SECT. 3.—*Application and Distribution of Proceeds of Sale.*

SECT. 7.

**Practice on Judgment for Sale.**

(1) When all parties before the court.

Application of proceeds.

**1620.** When all parties interested are before the court, the proceeds of sale may, if the court thinks fit, be paid to trustees of whom it may approve (*f*); otherwise they must be paid into court (*g*).

In either case the money must be applied, as the court from time to time directs, to one or more of the following purposes (*h*): (1) land tax redemption (*i*); (2) discharge or redemption of incumbrances affecting the hereditaments sold (*k*), or other hereditaments subject to the same uses or trusts; (3) purchase of other hereditaments to be settled in the same manner as the hereditaments sold (*l*); or (4) payment to any person becoming absolutely entitled according to English law (*m*). Such a person must be beneficially entitled: payment is not made to trustees for a person so entitled (*n*); but a trustee with a power of sale, on whom a share has devolved, is a person absolutely entitled within this provision (*a*). A married woman under the old law may obtain payment out on being separately examined as to her election to take the funds as personal estate (*b*), except where she requests or consents to sale, when separate examination is unnecessary, or where the fund does not exceed £200, when it is dispensed with (*c*). There is no provision allowing payment out of any part of the proceeds of sale to a tenant for life (*d*).

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(*f*) This has been allowed where the sale took place out of court (*Hayward* v. *Smith* (1869), 20 L. T. 70; but see note (*f*), p. 863, *ante*); it is not, however, the ordinary course; see *Higgs* v. *Dorkis* (1872), L. R. 13 Eq. 280; *Aston* v. *Meredith* (1872), L. R. 13 Eq. 492; and see p. 863, *ante*. In *Pyne* v. *Phillips*, [1895] W. N. 8, NORTH, J., purporting to act under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 40, ordered payment out to trustees for the purposes of the Settled Land Acts of a settled share.

(*g*) Partition Act, 1868 (31 & 32 Vict. c. 40), s. 8, incorporating the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), ss. 23—25. The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), repealed the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), but where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second (*Clarke* v. *Bradlaugh* (1881), 8 Q. B. D. 63, C. A., *per* BRETT, L.J., at p. 69); see title STATUTES; and, accordingly, both in *Re Barker* (1881), 17 Ch. D. 241, C. A., and *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474, the court treated the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), as still governing the application of funds arising from a sale under the Partition Acts.

(*h*) Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 23.

(*i*) See, further, title LAND TAX, Vol. XVIII., pp. 321, 327.

(*k*) See the order in *Waite* v. *Bingley* (1882), 21 Ch. D. 674.

(*l*) In *Langmead* v. *Cockerton* (1877), 25 W. R. 315, JESSEL, M.R., gave liberty to apply for investment in leaseholds, in order to make up the loss of income to a tenant for life.

(*m*) The curator *ad bona*, therefore, appointed by a foreign court, of a person of unsound mind not so found in England, cannot without an order in lunacy obtain payment out (*Grimwood* v. *Bartels* (1877), 46 L. J. (CH.) 788).

(*n*) *Aston* v. *Meredith* (1872), L. R. 13 Eq. 492.

(*a*) *Re Morgan, Smith* v. *May*, *supra*, following *Re Hobson's Trusts* (1877), 7 Ch. D. 708, C. A., and followed in *Re Sheffield Corporation and St. William's Roman Catholic Chapel Schools, Sheffield* (*Trustees*), [1903] 1 Ch. 208.

(*b*) *Standering* v. *Hall* (1879), 11 Ch. D. 652.

(*c*) *Wallace* v. *Greenwood* (1880), 16 Ch. D. 362.

(*d*) *Langmead* v. *Cockerton*, *supra*.

SECT. 7. Practice on Judgment for Sale.

Until application the proceeds of sale are not funds under the control of the court, so as to be invested as such, but they must be invested as under the Leases and Sales of Settled Estates Act, 1856 (*e*).

Investment.

(2) Where some parties not before the court.

**1621**. The practice where all parties are not before the court and service of notice of the proceedings on any person, or class of persons, has been dispensed with is subject to the following special rules (*f*). The proceeds are paid into court to abide further order, and the court must by order fix a period (which may be extended by further order), at the expiration of which the proceeds will be distributed, and must direct notices to be given, by advertisement or otherwise, as it thinks best adapted for notifying to the absent parties beneficially interested the fact of sale, the time of intended distribution, and the time within which a claim to participate in the proceeds must be made.

Application of rules.

These requirements are obligatory, and cannot be dispensed with in case of any parties beneficially interested as to whom service of notice of the proceedings has been dispensed with (*g*); but they do not apply in case of trustees for persons absolutely entitled who have no duties to perform; and accordingly, as to such trustees, no such advertisements are necessary (*h*).

Distribution of proceeds of sale.

If at the expiration of the period fixed the interests of all persons interested have been ascertained, the proceeds of sale are distributed accordingly (*i*); if the interests are not ascertained and it appears that they cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the proceeds are distributed as appears to the court to be most in accordance with the rights of the persons whose claims have been established, whether those persons are or are not before the court: the court may, however, make such reservation as seems fit in favour of other persons, whether ascertained or not, who may appear from the evidence before the court to have any *primâ facie* rights which ought to be so provided for, although not fully established. All other persons are then excluded (*k*).

Rights of persons excluded.

An excluded person, however, is not without remedy; he may recover from any participating person any portion received by the latter of his share (*k*), and where two or more sales are made, and he establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale are to abate to the extent to which they were increased by his non-participation in the previous sale (*l*), and are

(*e*) Stat. (1856) 19 & 20 Vict. c. 120, s. 25; see *Langmead* v. *Cockerton* (1877), 25 W. R. 315. The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 36, provides for investment as cash under the control of the court, but that Act is not impliedly incorporated in the Partition Act, 1868 (31 & 32 Vict. c. 40); see note (*g*), p. 865, *ante*.

(*f*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 4.

(*g*) *Phillips* v. *Andrews* (1887), 56 L. T. 108.

(*h*) *Crossman* v. *Richards*, [1888] W. N. 167.

(*i*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 4 (4).

(*k*) *Ibid.*, s. 4 (5).

(*l*) Interest cannot be claimed, therefore, on the amount of abatement

SECT. 7. Practice on Judgment for Sale.

Conversion under order for sale.

to that extent to be paid to the excluded person towards the share of the proceeds of the previous sale to which he would have been entitled if his claim had been established in due time (*m*).

**1622.** The order for sale operates as from its date, in the case of a person *sui juris* and absolutely entitled, to convert his or her share into personalty, and the share devolves, on the death of the owner, as such (*n*). Such conversion is not affected by a subsequent lunacy (*o*).

In the case of a person under disability, or a person not absolutely entitled, there is a reconversion effected in favour of that person's heir (*p*), who, however, takes the property as he finds it (*q*).

Accordingly the share of an infant or lunatic should, if put to a separate credit in the action, be earmarked as real estate (*r*), but even without such earmarking, or carrying to a separate credit, it is to be dealt with as real estate, at all events in cases where the sale is made on the request of persons other than the infant or lunatic (*s*).

(*m*) Partition Act, 1876 (39 & 40 Vict. c. 17), s. 5.

(*n*) *Re Dodson, Yates* v. *Morton*, [1908] 2 Ch. 638; compare *Burgess* v. *Booth*, [1908] 2 Ch. 648, C. A.; and *Steed* v. *Preece* (1874), L. R. 18 Eq. 192, where, however, the party was an infant, see note (*q*), *infra*; *Wallace* v. *Greenwood* (1880), 16 Ch. D. 362; *Hyett* v. *Mekin* (1884), 25 Ch. D. 735; *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257, C. A.; and see title EQUITY, Vol. XIII., p. 112. A bequest of personal estate will, therefore, include a share of a fund representing the proceeds of sale (*Re Harman, Lloyd* v. *Tardy*, [1894] 3 Ch. 607); see also *Re Morgan, Smith* v. *May*, [1900] 2 Ch. 474.

(*o*) *Re Pickard, Turner* v. *Nicholson* (1885), 53 L. T. 293; compare *Fowler* v. *Scott* (1871), 19 W. R. 972 (subsequent marriage, before 1882).

(*p*) The reason is that express provision is made for reinvestment in land; see p. 865, *ante*; *Foster* v. *Foster* (1875), 1 Ch. D. 588 (an infant); *Re Barker* (1881), 17 Ch. D. 241, C. A. (a lunatic); compare *Kelland* v. *Fulford* (1877), 6 Ch. D. 491; *Mildmay* v. *Quicke* (1877), 6 Ch. D. 553 (a married woman under the old law); *Mordaunt* v. *Benwell* (1881), 19 Ch. D. 302. In *Higgs* v. *Dorkis* (1872), L. R. 13 Eq. 280, WICKENS, V.-C., thought that in the case of a married woman a conversion was effected; the decision was before the Partition Act, 1876 (39 & 40 Vict. c. 17). In *Wallace* v. *Greenwood* (1880), 16 Ch. D. 362, a case after that Act, JESSEL, M.R., at p. 366, expressed a similar opinion. These opinions have no relation to married women under the present law, and in so far as they relate to disabilities other than that of marriage seem inconsistent with the cases cited above.

(*q*) *Mordaunt* v. *Benwell* (1881), 19 Ch. D. 302; *Re Norton, Norton* v. *Norton*, [1900] 1 Ch. 101.

(*r*) *Howard* v. *Jalland*, [1891] W. N. 210, considered in *Re Norton, Norton* v. *Norton, supra*, by BYRNE, J., at p. 105; compare Supreme Court Funds Rules, 1905, r. 21. In *Wallace* v. *Greenwood, supra*, at p. 365, there are *dicta* of JESSEL, M.R., at p. 365, to the contrary.

(*s*) *Re Norton, Norton* v. *Norton, supra*. In *Wallace* v. *Greenwood, supra*, JESSEL, M.R., at p. 365, considered that in the case of a request for sale on behalf of the infant a conversion into personalty was effected. In *Foster* v. *Foster, supra*, the request for sale was made by parties other than the infants, and the property was held by the same judge to be reconverted into realty. See *Charlton* v. *Murray* (1909), 10 New South Wales State Reports, 49, where sale was ordered on a request on behalf of an infant, and *Foster* v. *Foster, supra*, and *Re Norton, Norton* v. *Norton, supra*, were not followed.

END OF VOI XXI.

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